#1-02

PAUL BARNES AND LONNIE TUCKER,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
SIDNEY SHOMALLI WILLIAMS, BOARD MEMBER, EAST ORANGE BOARD OF EDUCATION, ESSEX COUNTY	:	DECISION
RESPONDENT.	:	
	:	

January 7, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7218-00
AGENCY DKT. 148-5/00

PAUL BARNES AND LONNIE TUCKER ,

Petitioners,

v.

SIDNEY SHOMALLI WILLIAMS, BOARD MEMBER, EAST ORANGE BOARD OF EDUCATION, ESSEX COUNTY,

Respondent.

Paul Barnes and **Lonnie Tucker,** petitioners, *pro se*

Melvin C. Randall, Esq., for respondent (Love and Randall, attorneys)

Record Closed: October 2, 2001 Decided: November 16, 2001

BEFORE **MARGARET M. MONACO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On May 4, 2000, petitioners Paul Barnes and Lonnie Tucker, residents of the City of East Orange, filed a Petition of Appeal with the Commissioner of Education (the Commissioner) arising from the appointment of respondent Sidney Shomalli Williams to the Board of Education of the City of East Orange (East Orange Board of Education or the Board). Petitioners challenge respondent's lack of qualification for membership on the Board and allege that respondent was neither a registered voter nor a resident of the school district as required by *N.J.S.A.* 18A:12-1, *et seq.* The Petition of Appeal also includes allegations related to violation(s) of the School Ethics Act, *N.J.S.A.* 18A:12-21, *et seq.*

By letter dated May 8, 2000, Deborah Antanaitis, Director of the Bureau of Controversies and Disputes within the Department of Education (Department), acknowledged receipt of the Petition of Appeal on May 4, 2000. The letter informed the parties that, "[i]n reviewing the petition, it appears that various counts of the petition allege violation of the School Ethics Act, an area of law over which the Commissioner of Education does not have primary jurisdiction," consequently "a copy of the petition is being forwarded to the School Ethics Commission for its review and action, as needed," and "[t]he Commissioner will retain jurisdiction over those aspects of the petition which challenge respondent's lack of qualification for membership on a board of education, pursuant to *N.J.S.A.* 18A:12-1, *et seq."* On or about July 10, 2000, respondent filed an Answer to Petition of Appeal asserting, among other defenses, that the Petition of Appeal should be dismissed for failure to file the same with the Commissioner in a due and timely manner.

The Department transmitted the matter to the extent indicated above to the Office of Administrative Law where, on August 3, 2000, it was filed for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. Following prior adjournments, a prehearing conference was held on December 8, 2000 and a prehearing order was entered on December 18, 2000. The hearing was set for

May 9 and 10, 2001 and subsequently adjourned to July 17 and 18, 2001 due to a scheduling conflict.

On June 27, 2001, respondent filed a motion for summary decision. In support of the motion respondent submitted a certification of his counsel, Melvin C. Randall, Esq., accompanied by a Statement of Material Facts and a brief. Respondent subsequently furnished an extract from the minutes of the meeting of the East Orange Board of Education on December 19, 2000 certified Dy Mark Kramer, Board Secretary/Business Administrator, under correspondence dated July 9, 2001. Status conferences were held with petitioner(s) and counsel for respondent and a briefing schedule was established with regard to petitioners' response to the motion. Following the receipt of no response by the established due date, the undersigned advised petitioners by letter dated September 25, 2001 that the time in which petitioners could submit a response was being extended until October 2, 2001 and, if no response was received by that date, the motion would be considered unopposed. No response was thereafter received on behalf of petitioners and the hearing record was closed on October 2, 2001.

ISSUES PRESENTED

The foundation of respondent's motion for summary decision is premised upon two independent grounds. The issues presented are (1) whether petitioners' appeal is time-barred by the ninety-day limitations period embodied in *N.J.A.C.* 6A:3-1.3(d) and (2) whether the controversy before this forum is moot warranting dismissal since respondent has vacated his seat on the East Orange Board of Education.

FINDINGS OF FACT

The operative facts, which are uncontested, are gleaned from the pleadings coupled with the certification and exhibits submitted in support of the within motion. Based upon a review of this documentation, I **FIND** the following undisputed **FACTS:**

1. On May 18, 1999, the Mayor of the City of East Orange, New Jersey, appointed respondent to the East Orange Board of Education.

2. On May 4, 2000, petitioners filed a Petition of Appeal with the Commissioner alleging, in relevant part, that respondent lacked the qualification for board membership pursuant to *N.J.S.A.* 18A:12-1, *et seq.*

3. By letter dated December 6, 2000, Mark Kramer, Board Secretary/School Business Administrator, informed the Mayor of information regarding respondent's relocation to another State. The letter further advised that, pursuant to *N.J.S.A.* 18A:12-3, whenever a board member ceases to be a resident of the school district his membership on the board "shall immediately cease" and, thus, a vacancy exists on the East Orange Board of Education since respondent is no longer a resident of the City of East Orange which, pursuant to *N.J.S.A.* 18A:12-7, the Mayor had the statutory authority to fill within a period of thirty days.

4. At the December 19, 2000 meeting of the East Orange Board of Education, Norman Jeffries was administered the Oath of Office for School Board Members by the School Business Administrator to fill the unexpired term of respondent until 2002.

LEGAL DISCUSSION

The Summary Decision Standard

Pursuant to *N.J.A.*C. 1:1-12.5(b), summary decision "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This rule is substantially similar to the summary judgment rule embodied in the New Jersey Court Rules. *R.* 4:46-2. The summary judgment procedure is designed to provide a "prompt" and "inexpensive"

method of disposing of a case which does present any genuine issue of material fact requiring disposition at a hearing. *Judson v. Peoples Bank & Trust Co. of Westfield,* 17 *N.J.* 67, 74 (1954). In connection therewith, all inferences of doubt are drawn against the movant and in favor of the party against whom the motion is directed. *Judson, supra,* 17 *N.J.* at 75. However, to defeat the motion the non-moving party must "come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" *Brill v. Guardian Life Insurance Co.*, 142 *N.J.* 520, 529 (1995) (citations omitted). As articulated by the New Jersey Supreme Court in *Brill:*

> [A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The 'judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial'. . . . If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of *Rule* 4:46-2. . . . The import of our holding is that when the evidence 'is so one-sided that one party must prevail as a matter of law' . . . the trial court should not hesitate to grant summary judgment.
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> *[Brill, supra,* 142 *N.J.* at 540.] (citations omitted.)

Accordingly, in order for the non-movant to prevail, the party "must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." *N.J.A.C.* 1:1-12.5(b). "If the adverse party does not so respond, a summary decision, if appropriate, shall be entered." *Ibid.* Stated differently, should the adverse party fail to respond, "an absence of material factual dispute may be presumed and the movant will prevail if the law supports the movant's position." 37 *New Jersey Practice, Administrative Law and Practice* §5.18 at 258 (Steven L. Lefelt, Anthony Miragliotta and Patricia Prunty) (2d ed. 2000).

The Ninety-Day Rule

The rules of procedures governing the filing of petitions with the Commissioner are embodied in *N.J.A.C.* 6A:3-1.1, *et seq.* and include provisions prescribing time limitations for the filing of disputes arising under the school laws. *N.J.A.C.* 6A:3-1.3(d) directs, in pertinent part, as follows:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

The New Jersey Supreme Court has upheld the validity and enforceability of the ninety-day limitations period. *Kaprow v. Bd. of Educ. of Berkeley Tp.,* 131 *N.J.* 572, 580-583 (1993). *See also North Plainfield Educ. Ass'n v. Bd. of Educ. of the Borough of North Plainfield,* 96 *N.J.* 587 (1984).[1] In general, the purpose of a limitations period is two-fold. It "is to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims." *Kaprow, supra,* 131 *N.J.* at 587. It is also intended "'to penalize dilatoriness and serve as a measure of repose' by giving security and stability to human affairs." *Ibid.* {citation omitted). In the school law context, the New Jersey Supreme Court has held:

> The Legislature's broad delegation of power to the Commissioner and the State Board, particularly *N.J.S.A.* 18A:6-26, encompasses the authority to establish a time limitation for the resolution of disputes under the school laws. The limitations period provides a measure of repose, an essential element in the proper and efficient administration of the school laws .... The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days .... Certainly, for the Commissioner to find that the efficient administration of a school system requires the stability offered by the ninety-day limitation period is reasonable .... [fhe

[1] The cited decisional law addressing the ninety-day period and respondent's submission refer to the provision formerly contained in *N.J.A.C.* 6:24-1.2(c). The regulation was readopted and recodified with amendments as *N.J.A.C.* 6A:3-1.3(d) effective April 3, 2000. The quoted language of the regulation germane to this matter was similarly incorporated in *N.J.A.C.* 6A:24-1.2(c).

> regulation] represents a fair and reasonably-necessary requirement for the proper and efficient resolution of disputes under the school laws.
>
> *[Id.* at 582.]

See *also Nissman v. Bd. of Educ. of Long Beach Island Twp.,* 272 *N.J. Super.* 373, 380 (App. Div. 1994), *certif. denied,* 137 *N.J.* 315 (1994) ("What is important is that the Local Board had the right to know within 90 days whether its action was going to be challenged").

As noted, the regulation requires that a petitioner must file his or her "petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency" that forms the subject of the requested contested case hearing. *N.J.A.C.* 6A:3-1.3(d). Decisional law provides guidance as to what constitutes adequate notice. In *Kaprow,* the New Jersey Supreme Court stated that "[a]dequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate" and it "must be sufficient to further the purpose of the ninety-day limitations period." *Id.* at 587. In this regard, "the notice requirement should effectuate concerns for individual justice by not triggering the limitations period" until the affected individual has "been alerted to the existence of facts that may equate in law with . . . a cause of action" and, "[a]t the same time, it should further considerations of repose by establishing an objective event to trigger the limitations period in order 'to enable the proper and efficient administration of the affairs of government.'" *Ibid.* (citation omitted). In other words,

> [w]hen a plaintiff knows or has reason to know that he has a cause of action against an identifiable defendant and voluntarily sleeps on his rights so long as to permit the customary period of limitations to expire, the pertinent considerations of individual justice as well as the broader considerations of repose, coincide to bar his action.
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> *[Ibid.* (quoting *Farrell v. Votator Div.,* 62 *N.J.* 111, 115 (1973).]

Utilizing these standards, the Court concluded that the unofficial and informal notice given in that case sufficed to trigger the ninety-day limitations period. *Kaprow, supra,* 131 *N.J.* at 588.

The limitations period prescribed by regulation has been strictly applied in a variety of contexts thereby rendering claims filed outside the ninety-day period time-barred. *See e.g. Kaprow, supra,* 131 *N.J.* 572 (dismissing petition asserting reinstatement rights following a reduction in force); *North Plainfield Educ. Ass'n, supra,* 96 *N.J.* 587 (dismissing petition seeking credit on salary scale for time spent on sabbatical); *Nissman, supra,* 272 *N.J. Super.* 373 (dismissing claim for tenure). Although the Commissioner possesses the discretion to relax the rules "in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice," *N.J.A.C.* 6A:3-1.16, in the context of the ninety-day rule such authority is generally limited to cases presenting "exceptional circumstances" or "compelling reasons" warranting relaxation. *See Kaprow, supra,* 131 *N.J.* at 590 ("Nor do these facts present the exceptional circumstances that compel the Commissioner to waive the ninety-day limitation."); *DeMaio v. New Providence Bd.* of *Educ.,* 96 *N.J.A.R.2d* (EDU) 449, 453 ("relaxation of the regulation is generally unsuccessful unless there are compelling reasons justifying relaxation or where circumstances are such that strict adherence would be inappropriate, unnecessary or where injustice would occur").

Against this backdrop, the crux of petitioners' claim before this forum concerns respondent's alleged lack of qualification for membership on the East Orange Board of Education in accordance with *N.J.S.A.* 18A:12-1.[2] Respondent contends that petitioners

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[2] *N.J.S.A.* 18A:12-1 entitled "Qualifications of board members" provides:

> Each member of any board of education shall be a citizen and resident of the district, or of such constituent district of a consolidated or regional district as may be required by law, and shall have been such for at least one year immediately preceding his appointment or election, he shall be able to read and write, shall be registered to vote in the district, and, notwithstanding the provisions of *[N.J.S.A.J* 2C:51-1 or any other law to the contrary, he is not disqualified as a voter pursuant to *[N.J.S.A.J* 19:4-1.

The Petition of Appeal alleges, in pertinent part, that at the time of his appointment respondent was not a resident of, nor a registered voter in, the East Orange school district, he did not reside in East Orange for at least one year preceding his appointment, respondent resided at locations in New York and respondent

knew or should have known of his appointment to the Board on May 18, 1999 and did not file a challenge to his qualifications until approximately one year later. Accordingly, respondent avers that the Petition of Appeal should be dismissed as time-barred since it was filed after the mandated ninety-day period.

The record reveals that the action which forms the basis for this contested case arises from respondent's appointment to the East Orange Board of Education on May 18, 1999. Petitioners offer no date in opposition to May 18, 1999 for purposes of triggering the limitations period. Petitioners furnished no evidence, by means of an affidavit or otherwise, from which it can be concluded that petitioners lacked adequate notice of the disputed action or the existence of facts to enable them to file a timely claim. Similarly, the record is bereft of facts which justify deferring the commencement of the limitations period after May 18, 1999. *Contrast Baptist v. Trachtenberg,* 1991 *S.L.D.* 1274. Succinctly stated, petitioners provide no explanation in support of why the Petition of Appeal was filed nearly one year after respondent's appointment or the injustice that will result unless the ninety-day requirement is relaxed. No "exceptional circumstances" or "compelling reasons" exist in this case to warrant a waiver or relaxation of the ninety-day filing requirement particularly, where as here, respondent no longer serves as a member of the Board.

I **CONCLUDE** that under the circumstances presented the ninety-day limitations period was triggered on the date of respondent's appointment. I further **CONCLUDE** that the circumstances do not justify a waiver or relaxation of the ninety-day limitations period pursuant to *N.J.A.C.* 6A:3-1.16. Accordingly, I **CONCLUDE** that petitioners' claim challenging respondent's qualification for membership on the East Orange Board of Education should be dismissed as untimely and time-barred in accordance with the dictates of *N.J.A.* C. 6A:3-1.3(d).

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filed "a false oath of office" in that he did not possess the qualifications of membership prescribed by law, including a specific declaration that he was not disqualified as a voter, and "a false affirmation as to his voting status." See Petition of Appeal at ,-1,r1-8.

Mootness

It is further urged that the controversy is moot since respondent vacated his seat on the East Orange Board of Education on or about December 6, 2000. For the reasons that follow, the mootness doctrine provides an additional and independent basis for dismissal of petitioners' claim.

It is well settled that "questions that have become moot or academic prior to judicial scrutiny generally have been held to be an improper subject for judicial review." *Anderson v. Sills,* 143 *N.J. Super.* 432, 437 (Ch. Div. 1976). *See Oxfeld v. New Jersey State Bd. of Educ.,* 68 *N.J.* 301 (1975); *In re Geraghty,* 68 *N.J.* 209 (1975); *Sente v. Mayor and Municipal Council of the City of Clifton,* 66 *N.J.* 204 (1974). It is equally "well established that the Commissioner does not decide moot issues." *Pinkham v. Bd. of Educ. of the Borough of South River,* 1974 *S.L.D.* 1103, 1110, *modified in part and affd State Board of Education,* 1975 *S.L.D.* 1119. *See Baptist, supra,* 1991 *S.L.D.* at 1275; *Tedesco v. Bd. of Educ. of Lodi,* 1955-56 *S.L.D.* 69. In *Anderson, supra,* the court described the underlying rationale of this doctrine:

> There are two basic reasons for this doctrine. First, for reasons of judicial economy and restraint, courts will not decide cases in which the issue is hypothetical, a judgment cannot grant effective relief, or the parties do not have concrete adverse interest. Second, it is a premise of the Anglo-American judicial system that a contest engendered by genuinely conflicting self-interests of the parties is best suited to developing all relevant material before the court. Therefore, where there is a change in circumstances so that a doubt is created concerning the immediacy of the controversy, courts will ordinarily dismiss cases as moot, regardless of the stage to which the litigation has progressed.
>
> *[Anderson, supra,* 143 *N.J. Super.* at 437.]

See Moss Estate, Inc. v. Metal & Thermit Corp., 73 *N.J. Super.* 56, 67 (Ch. Div. 1962). ("[i]t is the policy of the courts to refrain from advisory opinions, from deciding moot cases, or generally functioning in the abstract, and 'to decide only concrete contested issues conclusively affecting adversary parties in interest'") (citation omitted).

Simply put, inasmuch as respondent has vacated his seat on the East Orange Board of Education, the debate concerning his qualifications and petitioners' demand for his removal are academic and moot. *See Baptist, supra,* 1991 *S.L.D.* 1274; *Amorosa v. Bd. of Educ. of the City of Jersey City,* 1964 *S.L.D.* 105. The matter presents no issue of significant public importance or other compelling reason warranting deviation from the general rule against adjudicating moot issues .

It is observed that, in addition to demanding respondent's removal from the Board, petitioners request the Commissioner "to file criminal charges" against respondent and require respondent to reimburse the Board for expenses made to respondent in his position as a Board member *(e.g.,* workshops, conferences, *etc.).* Initially, it is less than clear whether petitioners request this relief in connection with the instant proceeding or culminating from respondent's alleged violation(s) of the School Ethics Act, the latter of which is beyond the issues before this forum. Apart from this uncertainty, petitioners offer no precedent nor statutory authority for the Commissioner to take such action or order such relief should they ultimately succeed in proving that respondent lacked the required qualifications. And, although the statutory framework envisions removal of a board member under these circumstances, *N.J.S.A.* 18A:12-3, the additional relief requested by petitioners does not fall within the apparent scope of the Commissioner's authority in the context presented. Accordingly, since respondent has vacated his seat on the Board and there is an absence of supported further relief that the Commissioner may grant, no viable issue exists for resolution by this forum.

CONCLUSION

Based upon the foregoing facts and authorities cited, I **CONCLUDE** that petitioners' claim regarding respondent's lack of qualification for membership on the East Orange Board of Education is time-barred pursuant to *N.J.A.C.* 6A:3-1.3(d) Alternatively, I **CONCLUDE** that the transmitted controversy has been rendered moot. Accordingly, I **CONCLUDE** that the standards for summary decision have been satisfied and respondent's motion should be granted.[3]

ORDER

It is **ORDERED** that respondent's motion for summary decision be and hereby is **GRANTED** and the allegations of the Petition of Appeal challenging respondent's qualification for membership on the Board of Education of the City of East Orange pursuant to *N.J.S.A.* 18A:12-1, *et seq.* be and hereby are **DISMISSED WITH PREJUDICE.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

[3] This opinion is limited to the allegations of the Petition of Appeal relating to respondent's qualification for membership on the local board of education. No opinion is expressed as to the viability or propriety of the allegations asserting violation(s) of the School Ethics Act which the Department determined are within the primary jurisdiction of the School Ethics Commission.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 16, 2000
DATE

MARGARET M. MONACO, ALJ

Receipt Acknowledged:

11-21-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 26 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

pb

OAL DKT. NO. EDU 7218-00
AGENCY DKT. NO. 148-5/00

PAUL BARNES AND LONNIE TUCKER,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
SIDNEY SHOMALLI WILLIAMS, BOARD MEMBER, EAST ORANGE BOARD OF EDUCATION, ESSEX COUNTY	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon careful and independent review of the record in this matter, the Acting Commissioner finds and concludes that respondent's Motion for Summary Decision is appropriately granted here.[1] However, while noting the ALJ's determinations that the within Petition of Appeal, which was filed almost one year after respondent's appointment to the East Orange Board of Education, is time-barred pursuant to *N.J.A.C.* 6A:3-1.3(d), and that the record evidences no compelling reasons or exceptional circumstances which would warrant relaxation of the 90-day rule, the Commissioner finds it unnecessary to reach these issues herein. As found by the ALJ, this controversy was rendered moot on or about December 6, 2000, when respondent vacated his seat on the Board, and dismissal is warranted on that basis alone.

[1] **It is specifically noted that the Administrative Law Judge (ALJ) advised the parties by letter dated September 25, 2001, that a decision on respondent's Motion for Summary Decision, to which petitioners filed no response, would only deal with the respondent's asserted basis for dismissal of this case and would not reach the underlying merits of the issues raised with respect to Mr. Williams' qualification for Board membership.**

Accordingly, the Initial Decision of the OAL is affirmed as set forth above. Summary decision is hereby granted to the Board and the instant Petition of Appeal is dismissed.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: _ 1/07/02

Date of Mailing: __ 1/09/02

[2] **This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 1SA:6-27 *et seq.* and *N.J.A.* C. 6A:2-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.**

#2-02

NILKANTH PATEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

January 7, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3615-99
AGENCY DKT. NO. 56-3/99

NILKANTH PATEL,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,
Respondent.

Paul E. Griggs, Esq., for petitioner
(McConnell, Lenard & Griggs, LLP)

Eric Martin Bernstein, Esq., for respondent
(Eric M. Bernstein & Associates LLC, attorneys)

Record Closed: November 12, 2001 Decided: November 16, 2001

BEFORE **ELINOR R. REINER,** ALJ:

On March 23, 1999, petitioner, Nilkanth Patel, filed a verified petition of appeal with the Commissioner of Education, alleging that respondent improperly failed to compensate him for 88 days of unused and accrued sick leave, personal leave, recess leave and vacation leave. On March 30, 1999, respondent filed an answer denying

petitioner's allegations, asserting various defenses, and requesting dismissal of the petition with prejudice. On April 9, 1999, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:148-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was assigned to the undersigned judge on June 7, 1999, and a telephone prehearing conference scheduled for August 2, 1999. The prehearing conference was adjourned to August 10, 1999, at the request of counsel for petitioner. The prehearing conference was held on that date, at which time the issues were isolated, and a hearing scheduled for February 17 and 18, 2000.

On or about January 18, 2000, respondent moved for summary decision; thereafter, petitioner filed a cross-motion for summary decision. During a conference with counsel on February 9, 2000, counsel agreed to file a joint stipulation of facts. The date for respondent to reply to petitioner's cross-motion was established, and the hearing scheduled for February 17 and 18, 2000 was adjourned. By letter dated April 27, 2000, the undersigned denied the pending motions. Respondent requested interlocutory review of this ruling. By letter dated May 18, 2000, the Commissioner of Education affirmed the undersigned's denial of summary decision. The hearing was scheduled for September 28 and 29, 2000 at the Office of Administrative Law. Counsel for petitioner requested an adjournment, and the matter was rescheduled to June 11 and 12, 2001. Although petitioner did not appear on June 11, 2001, settlement discussions were held with counsel and it appeared that a probable settlement had been reached. Since a signed settlement agreement was not filed, the matter was rescheduled for a settlement conference on November 14, 2001 at the Office of Administrative Law. The undersigned received a signed settlement agreement on November 12, 2001, and the scheduled hearing was adjourned.

The parties have agreed to settle this matter and have prepared the attached Settlement Agreement and General Release, indicating the terms of settlement.

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:148-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

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DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

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DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

IIOV6 I
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

CONFIDENTIAL

SETTLEMENT AGREEMENT AND GENERAL RELEASE

IT IS HEREBY AGREED by and between **NILKANTH PATEL** ("PATEL") and the **ENGLEWOOD BOARD OF EDUCATION** ("Board") for the good and sufficient consideration set forth below. as follows:

1. The Board, as used herein. shall at all times mean the Englewood Board of Education, its subsidiaries, affiliates, predecessors, successors and assigns of any and all of them, their present and former directors, officials, officers, representatives, associates. partners, servants, employees, agents. attorneys, successors, heirs. executors and administrators whether in their individual or official capacities, and all other persons,. firms, corporations, associations. partnerships or any other entity connected therewith; and,

2. Patel, as used herein, shall mean Nilkanth Patel, his heirs, representatives, privies, executors, administrators. assigns. successors-in-interest and predecessors-in-interest; and,

3. Within thirty (30) business days of the Board's receipt of this Settlement Agreement and General Release as amended below, executed by Patel before a Notary Public, the Board shall pay to Patel the sum of Seven Thousand Five Hundred Dollars ($7,500.00). Patel and the Board acknowledge and agree that said payment is in settlement of any and all claims that had been asserted or can be asserted or may be asserted or could be asserted by Patel for compensatory damages, pain, suffering, emotional distress, stress, humiliation. embarrassment, mental anguish, medical expenses, punitive damages, interests, attorneys fees, costs of suit, loss of sick time.

loss of vacation time, loss of benefits, consequential damage, reputation damage, breach of eJ({)ress or implied contract. interference *in* any contract, economic opportunity or prospective economic advantage which arose out of or could arise out of Patel's Complaint against the Board, OAL Docket No. EDU 03615-99N / Agency Ref. No. 56-3199, for, but not limited to. violation of his civil rights. privileges and immunities secured by the Civil Rights Act of 1871, 42 U.S.C. §§ 1981, 1983, 1985, 1986 and 1988. the New Jersey Tort Claims Act N.J.S.A. Title 59, the Fourth and Fourteenth Amendments to the United States Constitution and any and all other federal, state and local constitutional, statutory, regulatory or administrative laws, ordinances or common law duties, whether enumerated herein specifically or not. Patel and the Board expressly understand and agree that said payment includes any and all amounts that may be claimed by Patel or on his behalf, or by his attorneys, heirs, successors or assigns. against the Board. This Settlement Agreement is contingent upon the approval of the Office of Administrative Law and the New Jersey State Commissioner of Education. Further. Patel and the Board agree that this Settlement Agreement end General Release is contingent on and subject to approval and ratification by the• Englewood Board of Education; and,

4. (a) This settlement is intended as and for damages for all and all possible injuries and Patel hereby waives any and all claims for lost wages, income or future earnings. However, should it be determined that any payments made pursuant to paragraph 3 herein constitute gross income within the meaning of the Internal Revenue Code and its applicable amendments, or under any other federal, state or local statute or ordinance, Patel shall be solely liable for and agrees to pay any amount that may be

determined to be due and owing as taxes, interest and penalties arising out of such payments. Specifically, Patel understands and agrees that his attorney will be provided with a 1099 Miscellaneous form with his payment from the Board. Patel also understands and agrees that any adjustments to him withholding or any estimated tax payments are his responsibility. Further, Patel understands and agrees that the Board will report the payment made *to* Patel to the Internal Revenue Service, the New Jersey State Division of Taxation and other pertinent agencies, but the Board will not take a position as to whether the payments are taxable; and,

(b) In any action commenced against Patel to enforce the provisions of this paragraph, the Board, if it is the prevailing party, shall be entitled to recover its reasonable attorneys' fees, costs and disbursements incurred in prosecuting the action.

5. Neither this Settlement Agreement and General Release, nor anything contained herein. shall be construed as an admission by the Board or Patel of any liability or unlawful conduct whatsoever. Patel and the Board further acknowledge that the parties enter into this Settlement Agreement and General Release solely to avoid further expensive. burdensome and protracted litigation. This Settlement Agreement and General Release is not intended to be used and shall not be used as evidence or for any other purpose in any other action or proceeding, other than evidence of the compromise between Patel and the Board as set forth herein or to enforce the terms of this Settlement Agreement and General Release; and,

6. Patel releases, acquits, gives up and forever discharges any and all claims and rights which he may have against the Board up to the time of the execution of this Settlement Agreement and General Release. This releases all claims, including

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those of which Patel is not aware and those not mentioned in this Settlement Agreement and General Release. This Settlement Agreement and General Release applies to claims resulting from anything, which has happened from the date of the alleged incident to now. Patel specifically releases the following claims:

Any and all damages, whether known or unknown at this date, arising from or relating to the incidents as set forth in the action known as Nilkanth Patel v. Englewood Board of Education, OAL Docket No. EDU 03615-99 / Agency Ref. No. 56-3199. including attorney fees pursuant to 42 U.S.C. §1983 and 42 U.S.C. §1988 or other applicable law.

More specifically, In consideration of the payment specified in Paragraph 3 above and the entry into this Settlement Agreement and General Release by the Board, Patel hereby releases, acquits and forever discharges the Board of and from any and all actions or causes of action. suits, debts, claims, complaints, contracts, controversies, agreements, promises, damages, cross-claims, claims for contribution and/or indemnity, claims for costs and/or attorney's fees, judgments and demands whatsoever, in law or equity, which Patel ever had, now has, or may have. as of the date of this Settlement Agreement and General Release, as set forth more particularly in Paragraph 3. Further, Patel hereby waives any and all relief not explicitly provided for herein.

7. Patel agrees not only to release, acquit and forever discharge the Board from any and all claims which arose from the incidents set forth and any related thereto to the action known as Nilkanth Patel v. Englewood Board of Education, OAL Docket No. EDU 03615-99 / Agency Ref. No. 56-3199 that Patel could make on his own behalf, but also those which have been or may be made against the Board by any other person

or organization on his behalf. Patel specifically waives any right to become. and promises not to become, a member of any class in any case in which any claim is asserted against the Board, involving any event that has occurred on or before the date of this Settlement Agreement and General Release; and,

8. The Board affirms that, as of the date of execution of this Settlement Agreement and General Release, they have no knowledge of any pending class action against it to which Patel could be a potential class member as a result of the incidents set forth and any incidents related thereto to the action known as Nilkanth Patel v. Englewood Board of Education, OAL Docket No. EDU 03615-99 / Agency Ref. No. 56-3199; and,

9. Patel specifically acknowledges that the payment referred to in Paragraph 3 hereof constitutes any and all additional consideration not otherwise owed to him but for this Settlement Agreement and General Release: and,

10. Unless directed to do so by Court Order or lawfully issued subpoena with notification to the Board at the time the lawfully issued subpoena was issued, Patel agrees that he will not give testimony or evidence against the Board in any proceeding with respect to the incidents set forth and any incidents related thereto to the action known as Nilkanth Patel v. Englewood Board of Education, OAL Docket No. EDU 03615-99/ Agency Ref. No. 56-3199; and,

11. Patel and his attorney(s) agrees and promises that they will not disclose, either directly or indirectly, in any manner whatsoever. any information regarding either: (a) the substance or existence of his complaints. claims, charges and/or actions against the Board; or, (b) the existence, terms or contents of this Settlement Agreement and

General Release, to any person or organization, including, but not limited to, any governmental agency, members of the press and media. present and former officers, employees and agents of the Board and other members of the publlc. This paragraph shall not preclude Patel or his attomey(s) from disclosing the existence or terms of 1his Settlement Agreement and General Release to governmental authorities which require such information. Patel may only state, without elaboration, as follows: "The situation has been resolved to the mutual satisfaction of Patel and the Board." In the event Patel or his attorneys violate this paragraph or any other paragraph of this Agreement, Patel shall be obligated to pay forthwith to the Board the sum of Seven Thousand Five Hundred Dollars ($7,500.00) as liquidated damages, as well as any and all attorneys' fees and costs incurred by the Board in attempting to recover the amount referred to above. The Board may also commence an action for equitable relief, as they deem appropriate. In the event the Board commences any such action, the remaining provisions of this Settlement Agreement and General Release shall remain in full force and effect; and,

12. Patel agrees that he shall not seek any further amount other than the amount set forth in Paragraph 3 from the Board; and,

13. This Settlement Agreement and General Release contains the full agreement of Patel and the Board and may not be modified, altered, changed or tenninated **except** upon the express prior written consent of Patel and the Board, which consent must be signed by Patel and the Board or their duly authorized agents; and,

14. The waiver by Patel and/or the Board of a breach of any provision hereof shall not operate or be construed as a waiver of that breach by the other, or as a waiver of any subsequent breach by the other; and,

15. If any term, provision or condition of this Settlement Agreement and General Release is held invalid or unenforceable by a court of competent jurisdiction, such holding shall be without effect upon the validity or enforceability of any other provision, term or condition of this Settlement Agreement and General Release; and,

16. Patel hereby acknowledges and agrees that he further expressly waives and assumes the risk of any and all claims or damages which exist as of this date *for* which Patel does not know of or suspect to exist. whether through ignorance, oversight, error. negligence, or otherwise and which, if known, would materially effect his decision to enter into this Settlement Agreement and General Release; and,

17. Patel represents and warrants that no other person or entity has or has had any interest in the claims, demands, obligations, or causes of action referred to in this Settlement Agreement and General Release: that Patel has not sold, assigned, transferred, conveyed or otherwise disposed of any of the claims, demands, obligations or causes of action referred to in his verbal complaint(s) and/or in this Settlement Agreement and General Release; and,

1a. This Settlement Agreement and General Release shall be construed and interpreted in accordance with the laws of the State of New Jersey; and,

19. Patel and the Board agrees to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary or

appropriate to get full force and effect of the basic terms and interest of this Settlement Agreement and General Release; and,

20. This Settlement Agreement and General Release shall not be executed in counterparts and shall be enforceable only if executed by Patel and the Board; and.

21. This Settlement Agreement and General Release shall become effective immediately following execution by Patel and the Board; and,

22. Patel and the Board shall bear all costs and expenses arising from the actions of their own counsel in connection with the Settlement Agreement and General Release. As set forth in Paragraph 3, the Board has agreed to pay the sum of $7,500.00 to Patel. As further consideration for this Settlement Agreement and General Release. Patel and his attorney agree that this sum represents all the monies which the Board has agreed to pay to Patel and his attorneys and that any additional attorney's fees which may arise from the actions of Patel's attorneys in connection with the incidents set forth and any incidents related thereto to the action known as Nilkanth Patel v. Englewood Board of Education, OAL Docket No. EDU 03615-99 / Agency Ref. No. 56-3199 are to be borne by Patel; and,

23. This Settlement Agreement and General Release contains the entire agreement between Patel and the Board with regard to the matters set forth in it, and shall be binding upon and inure to the benefit of their officials, officers, directors. attorneys, representatives, employees, associates, partners, agents, servan1s. executors, administrators, personal representatives, heirs, successors and assigns of each. and all other persons, firms, corporations, associations or partnerships or any

other entity or persons connected therewith, except as set forth herein or as may be agreed to in writing between the parties: and,

24. In entering into this Settlement Agreement and General Release, Patel has relied upon the legal advice of his attorney, who is the attorney of his own choice, as to the terms of this Settlement Agreement and General Release which have been completely read and explained by his attorney and those terms are fully understood and voluntarily accepted; and,

25. All notices, demands and requests which are required and desired to be given shall be in writing and shall be sent pre-paid, registered *or* certified mail, return receipt requested, addressed as follows:

For **PATEL:**

Paul E. Griggs, Esq.
4 Waterioo Road
P.O. Box 111
Stanhope, New Jersey 07874

For the **ENGLEWOOD BOARD OF EDUCATION:**

Eric Martin Bernstein, Esq.
ERIC M. BERNSTEIN & ASSOCIATES, L.L.C.
Two North Road
P.O. Box 4922
Warren, New Jersey 07059

26. This Settlement Agreement and General Release shall become effective immediately following execution by all the following parties.

IN WITNESS WHEREOf, Pal and fie In Jd , _,. halluntD aa t:ta I'lendc.

NIU(AMTH PATEL

Paul E. Grigga, Esq.

Nilkanth Patel

ENGLEWOOD BOARD OF EDUCATION

Robert Brown, Board Secretary/
Business Administrator

By: David G. Matthews, Board President

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or·d. 979-947-8938 Paul E. Grigga Nov 12 01 10:54a P.01

TOTAL P.01

STATE OF NEW JERSEY)
) ss.
COUNTY OF)

I, _____, a Notary Public, do hereby certify that Nilkanth Patel, personally known to me to be the same person whose name is subscribed to the foregoing instrument. appeared before me this day in person and acknowledges that he signed and delivered the said instrument as his free and voluntary act, for the uses and purposes set forth therein.

Given under my hand and official seal this 9th day of November, 2001.

Notary Public

CAROL MACDONALD
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 7, 2002

OAL DKT. NO. EDU 3615-99
AGENCY DKT. NO. 56-3/99

NILKANTH PATEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: ----1/07/02

Date of Mailing: __ 1/_09/0_2_ _

• The record indicates that this settlement agreement was approved and ratified by the Englewood Board of Education at a Special Public Meeting on December 13, 2001.

L.C., on behalf of minor children, W.C. and R.C.,	:	
PETITTONER,	:	
V.	:	**COMMISSIONER OF EDUCATION**
BOARD OF EDUCATION OF SOMERVILLE SOMERSET COUNTY,	:	**DECISION**
RESPONDENT.	:	
	:	

January 11, 2002

OAL DKT. NO. EDU 10942-99
AGENCY DKT. NO. 346-11/99

L.C., on behalf of minor children, W.C. and R.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF SOMERVILLE SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING ASSISTANT COMMISSIONER

Date of Decision: 1/11/02

Date of Mailing: 1/11/02

4-02

S.H. AND S.H., on behalf of minor child, D.W.,:

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY, : DECISION

RESPONDENT. :

:

January 11, 2002

OAL DKT. NO. EDU 9974-98 and EDS 9973-98 (Consolidated)
AGENCY DKT. NO. 493-11/98

S.H. AND S.H., on behalf of minor child, D.W.,:		
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING ASSISTANT COMMISSIONER

Date of Decision: 1/11/02

Date of Mailing: 1/11/02

K.T., on behalf of minor child, V.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP WOODBRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 11, 2002

OAL DKT. NO. EDU 8036-99
AGENCY DKT. NO. 272-9/99

K.T., on behalf of minor child, V.T.,	:	
PETITIONER,	:	
V..	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP WOODBRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.* C. 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING ASSISTANT COMMISSIONER

Date of Decision: 1111102

Date of Mailing: 1/11/02

6-02

ELEANOR INDRUNAS	:	
PETIDONER,	:	
V.	:	**COMMISSIONER OF EDUCATION**
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	**DECISION**
RESPONDENT.	:	
	:	

January 11, 2002

OAL DKT. NO. EDU 3845-99
AGENCY DKT. NO. 399-9/98

ELEANOR INDRUNAS	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING ASSISTANT COMMISSIONER

Date of Decision: 1/11/02

Date of Mailing: 1/11/02

OAL DKT. NO. EDU 3812-99
AGENCY DKT. NO. 399-9/98

NANCY LUCE.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY. HUDSON COUNTY.	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c. approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING ASSISTANT COMMISSIONER

Date of Decision: 1/11/02

Date of Mailing: 1/11/02

NANCY LUCE,	:	
PETITIONER,	:	
V.	:	**COMMISSIONER OF EDUCATION**
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	**DECISION**
RESPONDENT.	:	
	:	

January 11, 2002

8-02

BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	**COMMISSIONER OF EDUCATION**
UNITY CHARTER SCHOOL, MORRIS COUNTY,	:	**DECISION**
RESPONDENT.	:	

SYNOPSIS

Petitioning Board sought a decision remedying the racial variance in the enrollment of the charter school as compared to that of the district in which it is located.

The parties agreed to a settlement establishing a multi-tiered, racially based lottery system for determining the school's enrollment.

The Commissioner rejected the settlement as a remedy not sufficiently supported by facts established on the record. The matter was remanded to the Office of Administrative Law for further proceedings, without precluding the possibility of settlement through a remedy narrowly tailored to established deficiencies.

January 11, 2002

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO: EDU 7310-01

AGENCY DKT. NO: 157-6/01

BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY,

Petitioner,

v.

UNITY CHARTER SCHOOL, MORRIS COUNTY,

Respondent.

John Geppert, Esq., for petitioner
(Wiley, Malehorn and Sirota, attorneys)

David Ganz, Esq., for respondent
(Collier, Jacob & Mills)

Record Closed: January 2, 2002 Decided: January 4, 2002

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

This matter was transmitted to the Office of Administrative Law (OAL) on August 20, 2001, for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-J et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Consent Order.

Having reviewed the contents of the attached Consent Order, I **FIND** (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached Consent Order meets the requirements of *N.JA.* C. *1: 1-19. 1. 1* and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.SA.* 52:14B-10.

1/04/02
DATE

JEFFREY A. GERSON,
Administrative Law Judge

Receipt Acknowledged:

1/5/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

lg

WILEY, MALEHORN AND SIR.OTA
250 MADISON AVENUE
MORRISTOWN, NEW JERSEY 07960
(973)539-1313

Attorneys for Petitioner Morris School District

MORRIS SCHOOL DISTRICT BOARD OF EDUCATION,
Petitioner,

v.

UNITY CHARTER SCHOOL,
Respondent.

BEFORE THE COMMISSIONER
OF EDUCATION OF NEW JERSEY

CONSENT ORDER

Agency Docket No. 157-6/01

WHEREAS, Unity Charter School opened within the borders of the Morris School District in September 1998;

WHEREAS, Unity Charter School is a public school of choice and can only enroll those students who choose to enroll or those who choose to stay;

WHEREAS, Morris School District and L'nity Charter School desire that Unity have an ethnically and diverse student population that resembles the population of the school district in which it resides;

WHEREAS, a Petition in this matter \\JS filed on or about June 1, 2001 with the Commissioner of Education to address the racial h.alancing issue; and

WHEREAS, Unity Charter School .mJ \1orris School District have reached an agreement as set forth herein to attempt to resohe 1hls issue;

IT IS on this __y_____ of- -- ..... _____ _,. 20 RDERED as follows:

1. The Morris School District will provide Unity Charter School with documentation by January 5th of each year showing the percentages of White, Black and National Origin students ir, the Morris School District.

2. Unity Charter School agrees to implement and conduct a multi-tiered lottery, which shall include, but not be limited to White, Black, and National Origin tiers, for the determination of its student population each school year that this consent order is in effect. The procedure used for this lottery is modeled after the lottery procedure used by the Normandy Multiaged Magnet School of the Morris School District that has been developed as part of the Morris School District's state:approved school desegregation plan..

3. Unity Charter School agrees to use the Morris School District racial/ethnic percentage information to determine the proportionate number of students Unity Charter School seeks to enroll in each of the three classifications. It is the intent of the parties that Unity Charter School use all best efforts to achieve this proportion at each grade level.

4. Unity Charter School agrees to maintain separate waiting lists for those students who sought to enroll in Unity Charter School but were not selected during the lottery. Unity Charter School agrees to use its est efforts to recruit a sufficient pool of students for each classification and agrees to use best efforts to continuously maintain a sufficient number of students on the waiting list in each of the respective classifications.

5. If a student notifies Unity Charter School, prior to the start of or during the school year, that they are not going to remain enrolled at Unity Charter School, then a replacement student is to be selected from the waiting list needed to improve/maintain racial balance.

6. In the event that a parent/guardian files suit against Unity Charter School based upon this Consent Order, Unity Charter School will advise the Morris School District of the lawsuit within five (5) days of being served. The Morris School District agrees to intervene in and defend both the Morris School District and the terms of this Consent Order in lawsuits specifically regarding this Consent Order or the lottery procedure set forth herein. The Morris School District will not intervene in or defend against any claims, causes of action, demands or lawsuits, unless they are specifically related to and directly attributable to the terms and conditions of this Consent Order or the lottery procedure set forth herein.

7. Morris School District agrees in good faith to use appropriate means at its disposal to support Unity Charter School's efforts to achieve racial balance. This good faith support shall include, the Morris School District's best efforts to achieve the following:

A. Morris School District agrees at kindergarten orientation and student registration, and other appropriate times as agreed upon by the parties, to inform parents and/or students that Unity is available to them as an alternative option to either Normandy School or the other schools within the Morris School District.

B. Morris School District shall provide Unity with introductions to specific community groups located within_ the Morris School District, including, but not limited to, the Urban League, Neighborhood Hou,e and the Council of Clergy.

C. At its discretion, Morris School District will assist Unity Charter School in other ways.

8. Unity Charter School agrees to pn:,vide the Morris School District with written confirmation of the results of the lottery within 30 days of such lottery, and enrollment figures by racial/ethnic classification on October 15 and February 15. To the extent such enrollment

figures by raciaVethnic classification are reported to the State at other times of the year, Unity Charter School agrees to provide such figures to the Morris School District within 30 days of their being reported to the State.

9. It is agreed between the parties that the tenns of this order shall not take effect unless and until the office of the Commissioner of Education of the State of New Jersey has made a determination to accept the tenns of this order.

10. This order shall remain in effect for a period of two years from the date that it is approved by the New Jersey Commissioner of Education. However, the parties, by mutual consent, may extend the tenns of this order for an additional period of time by providing written notice of their mutual consent to the office of the New Jersey Commissioner of Education prior to the expiration of the original two years.

11. Morris School District agrees not to take any further legal action against Unity Charter School regarding racial composition during the two years following the date this consent order is approved by the New Jersey Commissioner of Education.

A.L.J.

I HEREBY CONSENT
to the fonn and entry of the within Order.

John G. Geppert, Jr., Esq.
Wiley, Malehorn and Sirota
Attorneys for Petitioner
Morris School District

I HEREBY CONSENT
to the form and entry o f the within Order.

David Ganz, Esq.
Collier, Jacob & Mills, PC
Attorneys for Respondent
Unity Charter School

Dated: . 1z_/l I

OALDKT. NO. EDU7310-01
AGENCY DKT. NO. 157-6/01

BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
UNITY CHARTER SCHOOL, MORRIS COUNTY,	:	**DECISION**
RESPONDENT.	:	

The record of this matter and proposed settlement in the form of a Consent Order approved by the Administrative Law Judge pursuant to *N.J.A. C.* 1: 1-19.1, have been reviewed.

Upon such review, Commissioner is compelled to reject the proposed agreement as insufficiently supported by the record.

The parties in this matter have, in effect, proposed a remedy employing race as a paramount factor in determining which students may be admitted, both initially and through waiting lists, to the charter school. They have done so in the absence of proofs that the school does not, in fact, reflect a racial cross-section of the community's school-age population, *N.J.S.A.* 18A:36A-8(e), or that its existence has created a negative impact on the racial composition of the District's public schools. Moreover, even assuming, ***arguendo,*** that an infirmity of this type had been established on record, the parties have not identified its cause(s), so as to enable the Commissioner to find that the proposed remedy is specifically tailored to such cause(s).[1]

[1] **For example, disparities caused by insufficient outreach would likely be addressed through remedies quite different from those addressing inability to retain minority students once admitted.**

In rejecting the proposed agreement, the Commissioner commends the parties' cooperative efforts toward effectuating increased diversity, and he stresses that he does not preclude stipulation of facts or the possibility of settlement through an appropriately supported and tailored remedy. He also notes, however, that any agreement presented to him for approval must be so supported and tailored, and that it may not, as does the current agreement, provide for indefinite extension by the parties without provision for assessment of the agreement's effectiveness. He further notes that any proposed settlement concerning recruitment, enrollment or waiting lists is tantamount to an application for charter amendment, *N.J.A. C.* 6A: 11-2.6. As such, if an agreement in this matter is ultimately approved by the Commissioner, it will serve to amend the Unity Charter School's charter.

Accordingly, this matter is remanded to the Office of Administrative Law for such proceedings as are necessary to establish a factual record, with legal argument and analysis as necessary, that will permit the Commissioner to make an informed determination on the appropriateness of any proposed remedial agreement, or for proceedings on the merits if settlement consistent with this decision cannot be reached.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: January 11, 2002

Date of Mailing: January 11, 2002

[2] This decision, as the Commissioner's final detennination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 ***et seq.*** and *N.J.A.C.* 6A:4-1.1 ***et seq.,*** within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

BART MATTALIANO,	:	
PETITIONER .	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 11, 2002

OAL DKT. NO. EDU 3336-99
AGENCY DKT. NO. 28-2/99

BART MATTALIANO,	:	
PETITIONER.	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT **IS SO ORDERED.**

ACTING ASSISTANT COMMISSIONER

Date of Decision: 11/02

Date of Mailing: 11/02

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

January 10, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NOs. EDU 4411-01,
EDU 4412-01, EDU 4413-01,
EDU 4414-01, EDU 4415-01
EDU 4523-01, EDU 4760-01
AGENCY DKT. NOs. 180-6/01,
177-6/01, 181-6/01, 178-6/01,
179-6/01, 233-6/01, 274-7/01

BOARD OF EDUCATION
OF THE TOWNSHIP OF NEPTUNE,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION,
Respondent.

Richard E. Shapiro, Esq., for petitioner

Allison Colsey Eck, Deputy Attorney General, for respondent (John Fanner, Attorney General of New Jersey)

Record Closed: December 4, 2001 Decided: December *5,* 2001

BEFORE **JOHN R. TASSINI,** ALJ:

STATEMENT OF THE CASE

These cases involve the Board of Education of the Township of Neptune (BOE), an "Abbott district." N.J.S.A. 18A:7F-3 "Abbott district." The Comprehensive Educational Improvement and Financing Act of 1996 (CEIFA) and the Urban Education Reform Regulations in the Abbott Districts govern the cases. N.J.S.A. 18A:7F-1 to -34; N.J.A.C. 6:24-1.1 to -9.6.

The BOE, relative to its elementary schools, submitted to the Department of Education proposed whole school reform plans and school-based budgets for the 2001-02 school year. The Department's Office of Program Review and Improvement and Office of Fiscal Review and Improvement notified the BOE that it determined that certain elements of the plans and budgets should be denied. The BOE also submitted its proposed Early Childhood Program Aid One Year Operational Plan for Fiscal Year 2001-02. The Department's Division of Early Childhood Education and Division of Finance notified the BOE that it determined that certain elements of that plan should be denied. The BOE also submitted its application for supplemental funding for the 2001-02 school year. The Department's Assistant Commissioners determined that of the amount the BOE had applied for a certain amount should be denied. From these determinations, the BOE appealed to the Commissioner.

As shown by the attached Consent Order of Settlement, the parties have settled the cases.

PROCEDURAL HISTORY

The BOE submitted its proposed Green Grove Elementary School whole school reform plan and school-based budget for the 2001-02 school year. The Department's Office of Program Review and Improvement and Office of Fiscal Review and

Improvement notified the BOE that on May 14, 2001 it determined that certain elements of the plan and budget should be denied. On June 13, 2001, the BOE's petition of appeal was filed with the Department. N.J.S.A. 18A:6-9, N.J.A.C. 6:19A-6.1 et seq., N.J.A.C. 6A:24-9.1, -9.2, -9.3. The Department deemed the matter a contested case, bearing agency docket number 180-6/01, and transmitted it to the Office of Administrative Law (OAL), where, on July 16, 2001, it was filed bearing OAL docket number **EDU 4411-01.** N.J.S.A. 52:14B-2(b), N.J.A.C.6A:24-9.6.

The BOE submitted its proposed Ridge Avenue Elementary School whole school reform plan and school-based budget for the 2001-02 school year. The Department's Office of Program Review and Improvement and Office of Fiscal Review and Improvement notified the BOE that on May 11, 2001 it determined that certain elements of the plan and budget should be denied. On June 11, 2001, the BOE's petition of appeal was filed with the Department. N.J.S.A. 18A:6-9, N.J.A.C. 6:19A-6.1 et seq. N.J.A.C. 6A:24-9.1, -9.2, -9.3. The Department deemed the matter a contested case, bearing agency docket number 177-6/01, and transmitted it to the OAL, where, on July 16, 2001, it was filed bearing OAL docket number **EDU 4412-01.** N.J.S.A. 52:14B-2(b), N.J.A.C.6A:24-9.6.

The BOE submitted its proposed Summerfield Avenue Elementary School whole school reform plan and school-based budget for the 2001-02 school year. The Department's Office of Program Review and Improvement and Office of Fiscal Review and Improvement notified the BOE that on May 14, 2001 it determined that certain elements of the plan and budget should be denied. On June 13, 2001, the BOE's petition of appeal was filed with the Department. N.J.S.A. 18A:6-9,.N.J.A.C. 6:19A-6.1 et seq.• N.J.A.C. 6A:24-9.1, -9.2, -9.3. The Department deemed the matter a contested case, bearing agency docket number 181-6/01, and transmitted it to the OAL, where, on July 16, 2001, it was filed bearing OAL docket number **EDU 4413-01.** N.J.S.A. 52:14B-2(b), N.J.A.C.6A:24-9.6.

The BOE submitted its proposed Shark River Hills Elementary School whole school reform plan and school-based budget for the 2001-02 school year. The Department's Office of Program Review and Improvement and Office of Fiscal Review and Improvement notified the BOE that on May 11, 2001 it determined that certain elements of the plan and budget should be denied. On June 11, 2001, the BOE's petition of appeal was filed with the Department. N.J.S.A. 18A:6-9, N.J.A.C. 6:19A-6.1 et seq., N.J.A.C. 6A:24-9.1, -9.2, -9.3. The Department deemed the matter a contested case, bearing agency docket number 178-6/01, and transmitted it to the OAL, where on July 16, 2001, it was filed bearing OAL docket number **EDU 4414-01.** N.J.S.A. 52:14B-2(b), N.J.A.C.6A:24-9.6.

The BOE submitted its proposed Gables Elementary School whole school reform plan and school-based budget for the 2001-02 school year. The Department's Office of Program Review and Improvement and Office of Fiscal Review and Improvement notified the BOE that on May 14, 2001 it determined that certain elements of the plan and budget should be denied. On June 13, 2001, the BOE's petition of appeal was filed with the Department. N.J.S.A. 18A:6-9, N.J.A.C. 6:19A-6.1 et seq., N.J.A.C. 6A:24-9.1, -9.2, -9.3. The Department deemed the matter a contested case, bearing agency docket number 179-6/01, and transmitted it to the OAL, where, on July 13, 2001, it was filed bearing OAL docket number **EDU 4415-01.** N.J.S.A. 52:14B-2(b), N.J.A.C.6A:24-9.6.

The BOE submitted its proposed Early Childhood Program Aid One Year Operational Plan for Fiscal Year 2001-02. The Department's Division of Early Childhood Education and Division of Finance notified the BOE that on May 29, 2001 it determined that certain elements of the plan should be denied. On June 22, 2001, the BOE's petition of appeal was filed with the Department. N.J.S.A. 18A:6-9, N.J.A.C. 6:19A-6.1 et seq., N.J.A.C. 6A:24-9.1, -9.2, -9.3. The Department deemed the matter a contested case, bearing agency docket number 233-6/01, and transmitted it to the OAL, where, on July 24, 2001, it was filed bearing OAL docket number **EDU 4523-01.** N.J.S.A. 52:14B-2(b), N.J.A.C.6A:24-9.6.

On July 30, 2001, **EDU 4411-01, EDU 4412-01, EDU 4413-01, EDU 4414-01, EDU 4415-01,** and **EDU 4523-01** were assigned to me and I forwarded a scheduling letter to the attorneys.

The BOE submitted its application for supplemental State funding in the amount of $8,957,201 for the 2001-02 school year. By letter dated June 26, 2001, the Department's Assistant Commissioner Thomas McMahon, Acting Assistant Commissioner Gloria Hancock and Assistant Commissioner Margretta Reid Fairweather notified the BOE that they had determined that of the amount the BOE had requested $6,565,800 should be denied. On July 26, 2001, the BOE's petition of appeal was filed with the Department. N.J.S.A. 18A:6-9, N.J.A.C. 6:19A-6.1 et seq., N.J.A.C. 6A:24-9.1, -9.2, -9.3. The Department deemed the matter a contested case, agency docket number 274-7/01, and transmitted it to the OAL, where it was filed on August 14, 2001 bearing OAL docket number **EDU 4760-01.** N.J.S.A. 52:14B-2(b), N.J.A.C.6A:24-9.6.

EDU 4760-01 was assigned to me and the attorneys and I engaged in a series of conferences relative to all of the cases. The parties exchanged information and conferred and, on the record closed date, I received the executed Consent Order of Settlement.

FINDINGS OF FACT

The parties agree that, by way of the Consent Order of Settlement, there will be funding that is reasonable and sufficient to provide appropriate educational services for the BOE's students. The parties have voluntarily and intelligently entered into the Consent Order of Settlement and have settled the case. Resolution of the cases by way of the Consent Order of Settlement, instead of by full litigation, will avoid substantial time and expense for the parties, the OAL and the Department, i.e., for the public.

CONCLUSIONS OF LAW

The Consent Order of Settlement meets the requirements of law and should be approved. See N.J.A.C. 1:1-19.1.

ORDER

I **ORDER** the parties to comply with the Consent Order of Settlement and that these proceedings be concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 5, 2001
DATE

JOHN R. TASSIN!, ALJ

Receipt Acknowledged:

12/6/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DEC 12 2001
DATE

OFFICE OF ADMINISTRATIVE LAW

JOHN J. FARMER, JR.
Attorney General of New Jersey
Attorney for Respondent
New Jersey Department of Education
R.J. Hughes Justice Complex
PO Box 112
Trenton, New Jersey 08625

By: Allison Colsey Eck
Deputy Attorney General
(609)663-8197

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

2001 DEC -W A q: SW

BOARD OF EDUCATION OF NEPTUNE TOWNSHIP, Petitioner, v. NEW JERSEY DEPARTMENT OF EDUCATION, Respondent.	OAL DOCKET NOS. EDUOT 04760-01S EDUOT 04523-01S EDUOT 04411-01S EDUOT 04412-01S EDUOT 04413-01S EDUOT 04414-01S EDUOT 04415-01S **CONSENT ORDER OF SETTLEMENT**

Petitioner, Board of Education of Neptune Township {"Petitioner"), through its Attorney, Richard E. Shapiro, Esq., and Respondent, New Jersey Department of Education ("Department"), through its attorney, the Honorable John J. Farmer, Jr., Attorney General of the State of New Jersey {Allison Colsey Eck, Deputy Attorney General, appearing), hereby stipulate to the following terms of settlement:

1. On or about June 11, 2001, Petitioner filed Petitions of Appeal {"Petitions") with the Commissioner of Education seeking review of the Department's determinations with respect to Petitioner's school-based budgets for Shark River and Ridge Avenue elementary schools. On or about June 13, 2001, Petitioner filed Petitions of Appeal with the Commissioner of Education seeking review of the Department's determinations with respect to Petitioner's school-based budgets for

Green Grove, Gables and Summerfield elementary schools. On or about June 22, 2001, Petitioner filed a Petition of Appeal with the Commissioner of Education seeking review of the Department's determinations with respect to Petitioner's request for additional funding for the Early Childhood Program. On or about July 26, 2001, Petitioner filed a Petition of Appeal with the Commissioner of Education seeking review of the Department's determinations with respect to Petitioner's request for supplemental funding for the 2001-2002 school year under the Abbott v. Burke decisions and DOE regulations.

2. These Petitions were subsequently transferred to the Office of Administrative Law as contested cases.

3. The parties thereupon entered into discussions to amicably resolve these matters in the public interest.

4. Based on those discussions, the Department agrees that the Petitioner has demonstrated a need for additional Abbott v. Burke state aid in the amount of $4,921,434.00. Included in this amount is the sum of $1,029,746 in additional funding for the Early Childhood Program pursuant to the September 24, 2001 determination by the Division of Early Childhood. Also to be deducted from this sum in this sum is the amount of $794,517 which petitioner owes to the Department for Abbott v. Burke parity aid from the 2000-2001 school year. Neptune shall record an account payable in the amount of $794,517 in the 2001-2002 budget, however an adjustment will be made at the commencement of the 2002-2003 school year on Neptune's records to reflect that Neptune repaid the $794,517 to the Department and a corresponding deduction will be made from the total amount of additional Abbott v. Burke state aid provided by the Department pursuant to this settlement. Thus the total amount of

additional Abbott v. Burke state aid in the form of a cash payment that the Department is required to fund is $4,126,917.

5. This settlement does not waive any of the review requirements and mandated adjustments pursuant to P.L. 2001, c. 130, including reallocation of the district's undesignated general fund balance in excess of two percent. In the event that any portion of the additional Abbott v. Burke state aid awarded pursuant to this settlement is not expended during the current fiscal year ending June 30, 2002, that portion of the additional funding must be used to support programs and services during the 2002-2003 school year.

6. Petitioner may anticipate a cash payment in the amount of $4,126,917 and record an account receivable in the 2001-2002 budget year of that same amount.

7. The Commissioner shall seek from the Legislature an appropriation for the 2002-2003 budget year in the amount of $4,126,917, subject to any adjustments mandated by P.L. 2001, c. 130. The receipt of this additional Abbott v. Burke aid will occur in one-lump sum payment to be made no later than the middle of the first month of the 2002-2003 budget year, subject to appropriation in the FY 2003 Appropriations Act and the terms of this settlement agreement.

8. In the event that petitioner experiences cash flow shortages during the 2001-2002 school year, the Department shall provide expeditious assistance to petitioner to resolve such cash flow difficulties. Such assistance may include, but not be limited to, the provision of an accelerated payment schedule of petitioner's 2001-2002 state aid.

9. The Petitioner agrees to dismissal with prejudice of the following petitions pending before the Office of Administrative Law and

the Commissioner of Education: Petitioner's early childhood appeal (OAL Docket No. EDUOT 04523-01S); Petitioner's school-based budget appeal for Summerfield Elementary School (OAL Docket No. EDUOT 04413-01S); Petitioner's school-based budget appeal for Gables Elementary School (OAL Docket No. EDUOT 04415-01S); Petitioner's school-based budget appeal for Green Grove Elementary School (OAL Docket No. EDUOT 04411-01S); Petitioner's school-based budget appeal for Ridge Avenue Elementary School (OAL Docket No. EDUOT 04412-01S); Petitioner's school-based budget appeal for Shark River Hills Elementary School (OAL Docket No. EDUOT 04414-01S); and Petitioner's 2001-2002 Supplemental Funding appeal (OAL Docket No. EDUOT 04760-01S).

10. This Consent Order does not preclude Petitioner from applying for additional Abbott v. Burke state aid pursuant to N.J.A.C. 6A:24-7.1(f).

11. Resolution of this matter on the terms set forth herein shall not be construed as precedent in other pending or future litigation.

JOHN J. FARMER, JR.
Attorney General of the State
of New Jersey

RICHARD E. SHAPIRO, ESQ.
Attorney for Petitioner,
Board of Education of
Neptune Township

ALJ, ISON COLSEY ECK, DAG

RICHARD E. SHAPIRO, ESQ.

DATED: 1/14/01

DATED: 1/4/01

SO ORDERED THIS 5th DAY OF June 2001.

HONORABLE JOHN R. TASSINI, A.L.J.

subject to review by the Commissioner of Education

7d

OAL DKT. NOS. EDU 4411-01, EDU 4412-01,
EDU 4413-01, EDU 4414, EDU 4415, EDU 4523-01,
AND EDU 4760-01
AGENCY DKT. NOS. 180-6/01, 177-6/01, 181-6/01,
178-6/01, 179-6/01, 233-6/01, AND 274-7/01

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The initial decision, record of this matter and settlement transmitted by the Office of Administrative Law have been reviewed. Because this agency is a party to the present case, the settlement, pursuant to *N.J.A.C.* 1:1-19.l(c) and (d), is deemed to be the final decision in this matter.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/10/02

Date of Mailing: 1/14/02

11-02

NATALIA MARIA TOMASSINI,	:	
PETITIONER,	:	
V.	:	**COMMISSIONER OF EDUCATION**
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	**DECISION**
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the Board's assignment of her to another teaching position for the 2000-2001 school year and reduction in her salary.

The ALJ determined that the Board's reassignment of petitioner from her teacher-facilitator position to a teacher position, and concomitant reduction in her salary, were contrary to law because petitioner accrued tenure under her instructional certificate, and her tenure under the instructional certificate was transferable to the new position, thus precluding the reduction in petitioner's salary.

The Commissioner affirmed the decision of the ALJ.

January 10, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

GRANTING PETITIONER'S MOTION FOR SUMMARY DECISION AND DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

OAL DKT. NO. EDU 6585-00

AGENCY DKT. NO. 285-7/00

NATALIA MARIA TOMASSINI,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

Respondent.

Kathleen A. Naprstek, Esq., for petitioner (Zazzali, Zazzali, Fagella and Nowak, attorneys)

Thomas W. Sumners, Jr., Esq., for respondent (Sumners, George & Dortch, P.C., attorneys)

Record Closed: July 13, 2001 Decided: November 27, 2001

BEFORE **KATHRYN A. CLARK,** ALJ

This case arises out of a dispute between the Trenton Board of Education ("respondent") and one of its elementary school teachers, Natalia Maria Tomassini ("petitioner"). Petitioner's annual salary was reduced in conjunction with her reassignment from a teacher/facilitator

position to a teaching position. Petitioner alleges that the reduction of her salary, without notice and a hearing, constitutes a violation of her rights under the Education Tenure Act, N.J.S.A. 18A:28-1 to -18. Although respondent admits to reducing petitioner's annual salary in conjunction with her reassignment, it denies violating petitioner's tenure rights. Respondent asserts that petitioner did not have tenure in the teacher/facilitator position therefore the reduction of her salary was authorized under N.J.S.A. 18A:28-6.

STIPULATED FACTS[i]

1. Respondent Board of Education of the City of Trenton, Mercer County, is a public school district with administrative offices located at 108 North Clinton Avenue, Trenton, New Jersey.

2. Petitioner holds an instructional certificate issued by the New Jersey State Board of Examiners with an endorsement as an elementary teacher and an administrative certificate with an endorsement as a supervisor.

3. Petitioner commenced employment with respondent on or about November 1, 1989 as an elementary teacher and continues to be employed by respondent at the present time.

4. As a consequence of her employment and certifications, petitioner acquired tenure under N.J.S.A. 18A:28-5 with respondent.

5. During the 1999-2000 school year, petitioner was assi$_{g n}$ed to the full time position of teacher/facilitator at the Franklin School. The teacher/facilitator position is a teaching position which requires a valid instructional certificate. While petitioner held this position, she was paid an annual salary of $51,156.00.

6.. By letter, dated May 15, 2000, petitioner was notified that she was being reassi$_{g n}$ed to another teaching position for the 2000-2001 school year and that her annual salary was being reduced. Respondent did not, however, abolish the position Teacher/Facilitator at the Franklin School but reassi$_{g n}$ed another individual to that position for the 2000-2001 school year.

7. By letter dated May 24, 2000, petitioner was notified that respondent had approved her reassignment to another teaching position for the 2000-2001.

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i The following facts were taken from Respondent's Exhibit I, the "Stipulation of Facts."

8. For the 2000-2001 school year, petitioner has been assigned to the position of elementary teacher at the Columbus School and her annual salary has been reduced to $49,320.00.

LEGAL STANDARDS

Standard for Summary Decision

Under the Uniform Administrative Procedure Rules, a party may move for summary decision if:

> the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.
>
> [N.J.A.C. 1:1-12.5(b).]

The summary decision rule is essentially the same as the summary judgment rule under the New Jersey Rules of Court, which permits a party to move for summary judgment if:

> the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.
>
> [R. 4:46-29(c).J

The Supreme Court in Brill v. Guardian Life Ins. Co., 142 N.J. 520,523 (1995) provided further guidance for the summary decision analysis: "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one sided that one party must prevail as a matter of law." Id. at 536.

A contested case can be summarily disposed of before an ALJ without a plenary hearing in instances where the undisputed material facts indicate that a particular disposition is required as a matter of law. In the Matter of Robros Recycling Corp., 226 N.J. Super. 343, 350 (App. Div. 1988). A summary decision must be based on an examination of the totality of circumstances, mitigating and aggravating factors, adequate factual findings and conclusions of law. Ibid.

Tenure Law

The tenure of educational personnel is authorized by the Education Tenure Act, N.J.S.A. 18A:28-1 to -18. Tenure is a status in a particular position created by statute, not the agreement of the parties, Zimmerman v. Bd. of Educ. of Newark, 38 N.J. 65, 72 (1962), that serves to provide a measure of security to teachers and other school employees who faithfully serve for the requisite period. Barnes v. Bd. of Educ. of Jersey City, 85 N.J. Super., 42, 45 (App. Div. 1964), cert. den., 43 N.J. 450 (1964). Educators who are employed in public schools must hold a valid certificate "to teach, administer, direct or supervise the teaching, instruction or educational guidance of ... pupils in such public schools." N.J.S.A. 18A:26-2. The State Board of Examiners has implemented the certification requirement by authorizing three certificates that an educator may hold: (1) Instructional; (2) Administrative; and (3) Educational Services. N.J.A.C. 6: 11-2.3. In order to attain tenure, an educator must hold the appropriate certificate for his or her position. N.J.S.A. 18A:26-5. An educator may hold more than one type of certificate. In addition to the three types of certificates an educator may hold, the State Board of Examiners has designated special endorsements under each type of certificate. N.J.A.C. 6:11-2.3. An educator must hold the appropriate certificate and endorsement for his or her position. N.J.A.C. 6: 11-6.1, -6.2. An educator may possess multiple endorsements under a single certificate, qualifying him or her to fill any position covered by the respective endorsements. N.J.A.C. 6:11-6.2 (a)(2), (a)(8).

Therefore, in order to obtain tenure, an educator must hold the appropriate certificate issued by the State Board of Examiners and maintain employment in a position for:

> 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.
>
> [N.J.S.A. 18A:28-5.]

Once an individual has obtained tenure within a particular area, she or he cannot lose tenure protections as long as she or he continues within the area of tenure absent inefficiency, incapacity, conduct unbecoming a teaching staff member, or other just cause. N.J.S.A. 18A:28-5; see also. Quinlan v. Bd. of Educ. Township of N. Bergen, 1959-60 *S.L.D.* 113, 144 rev'd. on other grounds, State Board of Education. 1960-61 *S.L.D.* 243, aft'd 73 N.J. Super. 40 (App. Div. 1962). In the event that a tenured educator is transferred or promoted to a separately tenurable position, N.J.S.A. 18A:28-6 provides for the acquisition of tenure in the new position.i[i]

It has been uniformly recognized by both the State Board of Education and the Commissioner that the positions enumerated under N.J.S.A. 18A:28-5[iii] are separately tenurable, meaning that tenure accrued within one of the enumerated positions does not transfer to another enumerated position. Id. at 365, citing. Kaprow v. Bd. of Educ. 255 N.J. Super. 76, 92 (App. Div. 1992) (agreeing that "Assistant Superintendent" is a separately tenurable position). However, tenure attained under an instructional certificate is transferable to other positions included under the same certificate. Capodilupo v. W. Orange Township Bd. of Educ., 218 N.J. Super. 510 (App. Div.), cert. den., 109 N.J. 514 (1987)(holding that teacher with both elementary and secondary physical education endorsements was tenured in both jobs under instructional

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; N.J.S.A. 18A:28-6 provides: Any such teaching staff member under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to 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; ... 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.

mThe positions enumerated under N.J.S.A. 18A:28-5 are: "teacher, principal, other than administrative principal, assistant principal, vice-principal, assistant superintendent, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and excepting those who are not the holders of any other nurse performing school nursing services, school athletic trainer and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners."

certificate where both assignments fell within single "position" of teacher listed in statute); Bednar v. Westwood Bd. of Educ., 221 N.J. Super. 239 (App. Div.1987) (holding that tenured teacher with instructional certificate and endorsement in art also entitled to tenured post requiring secondary art endorsement), cert. den., 110 N.J. 512 (1988). In other words, tenure acquired under any one endorsement entitles an educator to tenure under all other endorsements obtained under his or her instructional certificate. Thus, an educator with tenure under an instructional certificate with any endorsement that he or she possesses can, in effect, extend or transfer that tenure to other endorsements that are subsumed under the instructional certificate. Dennery v. Bd. of Educ., 131 N.J. 626, 634 (1993); Ellicott v. Bd. of Educ., 251 N.J. Super. 342, 350 (App. Div.1991)(finding that tenured speech correctionist also had tenure as learning disabilities consultant under educational services certificate where neither assignment was listed in statute).

Educators who are under tenure, "shall not be dismissed or reduced in compensation except for inefficiency, incapacity, conduct unbecoming ... or other just cause," N.J.S.A. 18A:28-5, and then only in the manner prescribed by N.J.S.A. 18A: 6-10, which provides that a dismissal or a reduction in compensation, must be preceded by "a hearing … 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."

Thus, once an educator has attained tenure, he or she is entitled to notice and a hearing prior to receiving a reduction in salary or being dismissed.

ANALYSIS

The essential facts in this case are not in dispute and the parties agree that a summary decision is the appropriate disposition for the case. The only question in this case is a legal one: Did respondent violate petitioner's tenure rights when it reduced her salary as a result of withdrawing her from the teacher/facilitator position and reassigning her to a teaching position?

Petitioner's Motion for Summary Decision is **GRANTED.** The parties agree that petitioner's compensation was reduced from $51,156.00 to $49,320.00 in concurrence with her reassignment from the teacher/facilitator position to another teaching position.[iv] The parties further agree that the positions, relevant to this matter, held by petitioner require an instructional certificate and that petitioner accrued tenure under her instructional certificate as a teaching staff member.[v] Since petitioner accrued tenure under her instructional certificate, and tenure accrued under an instructional certificate is transferable, petitioner retained her tenured status when she was reassi$_{gn}$ed to the teacher/facilitator position, and again when she was reassi$_{gn}$ed to her current teaching position.

Respondent offered no explanation for the reduction in salary aside from the fact that petitioner was reassi$_{gn}$ed. Respondent asserts that petitioner's reassi$_{gn}$ment constitutes a "transfer or promotion to another position," which is governed by N.J.S.A. 18A:28-6. Respondent attempts to bolster this assertion by claiming that petitioner obtained the teacher/facilitator position under a supervisory endorsement to an administrative certificate. If, in fact, the teacher/facilitator position required an administrative certificate, and petitioner obtained the position under her administrative certificate, the teacher/facilitator position would be separately tenurable, and then respondent's assertion would be correct.

Respondent's claim is contrary to both the stipulated facts and the job description that was furnished to petitioner by respondent. The job information statement provided by respondent specifically lists a "New Jersey Instructional Certificate" as the required certification/ licensure for the position. There is no indication in the job information statement or elsewhere that an administrative certificate with a supervisory endorsement is required for the position. Furthermore, respondent has failed to provide any basis for its assertion that petitioner obtained the position under her administrative certificate. Therefore, respondent's motion for summary decision must be **DENIED.**

[iv] Stipulation of facts paragraphs 6 and 9.

[v] Stipulation of facts paragraphs 4-6.

CONCLUSION

Based on the stipulated facts and the evidence provided, there is no genuine issue of material fact. The positions held by petitioner required an instructional certificate. Petitioner accrued tenure under her instructional certificate. The tenure accrued by petitioner in her teaching staff position transferred to the teacher/facilitator position. An educator's salary is protected under the Tenure Act, which requires notice and a hearing prior to reducing an educator's salary. Respondent failed to provide notice and a hearing, as tenure law requires. Respondent violated petitioner's tenure rights when it reduced her salary. Therefore, petitioner's motion for summary decision is **GRANTED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otheiwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Nov. 27, 2001
DATE

Kathryn A. Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

11/30/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 3 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cmo

OAL DKT. NO. 6585-00
AGENCY DKT. NO. 285-7/00

NATALIA MARIA TOMASSINI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, and based on the joint stipulation of facts, the Commissioner concurs with the Administrative Law Judge (ALJ) that the Board violated petitioner's tenure rights when it reduced her salary upon reassignment to "another teaching position for the 2000-2001 school year***" in the absence of a reduction in force. (Initial Decision at 2)

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein; summary judgment is granted to petitioner. The Board is directed to restore petitioner's salary to $51,156 (the amount which she earned in the 1999-2000 school year), to reimburse petitioner the difference between the salary to which she was entitled in 2000-2001 school year, and the salary which she actually earned that year, and to provide petitioner with all emoluments denied or reduced as a result of the reduction in her compensation.

IT IS SO ORDERED.°

ACTING COMMISSIONER OF EDUCATION

Date of Decision: ____ 1/11.02

Date of Mailing: 1/14/02

• This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* ISA:6-27 ***et seq.*** and *N.J.A.C.* 6A:4-1.1 ***et seq.,*** within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

K.F., on behalf of minor child, J.F.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent challenged the Board's residency determination.

The ALJ held in favor of the Board after conducting a hearing which petitioner failed to attend. The ALJ also determined that the Board is entitled to $7,688.39 in tuition from petitioner.

The Commissioner affirmed the determination of the ALJ and ordered reimbursement of tuition in the amount determined by the ALJ.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3191-01
AGENCY DKT. NO. 68-3/01

K.F. ON BEHALF OF MINOR CHILD, J.F.,

Petitioner,

v.

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

Respondent.

No appearance by or for petitioner

Alan J. **Schnirman,** Esq., for respondent

Record Closed: November 26, 2001 Decided: November 28, 2001

BEFORE **RICHARD McGILL,** ALJ:

K.F. {hereinafter "petitioner") filed a petition with the Commissioner of Education challenging a residency determination by the Board of Education of the City of Linden {hereinafter "respondent") in regard to minor child, J.F. Respondent counterclaims for tuition reimbursement for the alleged period of ineligible attendance and requests attorney's fees.

PROCEDURAL HISTORY

Petitioner filed a *pro se* residency appeal form with the Commissioner of Education on March 13, 2001, invoking the Commissioner's authority to hear and determine controversies arising under the school laws pursuant to *N.JS.A.* 18A:6-9. On April 2, 2001, respondent filed an answer which included a request for tuition reimbursement and attorney's fees and costs. The matter was transmitted to the Office of Administrative Law on April 9, 2001, for determination as a contested case.

The matter was scheduled for a hearing on November 21, 2001, at the Office of Administrative Law in Newark, New Jersey, and notice was sent to both parties. K.F. did not appear for the hearing, and no message was received in regard to the nonappearance. Respondent submitted proofs with respect to its request for tuition reimbursement, and the record closed on November 26, 2001, after giving K.F. an additional business day to submit an explanation for her nonappearance.

ISSUES

The issues in this proceeding is whether J.F. is eligible to attend respondent's public schools free of charge in accordance with *N.JS.A.* 1SA:38-1 and, if not, whether respondent's requests for tuition reimbursement and attorney's fees and costs should be granted.

FACTS

The only witness in this proceeding was Donald Van Handel, who is employed by respondent as its Director of Guidance and Assessment. Mr. Van Handel is also the residency officer. His testimony was fully credible and is accepted as true. Based upon the evidence presented at the hearing, I **FIND** as follows. J.F. was born on April 14, 1993, and he attended respondent's public schools beginning with the 1997-98 school year. During September or October 2000, J.F. made a statement that he lives in Elizabeth, New Jersey. As a result of this

statement, respondent initiated an investigation concerning J.F.'s residency. During the course of the investigation, respondent received a copy of a form dated November 21, 2000, from the Social Security Administration. K.F. signed the form and used an address in Elizabeth. After a hearing, respondent ordered the removal of J.F. from its public schools. K.F. filed a residency appeal, and J.F. remained in respondent's public schools through the end of the school year. In June 2001, K.F. advised respondent that she was moving to Bishopville, South Carolina, and that J.F. would be transferring to another school. J.F. did not return to respondent's schools in September 2001. Using November 21, 2000, as the starting date, J.F. attended respondent's public schools for a total of 131 days through the end of the 2000-2001 school year. At a rate of $58.69 per diem, the total tuition for this period of time was $7,688.39.

LAW AND ANALYSIS

Attendance at public schools shall be free to any person who meets the requirements set forth in *N.J.S.A.* 1SA:38-1. A person who is domiciled within the school district and satisfies other requirements may attend the public schools free of charge. *N.J.S.A.* 18A:38-l(a). If the board of education orders the removal of a child from its public schools because he does not meet the requirements of *N.J.S.A.* 1SA:38-1, the parent may contest that determination before the Commissioner of Education. *N.J.S.A.* 18A:38-l(b)(2). In the proceeding before the Commissioner of Education, the parent has the burden of proof by a preponderance of the evidence to establish that the child meets the requirements for eligibility. *Ibid.* If the evidence does not support the claim, the parent shall be assessed tuition for the student prorated to the time of the student's ineligible attendance in the school district. *Ibid.*

Here, K.F. did not appear for the hearing and did not provide any explanation for the nonappearance. Under the circumstances, K.F. failed to carry the burden of proof that K.F. met the requirements to receive a free education in respondent's public schools. Therefore, I **CONCLUDE** that the petition in this matter must be dismissed.

It follows from the dismissal of the petition that J.F. was ineligible for attendance at respondent's public schools during the period in question. Therefore, K.F. must be assessed tuition for the period in question. Based upon the findings above, I **CONCLUDE** that K.F. should be assessed tuition in the amount of $7,688.39 for the period of J.F.'s ineligible attendance.

An award of attorney's fees is not normally permitted unless authorized by statute, court rule or contract. *Reifer v. Merling,* 322 *N.J. Super.* 124, 141 (App. Div. 1999). An award of attorney's fees is not authorized by *N.JS.A.* 1SA:38-1, and respondent has not advanced any court rule or contract to support its request. Therefore, I **CONCLUDE** that respondent's request for attorney's fees and costs must be denied.

Accordingly, it is **ORDERED** that:

1. The petition in this matter be dismissed.

2. Respondent's request for assessment of tuition in the amount of $7,688.39 'ls granted.

3. Respondent's request for attorney's fees and costs is denied.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.JS.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Nov. 28, 2001
DATE

RICHARD McGILL, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC - 3 tUU\
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATNE LAW

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APPENDIX

WITNESS LIST

For petitioner:

None

For respondent:

Donald Van Handel

EXHIBIT LIST

R-1	Tuition calculation	Evidence

OAL DKT. NO. EDU 3191-01
AGENCY DKT. NO. 68-3/01

K.F., on behalf of minor child, J.F.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner, who did not appear for the hearing in this matter, has failed to carry her burden of showing that her son was entitled to a free education in the District.

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein. Pursuant to *N.J.S.A.* 1SA:38-1 b(2), the Commissioner directs that petitioner remit to the Board tuition in the amount of $7,688.39, as determined due and owing for J.R.'s ineligible attendance in the District.

IT IS SO ORDERED:

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/10/02

Date of Mailing: 1/16/02

• This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* ISA:6-27 ***et seq.*** and *N.J.A.C.* 6A:4-1.1 ***et seq.,*** within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

14-02R

IN THE MATIER OF THE TENURE HEARING :
OF ELMENA JEAN, STATE-OPERATED :
SCHOOL DISTRICT OF THE CITY OF :
NEWARK, ESSEX COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION ON REMAND

January 10, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11456-99
AGENCY DKT. NO. 379-9/96
{OAL DKT. NO. EDU 1546-98
AGENCY DKT. NO. 379-9/96
ON REMAND)

STATE-OPERATED SCHOOL DISTRICT OF NEWARK,

Petitioner,

v.

ELMENA JEAN,

Respondent.

Cherie L. **Maxwell,** Esq., for petitioner {Sills, Cummis, Zuckerman, Radin, Epstein & Gross, attorneys)

Charles Auffant, Esq., for respondent

Record Closed: November 8, 2001 Decided: November 27, 2001

BEFORE **DIANA C. SUKOVICH,** ALJ:

NATURE OF THE CASE AND PROCEDURAL HISTORY

On March 12, 1996, the Acting Assistant Executive Superintendent of the State-Operated School District of the City of Newark {petitioner) filed tenure charges against Elmena Jean (respondent), a tenured teacher employed in the district. The State District Superintendent of petitioner issued a Certification of Determination in support of the tenure charges on August 30, 1996. Respondent filed a response, and the State

Department of Education (DOE) transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13.

The parties reached a resolution of the matter at that time. This judge issued an Initial Decision approving the Stipulation of Settlement on December 15, 1997. On January 23, 1998, the Commissioner of the DOE (Commissioner) issued a decision. remanding the matter to the OAL. The DOE transmitted the matter on remand to the OAL for determination as a contested case. The parties again reached a resolution of the matter, and this judge issued an Initial Decision, on August 13, 1999, approving the Settlement Agreement. The Commissioner issued a decision, on October 4, 1999, again remanding the matter to the OAL That matter on remand, the current case, was transmitted to the OAL on October 22, 1999 for determination as a contested case.

Conferences, both by telephone and in-person, were conducted throughout the proceedings, and a hearing was initially scheduled, subsequent to adjournment of a prior scheduled hearing date, for October 23, 2001. The parties were represented on that date, and at the request of counsel, a conference, in lieu of a hearing, was conducted. By letter dated November 5, 2001, received by the OAL on November 8, 2001, petitioner's counsel forwarded a letter dated October 31, 2001 from respondent's counsel to petitioner's counsel, as well as a letter dated October 23, 2001 from respondent to petitioner. In the latter letter, respondent advised that she was retiring and resigning from her position as an elementary school teacher, with petitioner, effective October 23, 2001. In her letter of November 5, 2001, petitioner's counsel advised that petitioner had accepted respondent's letter of resignation and requested that this judge dismiss the tenure charges on the basis of mootness. Respondent filed no objections and did not dispute that the letter of resignation had been accepted. The record is deemed closed on November 8, 2001.

FINDINGS OF FACT

I **FIND** the following to be facts.

On March 12, 1996, the Acting Assistant Executive Superintendent of petitioner filed charges tenure charges against respondent, a tenured teacher employed in the district. The State District Superintendent of petitioner issued a Certification of Determination in support of the tenure charges on August 30, 1996. By letter dated October 31, 2001 to petitioner, respondent tendered her resignation. Petitioner accepted the resignation.

DISCUSSION

The Commissioner generally has jurisdiction to determine and hear controversies and disputes arising under the local school laws. ***N.J.S.A.*** 18A:6-9. A tenured local school teacher shall not be dismissed nor reduced in compensation except for inefficiency, incapacity, unbecoming conduct, "or other just cause," and then only subsequent to a hearing, after written charges of the cause or causes of complaint shall have been preferred against him/her, signed by the person or persons making the same, and filed and proceeded upon in accordance with pertinent statutory provisions. *N.J.S.A.* 18A:6-10. The pertinent statutory provisions also address the filing of tenure charges with the local school board, certification of charges to the Commissioner, filing of responses by the individual in question, a determination on the sufficiency of charges by the Commissioner, and deadlines applicable to hearings in tenure cases. *Id.* at §§ 6-11, 6-13, 6-14, & 6-16 & *N.J.S.A.* 52:14B-10.1.

Regulations promulgated by the DOE address the "WITHDRAWAL, settlement or mooting of tenure charges." *N.J.A.C.* 6A:3-5.6. Those regulations address the factors to be considered when there is a proposed withdrawal or settlement of pending tenure charges. *Id.* at §§ {a}-{c). Once tenure charges are certified to the Commissioner, they .may be withdrawn or settled only with the Commissioner's approval. Any proposed withdrawal or settlement, whether submitted to the Commissioner or to an Administrative Law Judge, shall address certain specified standards. *Id.* at § (a).

The pertinent regulations also address the effect of a resignation or retirement by the individual in question during the pendency of tenure charges:

> Where tenure proceedings are concluded prior to adjudication because the charged party has unilaterally resigned or retired, the Commissioner may refer the matter to the State Board of Examiners for action against the charged party's certificate as it deems appropriate, when such referral is warranted under the provisions governing resignation or retirement prior to conclusion of tenure charges as set forth in *N.J.A.C.* 6:11-3.5. *Id.* at § (d.)

The referenced provision requires that in cases in which teaching staff members accused of misdemeanors, crimes, or unbecoming conduct, which might warrant revocation or suspension, resign or retire from their positions, either before tenure proceedings have been brought or prior to the conclusion of such proceedings, it is the responsibility of the chief school administrator of the district in question to notify the State Board of Examiners (State Board) of the alleged conduct. If the State Board issues an Order to Show Cause, it is the responsibility of the local school district to cooperate with the State Board in ascertaining and presenting the facts underlying such allegations pursuant to *N.J.A.C.* 6:11-3.6(a)(2). *Id* at § 3.5. *N.J.A.C.* 6:11-3.6, in turn, addresses the procedures for revocation or suspension of certificates.

In construing regulatory provisions, the plain language must first be considered. *Merin v. Maglaki,* 126 *N.J.* 430 (1992). Pertinent provisions must also be construed in *pari materia. Alling Street Urban Renewal* Co. *v. City of Newark,* 204 *N.J. Super.* 185 (App. Div. 1985), *cert. den.* 103 *N.J.* 472 (1986). The fact that *N.J.A.C.* 6A:3-5.6(a) specifically requires that tenure charges may be withdrawn or settled only with the Commissioner's approval, and then only upon consideration of certain factors, but *N.J.A.C.* 6A:3-5.6(d) does not require Commissioner review of the status of tenure proceedings not yet adjudicated when the individual in question resigns or retires, supports a conclusion that pending tenure charges should be dismissed when there is a unilateral resignation or retirement. Such a construction is also supported by the requirement that the local school district, in certain cases, notify the State Board of the alleged conduct. That requirement, on its face, addresses the broader public interest pertinent to tenure proceedings. I also note that such an interpretation is consistent with decisional law prior to enactment of the regulation in question. *See, e.g., In The Matter of the Tenure Hearing of Bernard Thomassen,* 97 *N.J.A.R.* 2d (EDU) 7. I am therefore persuaded that the tenure charges in the current matter should be dismissed

Petitioner's counsel states in her letter that because the pertinent tenure charges alleged inefficiency, it does not appear that petitioner is required to forward the matter to the State Board but that it is prepared to do so if required. Petitioner's interpretation of the pertinent regulation is a reasonable one. The Commissioner, however, can determine to refer the matter to the State Board. *N.J.A.C.* 6A:3-5.6(d).

CONCLUSION

I **CONCLUDE** that the tenure charges certified by petitioner against respondent on August 30, 1996 should be dismissed because respondent retired from her position with petitioner, effective October 23, 2001, and the tenure charges are therefore moot.

ORDERED

It is hereby **ORDERED** that the tenure charges certified by petitioner against respondent on August 30, 1996 be and are hereby **DISMISSED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:148-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

- J, I , Jcui	Diana C. Sukovich
DATE	**DIANA C. SUKOVICH,** ALJ
	Receipt Acknowledged:
11/30/01	
DATE	DEPARTMENT OF EDUCATION
	Mailed to Parties:
DEC - 5 2001	ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
DATE	OFFICE OF ADMINISTRATIVE LAW

\mvh

OAL DKT. NO. EDU 11456-99 (ON REMAND FROM EDU 1546-98 AND EDU 11169-96)
AGENCY DKT. NO. 379-9/96

IN THE MATTER OF THE TENURE HEARING :
OF ELMENA JEAN, STATE-OPERATED :
SCHOOL DISTRICT OF THE CITY OF :
NEWARK, ESSEX COUNTY. :

COMMISSIONER OF EDUCATION

DECISION ON REMAND

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

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge (ALJ) that this matter may properly be dismissed as moot. Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein. A copy of this decision shall be forwarded to the State Board of Examiners.

IT IS SO ORDERED.•

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/10/02

Date of Mailing: 1/16/02

• **This decision, as the Commissioner's fmal detennination, may be appealed to the State Board of Education pursuant to** *N.J.S.A.* **ISA:6-27** ***et seq.*** **and** *N.J.A.C.* **6A:4-1.l** ***et seq.,*** **within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.**

HARRY INDAR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 10, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10345-00

AGENCY DKT. NO. 285-9/99

HARRY INDAR,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF JERSEY CITY,

Respondents.

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

Ken Iwama, Esq., Assistant General Counsel, for respondent
(Jersey City Public Schools, attorneys)

Record Closed: November 20, 2001 Decided: November 26, 2001

BEFORE **IRENE JONES,** ALJ:

On December 29, 2000 this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to *N.J.S.A.* 52:148-1 to -15 and *N.J.S.A.* 52:14F1 to -13. A hearing was scheduled on October 9, 2001 at the OAL in Newark, New Jersey.

The parties resolved the matter prior to the hearing and they have prepared and submitted the attached stipulation of settlement. The terms of the settlement are incorporated herein by reference.

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

IL/26/01
DATE

IRENE JONES, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION,

Mailed to Parties:

DEC -S 100\
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

sej

IN THE MATTER OF TENURE HEARING OF HARRY INDAR, STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY AGENCY DKT: NO. 854/01 STIPULATION OF SETTLEMENT

Oi OCT - ? PM 1:2

WHEREAS, Harry Indar has been employed as a full-time teacher with the Jersey City Public Schools since September, 1992; and

WHEREAS, tenure charges of chronic and/or excessive absenteeism, unbecoming conduct, insubordination and other just cause were certified against Harry Indar and filed with the Commissioner on or about April 5, 2001; and

WHEREAS, the parties wish to resolve this matter and believe that settlement is appropriate and in the public interest because the tenure charges do not involve any physical danger to students and because settlement will avoid the uncertainties of litigation as well as avoid the waste of financial and human resources entailed with litigation;

NOW, THEREFORE, in consideration of the mutual promises and undertakings contained in this Stipulation of Settlement (hereinafter "Settlement"), Harry Indar and the State-Operated School District of Jersey City (hereinafter "District"), hereby agree that the above-captioned matter and any and all ther ci ms, rights and obiigatioD:s betweeu the unde igned parties shal be resolved as follows:

1. The parties agree that this Settlement represents the compromise of disputed claims and is not an admission of liability, negligence or wrongdoing by either party.

2. Harry Indar agrees to resign from his employment with the District on October 1, 2001. The.

District accepts Harry Indar's resignation on the same date.

3. Harry lndar agrees to withdraw, with prejudice, any and all appeals of the withholding of his salary increments which are currently pending before the Commissioner of Education and/or the Office of Administrative Law.

4. Harry lndar, and anyone who succeeds his rights and responsibilities such as his heirs and/or the executor of his estate, hereby releases and forever discharges the District, its successors and assigns, and its past, present or future officers, directors, agents or employees, from any and all claims, including those of which Harry lndar is not aware and those not mentioned in this Settlement, arising from his employment with the District including, but not limited to, any and all claims arising from the separation of his employment with the District and/or arising from the withholding of any and all of his salary increment(s).

5. The District agrees to withdraw, with prejudice, the tenure charges filed against Harry Indar identified as Agency Dkt. No. 85-4/01.

6. Pursuant to In Re Cardonick, 1990 S.L.D. 842, Harry Indar has been advised of the Commissioner's duty pursuant to N.J.A.C. 6: 11-3.6 to refer tenure determinations to the State Board of Examiners for possible revocation of his teaching certificate.

7. Harry Indar and the District acknowledge that the terms of this Settlement are contingent upon the review and approval of the Commissioner ofEducation. In the event that any of the terms of this Settlement are disapproved, the Settlement shall be nulland_void.

8. Harry Indar acknowledges that he has had the opportunity to discuss all aspects of this Settlement with his attorney prior to signing it. Harry Indar further acknowledges that he has carefully read and understands all of the provisions herein and that he has knowingly and voluntarily executed same without coercion and duress and that he is not taking any medication nor is he

suffering from any physical or mental disabilities which would affect his understanding of the terms of this Settlement or his decision to enter into this Settlement.

9. .This Settlement con titutes the entire.agreement with respect to the subject matter hereof and shall not be amended; modified or amplified except in writing signed by both parties.

Ken Iwama
Attorney for Respondent
State-Operated School District of
Jersey City

Date: 9/28/01

Harry Indar
Harry Indar

Date: 9/26/01

Mark E. Liebman, Esq.
Attorney for Harry Indar

Date: 9/26/01

OAL DKT. NO. EDU 10345-00
AGENCY DKT. NO. 285-9/99

HARRY INDAR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon review, the Commissioner approves the settlement terms in connection with this increment withholding matter• and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/10/02

Date of Mailing: 1/16/02

• It is noted that, by letter dated November 7, 2001, the Commissioner accepted the parties' settlement of tenure charges against Mr. Indar.

16-02

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

Januaty 10, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3955-99

AGENCY DKT. NO. 62-3/99

MICHELLE TORRE,

Petitioner,

v.

BOARD OF EDUCATION OF ELIZABETH, UNION COUNTY,

Respondent.

Sanford Oxfeld, Esq., for petitioner
(Oxfeld & Cohen, attorneys)

Mary E. **Hennessy,** Esq., for respondent
(Murray, Murray & Corrigan, attorneys)

Record Closed: November 19, 2001 Decided: November 26, 2001

BEFORE **MARGARET M. HAYDEN,** ALJ:

This matter was transmitted to the Office of Administrative Law {OAL) from the Department of Education on April 28, 1999, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. On April 12, 2000, the case was placed on inactive status pending the outcome of petitioner's workers compensation case.

On May 24, 2001, petitioner's counsel requested that the matter return to active status. A hearing was scheduled for December 10, 2001 at the OAL, 185 Washington Street, Newark, New Jersey. Prior to the hearing, settlement discussions were held and a settlement was reached.

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

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:148-10.

/f&'4<- ;:)(p I .J

DATE

MARGARET M. MAY, ALJ

Receipt Acknowledged:

11-28-01

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 29 2001

DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

jb

MURRAY, MURRAY & CORRIGAN
25 Sycamore Avenue
Little Silver, New Jersey 07739
Attorneys for Respondent
(732) 747-2300

MICHELE TORRE, Petitioner, **v.** **ELIZABETH BOARD OF EDUCATION,** Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY O.A.L. Docket No. EDUOR 03955-99N Agency Docket No. 63-3/99 SETTLEMENT AGREEMENT

1. This Agreement is being entered into between the Elizabeth Board of Education ("Board") and Michele Torre ("Torre") to resolve all the litigation pending between them before the Commissioner of Education, Agency Docket No. 63-3/99 and OAL Docket No. EDUOR 03955-99N, as well as any litigation that could have been brought. The parties express their intent to enter into this Agreement to amicably resolve all disputes between them and to avoid the cost and time of continued litigation on the matters between them.

2. The Board agrees to place twenty-one (21) sick days in the sick bank of Michele Torre upon the approval of this Agreement by the Commissioner of Education. The Board agrees to settle this matter in the best interests of the district. Such settlement avoids an expensive hearing at the Office of Administrative Law and prevents the disruption of the education process by allowing potential witnesses to remain in their educational functions.

3. Neither party makes any admissions in the settlement of this case.

4. Torre acknowledges that this Agreement is in settlement of disputed issues of fact and law, that she has had the right and opportunity to discuss all aspects of this Agreement with

her legal counsel prior to entering into it and that she has availed herself of this right, that she has carefully read and fully understands all of the provisions of this Agreement, and that she is entering into this Agreement knowingly and voluntarily in exchange for good and valuable consideration.

5. In consideration for this Agreement, Torre irrevocably and unconditionally releases the Board and any employee and/or official of the Board, from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, causes of action, rights, costs, losses, debts and expenses of any nature whatsoever, known or unknown, which Torre, her heirs, executors, administrators, successors and assigns ever had, now have or hereafter can, shall or may have (either directly, indirectly, derivatively or in any other representative capacity) by reason of any matter, fact or cause whatsoever from the beginning of time to the date of this Agreement, including without limitation, all claims arising under this Agreement and any past Agreement entered into between Torre and the Board.

6. This Agreement sets forth the entire agreement among the parties hereto. This Agreement supersedes all prior agreements and understandings concerning the subject matter hereof, and it may not be changed orally but may be changed only in a writing signed by all parties. This Agreement shall be interpreted in accordance with New Jersey law.

IN WITNESS WHEREOF, the parties have executed this Settlement Agreement as of the date set forth below.

For the Elizabeth Board of Education

MURRAY,MURRAY &CORRIGAN

Mary E. Hennessy, Esq.

Dated: 11/17/01

For Michele Torre

OXFELD COHEN

Sanford Oxfeld, Esq.

Dated: 11-8-01

Michele Torre

Dated:

OAL DKT. NO. EDU 3955-99
AGENCY DKT. NO. 62-3/99

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

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

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

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/11/02

Date of Mailing: 1/16/02

17-02

RALPH MC CULLOUGH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the Board's decision to terminate him, contending that he had acquired tenure as a janitor and could be terminated only in accordance with the laws governing tenure employee hearings. The Board argued that petitioner had at all times been appointed to a fixed term and, thus, had not acquired tenure.

The ALJ determined that petitioner did not acquire tenure and was properly removed from his position, concluding that his initial appointment for one year as a substitute janitor covered the full term of his employment by the Board even though he was subsequently appointed to the position of assistant custodian.

The Commissioner reversed the determination of the ALJ. The Commissioner determined that the fixed term attendant to petitioner's appointment as a substitute custodian did not govern his subsequent appointment to a permanent position. Instead, the Commissioner concluded that, upon his appointment to the position of assistant custodian, petitioner acquired tenure as a janitor by operation of law because such appointment was for an indefinite period of time as reflected by the documents in the record.

January 15, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
ORAL INITIAL DECISION
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DKT. NO. EDU 10053-99
AGENCY DKT. NO. 325-10/99

RALPH MCCULLOUGH,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,
Respondent.

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

Richard Golden, Esq., for respondent (Sumners George & Dortch, attorneys)

Record Closed: October 16, 2001 Decided: December 4, 2001[1]

This is a transcript of the administrative law judge's oral decision rendered pursuant to *N.J.A.C.* 1:1-18.2.

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[1] An extension of time for issuing the decision was requested and granted pursuant to *N.J.S.A.* 52:14B-10(c).

BEFORE **BRUCE R. CAMPBELL,** ALJ:

Ralph McCullough, the petitioner, has asserted he has a tenure status as a custodian employed by the Trenton Board of Education, because he was not appointed to a fixed term of employment by that body. He alleges that any nonrenewal of employment therefore was without legal basis. The Board has denied this and has also challenged the timeliness of the appeal. Mr. McCullough has testified in his own behalf and the Board has presented McCullough's former union representative. Five documents are in evidence.

From the evidence adduced, I **FIND:**

1. Ralph McCullough began regular employment by the Trenton Board of Education on July 1, 1997 (Exhibit P-1).

2. By letter dated February 2, 1998, the Board changed McCullough's job title and salary, but not his term of employment (Exhibit P-2).

3. Exhibit P-1 clearly states the term of employment to be July 1, 1997 through July 30, 1998.

4. On April 30, 1998, McCullough signed a classified staff contract for the 1998-1999 school year (Exhibit P-4).

5. By law and by custom, the school year as distinguished from the academic year runs from July 1 to the next 30th of June.

I **CONCLUDE** that all of the petitioner's service from July 1, 1997 through June 30, 1999 was for fixed terms and therefore tenure did not attach. I further **FIND** that disciplinary action and/or termination was contemplated against McCullough at or about the end of the 1997-1998 school year and **FIND** that union intervention resulted in withdrawal of the termination and institution of a six-month period of probation. I **FIND** McCullough agreed to this because by his

own testimony. He stated "do what you want" or words to that effect as he left the meeting with his union representative and the coordinator of custodial and grounds operations.

I **FIND** the Board accepted the June 30, 1999 recommendation that McCullough be terminated. The Board acted formally on July 26, 1999, to end its relationship with McCullough. I **CONCLUDE** that the petitioner never enjoyed a tenure status. The only way tenure could attach under these facts was for the Board to employ McCullough for other than a fixed term beginning on July 1, 1999, and it did not do so. Accordingly, I determine the petition to be without merit and **ORDER** that it be dismissed. This is subject to the filing of exceptions.

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

This recommended oral decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

END OF TRANSCRIPT

I, Janice Hengeli, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Campbell's oral decision rendered in the above matter on October 16, 2001.

DATED Dlkp '4)Cb)

Janice Hengeli

4 DECEMBER 2001

DATE

BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

12/6/01

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DEC '7 2001

DATE

OFFICE OF ADMINISTRATNELAW

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increase in his salary for 1998-99, notwithstanding the nomenclature utilized in the titling of this particular form or that its wording subjects the increase to the successful completion of petitioner's 1997-98 job responsibilities. It is by now well-established that salary agreements, standing alone, do not establish yearly reappointments for definite terms. *(See Smith v. Board of &lucation of the Township of East Brunswick,* decided by the Commissioner August 15, 1983, *aff'd* State Board April 4, 1984; *see, also, Gilliam, supra.)* To the contrary, these notices are more commonly recognized as indicia of the tenure status of an employee. Specifically:

> Such salary notices or salary agreements are generally reserved for those employees who have acquired a tenure status in the employ of a board of education. *Once an employee has acquired tenure,* as for example, a teaching staff member, pursuant to NJ.S.A. 18A:28-5, the board's offer of a contract to the teacher becomes superfluous in regard to the term of employment. The term is indefinite and continuous; therefore, the only subject matter to be contracted for is the employee's annual salary and emoluments ... [T]he need for a contract between a board of education and a tenured employee, setting forth all the terms and conditions of employment is no longer necessary and the board resorts to the issuance of a salary notice or salary agreement, pursuant to the negotiated agreement to the tenured employee." (emphasis in original) *(Cromwell, supra,* Slip. Opinion at 6-7, *quoting Smith v. Bd of &J. of the Twp. of East Brunswick, supra,* at 13)

Consequently, based on the record before him, the Commissioner concludes that petitioner was appointed to his custodial position for other than a fixed term and he was, therefore, a tenured employee of the Board pursuant to NJ.S.A. 18A:17-3, with the effective date of that appointment, January 27, 1998. As such, absent the following of the procedures set forth in NJ.S.A. 18A:6-10, petitioner was improperly discharged from his position, in violation of his tenure rights, when the Board acted on July 26, 1999 to terminate his employment.2

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[2] The Commissione.r rejects any suggestion by the Board that petitioner's alleged agreement to a six-month pe.riod of probation in July 1998 constituted a waiver of his tenure rights. Although the Board may have been contemplating termination of petitioner's employment, the fact remains that, having received tenure, he could not be removed except pursuant to the dictates of the Tenure Employees Hearing Law, *N.J.S.A.* 18A;6-10 *et seq.*

Accordingly, the Commissioner reverses the decision of the OAL and holds that petitioner's termination on July 26, 1999 was without force and effect.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 1/15/02

Date of Mailing: 1/16/02

[3] **This decision, as the Commissioner's final determination may be appealed to the State Board of Education pursuant to** *N.J.S.A.* **lSA:6-27** *et seq.* **and** *N.J.AC.* **6A:2-U** *et seq.* **Commissioner decisions are deemed filed three days after the date of mailing to the parties.**

18-02

M.D. AND J.D., on behalf of minor children, A.D., B.D. AND S.D.,

PETITIONERS,

V.

BOARD OF EDUCATION OF WASHINGTON TOWNSHIP, MORRIS COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

January 18, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9218-01
AGENCY DKT. NO. 424-10/01

M.D. and J.D. on Behalf of Minor Children A.O., B.D. and S.D.,
Petitioners,
v.
BOARD OF EDUCATION WASHINGTON TOWNSHIP, MORRIS COUNTY,
Respondent.

Diane K. Weeks, Esq., for petitioners

Paul E. Griggs, Esq., for respondent
(McConnell, Lenard & Griggs, attorneys)

Record Closed: November 16, 2001 Decided: November 29, 2001

BEFORE **ELINOR R. REINER,** ALJ:

On October 11, 2001, petitioners, M.D. and J.D., filed a petition of appeal on behalf of themselves and their three minor children A.D., B.D. and S.D. Petitioners claimed that their three children were improperly excluded from respondent's school for

failure to undergo Mantoux tuberculin tests. On October 15, 2001, petitioners filed a motion and supporting brief in support of their request for emergent relief. On October 18, 2001, the Department of Education, Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Oral argument on petitioners' request for emergent relief was scheduled to be heard by the undersigned administrative law judge on October 18, 2001. On that date, a conference was held with counsel. Dates were established for the submission of respondent's answer to the petition and response to petitioners' motion for emergent relief, a reply by petitioners and a joint stipulation of facts. A full plenary hearing was scheduled for November 16, 2001.

On or about October 25, 2001, respondent readmitted S.D. to respondent school district. On or about October 31, 2001, respondent readmitted A.O. and B.D. to the district. As a result of conferences held between the parties, the parties consented to an order of dismissal in this matter, and the hearing was adjourned. The parties have prepared a Consent Order of Dismissal, deeming the emergent relief application moot and denying respondent's motion for summary decision.

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:148-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

2/nvt. t77 ,-J f dl bcJ/
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC - 6 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

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Dlaoe K. Weeka, Esq.
Law Office or .Dian• K. WHkl
12 West Ma.in Street. First floor
Mcooham, NJ 07945
(7J) S4)-5ZS0
(973) 543-5255 Fax

Am,mey for Pc:til ioner,
M.O. and J.t>., inuividuillly and
as parent.guardians for Uleir mmor children
A.D.. B.D.• and S.O.

BEFORE THE COMMISSIONER OF £DUCA.TION OF NEW JERSEY, VITO GAGLIARDI. Sr.

M, D. and J.D• iDdiTidu11Jy and H parent• 1u•rdlaa1 for tbeir minor children A,D., 8.D., ■ad S.D.•

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'WASHINGTON TOWNSHIP SCHOOL ; DJSTIUCT, WASHINGTON ·a-OWNSHIP ; BOARD OF EDUCATION. JOHN: DEl0ERT, llueril11 Superlateadcnt or (School1, KEVIN WALSH, Long Valley Middle School. Nvnb Principal; and ANCY CANNJI'"lC, Kouminr Scbool1 Priqdpel, JOUN DOES 11d JANE DOES, J..10 fndusive,

Resp<,ndeet,.

At ENCY OIOCKET NO.: 414•10101

CONS1:th· ORDRR OF DISMISSAL

THIS MATTER having been opened 1n \he< ourt by ial'IC K. W eks, Esq .. a\lomey fur .Pelilioners M.D. and J.D. on behalf of their three mil ,or cl ld(en; A.D., B.D.• and S.D., urion .ui application for emtr,&cnt relieftb enjoin Re1ponden1 from e,c luding A.O., O.D., and S.D. from

altendil•g R.,pondento' p\ffllic •ohool• on lhe h;ui• •'.1 "dµion" given lo R..pondcru, from the New Jersey Departmmt of Hcallb and Senior S:rvicer l require the 11dminislratiori of • Monlu•• 1c,1 upon re1ilioncrs' children, notice ha, ing bl given to Re,ponden1.< by their 11tlorneys, Mc:Connelt, Lenard & Griggs, (P11ul Grig1 .s, ap;ca.bog), Rcspondenls having cro - muvl:'d for sunuuary d,;;ci:rion on the biam lhal lht NJOHSS rj,quired lite 11dministnat1on of lhe Mantoux tc1\ ur,on Pelilioners'. eh\ldn:n, notice havin l tiec:n g cn to Petttioncrs, and lhe Court having Ordered a plenary hearing for Novcmbm 16, 2(: ill:

n· IS HER.EDY STIPULATF.D I\NO A•;u E.D T.O BY THt; rARTIES AS FOLLOWS;

J. On October 1, 2001, Rt.5p1:md1s. ct.cluded ;f>etiiion,i;n· three children from olt,nd"11«., di&tricl achools on the basi, of their n,fu• •l to 1•bri• to the ManlOUk,.., proc,dw, o, lo provide resu11, ftom me 11dministrauon ol'5\lth a es. :

2. On October 25, 2001, RcsPondcnt:s ca ilt d S.D. to the district Kossm1111 School Elementary School.

l On Oclubcr 11, 2001, R.cspondenls rcai!rnitted -D . .md B.D. to the llistricl Long Valley Mit\dle School.

4. Pe1ilioncrs' children remain fflrOllcd in tesrondFnt schools.

IT IS on thii 16[b] day of November 2001:

ORDERED Rrspondents are enjoined from cclucin A.O., B.D., and S.D., the tninor chaJdren of M.O. ,nd J.U. from :Atrending lhe rubbc t:hoo s df Responctent Dittricl based upan their rl!fuu& to submit 10 1he Mantoux cesl procedure o, to p:ov dc 1he results of QJminist1alion or a Mantoux test: and

FURTHIR ORDER.ID Pe1i1ione,i' ipplicn1 !On fo enhrstnt relief i, hereby di5m"sed as moot and RwJmrrdent,• motion for summllJ) declSI ,n ,s 4repy denied.

HON. EI .JNO R REINER
Slate Ad ninist•ula,e Law Judge

Stipul"\cd und Agreed to:

Pelitioncrs John and Maureen. Drummond
by their auorney
Diane K. Weeks, Esq.

SlipuJ1100 and Agreed 10:

Respondents by lheir counsel
McCoMell, Lenl!ld It. GrisBC
(Paul Griggs. E!lq., for lhe finn)

OAL DKT. NO. EDU 9218-01
AGENCY DKT. NO. 424-10/01

M.D. AND J.D., on behalf of minor children, A.D., B.D. AND S.D.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF WASHINGTON TOWNSHIP, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record, settlement in the form of a Consent Order of Dismissal, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review of the parties' agreement and the supporting record, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/18/02

Date of Mailing: 1/18/02

BONNIE MIRAGLIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 22, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2165-00

AGENCY DKT. NO. 20-1/00

BONNIE MIRAGLIA,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,

Respondent.

Michael Damm, Esq., for the petitioner (Selikoff and Cohen, P.A., attorneys)

Karen A. Murray, Esq., for the respondent (Murray, Murray & Corrigan, attorneys)

Record Closed: December 12, 2001 Decided: December 12, 2001

BEFORE **BEATRICE S. TYLUTKI,** ALJ:

This matter concerns the allegation of the petitioner, Bonnie Miraglia, that the respondent, Board of Education of the City of Camden, Camden County, improperly used her sick days for a work related injury/illness, in violation of N.J.S.A.18A:30-2.1. The petitioner requested a hearing and the matter was transmitted to the Office of Administrative Law (OAL) on March 17, 2000, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A telephone prehearing conference was held on June 26, 2000. On that date, the parties requested that the matter be placed on the inactive list for a period of six months pending a resolution of the Workers' Compensation matter. After the lapse of the six month period, the parties again requested that the matter be retained on the inactive list for another six month period. Prior to the matter coming off the inactive list, the parties conferred and agreed to a settlement. The attached stipulation sets forth the terms of the settlement, and is incorporated herein.

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52: 14B-10.

December 12, 2001
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

JJ-) '/-i))
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

0 EC 1 , .. 20ftt
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

None

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

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SELIKOFF & COHEN, P.A.
Suite 314
307 Fellowship Road
Mt. Laurel, New Jersey 08054-1233
(856) 778-6055
Attorneys for Petitioner

BO:t,.i'"MIRAGLIA,

Petitioner,

v.

CAMDEN CITY BOARD OF EDUCATION,

Respondent.

BEFORE THE COMMISSIONER
OF EDUCATION OF THE STATE OF
NEW JERSEY

OAL DOCKET NO. EDU 2165-00
AGENCY REF. NO. 20-1/00

STIPULATION OF DISMISSAL
ON SETTLEMENT

The Matter in difference in the above entitled action having been amicably resolved between the parties by virtue of an Order Approving Settlement reached before the Division of Workers' Compensation under Claim Petition No. 2000-12;

It is hereby stipulated and agreed that in view of the fact that all disputed facts and issues have been considered and have now been resolved.

Accordingly, it is hereby stipulated and agreed that the Order Approving Settlement in the workers' compensation matter (copy attached) disposes of all of the issues which are the subject of the Petition of Appeal, including but not limited to the claim for the return of 50 ½ sick days, from November 4, 1999 through January 12, 2000 and therefore in view of that the parties agree that th

Petition of Appeal may be dismissed with prejudice.

Therefore, it is hereby stipulated and agreed that in view of the resolution reached before the Division of Workers' Compensation, the Petitioner's claim pending before the Commissioner of Education involving the return of sick days for the above period be dismissed with prejudice.

Murray, Murray & Corrigan

Kare Mu 2ra){rre

Dated: /J-/lc/ Of

Selikoff and Cohen, P.A.

Michael C. Damm, Esquire

Dated: {2/0jb{

I, Petitioner Bonnie Miraglia have read and hereby agree to the terms set forth in this Stipulation of Dismissal. I understand the while I have a right to a trial before the Office of Administrative Law and independent consideration of my case by the Commissioner of Education, I am waiving my right to a trial and agree to the dismissal of my Petition of Appeal as set forth above. I understand that this dismissal is final and that I cannot come back and re-litigate this matter. I am making this decision knowingly and voluntarily. I recognize that this Stipulation of Dismissal is subject to the approval of the Commissioner of Education.

Bonnie Miraglia

Dated: I'J.../of

OAL DKT. NO. EDU 2165-00
AGENCY DKT. NO. 20-1/00

BONNIE MIRAGLIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/22/02

Date of Mailing: 1/22/02

21-02

IN THE MATTER OF THE TENURE	:	
HEARING OF RALPH MC CULLOUGH,	:	**COMMISSIONER OF EDUCATION**
SCHOOL DISTRICT OF THE CITY OF	:	**DECISION**
TRENTON, MERCER COUNTY.	:	

SYNOPSIS

Board filed tenure charges against respondent janitor of conduct unbecoming and excessive absenteeism. In a companion case, respondent filed an action against the Board for terminating him in contravention of his tenure rights. The Commissioner determined in that matter that respondent was a tenured employee and that the Board must follow the statutory procedures for tenured employees in order to terminate respondent's employment.

The ALJ, who decided both the termination matter and the within tenure matter, recommended dismissing the tenure proceedings because he determined in the companion matter that petitioner did not have tenure and was properly terminated by the Board.

The Commissioner reversed and remanded the matter for proceedings to resolve the tenure charges based on his decision in the companion matter that respondent is a tenured employee entitled to the protections of the statutory procedures for terminating tenured employees.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2048-00

AGENCY DKT. NO. 57-2/00

IN THE MATTER OF THE TENURE HEARING OF RALPH MCCULLOUGH, SCHOOL DISTRICT OF THE CITY OF TRENTON,MERCERCOUNTY

Richard E. Golden, Esq., for petitioner (Sumners, George & Dortch, attorneys)

Michael T. Barrett, Esq., for respondent (Bergman & Barrett, attorneys)

Record Closed: November 16, 2001 Decided: December 4, 2001

BEFORE **BRUCE R. CAMPBELL,** ALJ:

Ralph McCullough, respondent, filed a petition of appeal with the Commissioner of Education asserting he had a tenure status as a custodian employed by the Trenton Board of Education because he was not appointed to a fixed term of employment by that body. Therefore, he alleges that when the Board failed to renew his employment, its action was without legal basis. The Board filed an answer denying all allegations.

The matter was transmitted to the Office of Administrative Law for determination as a contested case. *N.J.S.A.* 52:14F-1 through -13. The case was set down for hearing on October 16, 2001, under OAL Dkt. No. EDU 10053-99. In the meanwhile, the Board filed tenure charges

against McCullough so that, in the event his petition was successful, the Board could still attempt to sever the employment relationship. OAL Dkt. No. EDU 2048-00.

On October 16, 2001, after a brief hearing, I ruled that McCullough's employment from July 1, 1997 through June 30, 1999 was for fixed terms and therefore tenure did not attach. I further determined that disciplinary action and/or termination was contemplated against McCullough at or about the end of the 1997-98 school year and that union intervention resulted in withdrawal of the termination and institution of a six-month period of probation. McCullough's testimony did not dispute that arrangement.

The short answer is that the Board accepted the June 30, 1999 recommendation that McCullough be terminated. The Board acted formally on July 26, 1999 to end its relationship with McCullough. Tenure could have attached only if the Board had employed McCullough for other than a fixed term beginning on July 1, 1999, and it did not do so. The petition was dismissed.

On November 16, 2001, the Board's counsel requested that the tenure charges be dismissed as moot. Having heard no opposition, I **CONCLUDE** that the tenure charges filed by the Trenton Board of Education against Ralph McCullough are, in fact, moot, it having been decided in a prior case that McCullough did not gain tenure status while employed by the Board. Accordingly, the charges are **DISMISSED** as moot. It is so **ORDERED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DEC 0 4 2001
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

12/6/01
DATE

Debbie Astamatiz
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DEC. 'i 2om·
DATE

OFFICE OF ADMINISTRATIVE LAW

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OALDKT. NO. EDU2048-00
AGENCY DKT. NO. 57-2/00

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

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

In light of the Commissioner's determination in the companion case to the instant matter, *Ralph McCullough v. Board of Education of the City of Trenton, Mercer County,* OAL Dkt. No. EDU 10053-99, Agency Dkt. No. 325-10/99, decided by the Commissioner on January 15, 2002, which found that Mr. McCullough had attained tenure as a custodian, the Initial Decision is hereby reversed and this matter is remanded to the OAL for proceedings pursuant to *N.J.S.A.* 18A:6-10 *et seq.*

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/22/02

Date of Mailing: 1/23/02

• This decision, as the Commissioner's final determination may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:2-1.1 *et seq.* Commissionec decisions are deemed filed three days after the date of mailing to the parties.

22-02

CAMDEN ACADEMY CHARTER SCHOOL, PETITIONER, V. BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

January 24, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6618-01
AGENCY DKT. NO. 423-10/01

CAMDEN ACADEMY CHARTER SCHOOL,
Petitioner,
v.
CITY OF CAMDEN BOARD OF EDUCATION,
Respondent.

Gary D. Wodlinger, Esq., for petitioner (Lipman, Antonielli, Batt, Dunlap, Wodlinger & Gilson, P.C., attorneys)

James J. Breslin, Esq., for respondent (Lenox, Socey, Wilgus, Formidoni, Brown & Casey, LLC, attorneys)

Record Closed: December 6, 2001 Decided: December 10, 2001

BEFORE **ANTHONY T. BRUNO,** ALJ:

This matter was transmitted to the Office of Administrative Law on October 16, 2001, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 10, 2001
DATE

/ **ANTHO .BRUNO,ALJ**

Receipt Acknowledged:

Dec. 13, 2001
DATE

2f Uu&4cu'L:.i
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 13 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

LENOX, SOCEY, W1LGUS, FORMIDONI,
BROWN, GIORDANO & CASEY
3131 Princeton Pike, 1B,
Trenton, New Jersey 08648
(609) 896-2000
Attorneys for Respondent, City of Camden Board of Education

CAMDEN ACADEMY CHARTER SCHOOL Petitioner, **vs.** CITY OF CAMDEN BOARD OF EDUCATION Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW DOCK.ET NO.EDUC 6618-01 **CONSENT ORDER**

THIS MATTER having been opened by the CoW1 by Lipman, Antonelli, Batt, Dunlap, Wodlinger and Gilson, P.C., attorneys for the Petitioner, Camden Academy Charter School, and the respondent, Camden Board of Education, having been represented by Lenox, Socey, Wilgus, Fonnidoni, Brown, Giordano, & Casey, LLC, And the parties having come to an agreement as set forth below:

IT **IS ON THIS DAY OF , 2001;**

ORDERED as follows:

1. Vocational and Charter School students currently participating in Board of Education interscholastic sports/activities are to be allowed to continue said participation;

2. Students attending Vocational and Charter Schools will not be prohibited from such participation unless the Board of Education approves such a policy;

3. AU current Board of Education policies and regulations shall govern Vocational and Charter School students' participation in Board of Education inter-scholastic sports/activities;

4. Vocational and Charter School students shall be responsible for arranging transportation to the school in order to participate in practices and games;

5. The respective Vocational and Charter Schools shall present to the Board of Education an appropriate "Certificate of Insurance" consistent with Board of Education policies and/or N.J. statutes, which names the Board of Education as an additional insured; finally,

6. This decision has no precedenital value.

ANTHONY BRUN'O, J.A.L. .

I have reviewed the above Order and hereby provide my Consent to same.

Dated: 12-11-01

GARY D. WODLINGER, ESQUIRE
Lipman, Antonielli, Batt, Dunlap
Wodlinger & Gilson, PC.
Attorney for Petitioner

JAMES J. BRESLIN, ESQUIRE
Lenox, Socey, Wilgus, Formidoni &
& Casey,LLC
Attorney for Respondent

OAL DKT. NO. EDU 6618-01
AGENCY DKT. NO. 423-10/01

CAMDEN ACADEMY CHARTER SCHOOL,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	
RESPONDENT.	:	

The record, Consent Order and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter.[1] The matter is hereby dismissed, subject to compliance with the terms of the settlement.[2]

IT IS SO ORDERED.

TING COMMISSIONER OF EDUCATION

Date of Decision: 1/24/02

Date of Mailing: 1/28/02

[1] The record includes a copy of the Board's resolution approving the terms of the settlement. *N.J.A.C.* 6A:3-l.13(d).
[2] In so approving, the Commissioner cautions that any policy which the Board may later adopt governing the participation of vocational and charter school students in its interscholastic sports must comply with ***G.W.S., on behalf of minor child, A.F.S. v. William Petrino, Superintendent and Rahway Board of Education, Union County,*** Commissioner Decision, November 29, 1999, Decision No. 389-99.

23-02

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

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

January 24, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5373-01
AGENCY NO. 123-5/01

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

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,

Respondent.

J.L., petitioner, *prose*

Anthony D'Elia, Esq.• for respondent

Record Closed: December 6, 2001 Decided: December 6, 2001

BEFORE **MARGARET M. MONACO,** ALJ:

This matter involves an appeal by petitioner J.L. on behalf of A.S.M. from a residency determination by respondent Board of Education of the City of Clifton. The Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL) where, on June 21, 2001, it was filed for a hearing and determination as a contested case. Subsequent to the assignment of the matter to the undersigned on August 6, 2001, a hearing was scheduled for September 7, 2001. The hearing was adjourned following petitioner's non-appearance and

rescheduled for October 10, 2001. The October 10, 2001 hearing was, thereafter, adjourned at petitioner's request and the hearing was rescheduled for November 7, 2001. Petitioner and counsel for respondent appeared at the OAL on November 7, 2001 and engaged in settlement discussions. The November 7, 2001 hearing was adjourned at the parties' request to provide them additional time to finalize an amicable resolution of the matter. The parties reached a settlement and counsel for respondent submitted the attached Stipulation of Settlement indicating the terms of agreement and resolution of respondent approving the settlement terms which the undersigned received on December 6, 2001.

Having reviewed the record and the terms of the settlement, I **FIND:**

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 6, 2001
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

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OFFICE OF ADMINISTRATIVE LAW
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BOARD OF EDUCATION
CLIFTON, NEW JERSEY 07013

RESOLUTION #11/14/01 - F

J.L. O/B/O A.S.M. VS. CLIFTON BOARD OF EDUCATION
DOCKET NO.: 123-5/01

WHEREAS, the Board of Education of the City of Clifton objected to admission of the minor child, A.S.M. in May of 2001; and

WHEREAS, the Clifton resident appealed the Board's decision to the Office of Administrative Law; and

WHEREAS, the matter can be settled under the following terms and conditions:

(1) The Board of Education shall agree to withdraw any objections to admission if (i) the minor child begins living with the child's father in Clifton on a full time basis beginning November 12, 2001 and (ii) the minor child's father (along with the Clifton resident) jointly agree to repay Clifton $2,000.00 at the rate of $150.00 per month beginning the first day of the month following the Commissioner of Education's approval of this settlement.

(2) Should the minor child's father and the Clifton resident fail to make such payments, the Clifton Board of Education shall be entitled to enter judgement in the Superior Court of New Jersey in the amount of $3,000.00 (less any payments received) without prior notice to either the natural father or the Clifton resident; and

'WHEREAS, the Clifton Board of Education desires to settle this matter under the above terms and conditions.

NOW, THEREFORE, BE IT RESOLVED, that the matter of J.L. o/b/o A.S.M. vs. the Clifton Board of Education be settled under the aforesaid terms and conditions and the Board attorney be directed to proceed further before the Office of Administrative Law to finalize the Settlement Agreement.

L. 0/b/-0I}-- A
Ptl1'1>e-t

vr.

Board of Education City of Clifton

BEFORE Comm. of Educa'
EDUOS 05373 -01N
Docket # 123-5/01

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fi F, Tie,-te,JT-

1. Petitioner is withdrawing the instant appeal
2. Respondent is withdrawing its counterclaim for back tuition.
3. ~~Petitioner~~ has presented Auto insurance documents indicating that the minor child's father (Augusto Santa Maria) resides at 110 W. 2ND ST. in Clifton with Terry Pearson.
4. The minor's father, Mr. Maria has represented that he currently lives at that Clifton address.
5. Petitioner cannot establish that there exists a special economic or family hardship as required pursuant to N.J.S.A. 18A: 38-1(b). However, based upon [illegible] Clifton beginning November 12, 2001 and will be entitled to attend the Clifton school system while living with Mr. Maria in Clifton.
6. Petitioner agrees to pay back tuition to the Clifton ~~Board of Education in the amount of~~ $2000. per month. First payment is due the first day of the month following the Commissioner of Education's approval of this Agreement.
7. Should Petitioner fail to make the requisite

payments, Respondent shall be entitled to enter Judgment in the Superior Court of New Jersey in the amount of $3,000 (less any payments received by the Respondent) without notice to the Petitioner.

8. This Agreement is subject to approval by the Commissioner of Education.

9. We have reviewed and fully understand this Agreement and ask the Court to approve this Settlement.

~~Augusto Santa Maria~~
Jaimie Lam 11/7/01

OAL. DKT. NO. EDU 5373-01
AGENCY DKT. NO. 123-5/01

J.L., on behalf of minor child, A.S.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/24/02

Date of Mailing: 1/28/02

24-02

H.M., on behalf of minor child, S.M.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the Board's residency determination.

The ALJ determined that petitioner is not domiciled in respondent's District and that his child is not entitled to a free education in the District. The ALJ ordered reimbursement of tuition.

The Commissioner affirmed the decisions of the ALJ with regard to both residency and tuition.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5386-01
AGENCY DKT. NO. 127-5/01

H.M., ON BEHALF OF
MINOR CHILD, S.M.,
Petitioner,
v.
BOARD OF EDUCATION OF
THE TOWNSHIP OF UNION,
UNION COUNTY,
Respondent.

H.M., parent of **S.M.,** appearing pursuant to *N.J.A.* C. 1: 10B-5.1, for petitioner

Joseph M. Wenzel, Esq., appearing for respondent
(Lum, Danzis, Drasco, Positan & Kleinberg, attorneys)

Record Closed: November 15, 2001 Decided: December 12, 2001

BEFORE **MARGARET M. HAYDEN,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appealed the determination by respondent Board of Education of the Township of Union (District) that his minor child **S.M.** was not entitled to a free public education in the District. Petitioner claimed that the minor child was entitled to a free

public education pursuant to *N.J.S.A.* 18A:38-1{a) because she was domiciled within the District. The District answered that the minor child did not meet the requirements of domicile in the District and filed a counterclaim for payment of tuition.

On April 24, 2001, the District acted to remove S.M. from the township public education roll based on its finding that S.M. did not live in Union. By letter dated May 11, 2001, H.M., father of S.M., appealed the decision to the Department of Education. The Department of Education transmitted the matter to the Office of Administrative Law (OAL) on June 21, 2001. The OAL held a prehearing conference on August 29, 2001. The hearing was held on November 7, 2001. The record was left open until November 15, 2001, for the District to submit a certification concerning the per diem tuition rates and the amount of tuition requested.

FACTS

District's Evidence

On May 10, 2000, a Union High School teacher reported to the District's central office that S.M. was not living in Union. For an unknown reason the report was not sent to the investigators' office until March 26, 2001.

On March 27, 2001, Anthony R. Marino, a Residency Investigator for the District, parked in front of the Union residence when the that minor student in question was reported to reside with her father. Investigator Marino had seen S.M. at the high school the day before in order to be able to identify her. Two teenage girls exited the premises, later identified as A.M. and C.V. A.M. is the daughter of So.M., who is the owner of the house, Aunt of S.M. and the guardian of C.V. The minor child S.M. never exited from the Union residence. The same surveillance was repeated on March 28, 30, and April 3 and 4, 2001.

On March 29, 2001, Investigator Martino parked at the Irvington residence of the minor child's mother, D.W. At approximately 7:10 a.m. a red auto pulled out of the driveway with a female driver and S.M. in the passenger seat. Investigator Martino

attempted to follow but lost the auto on Stuyvesant Avenue in Union. On another day he saw the red auto pick up C.V. and A.M. on the corner of Oak and Earl Streets in Union with S.M. already in the passenger seat. The auto proceeded to Union High School where all three girls got out.

Early in the morning of April 17, 2001, Investigator Marino knocked on the door of the Union residence. When A.M. opened the door, the investigator showed his identification and asked to see her parents. A.M. stated that her parents were at work and that S.M. had just gone to the store with her father. Investigator Martino stated that he had been outside since 6:30 a.m. and did not see anyone leave the house. A.M. then admitted that S.M. stayed with her mother in Irvington and sometimes stayed in Union.

On Wednesday, April 18, 2001, Investigator Martino again went to S.M.'s mother's Irvington residence at 6:20 a.m. At 6:50 a.m. he talked to a neighbor who said that she knew D.W., the mother of S.M. She said that D.W. and S.M. lived on the third floor of the Irvington residence. The neighbor also identified the red car in the driveway as belonging to D.W.

The cost of educating a high school student in the Township of Union amounted to $7409 for the year 2000-01; the per diem rate for that year was $41.16. The cost of educating a high school student in Union for the year 2001-02 was $7853; the per diem rate was $43.61. From March 26, 2001, the day the investigation on S.M. began to the last day of school, June 15, 2001, there were 53 school days. Thus, the amount of tuition owed by petitioner for the year 2000-01 amounted to $2181.48. From the beginning of September 2001 to the date of the hearing, November 7, 2001, there have been 41 school days. Thus, the amount of tuition owed as of the date of the hearing for the current school year amounted to $1788.83. The total tuition due as of the date of the hearing was $3970.31.

H.M.'s Testimony

H.M. testified that he and his wife, D.W., have two children, S.M. age 16 and J.M. age 13. In 1994 the couple, who were not married, were having financial problems and they separated, H.M. going to live in Union with his sister-in-law and his brother. His wife went to live with her mother in Jersey City. In 1997 H.M. and D.W. married and lived together. In 2000 they separated again for financial reasons but they are still married. D.W. has a lot of health problems but H.M. cannot help her because he has not worked in many years due to his health problems. He also has not filed an income tax for many years so has not claimed her daughter as a dependent.

When they separated in 2000, the couple agreed that the older daughter, S.M., would live with H.M. and the younger, daughter J.M., would live with her mother. Thus, S.M. went to live in Union where the father lives with his sister-in-law, brother, their three children as well as another girl whom the sister-in-law has custody. S.M. stayed in the room with her cousin C.M. but H.M. did not have a bedroom in the Union residence. Although his daughter lives with him, on weekends and sometime during the week she goes to her mother's house. S.M. had to help her mother a lot because of the mother's health issues. S.M. lived with her father because she was having difficulty in school. S.M. takes the bus to the high school, which is about two miles away, and has to leave before 6:00 a.m. in order to catch the bus.

FACTUAL AND LEGAL DISCUSSION AND CONCLUSION

Public education must be provided free to persons over five and under 20 years of age who are domiciled within the school district. *N.J.S.A.* 18A:38-1(a). "The domicile of a person is a place where he has his true, fixed, permanent home and principal establishment, into which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving . . . . " *In the Matter of Unanue* 255 *N.J. Super.* 362, 374 (Law Div. 1991). Minors lack the capacity to chose their own domicile and thus their domicile is that of their parent or guardian.

Where the facts are contested, the trier of fact must weigh the credibility of the witnesses in order to make factual findings concerning the disputed facts. Credibility is the value that a fact finder gives to a witness's testimony, requiring an overall assessment of the witness's story in light of its rationality, internal consistency, and manner in which it hangs together with other evidence. *Carbo v. United States,* 314 *F.2d* 718 (9th Cir. 1963). Credible testimony must proceed from the mouth of a credible witness and must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. *State v. Taylor,* 38 *N.J. Super.* 6, 24 (App. Div. 1955). A fact finder is expected to base credibility decisions on common sense, which is also referred to as intuition or experience. *Barnes v. United States,* 412 *U.S.* 837, 93 *S. Ct.* 2357, 37 L *Ed.* 2d 380 (1973).

Having had an opportunity to observe the investigator, I **FIND** his testimony credible. There is no reason in the record to doubt the credibility of the investigator, who saw the student and her mother leaving the Irvington residence numerous times and never saw her leave the Union residence. Also, having had an opportunity to observe his demeanor and listen to his testimony I **FIND** H.M.'s testimony difficult to credit. He stated that he lived in Union with his sister-in-law since 1994 without having any room to stay in and no visible means of support. But H.M. also stated that he married his children's mother in 1997 and lived with her until 2000. H.M. was vague about these dates and also about the living arrangements. Moreover, I **FIND** it difficult to believe his explanation that his daughter left her. home before 6:00 a.m. every day to catch a bus to take her two miles to high school by 7:40 a.m. Based on the foregoing, I cannot credit H.M.'s testimony that S.M. lived in Union with him. Rather I **FIND** that the credible evidence showed that S.M. lived with her mother in Irvington. Thus, I **CONCLUDE** that the student was not entitled to a free public education in Union as she did not reside in Union at that time.

Petitioner has not contested the tuition figures provided by the District. Hence, I **FIND** that at the per diem rate for the year 2000-01 of $41.16 the tuition to the end of that year amounted to $2181.48. The per diem rate for 2001-02 is $43.63 and the amount owed as of the date of November 7, 2001 amounts to $1788.83 and $43.63 for each school day thereafter.

ORDER

Based on the foregoing, it **ORDERED** that the District's finding that petitioner's child was not entitled to attend Union schools is hereby **UPHELD.** The District's request for tuition reimbursement is hereby **GRANTED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:148-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Dec 17, 2001
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

12-14-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 19 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Exhibits

Joint:

J-1 Schematic of Irvington surveillance

District:

R-1 Residency Investigation Request

R-2 Investigator's Report

R-3 Tuition Rates, 2000-01

R-4 Tuition Rates, 2001-02

OAL DKT. NO. EDU 5386-01
AGENCY DKT. NO. 127-5/01

H.M., on behalf of minor child, S.M.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, and based on the Administrative Law Judge's (ALJ) **credibility determinations, the Commissioner concurs that petitioner has failed to prove that S.M. is entitled to a free public education in respondent's District.**

Accordingly, the Initial Decision of the ALJ **is adopted for the reasons expressed therein. The Commissioner directs that petitioner remit to the Board tuition in the amount of $3,970.31,**[1] **together with $43.63 per day from November 8, 2001 until the date of this decision.**

IT IS SO ORDERED.2

COMMISSIONER OF EDUCATION

Date of Decision: 1/28/02

Date of Mailing: 1/29/02

[1] **As the Initial Decision indicates, this figure represents tuition due and owing for** March 26, 2001 **until June** 15, 2001, **and September** 7, 2001 **through November** 7, 2001, **the date of the hearing in this matter.**

[2] **This decision, as the Commissioncr-'s** final **determination, may be appealed to the State Board of Education pursuant to** *N.J.S.A.* 18A:6-27 ***et seq.*** **and** *N.J.A.C.* 6A:4-1.1 ***et seq.,*** within 30 **days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.**

25-02

Y.I.S., ON BEHALF OF E.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the Board's determination that his son, who resided with his grandparents in the District, was ineligible to receive a free education.

The ALJ determined that petitioner had demonstrated that his son was entitled to attend school in the Board's District as an "affidavit student" pursuant to *N.J.S.A.* 18A:38-lb(l).

Initially, the Commissioner held that, although the resident of the District where the pupil resided, not petitioner, was the person entitled to file a petition contesting the Board's determination in this matter, fundamental fairness compelled a determination allowing petitioner to prosecute this appeal. The Commissioner affirmed the decision of the ALJ, finding that the limited support petitioner provided his son was consistent with that permitted by decisional law and newly adopted regulations.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 10964-97

AGENCY DKT. NO. 440-11/97

Y.I.S. ON BEHALF OF E.S.,

Petitioner,

v.

NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,

Respondent.

Howard B. Leopold, Esq., for petitioner
(M. Goodman & Associates, attorneys)

Cherie L. **Maxwell,** Esq., for respondent
(Sills, Cummis, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: September 10, 2001 Decided: December 6, 2001

BEFORE **IRENE JONES,** ALJ:

Petitioner, Y.I.S., challenges the determination of the respondent, Northern Valley Regional School District (District), Bergen County, that ordered the removal of his son. E.S. from its school district.

The instant controversy arose when the District learned that while the petitioner's son was attending school in the District, the petitioner did not reside in the District. After an investigation, the District held a hearing on October 20, 1997 wherein it was determined that petitioner was not a domiciliary of the District. Further, it was found that the requirements of *N.J.S.A.* 18A:38-1 did not exist. Thus, it was concluded that E.S. was not entitled to a free education within the District. On November 10, 1997, petitioner filed a petition with the State Department of Education, Bureau of Controversies and Disputes, challenging the District's determination and seeking an order that would allow E.S. to continue to attend the District schools free of charge. The matter was transmitted to the Office of Administrative Law on December 24, 1997 for hearing as a contested case pursuant to *N.J. S.A.* 52: 14B-1 to -15 and *N.J. S.A.* 52:14F-1 to -13. On December 7, 1997, respondent filed an Answer and Counterclaim seeking damages for tuition for the years in controversy.

Hearings were scheduled for July 1 and November 23, 1998 but were adjourned. On April 27, 2001, the District appeared and argued its motion for summary decision. With my consent, the petitioner was allowed to file a cross-motion for summary judgment out of time.

FACTS

Based on the record, I **FIND** the following to be the **FACTS** herein.

Petitioner, Y.S., is the parent of E.S., a student in the District's school. T.S. and C.S. are the grandparents of E.S. Y.S. enrolled E.S. in the Northern Valley Regional High School in September 1999. E.S. attended school there from the 1997-1998, 1998-1999, and 1999-2000 school years. The tuition rate for the 1997-1998 school years was $12,000; the rate for 1998-1999 was $12,500; and the rate for 1999-2000 was $12,600. E.S. also received educational services from the District for a portion of the 2000-2001 school year and the tuition rate for that school year was $12,600. Based on the tuition

rates from September 1997 through March 2001, the District has assessed petitioner $44,600 in tuition costs.

Petitioner resides and is domiciled in Fort Lee, New Jersey. Petitioner contends that his son, E.S., has always resided and been domiciled with his grandparents at MacArthur Avenue in Closter, New Jersey, which is located within the District. Petitioner provides his son with $1,560 per year in allowance or $30 per week. He also provides medical insurance for E.S. under a family plan at the cost of $509 per month. He continues to have legal custody of E.S. In 1996, petitioner did not claim E.S. as a IRS deduction. In 1995 and the prior years, petitioner is not certain if he claimed E.S. as a deduction and is unable to locate his tax returns. The grandparents have claimed E.S. as a dependent on their income tax returns for the years of 2000, 1999, 1998 and 1997.

E.S. is the son of petitioner and his ex-wife, S.S.S. S.S.S. and petitioner separated in June 1993. Prior to the legal separation, the couple resided at _ Maple Avenue, Closter, New Jersey, from 1982 to June 1993. After the separation, S.S.S. relocated to Korea and has had no contact with petitioner and E.S. Thereafter, the petitioner sold the house and relocated to Edgewater, NJ. E.S. was ten years old at this time.

Petitioner avers that during the time in controversy he worked a minimum of 65 to 70 hours per week. Further, he was required to travel overnight some seven to ten days a month. As a consequence of his traveling, his son's feelings of abandonment, the lack of affordable childcare, and his inability to spend "sufficient" time with his son, he and his parents (E.S.'s grandparents) agreed that it would be in E.S.'s "best interests" for him to live with the grandparents. Thus, in June 1993, E.S. moved to his grandparent's home where E.S. knew the neighborhood and the children having lived there previously. Petitioner remarried in 1997. E.S. continued to live with his grandparents because he did not get along with the petitioner's new spouse.

Petitioner further avers that he is a tenant-in-common with his parents at the Closter home. The home was purchased by his parents in 1987 and his name was placed on the deed to help them qualify for a mortgage. His name was removed from the deed two years ago. Petitioner denies contributing any financial assistance towards the house.

Moreover, the petitioner avers that his parents have supported E.S. gratis since 1993. He admits, that prior to 1998, he paid for E.S.'s health insurance. Further, he admits giving E.S. a weekly allowance.

E.S.'s grandfather, T.H.S., submitted an affidavit. He corroborates the separation of petitioner from his ex-wife. Further, that petitioner's name was on the deed to his home for the aforementioned reason. He avers that the down payment for the home, however was from his and his wife's funds. He and wife continue to pay all expenses related to the home.

T.H.S. further avers that his family income was higher than reported in discovery. The discrepancy is due to a typographical error. Their income fluctuates between $40,000 and $50,000 per year. In support, he relies on their joint income tax returns for 1997 through 2000.

T.H.S. asserts that E.S. was abandoned by his mother. His son did not have the financial wherewithal to support him in 1993. It was in E.S.'s best interests to allow him to live in Closter, an area he where he had previously resided. He and his wife have been in constant contact with his teachers. E.S. continues to live with them even though he has left school.

The respondent does not materially dispute the aforementioned facts. It contends that the petitioner provided E.S. with a monthly allowance and medical insurance. Further, the monthly expenses for the Closter property are $1,700 per month and the petitioner's parents originally claimed to have a monthly income of $1,400 per month.

Now, four years later, the petitioner's parents claim that their monthly income is $3,200 per month.

E.S. attended school in the District for the 1997-98, 1998-99, and 1999-2000 school years. The District provided services to E.S. for a portion of the 2000-2001 school year. E.S. received home instruction from September 2000 through January 2001 and was placed in the District's alternative education program from January 15 through January 30, 2001. E.S. withdrew from the District on March 1, 2001.

DISCUSSION

The statute governing this matter, commonly referred to as the "affidavit" statute, provides, in pertinent part, that public schools are "free to the following persons over five and under 20 years of age". It further provides that:

> Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, .. and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care of the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district.
>
> *[N.J.S.A.* 18A:38-1(b)1.)

The statute was amended in 1977 (as set forth) to prevent children from enrolling in school districts where they or their parent did not live.[1] The 1977 amendment authorized local boards of education to go before the Commissioner and challenge the validity of the affidavits submitted by parents and relatives or friends to determine if the exception for attending a public school provided by *N.J. S.A.* 18A:38-1 (b)1 was satisfied. The statute was further amended in 1993 again for the purpose of easing the burden on local school districts "attempting to remove illegally enrolled students," including "those living with a person other than the parent or guardian in order to obtain the benefit of a free public education in a district other than that of their entitlement by parental domicile." *Gunderson v. City of Brigantine Bd. of Educ.,* 95 *N.J.A.R.2d* (EDU) 39, 42 (citing *Sponsor's Statement, Senate Educ. Committee Stmt. And Governor's Conditional Veto Message to Senate Bill* No. 1447 of 1993, enacted as c. 380).

Respondent alleges that in accordance with the principles advanced in *N.J.S.A.* 18A:38-1, petitioner is not eligible for free attendance in the Northern Valley School District. It seeks a summary decision that would dismiss petitioner's appeal and find that E.S. is not entitled to a free education in its District. Further, it also seeks tuition reimbursement for the education E.S. received during the period of time at issue.

Petitioner argues that the affidavit statute was never intended to deny education to a child, whose living arrangements may not be consistent with the statutory scheme,

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[1]Parents sometimes attempt to send their children to schools in districts other than their own without actually changing their residence. It is a very simple matter for a parent to request a relative or friend who resides within the district to provide the child with an official address within the district for purposes of school attendance.

Further, if the friend or relative agrees to sign an affidavit, the school district must accept the child as a student within the system. The affidavit represents proof to the school district that the child is living with the relative or friend and the relative or friend is assuming all personal obligations for the child for a period longer than the school term. Currently, the school system must accept this affidavit unless it is willing to ask the county prosecutor to prosecute the party who signed the affidavit under false pretenses. This offers no practical solution to school boards since settlement through the courts is a long and difficult process. In fact, it is likely that the child will have left the schools system before the case is heard.

[Statement to Senate Bills No. 1464, L. 1977, c. 373.]

when it is clear that the child has no home or possibility of attending school other than with a non-parent district resident. *S.I. on Behalf of Minor R.L. v. Bd. of Ed. City of Clifton, Passaic County,* 95 *N.J.A.R.2d* {EDU) 476 (1995). It has therefore been held that this law should not be narrowly construed, otherwise it would "unreasonably place form over substance and overlook the substantial state interest in ensuring the education of all its children." *Id.* citing *Gunderson v. City of Brigantine Bd. of Educ.,* 95 *N.J.A.R.2d* (EDU) 39, 42 (1994).

Petitioner cites *K.M. v. Bd. of Ed. of West Orange,* OAL Dkt. EDU 7915-00, 2001 W.L. 307518 (March 2, 2001), wherein the West Orange Board of Education found a lack of residency for the children at issue. The children's parents worked at a motel in Philadelphia, where they were required to be available on a "moment's notice." In reversing the Board's determination, the administrative law judge found that there was clearly a family hardship. *See cf:* In *M.J. v. Bd. of Ed. of West Orange,* OAL Dkt. EDU 11825-99, (,.__, 2000), wherein it was found that the petitioner therein had a {demonstrated) economic hardship and no tuition was due to the district.

In E.L. *and J.L v. Bd. of Ed. of the Morris Hills Regional School District,* OAL DKT No. EDU 3172-97 2000, W.L. 148207 (2000), at issue, was an appeal of a high school student seeking enrollment in the Morris Hills Regional School District. Petitioner was living with her grandparents in Denville, New Jersey after her mother abandoned her. Her mother remarried and her new husband wanted nothing to do with the petitioner. While petitioner's mother had the financial ability to support her, it was found that the mother "lacks the normal parental instinct to nurture and protect her." Notwithstanding the fact that the petitioner's mother contributed 40% of petitioner's ordinary living expenses, it was found that a family hardship existed entitling petitioner to a free public education in the District.

In *Bd. of Ed. of the Township of East Brunswick v. J.R. et al.* 96 *N.J.A.R.* 2d 285 {1995), the child suffered from several illnesses. He lived with his mother and grandparents until his mother remarried and moved in with her new husband. The child

continued to live with her grandparents. The child's mother was in the U.S. Army Reserve on active detail and suffered various medical problems of her own. The child's stepfather was a superintendent for a garden apartment complex, requiring him to live on site and be on call, 24 hours a day. The child occasionally slept at his parents' home on the weekend and went on trips with them. The child's parents were able to financially support him. In fact, the child's mother paid his medical, prescription drug, and dental bills and provided him with clothing and diapers. In contrast, the child's grandparents provided him with 24 hours a day care, and were often in contact with the school. Under these circumstances, the Court found that the child's mother was not capable of caring for him due to family hardship. It was further found that it is not necessary that the child's grandparents provide all of the financial support for him gratis.

Likewise, in *C.N. v. South Orange Bd. of Education,* 96 *N.J.A.R.* 2d 913 (1996), domicile was found not to be with the father because he lived in another state, was unable to provide for her and had otherwise relinquished control over her. CF: *Katie McC/ean on Behalf of R.G. v. Bd. of Ed. Township of Ocean,* 96 *N.J.A.R.* 2d 632, wherein it was found to be inappropriate for a child entering adolescence, to share a bedroom with her brother when their parents could not afford a larger apartment. Under such circumstances, a hardship was found to exist.

In the case at bar, the petitioner contends that it was undisputed that E.S. moved in with his grandparents in June 1993, because there was no other suitable alternative. His mother totally abandoned him, having moved to Korea, and his father was emotionally, physically and financially unable to take care of him. It was a very difficult time for E.S. Prior to his parents' separation, he had spent every minute of his life living in the subject school district. His friends, teachers and familiar surroundings were all located in Closter, as were his grandparents, who had ample resources to support him. Rather than be brought up by a stranger, the family decided that it was best for E.S. to move in with his grandparents, with whom he was very close and remain in the same town in which he had grown up. Under these circumstances there can be no doubt that

E.S.'s move to his grandparents' home in June 1993, was for legitimate reasons, and he was therefore, entitled to a free education. Any other conclusion would be contrary to the spirit of *N.J.S.A.* 18A:38-1 which was only intended to prevent children to attend school who really were not truly residing in the district. This is not the case at hand.

Moreover, all of the surrounding circumstances conclusively support such a finding. Since E.S. moved in with his grandparents, his father has not claimed him as a dependent on his tax returns, while at the same time, his grandparents have done so. Additionally, even though E.S. has not attended school for the last year, he still lives with his grandparents. The fact that petitioner gave E.S. a weekly allowance and at one time, provided him with health insurance, is irrelevant. Indeed, it has been held that the law is not intended to dissuade parents who were otherwise unable to care for their children, from maintaining contact with them. *J.P.* v. *Bd. of Ed. of Township of Green Brook,* 97 *N.J.A.R.* 2d 83.

CONCLUSIONS

Pursuant to the statute, the proofs in this matter must show that 1) the grandparents are domiciled within Respondent's school district, 2) the grandparents are supporting E.S. *gratis,* 3) E.S.'s parents are not capable of supporting or providing care for him due to family or economic hardship, and 4) that E.S. is not residing with his grandparents solely for the purpose of receiving a free public education in Respondent's school district.

The first prong of the statutory requirements is satisfied. There is no allegation that the grandparents are not domiciled within the District and I so **FIND.** I further **FIND** that E.S. is not residing in the District solely for the purpose of receiving a public education.

In order to determine whether the grandparents are supporting the child gratis, within the intendment of the statute, the "Commissioner must look to the fundamental

purpose for which the legislation was enacted" when interpreting a statute, "and where a literal reading will not accord with the purpose, the spirit of the law will control over its letter." *Id.* (citing *N.J. Builders, Owners & Managers Assoc. v. Blair,* 60 *N.J.* 330, 333 (1972)). "Moreover, the meaning of a statute is to be gathered from the mischief sought to be eliminated as well as the proposed remedy. Id. (citing *Brewer v. Porch,* 53 *N.J.* 167, 174 (1969); *San-Lan Builders, Inc. v. Baxendale,* 29 *N.J.* 148, 155 (1958)).

Accordingly, the Commissioner held in *Gunderson* that the

> Intent of the "affidavit student" law is not now, and never has been, to deny an education to a child whose living arrangements may not be as contemplated by the statutory scheme when it is clear that the child has no home, or possibility of school attendance, other than with the nonparent district resident and that such resident is for all intents and purposes the sole caretaker and supporter of the child. Neither is its parental affidavit provision meant to act as a bar to a child who, do (sic) to particular circumstances, cannot produce such an affidavit but provides evidence that the underlying requirements of the law are being met. To hold otherwise harms a party the Legislature never meant to penalize, unreasonably places form over substance and overlooks the substantial State interest in earning the education of all its children.
>
> *[Id.* (citing *Sabella* v. *Lacey Tp.,* 204 *N.J. Super* 55, 60 (App. Div. 1985); *Restaurant Enterprises, Inc. v. Sussex Mutual Ins.* Co. 52 *N.J.* 73, 77 (1968)).]

I agree with the petitioner's assertion that the statutory requirement that a child be supported *gratis* has been deemed satisfied where grandparents paid a "substantial portion" of the support. *East Brunswick Bd. of Educ. v. J.R.,* 96 *N.J.A.R.* 2d (EDU) 285, 287. Thus, J.R. establishes that petitioner's health insurance coverage herein is not a factor in the determination of whether the grandparents are supporting E.S. *gratis.*

The next issue is whether the petitioner's $1560 annual allowance to his son is really "support" and not an allowance. The answer lies in whether the sum was truly an

allowance or was it to supplement the grandparents' income so as to pay for E.S.'s expenses.

The term *"gratis"* is defined as "without reward or consideration" and "done or received freely or gratuitously," Black's Law Dictionary 700 (6th ed. 1990). When viewed in the context of *N.J.S.A.* 18A:38-1.b.(1), the term underscores and emphasizes that a person undertaking the support of a child *gratis* does so freely without charging or seeking a reward.

I **FIND** that the income tax returns support that the grandparents had sufficient income to support E.S. Moreover, as noted above, a parent can provide some level of support and the weekly allowance herein is within the sphere allowed by the Commissioner.

The final issue is whether a family or economic hardship exits. I **FIND** that the fact herein support that a family hardship existed when E.S.'s mother separated from the petitioner and thereafter abandoned him when she moved to Korea. Moreover, the petitioner long working hours' are not disputed. Thus, he too, was virtually unavailable. The only sense of stability for E.S. at that time was his grandparents and his prior neighborhood. I **CONCLUDE** that a family hardship existed. For the foregoing reasons, the respondent's motion for summary judgment is hereby **DENIED** and the petitioner's cross motion is hereby **GRANTED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

12/06/01
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

1:J/11/41
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DEC 14 2001
DATE

OFFICE OF ADMINISTRATIVE LAW

md/mh/sej

OAL DKT. NO. EDU 10964-97
AGENCY DKT. NO. 440-11/97

Y.I.S., ON BEHALF OF E.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The Board's exceptions and petitioner's reply thereto are duly noted as submitted in accordance with *N.J.A.* C. 1: 1-18.4.

In its exceptions, the Board argues that, contrary to the Administrative Law Judge's (ALJ) findings, E.S. was not entitled to a free education in its District as an "affidavit student," pursuant to *N.J.S.A.* 18A:38-l{b). This is so, the Board reasons, because petitioner, in his motion and supporting certifications, failed to demonstrate either family or economic hardship. (Board's Exceptions at 5) To the contrary, the Board contends that petitioner's undisputed income was approximately *$55,500* in 1996 and, therefore, the ALJ's finding of financial hardship is unsupported by the facts on record. *(Id.* at 9) Moreover, the Board asserts that although comfort and familiarity may have been the reason E.S. moved in with his grandparents in 1993,

> [c]omfort and familiarity do not explain why petitioner's son was unable to reside with petitioner in 1997. In fact, petitioner claims that his "hectic" work schedule and his wife's incompatibility with his son prevented his son from residing with him in 1997. (citation omitted) The argument that comfort and familiarity created a family hardship are [sic] disingenuous. The ALJ's findings in this regard are unsupported by the record. The ALJ's findings in this regard are particularly troublesome in that she did not conduct a hearing, did not listen to witnesses, and did not receive affidavits from the petitioner's son, so it is difficult to understand the basis for these findings. *(Id.* at 10)

The Board further contends that petitioner has failed to satisfy his burden of proof since he "contributed significantly" to his son's upkeep, notwithstanding that his son was residing with petitioner's parents. *(Id* at 11) Specifically, petitioner provided his son with an allowance of $1,560 per year and maintained a medical insurance policy at the cost of $509 per month. *(Ibid.)* The Board also questions how petitioner's parents supported themselves and E.S. on their income "without additional support from some other source." *(Id.* at 12)

In reply, petitioner underscores that there is no evidence on record that his son's move into his grandparents' home was motivated by bad faith. Rather, petitioner asserts, all credible evidence demonstrates that there was no other suitable alternative. (Petitioner's Reply at 7) Additionally, petitioner argues that the fact that he earned $55,000 in 1996 is of no consequence, because it is undisputed that he could not adequately raise his son where his working schedule required his traveling "much of the time." *(Ibid.)* Rather than "hire a full time nanny at substantial cost that he could not afford to pay," petitioner opted to have E.S. move in with his parents. *(Id.* at 8) Petitioner suggests, "Perhaps the strongest evidence that there was no bad faith is that [E.] continues to live with his grandparents notwithstanding the fact that he no longer attends school. In fact, he has resided with them for approximately nine years." *(Ibid.)*

With respect to the allowance given to his son, petitioner finds this contribution to be irrelevant. ***(Ibid.)*** Indeed, petitioner asserts, "[I]t has been held that the law is not intended to dissuade parents who were otherwise unable to care for their children, from maintaining contact with them.***" (***Id.*** at 8-9) Moreover, petitioner notes that he has not provided health insurance for E.S. since 1998. ***(Id.*** at 9) Furthermore, as the affidavits of E.S.'s grandparents readily show, their income has fluctuated between $40,000 and $50,000 for the last five years, which is "more than sufficient" to sustain the monthly expenses of their home. ***(Ibid)***

Upon careful and independent review of the record in this matter, the Commissioner initially notes that under currently applicable standards, the father of E.S. is not permitted to appeal the Board's decision where E.S. was admitted to school pursuant to *N.J.S.A.* 18A:38-lb(l), the "affidavit" student provision. Rather, as that statute provides, it is the ***resident*** of the district, the non-parent with whom the child is living, who is specifically authorized to bring such an appeal. Notwithstanding this technical defect, inasmuch as the within petition was filed over fours years ago (November 10, 1997), its filing predates the promulgation of the regulation that specifically addresses this statutory filing restriction *(N.J.A.C.* 6A:3-8.l(b), effective April 3, 2000).[1] ***(See, also, H.K and G.K, on behalf of minor children, J.K and C.K v. Board of F.ducation of the Township of Cherry Hill, Camden County,*** Commissioner Decision August 28, 1998, wherein the Commissioner found that the pertinent statute should not be read to confer upon parents and legal guardians the standing to appeal a board's decision to remove a child from the district where that child was already admitted to the district as an affidavit student under *N.J.S.A.* 18A:38-l(b)I.) Therefore, fundamental fairness dictates that petitioner not be

[1] **That regulation states, "Where an appeal is taken from a determination of ineligibility under N.J.S.A lSA:38-l(b)1 ('affidavit' students), such appeal shall be filed by the resident making the claim of entitlement and shall not be filed by the parent or legal guardian."**

denied the opportunity to prosecute his appeal at this late stage of the proceedings, particularly where the Board failed to raise any objection to the same on the record.

Further, the Commissioner finds that the Board neither challenges nor contradicts the facts offered by the ALJ in the Initial Decision, notwithstanding that it objects to the *legal conclusions* drawn from those facts. (Board's Exceptions at 3-4) However, "disputes as to the conclusions to be drawn from the facts, as opposed to the facts themselves, will not defeat a motion for summary judgment." *Contini v. Board of Education of Newark,* 96 *NJ.A.R* 2d (EDU) 196, 215, *citing Lima & Sons, Inc. v. Borough of Ramsey,* 269 *NJ. Super.* 469, 478 (App. Div. 1994).[2]

The Commissioner concurs that petitioner has demonstrated that E.S. was entitled to attend school in the Board's District, free of charge, pursuant to *NJ.S.A.* 18A:38-lb(l). In so concluding, the Commissioner finds that the ALJ's analysis with respect to the limited support offered by petitioner to his son is consistent with both decisional law and newly adopted rules by the State Board of Education addressing this issue. *See NJ.A.C.* 6A:28-2.4(a)2.

Accordingly, the Initial Decision is adopted for the reasons expressed therein.

IT **IS SO** ORDERED.3

COMMISSIONER OF EDUCATION

Date of Decision: 1/28/02

Date of Mailing: 1/29/02

[2] Notably, it is the Board that moved for summary decision in this matter, arguing that there were no outstanding factual issues to be decided in this matter. (Board's Motion for Summary Decision at 4)

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* lSA:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.l *et seq.,* within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

25-02

EDU #10964-97
C# 25-02
SB# 8-02

Y.I.S., on behalf of E.S.,

PETITIONER-RESPONDENT,

v.

BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, January 28, 2002

For the Respondent-Appellant, Sills, Cummis, Radin, Tischman, Epstein & Gross (Cherie Adams Maxwell, Esq., of Counsel)

For the Petitioner-Respondent, M. Goodman & Associates, P.C. (Howard B. Leopold, Esq., of Counsel)

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

May 1, 2002

Date of mailing MAY 03 2002

27-02

IN THE MATIER OF THE TENURE	:	
HEARING OF ANTHONY MANGAN,	:	
SCHOOL DISTRICT OF THE TOWNSHIP OF	:	**COMMISSIONER OF EDUCATION**
HOLMDEL, MONMOUTH COUNTY.	:	**DECISION**
AND	:	
ANTHONY MANGAN,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

January 31, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NOS. EDU 10448-00
and EDU 4731-01 (Consolidated)
AGENCY DKT. NOS. 429-11/00
and 142-5/01

IN THE MATTER OF THE TENURE HEARING OF ANTHONY MANGAN, BOARD OF EDUCATION OF HOLMDEL TOWNSHIP, MONMOUTH COUNTY

ANTHONY MANGAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY,
Respondent.

Stephen B. Hunter, Esq., for petitioner (Klausner, Hunter & Rosenberg, attorneys)

Martin M. Barger, Esq., for respondent (Reussille, Mausner, Carotenuto, Barger & Steel, attorneys)

Record Closed: December 10, 2001 Decided: December 13, 2001

BEFORE **STEVEN C. REBACK,** ALJ:

These matters were transmitted to the Office of Administrative Law on December 28, 2000 and August 9, 2001, respectively, for determination as contested cases, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Joint Request for Approval of Settlement and Settlement Agreement indicating the terms thereof, which are attached and fully incorporated herein.

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

12/18/01
DATE I

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

12/17/01
DATE I

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 18 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cmo

Reussille, Mausner, Carotenuto, Barger & Steel, L.L.C.
365 Broad Street
P. 0. Box 580
Red Bank, New Jersey 07701-0580
(732) 741-1800
Attorneys for Respondent

IN THE MATTER OF THE TENURE HEARING OF ANTHONY MANGAN, BOARD OF EDUCATION OF HOLMDEL TOWNSHIP, MONMOUTH COUNTY.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDUTH 10448-00S AGENCY REF. NO. 429-11/00
	CONSOLIDATED WITH
ANTHONY MANGAN, Petitioner, BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, COUNTY OF MONMOUTH, Respondent.	OAL DOCKET NO. EDUTH 04731-01S AGENCY REF. NO. 142-5/01 JOINT REQUEST FOR APPROVAL OF SETTLEMENT, PROVIDING FOR WITHDRAWAL OF TENURE CHARGES AND PETITION OF APPEAL

INTRODUCTION

Counsel for the Board of Education of Holmdel Township ("Board") and counsel for its tenured employee ("Mangan") join in moving for an order finding that the Settlement Agreement between the parties, attached hereto as Exhibit A, meets the requirements of NJ.AC. 1:1-19.1, recommending that the Settlement Agreement be adopted by the Commissioner of Education, and ordering on condition that the Commissioner approves the Settlement Agreement without modification, that the Settlement Agreement be implemented

and the tenure charges filed by the Board, and the Petition of Appeal filed by Mangan each be withdrawn and these matters be dismissed with prejudice.

PROCEDURAL STATEMENT

This matter arises out of tenure charges against a tenured teaching staff member on grounds of unbecoming conduct, and that staff member's Petition of Appeal from a subsequent increment withholding on those same grounds. The tenure charges and Petition were transmitted to the Office of Administrative Law (OAL) on/or about December 18, 2000 and August 3, 2001 respectively, and consolidated for hearing pursuant to N.J.S.A. 52:14F-1 to 10.

Prehearing procedures concerning the Board's tenure charges and Mr. Mangan's Petition of Appeal commenced before the Honorable Steven Reback, A.LJ. On September 21, 200 I, counsel for both parties telephoned Judge Reback and informed him that they had reached a Settlement Agreement under which, subject to approval by the Commissioner of Education, the tenure charges and Petition of Appeal might be withdrawn. Both Mr. Mangan and the Board, through its authorized representative, stated that the parties had approved the settlement and agreed to it voluntarily.

The parties have agreed under the terms of the Settlement Agreement attached hereto as Exhibit "A" that Mr. Mangan should resign his position with the Holmdel Township Board of Education on June 30, 2003, at which time his retirement from public education shall be effective. The Board has recognized that Mr. Mangan (1) has a medical condition that prevents him from returning to his teaching position at this time and for the foreseeable future; (2) will utilize his substantial accumulated sick leave during the period of his paid medical leave

of absence; and (3) will provide medical documentation, when requested by the Board of Education, during the leave of absence regarding his medical condition.

The parties have further agreed under the terms of the Settlement Agreement attached hereto as Exhibit A that Mr. Mangan is entitled to full backpay and restoration of benefits from the date he was suspended without pay, including the salary he would have received had his employment and adjustment salary increments never been withheld, less any amounts paid to him after his 120 day suspension without pay expired.

The parties have further agreed under the terms of the Settlement Agreement attached hereto as Exhibit A that conditioned upon the Commissioner's approval of the Settlement Agreement without modification, the tenure charges against Mr. Mangan and Mr. Mangan's Petition of Appeal from the withholding of his increment shall both be withdrawn and dismissed with prejudice. Furthermore, should the Commissioner fail to approve the Settlement Agreement attached hereto as Exhibit A without modification, the parties have agreed to make every reasonable effort to reform their Settlement Agreement to meet his objections.

THE BOARD'S JUSTIFICATION FOR WITHDRAWAL OF TENURE CHARGES

The Board, through its counsel, Martin M. Barger, Esquire, makes the following representations:

On November 29, 2000 the Holmdel Township Board of Education certified tenure charges against Anthony Mangan, a teaching staff member in the employ of the Board.

There was a charge of Unbecoming Conduct. These charges were based upon allegations that Mr. Mangan had inappropriate physical contact with a student, had made inappropriate and vulgar comments, had made innuendoes of a sexual nature, and had been previously warned about such conduct.

Sustaining these charges was dependent upon testimony of students who were in Mr. Mangan's class during the time period noted above, as well as the testimony of an Administrator who is no longer with the District due to a medical condition. There is a question whether the Administrator can testify to the best of her ability and whether the students' testimony would have sustained the allegations contained in the charge.

Under the circumstances, the Board of Education has directed its counsel to withdraw the charges and request that the Commissioner of Education approve the withdrawal.

CONCLUSION

The Settlement Agreement was negotiated between counsel well versed in school law and the Commissioner's prior decisions approving settlements based upon all the attendant facts and circumstances. Counsel, as well as Mr. Mangan and the Board which unanimously approved it, are satisfied with the Settlement Agreement and believe that it fulfills the public interest with respect to these matters. For the reasons outlined above, and for good cause shown, this tribunal should conclude that the Settlement Agreement meets the requirements of N.J.A.C. 1:1-19.1, recommend that the Settlement Agreement be adopted without modification by the Commissioner of Education, order that the Settlement Agreement be implemented on condition that it is so approved, and therefore upon such approval dismiss with prejudice the tenure charges and Petition of Appeal in this consolidated matter.

Respectfully submitted,

Reussille, Mausner, Carotenuto,
Barger & Steel, L.L.C.
Attorneys for Board of Education
of Holmdel Township

BY _____
MARTIN M. BARGER

Klausner & Hunter, Esqs.
Attorneys for Anthony Mangan

BY _____
ST HUNTER

SETTLEMENT AGREEMENT REGARDING ACTIONS PENDING BEFORE THE COMMISSIONER OF EDUCATION

This Settlement Agreement is entered into by and between the Board of Education of Holmdel Township ("Board") and its tenured employee Anthony Mangan ("Mangan").

WHEREAS, Mangan has been continuously employed by the Board as a teaching staff member since September 1, 1978; and

WHEREAS, on December 18, 2000 the Board certified tenure charges against Mangan to the Commissioner of Education under the Tenure Employees Hearing Law, which charges were captioned:

IN THE MATTER OF THE TENURE
HEARING OF ANTHONY MANGAN
BOARD OF EDUCATION OF HOLMDEL
TOWNSHIP, MONMOUTH COUNTY

OAL DOCKET NO. EDUTH 10448-00S
AGENCY REF. NO. 429-11/00

AND WHEREAS, Mangan filed an Answer contesting the tenure charges; and

WHEREAS, on November 29, 2000, the Board adopted a Resolution withholding Mangan's increment for the same reasons specified in its tenure charges; and

WHEREAS, on/or about May 8, 2001, Mangan filed a Petition of Appeal with the Commissioner of Education alleging that the Board's action to withhold his increments was arbitrary and capricious, which Petition was captioned:

ANTHONY MANGAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF HOLMDEL,
COUNTY OF MONMOUTH,
Respondent.
OAL DOCKET NO. EDUOR 04731-0IS
AGENCY REF. NO. 142-5/01

AND WHEREAS, the Board filed an Answer contesting Mangan's Petition; and

WHEREAS, the aforesaid tenure charges and Petition of Appeal were consolidated for hearing before Administrative Law Judge Steven Reback; and

WHEREAS, hearing of the consolidated proceeding was scheduled to begin on October 15, 2001; and

WHEREAS, due to difficulties with certain witnesses, it appears that Holmdel Township Board of Education may not have been able to sustain the allegations contained in its tenure charges and increment withholding, and it would be in the best interest of the Board and the students of the district for which it is responsible to resolve all open issues with Mr. Mangan, who does have a medical condition that will adversely affect his ability to teach; and

WHEREAS, Mr. Mangan has stated that he will retire from public education, effective June 30, 2003.

NOW, THEREFORE, the matters in dispute having been amicably adjusted by and between the parties, it is hereby stipulated and agreed as follows:

I. The Board will seek the Commissioner's approval for this Settlement Agreement, and if the Commissioner approves the Settlement Agreement without modification, ask the Commissioner to allow the tenure charges against Mangan to be withdrawn and dismissed with prejudice;

2. Mangan will cooperate with the Board in seeking the Commissioner's approval for this Settlement Agreement, and if the Commissioner's approval for this Settlement Agreement, and if the Commissioner approves the Settlement Agreement without modification, ask the Commissioner to dismiss his Petition of Appeal with prejudice;

3. Should the Commissioner *fail* to approve the Settlement Agreement attached hereto as Exhibit A without modification, the parties have agreed to make every reasonable effort to reform their Settlement Agreement to meet his objections;

4. Mangan shall resign his position with the Holmdel Township Board of Education on June 30, 2003, at which time his retirement from public education shall be effective. Mangan has a medical condition that prevents him from returning to his teaching position in the foreseeable future. Mangan will use his accumulated sick leave during the time period at issue, at which time he will be on a Board approved medical leave of absence; and will provide medical documentation confirming his medical condition whenever requested to do so by the Board of Education.

5. The Board shall place Mangan on a paid medical leave of absence and shall pay Mangan his full salary through June 30, 2003. The Board shall restore Mangan's salary and

benefits as a teaching staff member through June 30, 2003 from the date Mangan was suspended without pay, including the salary Mangan would have received had his employment and adjustment increments not been withheld, less any salary payments paid to Mangan after his 120 day suspension without pay expired.

6. The Board shall remove from Mangan's personnel file all documents relating to the tenure charges and the withholding of is employment and adjustment increments.

DATED: December 3rd , 2001.

Reussille, Mausner, Carotenuto,
Barger & Steel, L.L.C.
Attorneys for Board of Education
of Holmdel Township

BY: _____
MARTIN M. BARGER

Klausner & Hunter, Esqs.
Attorneys for Anthony Mangan

BY: _____
STEPHEN.HUNTER

OAL DKT. NOS. EDU 10448-00 AND EDU 4731-01 (CONSOLIDATED)
AGENCYDKT. NOS. 429-11/00AND 142-5/01

IN THE MATIER OF THE TENURE	:	
HEARING OF ANTHONY MANGAN,	:	
SCHOOL DISTRICT OF THE TOWNSHIP OF	:	COMMISSIONER OF EDUCATION
HOLMDEL, MONMOUTH COUNTY.	:	DECISION
AND	:	
ANTHONY MANGAN,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

The record, Joint Request for Approval of Settlement, Settlement Agreement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1: 1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *See In re Cardonick,* 1990 *S.L.D.* 842,846, decided by the Commissioner April 7, 1982, *ajf'd* State Board April 6, 1983; *NJ.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to the parties' compliance with the terms of the settlement. A copy of this decision will be forwarded to the State Board of Examiners.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/31/02

Date of Mailing: 2/1/02

2-8-02

#28-02

BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

February 1, 2002

OAL DKT. NO. EDU 4903-01
AGENCY DKT. NO. 279-7/01

BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and settlement transmitted by the Office of Administrative Law have been reviewed. Because this agency is a party to the present matter, a local "Abbott" district appeal of respondent's determination on its supplemental funding request for the 2001-2002 school year, the settlement, pursuant to *N.J.A.C.* 1:1-19.l(c) and (d), is deemed the final decision in the matter and this matter is accordingly dismissed.*

COMMISSIONER OF EDUCATION

Date of Decision: 2-L=0I 20

Date of Mailing: 2/01/02

• The Commissioner notes that the Settlement Agreement utilizes the OAL Dkt No. EDU 4901-01. The correct OAL Dkt. No. is EDU 4903-01.

JOHN J. FARMER, JR.
Attorney General of New Jersey
Attorney for Respondent
New Jersey Department of Education
R. J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625

By: Beth Leigh Mitchell
Deputy Attorney General
(609) 292-4776

BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, Petitioner, v. NEW JERSEY DEPARTMENT OF EDUCATION, Respondent.	BEFORE THE OFFICE OF ADMINISTRATIVE LAW Hon. M. Kathleen Duncan,A.L.J. OAL DOCKET NO.: EDUOT-4901-01S DOE DOCKET NO.: 279-7/01 Civil Action

THIS STIPULATION is entered into by and between the parties to the within matter, Petitioner, Board of Education of the **Township of Pemberton, and Respondent,** New **Jersey Department of** Education, for the purpose of dismissing the above captioned matter with prejudice.

NOW THEREFORE, IT IS HEREBY STIPULATED AND THE COURT MAY SO ORDER, THAT:

1. The matter in dispute in the above captioned matter having been amicably resolved by and between the parties, it is hereby stipulated and agreed that the above captioned matter is dismissed with prejudice.

For the Petitioner,
Board of Education of the Township of Pemberton,

Dated: Jl/td/d1

◆sq.

For the New Jersey Department of Education:

JOHN J. FARMER, JR.
Attorney General of New Jersey

Dated: 12/18/2001

Beth Leigh Mitchell
Deputy Attorney General

APPROVED AND SO ORDERED this J.1 day of 2001,

CW -

The Honorable M. Kathleen Duncan, A.L.J.

29-02

#29-02

BOARD OF EDUCATION OF THE CITY OF GLOUCESTER, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COl'v1MISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

February I, 2002

OAL DKT. NOS. EDU 4408-01, EDU 4409-01,
EDU 4410-01, AND EDU 4761-01
AGENCY DKT. NOS. 174-6/01, 175-6/01,
176-6/01, AND 282-7/01

BOARD OF EDUCATION OF THE CITY OF GLOUCESTER, CAMDEN COUNTY,	
PETITIONER,	
V.	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	DECISION
RESPONDENT.	

The record of these matters and settlement transmitted by the Office of Administrative Law have been reviewed. Because this agency is a party to the present cases, the settlement, pursuant to *N.J.A.C.* 1:1-19.l(c) and (d), is deemed to be the final decision in these matters.

ITIS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/01/02

Date of Mailing: 2/01/02

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Z00, DfC -t., A q: 41

JOHN J. FARMER, JR.
Attorney General of New Jersey
Attorney for Respondent
New Jersey Department of Education
R.J. Hughes Justice Complex
PO Box 112
Trenton, New Jersey 08625

By: Allison Colsey Eck
Deputy Attorney General
(609)663-8197

GLOUCESTER CITY BOARD OF EDUCATION, Petitioner, v. NEW JERSEY DEPARTMENT OF EDUCATION, Respondent.	OAL DOCKET NOS. EDUOT 04761-01S EDUOT 04409-01S EDUOT 04408-01S EDUOT 04410-01S Be 'f -O-47G:1-8i!£ **CONSENT ORDER OF SETTLEMENT**

Petitioner, Gloucester City Board of Education ("Petitioner"), through its Attorney, Richard E. Shapiro, Esq., and Respondent, New Jersey Department of Education ("Department"), through its attorney, the Honorable John J. Farmer, Jr., Attorney General of the State of New Jersey (Allison Colsey Eck, Deputy Attorney General, appearing), hereby stipulate to the following terms of settlement:

1. On or about June 13, 2001, Petitioner filed Petitions of Appeal ("Petitions") with the Commissioner of Education seeking review of the Department's determinations with respect to Petitioner's school based budgets for its two elementary schools and its Required Programs for Secondary School budget at its high school. On or about July 26, 2001, Petitioner filed a Petition of Appeal with the Commissioner of Education seeking review of the Department's determinations with respect

to Petitioner's request for supplemental funding for the 2001-2002 school year under the Abbott v. Burke decisions and DOE regulations.

2. The Petitions were subsequently transferred to the Office of Administrative Law as contested cases.

3. After the commencement of hearings in the Office of Administrative Law, the parties entered into discussions to amicably resolve these matters in the public- interest.

4. Based on those discussions, the Department agrees that the Petitioner has demonstrated a need for additional Abbott v. Burke state aid in the amount of $1,499,675.00. Additionally, the sum of $400,000 in surplus from the 2000-2001 fiscal school year is to be appropriated by petitioner for use in the 2001-2002 school year. This settlement does not waive any of the review requirements and mandated adjustments pursuant to P.L. 2001, c.130, including reallocation of the district's undesignated general fund balance in excess of two percent. In the event that any portion of the additional Abbott v. Burke state aid awarded pursuant to this settlement is not expended during the current fiscal year ending June 30, 2002, that portion of the additional funding must be used to support programs and services during the 2002-2003 school year.

5. The Department has agreed to postpone its recoupment of the sum of $304,558 held by petitioner in legal reserves until July 2002 at which time said $304,558 will be appropriated by petitioner and deducted from the total amount of Abbott v. Burke state aid that the Department has agreed to pay to petitioner as a result of this settlement.

6. Petitioner may anticipate a cash payment in the amount of $1,195,117 and record an account receivable in tl)e 2001-2002 budgeLyear.

7. The receipt of this additional Abbott v. Burke state aid will occur in one-lump sum payment no later than the middle of the first month of the 2002-2003 budget year subject to appropriation in the FY 2003 Appropriations Act and the terms of this settlement agreement. Specifically, the Commissioner shall seek from the Legislature an appropriation for the 2002-2003 budget year in the amount of $1,195,117, subject to any adjustments mandated by P.L. 2001, c. 130.

8. In the event that petitioner experiences cash flow shortages during the 2001-2002 school year, the Department shall provide expeditious assistance to petitioner to resolve such cash flow difficulties. Such assistance may include, but not be limited to, the provision of an accelerated payment schedule of petitioner's 2001-2002 state aid.

9. The Petitioner agrees to dismissal with prejudice of the following petitions pending before the Office of Administrative Law and the Commissioner of Education: Petitioner's school-based budget appeal for Mary Ethel Costello Elementary School (OAL Docket No. EDUOT 04409-01S); Petitioner's school-based budget appeal for Cold Springs Elementary School (OAL Docket No. EDUOT 04408-01S); Petitioner's Required Programs for secondary School's appeal for Gloucester City High School (OAL Docket No. EDUOT 04410-01S); and Petitioner's 2001-2002 Supplemental Funding appeal (OAL Docket No. EDUOT 04761-01S).

10. This Consent Order does not preclude Petitioner from applying for additional Abbott v. Burke state aid pursuant to N.J.A.C. 6A:24-7.1(f).

11. Resolution of this matter on the terms set forth herein shall not be construed as precedent in other pending or future litigation.

JOHN J. FARMER, JR.
Attorney General of the State
of New Jersey

RICHARD E. SHAPIRO, ESQ.
Attorney for Petitioner,
Gloucester City Board of
Education

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DATED: 11/2/01

RICHARD E. SHAPIRO, ESQ.

DATED: 11/u/01

SO ORDERED THIS ----- DAY OF ------ 2001.

HONORABLE BRUCE R. CAMPBELL, A.L.J.

30-02

30-02 SEC

IN THE MATTER OF JAMES CARPENTER,	:	
PENNSVILLE BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
SALEM COUNTY.	:	DECISION

SYNOPSIS

The School Ethics Commission determined that respondent Board member violated the School Ethics Act when he voted to retain the bank where he is employed as the depository of monies for the District. The Commission recommended a penalty of reprimand to the Commissioner.

Based upon the Commission's finding of violation, which is not subject to review by the Commissioner, the Commissioner accepted the Commission's penalty recommendation and ordered that respondent be reprimanded.

January 31, 2002

IN THE MATTER OF JAMES CARPENTER, ***PENNSVILLE BOARD OF EDUCATION, SALEM COUNTY***	:	**BEFORE THE SCHOOL ETHICS COMMISSION Docket No.: C21-01 and C22-01 (Consolidated) DECISION**

PROCEDURAL HISTORY

The above matter arises from complaints filed by Robert J. Settle on June 4, 2001 and Michael Wooten on June 8, 2001. Therein, they allege that Mr. Carpenter violated the School Ethics Act, N.J.S.A. 18A:12-21 et . when he participated in the selection of the Pennsville National Bank as the depository for the Pennsville Board of Education when he is an employee of the Pennsville National Bank. Mr. Settle also alleges that Mr. Carpenter is the Chairperson of the Administration Committee. Mr. Wooten also alleges that Mr. Carpenter serves on the school board budget committee and voted in favor of every increase while serving on the board knowing that the increase would be deposited with his employer. Mr. Wooten alleged that Mr. Carpenter participated and voted despite repeated warnings by the administration and other board members. Mr. Wooten alleged that the above conduct constitutes a violation ofN.J.S.A. 18A:12-24(c). Mr. Settle did not allege a specific provision of the Act that was violated.

The answer to the complaint was filed on June 20, 2001. Therein, Mr. Carpenter stated that he participated and voted on the issue of the depository because he does not receive any financial gain or benefit from the bank being the depository. He denied having violated any provision of the School Ethics Act.

The Commission invited the parties to testify before it at its August 28, 2001 meeting. All parties appeared. Mr. Carpenter brought Dr. Robert Peddle, Pennsville School District Superintendent and Robert Vanderslice, President of Pennsville National Bank, to testify as witnesses on his behalf. After hearing testimony, the Commission voted at its public meeting to find probable cause that Mr. Carpenter violated N.J.S.A. 18A:12-24(c) when he participated in discussions and voted on the motion to name the Pennsville National Bank as the depository for the Pennsville Board of Education. The Commission found no probable cause and dismissed the allegation of Mr. Wooten that Mr. Carpenter's votes on the budget were in violation ofN.J.S.A. 18A:12-24(c) because the budget funds are deposited in the Pennsville National Bank. The Commission consolidated the complaints of Mr. Settle and Mr. Wooten since it found probable cause to credit the same allegation in each complaint.

FACTS

The Commission finds the following facts to be undisputed.

Mr. Carpenter was elected to the Pennsville Board of Education in April 1998. He was re-elected to a second term in April 2001. He has been an employee of the Pennsville National Bank since 1989. Mr. Carpenter became an Assistant Vice President at the bank in 1990. He is a trust officer for the bank and has no responsibility for the retail operation of the bank. He receives no compensation other than his salary and benefit package and owns no bank stock.

As a board member since 1998, Mr. Carpenter has had four opportunities to vote on resolutions naming the Pennsville National Bank as the school district's local depository. The first year he abstained from the vote at the recommendation of the superintendent. The following two years he voted in favor of the resolutions. In April 2001, when the resolution was presented, Mr. Wooten stated that he did not think that Mr. Carpenter could vote on a resolution naming his employer as the district's depository. Mr. Carpenter replied that there was no conflict of interest due to the low level of his position at the bank.

The minutes show that on April 9, 2001, Mr. Carpenter voted in favor of Pennsville National Bank continuing as the district's depository Wltil JWle 2001 when a new resolution formally naming the district's depository would be introduced. Mr. Wooten made his concerns of a conflict of interest known to Mr. Carpenter prior to the vote, but Mr. Carpenter voted nonetheless. On June 11, 2001, the minutes show that Mr. Carpenter abstained from voting on Pennsville National Bank as the district's depository. The date of the vote would have been after Mr. Carpenter received the two complaints in question from the School Ethics Commission.

The parties dispute the extent to which Mr. Carpenter was warned that he would be in violation of the School Ethics Act if he were to participate in the discussion and vote on whether Pennsville National Bank should be the depository. Mr. Wooten alleges that Mr. Carpenter was warned many times. Mr. Carpenter admitted that Mr. Wooten stated that he did not believe that Mr. Carpenter could vote for the Pennsville National Bank to be the depository because it was his employer. Mr. Carpenter further admitted that the superintendent advised that he should abstain from the vote when he first joined the Board and based on that advice, he abstained. The Commission has concluded that the dispute over how many times Mr. Carpenter was warned is not material to the determination of whether he violated N.J.S.A. 18A:12-24(c). For the purposes of this decision, the Commission accepts as Wldisputed the fact that Mr. Carpenter was twice given notice that he should not participate in discussions and vote on the Pennsville National Bank to be the depository.

Counsel for Mr. Carpenter agrees with the facts set forth above.

ANALYSIS

The Commission found probable cause on the charge that Mr. Carpenter's conduct when he participated in the discussion and vote on the resolution to continue the appointment of his employer, the Pennsville National Bank, as the depository for the Pennsville Board of Education violated N.1S.A. 18A:12-24(c). It provides:

> No school official shall act in his official capacity in any matter in which he, a member of his immediate family, or a business organization in which he holds an

> interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family.

Although Mr. Carpenter stresses that he had a low level position with the bank, the Commission does not find his position to be of such a low level that the public would not be concerned of the appearance of impropriety created by his participation in the discussion and vote on this matter. Mr. Carpenter may not have a direct financial involvement with the resolution since he will not receive any compensation from the Pennsville National Bank serving as depository, but the Commission finds probable cause that Mr. Carpenter has an indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. In determining whether such an involvement exists, the Commission asks whether the public might reasonably perceive that the school official could acquire some indirect financial gain by his participation in the matter. The Commission finds probable cause that such an involvement exists here. The Commission also finds probable cause to credit the allegation that Mr. Carpenter has a personal involvement that creates a benefit to him because the Board is such a major client to the Pennsville National Bank that the loss of the Board as a client could have negative repercussions to his employment.

Mr. Carpenter argues that the Commission found no violation of the standard set forth in N.J.S.A. 18A:12-24(c), but rather the offense found by the Commission was the perceived appearance of impropriety which may exist in the minds of the public. The Commission disagrees.

In finding a violation of N.J.S.A. 18A:12-24(c), the Commission is also mindful of the Legislature's purpose set forth at N.J.S.A. 18A:12-22(a), which provides:

> In our representative form of government it is essential that the conduct of members of local boards of education and local school administrators hold the respect and confidence of the people. These board members and administrators must 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.

In this case, the Commission is concerned that Mr. Carpenter's actions created a justifiable impression that the public trust was violated. Here, Mr. Carpenter is the Assistant Vice President of the bank that serves as the depository for the Board on which he sits. Although Mr. Carpenter may not be responsible for the retail operation of the bank, owns no bank stock and receives no compensation other than his salary and benefit package, he is nonetheless a bank employee who is impacted by the business the bank generates. The public would have a justifiable impression that its trust is being violated when Mr. Carpenter voted in favor of his employer, the Pennsville National Bank, to continue as the district's depository. While the Commission does not find a violation solely on N.J.S.A. 18A: l2-24(a), the Commission believes that its conclusion that Mr. Carpenter violated N.J.S.A. 18A:12-24(c) of the Act is more than adequately supported by the Legislature's stated purpose.

DECISION ON PROBABLE CAUSE

For the foregoing reasons, the Commission finds probable cause to credit the allegations that Mr. Carpenter violated N.J.S.A. 18A:12-24(c) of the School Ethics Act. It now recommends that the Commissioner of Education impose a penalty of reprimand.

In determining the penalty to recommend to the Commissioner of Education, the Commission considered that counsel for Mr. Carpenter advised that Mr. Carpenter would not vote on any matters that pertain to the Pennsville National Bank in the future as such action would violate Board policy. Therefore, the Commission finds that the appropriate penalty in this matter is a reprimand.

Paul C. Garbarini /C

Paul C. Garbarini, Chairman

Resolution Adopting Decision - C21-01 and C22-01 Consolidated

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof and has considered the arguments raised by parties in testimony; and

Whereas, the Commission found probable cause to credit the allegations in the complaint that respondent violated N.J.S.A. 18A:12-24(c) of the School Ethics Act; and

Whereas, the Commission has reviewed the written statement of the respondent setting forth the reasons that he should not be found in violation of the Act; and

Whereas, the Commission finds that Mr. Carpenter violated the Act;

Now Therefore Be It **Resolved** that the Commission finds that James Carpenter violated N.J.S.A. 18A:12-24(c) of the School Ethics Act, recommends that the Commissioner of Education impose a penalty of reprimand and adopts this decision.

Paul C. Garbarini

I hereby certify that this decision
was duly adopted by the School
Ethics Commission at its public meeting
on November 27, 2001.

Jacqueline Richmond
Acting Executive Director

AGENCY **DKT. NO.** 504-12/01

IN THE MATTER OF JAMES CARPENTER,	:	
PENNSVILLE BOARD OF EDUCATION,	:	**COMMISSIONER OF** EDUCATION
SALEM COUNTY.	:	**DECISION**

The record of this matter and the decision of the School Ethics Commission ("Commission") have been reviewed. Comments with respect to the Commission's decision were timely submitted by respondent, and were duly considered by the Commissioner in rendering the decision herein.[1]

Initially, it must be emphasized that pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the Act is **not reviewable by the Commissioner.** Only the School Ethics Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed following a finding of a violation by the School Ethics Commission. Therefore, this decision is restricted solely to review of the recommended penalty and its implementation.

Respondent's comments with respect to the Commission's decision set forth his objections to the Commission's determination that he violated the School Ethics Act and his

[1] **Complainant Robert J. Settle submitted comments to the Commission's decision by letter dated December 22, 2001. However, pursuant to *N.J.A.C.* I:6C-1.1 *et seq.* and *N.J.A.C.* 1:1-18.4, Mr. Settle is not a party to the within matter so as to provide him with the requisite standing to file written exceptions to the Commission's decision. *See, also,* the State Board decision in *In the Matter of Frank Pennucci, Board of Education of Brick Township, Ocean County,* March I, 2000.**

request that the Commissioner void the Commission's findings. As to the reprimand, respondent states, ***inter alia,*** that:

> Some people might consider a reprimand as a slap on the wrist, and therefore conclude that I am making much ado about nothing. But it is precisely because I give the decisions of the School Ethics Commission such weight, and place such value on my public name, that I am treating this matter with such seriousness. I sincerely believe that my vote did not violate the School Ethics Act; and I sincerely believe that the School Ethics Commission erred, though with out malice, when it concluded that I had violated the Act.*** (Respondent's Comments at 2)

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that reprimand is the appropriate penalty in this matter. Given the Commission's finding that respondent violated ***N.J.S.A.*** 18A:12-24(c) by his participation in the District's depository, the Commission's recommended penalty in this matter will not be disturbed absent a compelling basis to do so.

Accordingly, IT IS hereby ORDERED that James Carpenter be reprimanded as a school official found to have violated the School Ethics Act.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/31/02

Date of Mailing: 2/1/02

[2] **This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to** *N.J.S.A.* **lSA:6-27** ***et seq.*** **and** *N.J.A.C.* **6A:4-1.l** ***et seq.,*** **within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.**

IN THE MATTER OF THE TENURE	:	
HEARING OF FRANK MARMORA AND	:	COMMISSIONER OF EDUCATION
JOAN MARMORA, SCHOOL DISTRICT	:	DECISION
OF THE BOROUGH OF METUCHEN,	:	
MIDDLESEX COUNTY.	:	

February 1, 2002

AGENCY DKT NO. 488-12/01

IN THE MATTER OF THE TENURE	:	
HEARING OF FRANK MARMORA AND	:	COMMISSIONER OF EDUCATION
JOAN MARMORA, SCHOOL DISTRICT	:	DECISION
OF THE BOROUGH OF METUCHEN,	:	
MIDDLESEX COUNTY.	:	

For the Board, James B. Smith, Esq.

Respondents, Frank Marmara and Joan Marmara, ***Pro Se***

This matter having been opened before the Commissioner of Education on December 4, 2001, through certification of tenure charges of unbecoming conduct against Frank Marmara and Joan Marmara, tenured custodians, by the School District of the Borough of Metuchen, Middlesex County; and

The Commissioner having directed respondents, by personal notice to each of them, via both certified and regular mail on December 4, 2001, the certified copies of which were both signed for on December 7, 2001, to file an Answer to the tenure charges against them; and

Such communications clearly having provided respondents notice that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, individuals against whom tenure charges are certified shall have ***15 days from the date such charges are filed with the Commissioner*** to file a written response to the charges, and that failure to answer within the prescribed period, where no extension has been applied for and granted, or where there has been no submission by the

charged employee of a responsive filing indicating that s/he does not contest the charges, will result in the charges being deemed admitted by the charged employee; and

In that no reply has been received from either respondent in response to the Board's charges, each count of the charges against them is deemed to be admitted; and

The Commissioner's review of the tenure charges certified against Respondent Frank Marmora by the Board and the statement of evidence in support of those charges indicates that Respondent, over the last two years or more has been guilty of (a) theft of Board property; (b) attempted theft of the property of local businesses; (c) possession of stolen goods; (d) allowing an underage driver to operate Board vehicles; (e) inappropriate use of a student employee; (f) Conspiring to fraudulently obtain Board funds for his son, Eric Marmora; and (g) instigating the improper disposal of hazardous materials; and

The Commissioner's review of the tenure charges certified against Respondent Joan Marmora by the Board and the statement of evidence in support of those charges indicates that Respondent, over the last two years or more has been guilty of (a) making a false inventory report of film equipment; (b) possession of stolen goods; (c) condoning the theft of Board property; (d) conspiring to fraudulently obtain Board funds for her son, Eric Marmora; (e) allowing improper use of Board property, and (f) inappropriate use of a student employee; and

Having deemed such charges to be admitted by operation of rule, the Commissioner finds the charges against both respondents to be unbecoming conduct sufficient to warrant their dismissal from their tenured positions; now, therefore

IT IS ORDERED this 7sf day of February 2002 that Frank Marmora

and Joan Marmora are hereby dismissed from their tenured positions as custodians in the Board's employ as of the date of this order.•

COMMISSIONER OF EDUCATION

Date of Decision: 2/1/02

Date of Mailing: 2/1/02

• This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

30-02

SEC #C21-01 & C22-01 (consolidated)
C's # 30-02 SEC
SB# 13-02

IN THE MATTER OF JAMES CARPENTER,	:	STATE BOARD OF EDUCATION
PENNSVILLE BOARD OF EDUCATION,	:	DECISION
SALEM COUNTY.	:	

Decided by the School Ethics Commission, November 27, 2001

Decided by the Commissioner of Education, January 31, 2002

For the Respondent-Appellant, James Carpenter, pro se

The decision of the School Ethics Commission finding that the respondent had violated the School Ethics Act and the decision of the Commissioner of Education imposing a reprimand against the respondent as a result of such violation are affirmed for the reasons expressed therein.

May 1, 2002

Date of mailing ___ MAY 03 2002

32-01

32-02

ELAINE ISNER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

February 4, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2006-01

AGENCY DKT. NO. 30-2/01

ELAINE ISNER,

Petitioner,

v.

FREEHOLD REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION,

Respondent.

Barbara E. Riefberg, Esq., for the petitioner (Baron & Riefberg, P.A., attorneys)

James E. Collins, Esq., for the respondent (Cerrato, Dawes, Collins, Saker & Brown, attorneys)

Record Closed: December 17, 2001 Decided: December 18, 2001

BEFORE **BEATRICE S. TYLUTKI,** ALJ:

This matter concerns the allegation of the petitioner, Elaine Isner, that the respondent, Freehold Regional High School District Board of Education, improperly used her sick days for a work-related injury/illness, in violation of *N.J.S.A.* 18A:30-2.l. The petitioner requested a hearing and the matter was transmitted to the Office of Administrative Law (OAL) on March 23, 2001, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-l to -13.

A prehearing telephone conference was held on June 6, 2000. After that date, I had several telephone conferences with the parties and the matter was then scheduled for hearing on January 9, 2001. Prior to that date, the parties conferred and agreed to a settlement. The attached stipulation sets forth the terms of the settlement, and is incorporated herein.

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

December 18, 2001
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

12-20-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 20 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

None

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

JAMES E. COLLINS
Of Counsel
Cerrato, Dawes, Collins, Saker, Brown & Wilder
Wemrock Professional Mall
509 Stillwells Corner Road
Freehold, New Jersey 07728
(732) 431-5000
Attorney for Respondent,
Freehold Regional High School
District Board of Education

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STATE OF NEW JERSEY
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2001 DEC 11 A 11:16

ELAINE ISNER, Petitioner, **vs.** FREEHOLD REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OAk. DOCKET NO.: EDUOR 02006-01S AGENCY DOCKET NO. 30-2/01 STIPULATION OF SETTLEMENT

Petitioner, Elaine Isner (hereinafter "Petitioner") and Respondent, Freehold Regional High School District Board of Education (hereinafter "Respondent") having agreed to settle the above-captioned matter amicably in accordance with the terms set forth herein, state the following:

1. Respondent agrees to restore a total of 64 sick days and 3 personal days to Petitioner's account.

2. Respondent agrees to pay to Petitioner the difference between her worker's compensation benefits and her full salary for the 2000-2001 school year for the period from February 22, 2001 through and including May 15, 2001 with all applicable salary deductions being taken. The aforesaid gross amount, before applicable salary deductions, is $6,117.42.

3. Respondent shall pay Petitioner her full salary for May 29, 2001 and May 30, 2001. The aforesaid gross amount, before applicable salary deductions, is $446.73.

4. This Stipulation of Settlement shall have no effect upon the Petitioner's pending claim for additional Worker's Compensation benefits from the Respondent for permanent partial disability.

We hereby agree to the terms set forth in this Stipulation of Settlement.

DATED: December 8, 2001

Elaine Isner
ELAINE ISNER, Petitioner

FREEHOLD REGIONAL HIGH SCHOOL
DISTRICT BOARD OF EDUCATION,
Respondent

DATED:

BY:

OALDKT. NO. EDU2006-01
AGENCY DKT. NO. 30-2/01

ELAINE ISNER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/4/02

Date of Mailing: 2/4/02

33-02

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	
PETITIONER,	:	**COMMISSIONER OF EDUCATION**
V.	:	**DECISION**
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

February 4, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4849-01
AGENCY DKT. NO. 295-7/01

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION,
Respondent.

Richard E. Shapiro, Esq., for petitioner

Michael Lombardi, Deputy Attorney General, for respondent (John J. Farmer, Jr., Attorney General of New Jersey, attorney)

Record Closed: December 20, 2001 Decided: December 20, 2001

BEFORE **JOSEPH F. MARTONE,** ALJ:

This matter was transmitted to the Office of Administrative Law on August 22, 2001, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 20, 2001
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

12/26/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 27 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

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JOHN J. FARMER, JR.
Attorney General of New Jersey
Attorney for Respondent
New Jersey Department of Education
R. J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625

By: Michael Lombardi
Deputy Attorney General
(609) 943-5949

BOARD OF EDUCATION OF ASBURY PARK Petitioner, v. **NEW JERSEY DEPARTMENT OF EDUCATION,** Respondent.	**BEFORE THE COMMISSIONER OF EDUCATION** **AGENCY DOCKET NO. 295-7/01** **OAL DOCKET NO. EDUOT 04849-01S** Civil Action CONSENT ORDER OF SETTLEMENT

WHEREAS, Petitioner, Board of Education of the City of Asbury Park ("Petitioner"), through its Attorney, Richard Shapiro, Esq., brought the above captioned matter before the Commissioner of Education by the filing of a petition on July 26, 2001, which appealed the Department of Education's award of Supplemental Abbott v. Burke state funding ("Supplemental Funding") to the Petitioner and sought to appeal other issues as well; and

WHEREAS, Respondent, New Jersey Department of Education ("Department"), through its attorney, the Honorable John J. Farmer, Jr., Attorney General of the State of New Jersey by Michael Lombardi, Deputy Attorney General; and

WHEREAS, the parties agreed to amicably resolve this matter in the public interest;

THEREFORE, the Petitioner and the Department hereby stipulate to the following terms of settlement:

1. The Department agrees that the Petitioner has demonstrated a need for additional Supplemental Funding in the amount of $475,000.

2. The Department agrees to provide Petitioner with additional Supplemental Funding in the amount of $475,000. Petitioner may anticipate revenue in the amount of $475,000 and record an accounts receivable in the 2001/2002 budget year of that same amount. Petitioner shall contact the Department of Education, Fiscal Review, before borrowing against the accounts receivable to discuss terms and conditions of any loan and to develop a mechanism for the Department to fund any interest Petitioner must pay on any loan against the accounts receivable.

3. This settlement does not waive any of the review requirements and mandated adjustments pursuant to L.2001, c. 130, including reallocation of the district's undesignated general fund balance in excess of two percent. In the event that any portion of the additional Abbott v. Burke state aid awarded pursuant to this settlement is not expended during the current fiscal year ending June 30, 2002, that portion of the additional

funding must be used to support programs and services approved by the Department of Education during the 2002-2003 school year.

4. The Commissioner shall seek from the Legislature an appropriation for the 2002-2003 budget year in the amount of $475,000, subject to any adjustments mandated by P.L. 2001, 130. The receipt of this additional Abbott v. Burke aid will occur in one-lump sum payment to be made no later than the middle of the first month of the 2002-2003 budget year, subject to the appropriations in the FY 2003 Appropriations Act, the terms of this settlement and applicable law.

5. In the event Petitioner experiences cash flow shortages during the 2001-2002 school year, the Department shall provide expeditious assistance to Petitioner to resolve such cash flow difficulties. Such assistance may include, but not be limited to, the provision of an accelerated payment schedule of Petitioner's 2001-2002 state aid.

6. Petitioner agrees to dismissal with prejudice of Petitioner's above captioned matter, AGENCY DOCKET NO. 295-7/01, OAL DOCKET NO. EDUOT 04849-01S which is currently pending before the Office of Administrative Law and the Commissioner of Education.

7. This Consent Order does not preclude Petitioner from applying for additional Abbott v. Burke state aid pursuant to N.J.A.C. 6A:24-7.1(f).

8. Resolution of this matter on the terms set forth herein shall not be construed as precedent in other pending or future litigation.

For the Petitioner,
Board of Education of the City of Asbury Park,

Dated: 12/18/01

Richard Shapiro, Esq.

For the New Jersey Department of Education:

JOHN J. FARMER, JR.
Attorney General of New Jersey

Dated: 12/18/01

Michael Lombardi
Deputy Attorney General

SO ORDERED THIS 20th DAY OF J) 2001.

H0RALEJ0SEPH MARTONE

OAL DKT. NO. EDU 4849-01
AGENCY DKT. NO. 295-7/01

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The Initial Decision, record of this matter and settlement transmitted by the Office of Administrative Law have been reviewed. Because this agency is a party to the present matter, a local "Abbott" district appeal of respondent's determination on its supplemental funding request for the 2001-2002 school year, the settlement, pursuant to *N.J.A.C.* 1: 1-19. l(c) and (d), is deemed the final decision in the matter and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/4/02

Date of Mailing: 2/4/02

35-02

LAIDLAW TRANSIT, INC.,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY, SOMERSET COUNTY SUPERINTENDENT OF SCHOOLS, RYDER STUDENT TRANSPORTATION SERVICES, INC., AND JERSEY BUS SALES, INC.,	:	**COMMISSIONER OF EDUCATION**
	:	**DECISION**
RESPONDENTS.	:	

February 4, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7827-95

AGENCY DKT. NO. 285-7/95

LAIDLAW TRANSIT, INC.,

Petitioner,

v.

FRANKLIN TOWNSHIP BOARD OF EDUCATION, RYDER STUDENT TRANSPORTATION SERVICES, INC., AND NEW JERSEY BUS SALES,

Respondents.

Robert D. Frawley, Esq., for the petitioner (Smith, Stratton, Wise, Heher & Brennan, attorneys)

Russell Weiss, Esq., for the respondent, Franklin Township Board of Education (Carroll & Weiss, attorneys)

Michael D. D'Angelo, Esq., for the respondent, Ryder Student Transportation Services, Inc.

Thomas E. Monahan, Esq., for the respondent, New Jersey Bus Services, Inc. (Gilmore & Monahan, attorneys)

Record Closed: November 5, 2001 Decided: December 18, 2001

BEFORE **ROBERT W. SCOTT,** ALJ:

On July 27, 1995, the petitioner filed an application for emergent relief seeking to avoid the bidding process for student bus transportation of the respondent, Frankin Township Board of Education, for the 1995-1996 school year. The petitioner was an unsuccessful bidder to provide said bus services and was seeking to void the bidding process, alleging that the contract for said services was improperly awarded to the respondents, Ryder Student Transportation Services and New Jersey Bus Sales. An answer was filed to the petitioner's petition and a telephone hearing was held on August 29, 1995. The undersigned considered what the parties filed, including legal briefs and affidavits, and also considered oral arguments over the telephone. At the end of that telephone hearing, the undersigned advised the parties that he was denying the petitioner's application for emergent relief and was granting the respondent's motion for summary decision. The undersigned an order on August 29, 1995, which has been attached to this initial decision, indicating the results of the telephone hearing.

It would appear that the undersigned has never issued an initial decision concluding this matter, even though said order indicated above was signed on August 29, 1995. Based upon the evidence before me, which included the submissions by the parties and their arguments, I **FIND** that the respondent, Franklin Township Board of Eduucation, did not improperly award bus transportation services to respondents, Ryder Student Transportation Services, Inc., and Jersey Bus Services Inc., for the 1995-1996 school year. I **FIND** that Franklin complied with applicable law and regulations in awarding said contract and rejecting the petitioner's bid. Franklin did not make any unlawful modification to the bid specification, which would result in compelling that the contract awarded be set aside and the bidding process reaccomplished.

As indicated, I **CONCLUDE** that the petitioner was not entitled to emergent relief nor was it entitled to a further hearing on the merits and I **DISMISS** the petitioner's petition WITH PREJUDICE.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 18, 2001
DATE

Robert W. Scott
ROBERT W. SCOTT, ALJ

Receipt Acknowledged:

12-19-01
DATE

Deborah M. Antonelli
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 20 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

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CARROLL & WEISS
3131 Princeton Pike
Bldg. lB
Lawrenceville, NJ 08648
(609) 896-4222
Attorneys for Respondent
Franklin Township Board of Ed

LAIDLAW TRANSIT, INC. Petitioner(s) **vs.**	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY **DOCKET NO.: EDU 7827-95**
FRANKLIN TOWNSHIP BOARD OF EDUCATION; SOMERSET COUNTY SUPERINTENDENT OF SCHOOLS; RYDER STUDENT TRANSPORTATION SERVICES, **INC.**; AND JERSEY BUS SALES, **INC.** Respondent(s)	:	**ORDER**

This matter having been opened to the Office of Administrative Law by Carroll & Weiss, attorneys for respondent Board of Education of the Township of Franklin, on Notice of Motion pursuant to NJAC 1:1-12.5 for an Order for Summary Decision, and the Office of Administrative Law having considered the papers submitted by counsel, and for good cause hown:

IT IS on this c2 SI/– **day of** J , 1995

ORDERED that the Petition of Appeal ints matter is hereby dismissed with prejudice.

Robert W Scaff
A.L.J.

3a

OAL DKT. NO. 7827-9S
AGENCYDKT. NO. 28S-7/9S

LAIDLAW TRANSIT, INC.,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY, SOMERSET COUNTY SUPERINTENDENT OF SCHOOLS, RYDER STUDENT TRANSPORTATION SERVICES, INC., AND JERSEY BUS SALES, INC.,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENTS.	:	

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

Upon careful and independent review of the record in this matter, the Commissioner adopts the Initial Decision for the reasons expressed therein.

IT IS SO ORDERED.•

COMMISSIONER OF EDUCATION

Date of Decision: 2/4/02

Date of Mailing: 2/4/02

• This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 ***et seq.*** and *N.J.A.C.* 6A:4-1.1 ***et seq.,*** within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

34-02

KIMBERLY ANN SHINKLE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, :MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

February 4, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4736-99
AGENCY DKT. NO. 75-4/99

KIMBERLY ANN SHINKLE,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,
Respondent.

Michael B. Berman, Esq., for petitioner (Collins & Berman, attorneys)

Dennis M. Desantis, Esq., for respondent (Destribats, Campbell, DeSantis, Magee & O'Donnell, attorneys)

Record Closed: December 12, 2001 Decided: December 19, 2001

BEFORE **JOSEPH F. MARTONE,** ALJ:

This matter was transmitted to the Office of Administrative Law on June 29, 1999, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

T) /7,200/
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

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DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 21 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

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.COLLINS & BERMAN, P.A.
18A Robbins Street
Toms River, New Jersey 08753
(732) 341-2666 * Fax (732) 341-2717
Attorneys for Petitioner

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
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KIMBERLY ANN SHINKLE	: BEFORE THE COMMISSIONER OF
	: EDUCATION OF THE STATE
Petitioner,	: OF NEW JERSEY
	:
vs.	: AGENCY DOCKET: 75-4199
	: OAL DOCKET: EDU-04736-99S
HAMILTON TOWNSHIP	:
BOARD OF EDUCATION	: STIPULATION OF SETTLEMENT
	:
Respondent.	:
	:

This matter being presented to the Commissioner of Education of the State of New Jersey as a matter in dispute by way of Petition of Appeal on or about April 14, 1999, and this matter then being transferred to the Office of Administrative Law on June 29, 1999 for hearing, the Honorable Joseph Martone, ALJ, presiding, and it appearing that the parties wish to enter into a Stipulation of Settlement to resolve all issues that have or could have come before the Commissioner of Education, it is hereby agreed and stipulated as follows:

1. The Respondent Board of Education shall immediately restore fifty (50) days to the Petitioner's personal sick day bank.

2. Petitioner waives any and all rights she may have now or in the future, in any forum wheresoever situate, to proceed against the Respondent for any claims, including but not limited to, those based on the facts underlying this Petition of Appeal and an Employee Claim Petition filed with the Division of Workers Compensation known as C.P. 99-0109532.

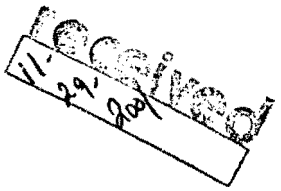
3. The Petitioner will file a withdrawn of claim with the Division of Workers

Compensation simultaneously with the instant Stipulation of Settlement.

4. Both parties shall co-operate to have the entry of the Voluntary Dismissal accepted by the Commissioner of Education and the Office of Administrative Law as well as with the Division of Workers Compensation.

Michael B. Berman, Esq.
Attorney for Petitioner
Dated: 1 1 f 1" 1

Dennis Desantis, Esq.
Attorney for Respondent
Dated: 11/10/



PREPARED BY:

By: DENNIS M. DeSANTIS, ESQ.

R E L E A S E

This Release, dated November , 2001, is given by the Releasor, **KIMBERLY ANN SHINKLE,** (referred to as "I") to the **HAMILTON TOWNSIDP BOARD OF EDUCATION,** (referred to as "You").

If more than one person signs this Release, "I" shall mean each person who signs this Release.

1. **Release.** I release and give up any and all claims and rights that I may have against you. This releases all claims, including those of which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything that has happened up to now. I specifically release the following claims:

Any and all claims or rights I may have now or in the future in any forum wheresoever situate, including, but not limited to those based on the underlying facts in a Petition of Appeal and an Employee Claim Petition filed with the Division of Workers Compensation known as C.P. 99-0109532

2. **Payment.** I have had fifty (50) sick days reinstated to my personal sick day bank as a teacher for the Hamilton Township Board of Education as payment in full for the making of this Release. I agree that I will not seek further payment from you whatsoever.

3. **Who is Bound.** I am bound by the Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

4. **Signatures.** I understand and agree to the terms of this Release. **If** this Release is made by a corporation, its proper corporate officers sign and its corporate seal is affixed.

Witnessed or Attested by:

Andrew Kasyjmer

Kimberly Ann Shinkle

KIMBERLY ANN SHINKLE

OALDKT. NO. EDU 4736-99
AGENCYDKT. NO. 75-4/99

KIMBERLY ANN SHINKLE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Stipulation of Settlement, Release and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

Date of Decision: 2/4/02

Date of Mailing: 2/4/02

36-02

L.N., on behalf of minor child, A.F.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, brother of A.F.N., challenged the Board's residency determination.

Petitioner failed to appear at the hearing, and the ALJ determined that A.F.N. is not entitled to a free education in the Board's District. The ALJ also assessed tuition for the period of ineligible attendance.

The Commissioner affirmed the decision of the ALJ, but adjusted the tuition award to the date of his decision.

February 4, 2002

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9937-00
AGENCY DKT. NO. 333-9/00

L.N. ON BEHALF OF MINOR CHILD, A.F.N.,

Petitioner,

v.

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

Respondent.

No appearance by or for petitioner

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

Record Closed: December 13, 2001 Decided: December 17, 2001

BEFORE **RICHARD McGILL**, ALJ:

L.N. (hereinafter "petitioner") filed a petition with the Commissioner of Education challenging a residency determination by the Board of Education of the South Orange and Maplewood School District (hereinafter "respondent") in regard to minor child, A.F.N. Respondent counterclaims for tuition reimbursement for an alleged period of ineligible attendance.

PROCEDURAL HISTORY

Petitioner filed his petition with the Commissioner of Education on September 26, 2000, invoking the Commissioner's authority to hear and determine controversies arising under the school laws pursuant to *N.J.S.A.* 18A:6-9. After respondent filed an answer and counterclaim on October 24, 2000, the matter was transmitted to the Office of Administrative Law on November 29, 2000, for determination as a contested case.

The matter was originally scheduled for a hearing on May 2, 2001. That hearing was adjourned at respondent's request, because respondent's witness was unavailable due to medical reasons and because petitioner had not responded to discovery requests. The hearing was rescheduled for December 12, 2001, at the Office of Administrative Law in Newark, New Jersey, and notices were sent to both parties.

On December 5, 2001, respondent filed a motion to dismiss the petition and to grant the counterclaim. Respondent also requested an expedited schedule for disposition of the motion pursuant to *N.J.A.C.* 1:1-12.2(g). By letter dated December 6, 2001, the undersigned granted the request for an expedited schedule and ordered that petitioner file his response to the motion by December 11, 2001, and that the parties present oral argument in regard to the motion on December 12, 2001, which was the scheduled hearing date in this matter. The parties were advised to have their witnesses present and to be ready to proceed with the hearing on December 12, 2001.

No response to the motion was received from petitioner, either by December 11, 2001, or thereafter, and petitioner did not appear for the hearing on December 12, 2001, or provide any explanation for the nonappearance. Respondent submitted proofs with respect to its counterclaim for tuition reimbursement, and the record closed on December 13, 2001, after giving L.N. an additional day to provide an explanation for his nonappearance.

ISSUES

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

FACTS

The only witness in the proceeding was Nancy Bradley, who is employed by respondent as its district registrar. Her testimony was fully credible and is accepted as true. Based upon the evidence presented at the hearing, I **FIND** as follows. Ms. Bradley took petitioner's application to enroll A.F.N. in respondent's public schools. The application was denied because most questions on the application had not been answered and there was no demonstration of family or economic hardship. After the petition in this matter was filed on September 26, 2000, A.F.N. was admitted to respondent's Columbia High School on October 2, 2000. A.F.N. completed the 2000-2001 school year and began the 2001-2002 school year at Columbia High School, where he is still a pupil. A.F.N. attended respondent's public schools for 164 days through the end of the 2000-2001 school year. At a per diem rate of $50.00, the tuition for the 2000-2001 school year is $8,200.00. Respondent calculated tuition for the 2001-2002 school year on the assumption that A.F.N.'s attendance at Columbia High School will end on January 31, 2002. This date allows time for a final decision in this matter. Using September 5, 2001, as a starting date and January 31, 2002, as an ending date, A.F.N. will have attended respondent's public schools for ninety days during the 2001-2002 school year. At a per diem rate of $54.37, the tuition for the 2001-2002 school year is $4,893.00.

LAW AND ANALYSIS

Attendance at public schools shall be free to any person who meets the requirements set forth in *N.J.S.A.* 18A:38-1. Under certain circumstances, a child who is kept in the home of a person who is domiciled in a school district may attend the public schools free of charge.

N.J.S.A. 18A:38-1(b)1. If the board of education denies admission to the child, the resident may contest that determination before the Commissioner of Education. *Ibid.* In the proceeding before the Commissioner of Education, the resident has the burden of proof by a preponderance of the evidence to establish that the child meets the requirements for eligibility. *Ibid.* If the evidence does not support the claim, the resident shall be assessed tuition for the student prorated to the time of the student's ineligible attendance in the school district. *Ibid.*

Here, petitioner did not appear for the hearing and did not provide any explanation for the nonappearance. Under the circumstances, petitioner failed to carry the burden of proof that A.F.N. meets the requirements to receive a free education in respondent's public schools. Therefore, I **CONCLUDE** that the petition should be dismissed.

It follows from the dismissal of the petition that A.F.N. was ineligible for attendance at respondent's public schools during the period in question. Therefore, petitioner must be assessed tuition for the period of ineligible attendance. Based upon the findings above, I **CONCLUDE** that petitioner should be assessed tuition in the amount of $13,093 ($8,200 + 4,893) for the period of A.F.N.'s ineligible attendance.

Accordingly, it is **ORDERED** that:

1. The petition in this matter is dismissed.

2. The counterclaim for assessment of tuition in the amount of $13,093 is granted.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Dec. 17, 2001
DATE

RICHARD McGILL, ALJ

Receipt Acknowledged:

12/21/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 31 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

WITNESS LIST

For petitioner:

None

For respondent:

Nancy Bradley

EXHIBIT LIST

None

OAL DKT. NO. EDU 9937-00
AGENCY DKT. NO. 333-9/00

L.N., on behalf of minor child, A.F.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner failed to demonstrate that A.F.N. is entitled to attend school in the Board's District, free of charge, pursuant to *N.J.S.A.* 18A:38-1b(1).

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein. The Commissioner directs that petitioner remit to the Board tuition in the amount of $8,200 for the 2000-2001 school year, together with $54.37 per day from September 5, 2001 until the date of this decision.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/4/02
Date of Mailing: 2/4/02

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

57-02

37-02

S.G. AND N.G., E.N. AND F.N., on behalf of minor children, G.G., M.G. AND E.G.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF VOORHEES, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parents and relatives challenged the Board's residency determination.

The ALJ determined that petitioners suffered no hardship entitling the children to attend school in the Board's District and that the children were not domiciled in the District. The ALJ recommended dismissal of the petition and payment of tuition by petitioners for the period of ineligible attendance.

The Commissioner affirmed the decision of the ALJ.

February 4, 2002

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 679-01

AGENCY DKT. NO. 35-2/01

S. AND N.G., AND E. AND F.N.,

ON BEHALF OF MINOR CHILDREN,

Petitioners,

v.

VOORHEES TOWNSHIP

BOARD OF EDUCATION,

Respondent.

John C. Penberthy, III, Esq., for petitioners

William C. Davis, Esq., for respondent Voorhees Township Board of Education (Davis & Mendelson, attorneys)

Record Closed: August 24, 2001 Decided: December 17, 2001

BEFORE **DANIEL B. MC KEOWN,** ALJ (t/a):

INTRODUCTION

S. and N. G. (petitioners) are the parents of three school age children who had been enrolled in the Voorhees Township schools operated by the Voorhees Township Board of Education (Board) until 1999 when petitioners and children took up residence in Israel. Upon their departure, the family leased their Voorhees Township home. Less than a year later, the

family left Israel and returned to Voorhees Township. Upon their return, the lease on their Voorhees home had not expired. Petitioners allege the children lived with S.G.'s sister, petitioner F.N. and her husband, E.N., the children's aunt and uncle in Voorhees Township as if the children were their own and were, therefore, domiciled in Voorhees Township and entitled to a free public school education. E. and F. N. are also named petitioners in this matter. The Board maintains petitioners failed to establish the children were domiciled in Voorhees Township and entitled to be enrolled in its schools tuition free under *N.J.S.A.* 18A:38-1. The Board counterclaims and demands petitioners pay tuition for the time the three children were educated in its district while not being domiciled in the Township.

After the Commissioner transferred the matter to the Office of Administrative Law April 6, 2001 as a contested case under *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F –1 to –13, a hearing was scheduled and conducted June 26, 2001 at the Office of Administrative Law, Mercerville. After the hearing, the parties filed written summaries and petitioners filed additional documents. The record closed September 15, 2001 upon the submission of a document (P-6) petitioner argues is relevant to the issues presented. An extension of time within which to file this initial decision has been granted.

FACTS

The competent, credible evidence in the record, and reasonable inferences drawn therefrom, establishes the following facts. Petitioners have three children, two of whom attended the Board's Kresson elementary school and the other attended the Board's middle school, while the family resided at their Flamingo Court address in Voorhees Township. Sometime prior to the beginning of the 1999-2000 academic year, S.G. states in his verified petition of appeal that he and his family decided they would live in Israel for three years where petitioner, N.G., says she has many relatives. However, S.G. testified at hearing he and his family intended to permanently live in Israel. Prior to their departure for Israel, petitioners leased their Flamingo Court home for a two-year period, and they removed their children from the Board's schools.

After spending one year abroad, petitioner S.G. testified they returned to this country because his mother, who lives in Cherry Hill, was ill and because of the instability in the Middle East. But, their Voorhees Township residence was still under the lease they entered prior to their departure in 1999. Petitioners took up residence with petitioner S.G.'s mother who lived on Sandringham Terrance in Cherry Hill. The mother was ill with cancer at the time and has since died. (P-6) When in late August 2000 petitioners attempted to reenroll their children at the Board's schools while living in Cherry Hill but using their former Voorhees Township Flamingo Court address, they were told another family enrolled their children using that same address. It was at that point petitioners explained to Board officials that they had leased their Voorhees house prior to their departure for Israel for a three-year stay, but returned after only one year. When petitioners could not immediately establish domicility in Voorhees as the result of having leased their house and then living with S.G.'s mother in Cherry Hill, they left the Voorhees schools without reenrolling their children.

On August 28, 2000 petitioners appeared at the Board's Signal Hill elementary school to enroll their children. This time, petitioners brought with them a lease (R-4) purportedly executed between them and S.G.'s sister, F.N, and her husband, E.N., who are domiciled in Voorhees Township on Knottingham Terrace. Petitioner testified that when he learned the Voorhees school district required him to have an address in the Township to enroll his children, petitioner specifically testified he asked his sister if his children could stay with her and her husband in their Voorhees Township home in order to attend the Voorhees schools. Petitioner did not testify he asked his sister if he and his family could live with her and her family. While the signatures of petitioners appear on the lease, there are no signatures of the N.'s on the document.

The sister, F.N. suggested a lease be executed between the parties. The lease (R-4A) purports to convey permissive use of the premises owned by the N.'s to S. and N.G. beginning September 1, 2000 and ending August 31, 2001. While the document contains the signatures of S. and N.G., it does not contain the signatures of either F. or E.N. According to the 'lease' provisions, petitioners S. and N.G., were to make a $2,250 security deposit, although petitioner testified he was not employed and had no income at the time. Despite his testimony he had no

income, he simultaneously testified he cannot recall if he made the security deposit. He says he does recall he paid only one month's rent. While the lease provisions impose upon S. and N.G. the obligation to paint and fix the house, be responsible for lawn cutting and snow removal, and for the payment of all utilities, S.G. and his family moved into the house still occupied by his sister and her husband. Both petitioner S.G. and petitioner E.N., brothers-in-law, claim both families shared the one house. There is nothing in the purported lease addressing two families sharing the one premises. Nevertheless, the terms of the lease impose the obligation upon petitioners S. and N.G. to assume all costs associated with the house as if it were their house all the while.

On the strength of the purported lease which represents petitioner and his family were residing on Knottingham Street, Voorhees Township, petitioners' children were reenrolled free of charge in the Voorhees Township Public Schools. However, petitioner testified that during the first month of the asserted lease, September 2000, he and his wife, along with F. and E.N., determined the house was too small for everyone. Consequently, petitioners testified they moved to his mother's house in Cherry Hill, while his children remained at the N. residence and attended the Voorhees schools. There is no evidence in this record to establish that either petitioners or the N.'s advised Voorhees Township school authorities of this change in living arrangements by which petitioners S. and N.G. were living in Cherry Hill, while the children were ostensibly living in Voorhees Township.

Sometime in October, one of petitioners' children was referred to the Board's child study team to determine eligibility for special education and related services. During the process of the referral, the Signal Hill school principal, Sheila Ferrari, learned that petitioners' telephone number listed on school records had an exchange normally associated with Cherry Hill residents. The principal asked petitioner about the Cherry Hill exchange and, according to notes (R-1) maintained by the principal which **I FIND** to be reliable in their accuracy, petitioner explained that when they moved to their new leased address in Voorhees Township, the telephone company simply transferred the number they had earlier been assigned while living in Cherry Hill with his mother. Obviously, petitioner intended to convey the false fact that he and his family were

residing at the Knottingham address in Voorhees Township. Upon further investigation, the principal discovered petitioners were listed in the telephone book as being residents of the Sandringham address in Cherry Hill; not in Voorhees Township as petitioners represented when they submitted a copy of the lease document. The telephone book also listed the N.'s as residents of the house on Knottingham Street. The principal's notes state that it was then reported to her by neighbors who live on Knottingham that they observed a green van picking up and dropping off petitioners' children at the Knottingham address before and after school.

The Voorhees Township school attendance officer, who testified he spent at least three days of personally observing the school coming and going of petitioners' children, filed a report (R-4) in which he states:

> [O]n several days during the first two weeks of November [2000] [petitioners' children] were observed leaving the residence at * * * Sandringham Terrace, Cherry Hill and being driven to school in Voorhees. The middle school student would be dropped off at the school and the Signal Hill students would be driven to Knottingham Drive in Voorhees near the intersection of Danforth Drive. The children would wait in the vehicle until the arrival of the school bus. They then would leave their vehicle and board the school bus. At no time did they go to the house at * * * Knottingham Dr. The family would leave the Cherry Hill residence at approximately 8:15 am in a green Quest van * * *. The van is being driven by a female.

Petitioner S.G. testified he and his wife own a green van, which is usually driven by his wife. The principal, having read the attendance officer's report and having talked with neighbors on Knottingham Terrace, and having learned of petitioners' telephone listing, formed the judgment that it was more likely than not petitioners were not domiciled in the geographic boundaries of the Voorhees Township school district. She sent petitioners a certified letter sometime in November to the Knottingham address they claimed as their residence and the letter was signed for by E.N. Petitioner E.G. came to the school on November 28, 2000 and talked with the principal regarding his residence. According to the principal's notes (R-1):

> [S.G.] told me that 'he wouldn't lie' to me, that he and his wife lived in Cherry Hill but the children were 'domiciled' (his word) at * * * Knottingham. He said

> they have a room and clothes and school books at that address and that they do not have a room or clothes at the Cherry Hill address. He said that he drives at 5:00 AM each day to pick up the children and bring them back to Cherry Hill so he can have time with them. Then his wife drives them to school. I asked about why she picks them up after school – he did not answer – changed the subject. He offered to pay for the investigator to come back and watch him leave the house in Cherry Hill at 5:00 AM to go get his children.

The principal explained to petitioner S.G. that if his children were residing at the Voorhees Township address with their aunt and uncle, an affidavit would have to be signed by the relatives stating they were supporting the children *gratis* for them to attend the Voorhees schools free of charge. See, *N.J.S.A.* 18A:38-1 The inference is drawn that sometime after the November meeting between the principal and petitioner S.G., and without affidavits being submitted, the Board made a demand for tuition because it determined petitioners were not domiciled within its geographic boundaries. Petitioners ultimately filed the verified petition of appeal seeking a declaration that the children are entitled to tuition-free attendance at the Voorhees schools on February 13, 2001.

After the Commissioner of Education transferred the matter to the Office of Administrative Law on March 2, 2001, Board counsel represents he was advised by petitioner's counsel that petitioners intended to sign the affidavit as provided for in the statute, and as cited above, which would effectively settle the matter without the need for a hearing. Petitioners' counsel failed to submit the affidavits from petitioners. In his post-hearing summation, counsel asserts the Board failed to establish the precise time the proposed affidavits were served upon his clients, while simultaneously asserting his clients did not file the requested affidavits because the Board failed to guarantee his clients privacy. The case did not settle, and was set down for hearing by the undersigned on a preemptory basis for petitioners' counsel failure to return telephone calls. The matter was then heard June 7 and June 26, 2001.

At hearing, petitioner S.G. testified on cross-examination he does not recall ever having seen, though he also testified in the same breath that he may have seen, a proposed affidavit that mirrors the cited statute sent his counsel by Board counsel, while on redirect examination he stated he does recall signing an affidavit provided him by his attorney. It is noted petitioners'

counsel has not submitted any relevant affidavits to this forum for petitioners' children to attend the Voorhees schools free of charge. Petitioner E.N. testified he did sign an affidavit, presumably upon his oath, that he was supporting the children as if they were his own. Neither petitioner E.N. nor petitioners' counsel filed such an affidavit with this forum.

Petitioner S.G. urges that his children were residing at the Knottingham residence in Voorhees Township and were thus entitled to a free public school education by the Board. He says it was always his intention to return to his residence in Voorhees Township, even at the time he left for Israel. But, this claim is contradicted by his own testimony when he explained he intended to live permanently in Israel.

S.G. claims that while he has no knowledge of any bills paid by his sister, F.N. or her husband E.N., on behalf of his children while they were living in their home, he believes the N.'s did purchase food and clothes for them. While S.G. acknowledges his children did come to Cherry Hill occasionally to be with him and his wife, their mother, he explains all their clothes, beds, and their computer remained at the Knottingham residence. S.G. testified that one of the children had dance class after school and was taken there by a friend, and his wife picked up the other two children for Hebrew lessons after school. There is a writing (P-1) in the record purporting to be the statement of the friend verifying he did take one of the children to dance class after school. The writing contains a signature not otherwise witnessed by anyone, and the friend did not appear at hearing for testimony. Another statement (P-4) from a neighbor of the N.'s was submitted in support of E.G.'s position that his children lived at the N.'s residence. This statement contains a signature not otherwise witnessed by anyone, and the person did not appear at hearing for testimony.

It is agreed between the parties that petitioners S. and N.G. retook possession of their Voorhees Township house on Flamingo Court and reenrolled the children in the Voorhees schools with this address (R-2). This reenrollment was effective May 14, 2001. Nevertheless, S.G. testified they took possession of their Flamingo Court address on April 16, 2001 and that any tuition he may owe should be calculated only until April 16.

E.N. testified that while in his house, E.G.'s children used the guest room when he and his wife left to live in his mother's house in Cherry Hill. After school, E.N. testified the children entered the house through the garage door with a lock combination. He testified that the children remained at his house overnight and occasionally would spend overnight with their parents, S. and N.G., at Cherry Hill. When this happened, E.N. testified, it would be for a maximum of ten days. E.N. testified he did purchase the children clothing and food. He gave as an example regarding the purchase of clothing that he purchased snow boots for one of the children during the winter months. He says he taught the children martial arts, and he stored their possessions for them in his house. E.N. did claim the children as dependents on his federal income tax return (P-7). It is noted that S.G. prepared E.N.' tax return as his accountant.

Finally, the Board presented the testimony of John Gianuito, a retired assistant superintendent of schools who is presently working with the Bowman and Company auditing firm. Mr. Gianuito testified that based on the established cost per pupil in the Voorhees Township School District for 2000-2001, the tuition demand made by the Board upon petitioners S. and N.G. for their three children who were not domiciled in the district between the opening of school through May 13, 2001 is accurately determined to be a total of $14, 432.

ANALYSIS

The issue in the matter is whether petitioners' children were domiciled in the Voorhees Township school district between the opening of school for the 2000-20001 academic year and through that period of time when either petitioners retook possession of their Flamingo Court residence or reenrolled their children on May 13, 2001 in the Voorhees schools using that address. *N.J.S.A.* 18A:38-1 provides that public schools shall be free to any person domiciled within the school district. Paragraph (b), subsection (1), of the statute provides that attendance shall also be free to:

> Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such

> other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board s sworn statement that he is domiciled within the district and is supporting h e child gratis and will assume all personal obligations for the child relative to school requirements and that intends so to keep and support the child gratuitously for a longer time than merely through the school term * * * an upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district.
>
> Subsection (d) of the same statute provides attendance shall be free to:
>
> Any person whose parent or guardian, even though not domiciled within the district, is residing temporarily therein, but any person who has had or shall have his all-year dwelling place within the district for one year or longer shall be deemed to be domicile within the district for the purposes of this section.

Domicile is the place of a person's abode where he or she has the present intention of remaining and to which if absent, he intends to return. *Mercadante v. City of Paterson*, 111 *N.J. Super.* 3, 39 (Ch.Div.1970), aff'd, 58 *N.J.* 112 (1971). A person may have multiple residences, but may have only one true domicile at a time. Therefore, the residence may coincide with domicile, but does not alone determine domicile. *State v. Benny*, 20 *N.J.* 238, 251 (1955). Domicile is an issue of fact and must be determined on a case-by-case basis. *Lea v. Lea*, 18 *N.J.* 1, 7 (1955). Persuasive evidence of actual domicile may include recitals as to domicile in a will, trust, tax return or other formal document, as well as statements to others as to domicile. But, the weight that attaches to such indicia other proofs support such domicile and are not individually or collectively intended to deceive. See, *Matter of Unanue*, 255 *N.J. Super.* 362 (Law Div. 1991). Finally, a choice of domicile by a person, irrespective of his or her motive, will be honored by the court, provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile. *Id.* at 376.

In this case, E.G.'s testimony reveals he and his family intended to make Israel their permanent home in 1999. Upon their departure for Israel, E.G. made the decision to lease their

Voorhees Township home because, inferentially, they did not then have the intention of returning. When the climate in Israel was found not to be what was expected, and in light of mother's declining health, E.G. and family decided to return to this country. Apparently, E.G. failed to consider the consequences of the children's enrollment in the Voorhees Township schools when he entered the lease on the Flamingo Court property because he unsuccessfully attempted to enroll his children using that his address as if it were his residence. Upon learning that he had to be domiciled within the Voorhees Township geographic boundaries for his children to attend the schools free, he did request his sister, F.N., to allow them to live with her so they would be residing in Voorhees.

But, in order to establish domicility in Voorhees Township, **I CONCLUDE** E.G. attempted to create the illusion of domicility by having the purported lease prepared which was intended to convey that he and his family were, in fact, residing at the Knottingham address-not just his children. I **FIND** E.G.'s testimony incredulous that he could not recall if he made a $2,500 security deposit in the circumstances of not having gainful employment and no source of income. **I FIND** not worthy of belief the provisions of the purported lease by which E. and N.G. were to assume all obligations as if the house were theirs, while having the true owners, the N.'s, also residing in the same dwelling. The inference is drawn that no such payment was made because the purported lease was never intended by the parties to be a legally enforceable agreement between them. Rather, the document was intended merely to convey the illusion of E. and N.G. of having a domicile in Voorhees so their children could attend that district's school free. It is doubtful on this record whether E. and N.G. ever spent one night in the Knottingham house.

E.G. undermines his own credibility by his testimony that the N.'s supported his children as if they were their own but has no knowledge of what it is the N.'s did in this regard. That the N.'s claimed the children as dependents on their income tax returns does not alter the lack of credibility I attach to the evidence in this record that the children were supported by the N.'s. E.G. undermines his credibility when he testified he could not recall if he had ever seen an affidavit he was to sign showing his children were in the care of the N.'s because he could not

provide that which is necessary, while almost in the next breath testifying that he did sign such an affidavit. It is noted that petitioners' counsel asserts in his summation filed after the hearing that affidavits were not submitted because the Board failed to guarantee privacy, which is the first time in the entire proceeding 'privacy' was ever attempted to be raised as an issue. Counsel does not specify the information sought in the affidavits he expected to be protected by a guarantee. In light of the fact the affidavits sought only that information specified in the statute, such an argument, without more, is specious.

The fact is neither set of petitioners filed the affidavits requested and, consequently, the adverse inference is drawn that the children, to the extent they may have, **I CONCLUDE**, occasionally stayed at the Knottingham address, did so with the acquiescence of the N.'s for the purpose of attending the Voorhees schools free of charge. Petitioners' reliance on subsection (d) of the statute is not relevant in these facts because petitioners E. and N.G. did not have a residence in Voorhees Township. While they may have resided at the Flamingo Court address for a number of years, they vacated that address when they moved to Israel.

CONCLUSION

In light of the foregoing, **I CONCLUDE** petitioners caused their children to be enrolled in the Voorhees Township schools under the guise of their being domiciled within the district by relying upon a purported lease for the Knottingham residence. **I FURTHER CONCLUDE** that to the extent the children resided at the Knottingham residence, they were there only for the purpose of attending the Board's schools without paying tuition. There is no hardship involved in this case; rather, the case involves only E. and N.G.'s efforts to have their children attend the Voorhees schools free of charge without being domiciled within the district. Their efforts in this regard have failed. The record supports **I CONCLUDE** the demand made by the Board for tuition from petitioners S. and N. G.

While the Board has a demand for tuition in the amount of $14, 432 against petitioners S. and N.G. for their three children attending their schools without being domiciled within the

district, tuition under *N.J.S.A.*19A:38-1 for children not domiciled within the school district is to be calculated on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance. The record does not reveal how the Board calculated its tuition demand from petitioner. Therefore, the Board is directed to calculate the amount of tuition petitioners owe from the first day of September 2000 when pupils began regular attendance through the May 13, 2001 when petitioners S. and N.G. caused their children to be properly enrolled using their proper address. Petitioner is directed to pay the amount of tuition as calculated by the Board under the statutory formula.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 17, 2001
DATE

Daniel B. McKeown by DL
DANIEL B. MCKEOWN, ALJ, t/a

Receipt Acknowledged:

12-20-01
DATE

Deborah A. Gutmann/CA
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 20 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/lam

DOCUMENTS IN EVIDENCE

P-1 Written Statement - Unverified

P-2 Memorandum to petitioners from lessees

P-3 Bank Statement

P-4 Written Statement - Unverified

P-5 Income Tax Return

P-6 Certified Death Certificate

P-7 Certified Tax Return

R-1 Principal's Notes

R-2 Change of Address

R-3 Deed

R-4 Report of Attendance Officer

R-4A Lease

OAL DKT. NO. EDU 679-01
AGENCY DKT. NO. 35-2/01

S.G. AND N.G., E.N. AND F.N., on behalf of minor children, G.G., M.G. AND E.G.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF VOORHEES, CAMDEN COUNTY,	:	
RESPONDENT.	:	

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

Upon careful and independent review of the record, and based upon the Administrative Law Judge's (ALJ) credibility determinations, the Commissioner concurs that petitioners have failed to meet their burden of proving that G.G., M.G. and E.G. were entitled to a free education in the Board's District from the start of school in September, 2000, until May 13, 2001. *N.J.S.A.* 18A:38-1 *et seq.*

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein. Petitioners shall remit to the Board tuition as calculated in accordance with law. [1]

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 2/4/02

Date of Mailing: 2/4/02

[1] The pertinent statute provides that appeals of "affidavit student" eligibility determinations must be filed by the resident keeping the student. *N.J.S.A.* 18A:38-1b(1). Further, "If in the judgment of the commissioner the evidence does not support the claim of the resident, he shall assess *the resident* tuition for the student prorated to the time of the student's ineligible attendance in the district." (emphasis added) (*Ibid.*)

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

37-02

EDU # 679-01
C's # 37-02
SB # 15-02

S.G. and N.G., E.N. and F.N., on behalf of minor children, G.G., M.G. and E.G.,	:	
PETITIONERS-APPELLANTS,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF VOORHEES, CAMDEN COUNTY,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, February 4, 2002

For the Petitioners-Appellants, John C. Penberthy, III, Esq.

For the Respondent-Respondent, Davis & Mendelson
(William C. Davis, Esq., of Counsel)

On March 11, 2002, the petitioners filed the instant appeal to the State Board of Education from a decision of the Commissioner of Education dated February 4, 2002, in which he rejected the petitioners' claim that their children were entitled to a free public education in Voorhees and directed the petitioners to pay tuition to the Voorhees Board for the period of their children's ineligible attendance in the district.

On March 14, 2002, the petitioners were advised that their notice of appeal was deficient in that it did not include a copy of the Commissioner's decision as required by N.J.A.C. 6A:4-1.7(c). They were given until March 20 to correct this deficiency.

On March 21, 2002, the counsel for the petitioners submitted the synopsis page of the Commissioner's decision. On March 22, counsel for the petitioners was reminded in a telephone call from the State Board Appeals Office that the regulations required him to submit a complete copy of the Commissioner's decision. Despite assurance from petitioners' counsel that a copy of the Commissioner's decision would be sent, he still has not submitted that decision.

Nor have the petitioners filed a brief in support of their appeal. Pursuant to N.J.A.C. 6A:4-1.11(a), the petitioners' appeal brief was due on April 1, 2002, 20 days after they filed their notice of appeal. The petitioners, however, failed to file a brief by that date. By letter dated April 4, 2002, the counsel for the petitioners was notified of his failure to file a brief and informed that this matter was being referred to the Legal Committee of the State Board for consideration of the petitioners' failure to perfect the appeal.

The petitioners have still failed to file a brief in support of their appeal, a month after the filing deadline. Nor have they offered any explanation for their failure to file or requested an extension of time for such filing. As a result, we dismiss the appeal in this matter for failure to perfect. N.J.A.C. 6A:4-1.12(a). See Paszamant v. Board of Education of the Borough of Highland Park, decided by the State Board, April 1, 1992, aff'd, Docket #A-4812-91-3 (App. Div. 1993).

May 1, 2002

Date of mailing MAY 03 2002

38-02

IN THE MATTER OF THE TENURE	:	
HEARING OF KRISTA REYNOLDS,	:	
SCHOOL DISTRICT OF THE BOROUGH OF	:	COMMISSIONER OF EDUCATION
HOPATCONG, SUSSEX COUNTY.	:	DECISION
	:	

February 1, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7443-01
AGENCY DKT. NO. 322-8/01

IN THE MATTER OF THE TENURE HEARING OF KRISTA REYNOLDS, SCHOOL DISTRICT OF THE BOROUGH OF HOPATCONG, SUSSEX COUNTY

Robert Tosti, Esq., for petitioner (Rand, Algeier, Tosti & Woodruff, attorneys)

Nancy I. Oxfeld, Esq., for respondent (Oxfeld Cohen, attorneys)

Record Closed: January 2, 2002 Decided: January 9, 2002

BEFORE **MARGARET M. MONACO,** ALJ:

This matter involves tenure charges of conduct unbecoming a teaching staff member certified by the Hoptacong Board of Education (the "Board") against Krista Reynolds under the provisions of the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10, *et seq.*

Krista Reynolds is a tenured teaching staff member employed by the Board. By resolution adopted on August 14, 2001, the Board found the existence of probable cause to certify tenure charges against Ms. Reynolds which, if true, are sufficient to

warrant dismissal or a reduction in salary. The Board further resolved to suspend Ms. Reynolds without pay pursuant to *N.J.S.A.* 18A:6-14.

The incident that gave rise to the tenure charges involves a school sponsored trip to Germany in April 2001 which Ms. Reynolds chaperoned. Basically, the Board alleged that Ms. Reynolds failed to properly supervise the students in her charge (by allowing them to leave the hotel unsupervised at night, failing to assure that they remained in their hotel rooms after their curfew, failing to insure that they did not have alcoholic beverages in their hotel rooms and failing to supervise their activities on the flight to and from Germany), and that this lack of supervision continued after Ms. Reynolds was made aware that the students were using their unsupervised time to visit nightclubs where they consumed alcoholic beverages and became intoxicated (First Charge); that on one night students were deadbolted in their rooms making it impossible for the students to exit their rooms in the event of a fire or emergency (Second Charge); and that Ms. Reynolds failed to obtain proper medical attention for students who became ill on the trip and failed to follow proper protocol relative to notifying the parents in connection therewith (Third Charge).

Under letter dated August 14, 2001, the Board filed its written tenure charges, supporting evidence and a certification of determination with the Commissioner of the Department of Education (Department) together with proof of service upon Ms. Reynolds. The Department acknowledged receipt of the certified tenure charges on August 16, 2001. Ms. Reynolds filed an Answer and Counterclaim which the Department received on August 23, 2001. The Department subsequently notified the parties, by letter dated August 24, 2001, of its referral of the matter to the Office of Administrative Law (OAL) where, on August 27, 2001, it was filed for hearing pursuant to *N.J.S.A.* 18A:6-16.

A prehearing conference was held on September 13, 2001. A prehearing order was thereafter entered on September 27, 2001 establishing discovery deadlines in accordance with the required time periods, as may be extended for a period of up to

thirty days, and scheduling the hearing to commence within thirty days of the end of the discovery period (as extended) on December 10, 2001.

The hearing commenced on December 10, 2001 and continued on December 11 and 12, 2001. The parties appeared at the OAL on December 13, 2001 and, at their request, the hearing scheduled for that date was adjourned to provide the parties additional time to finalize a proposed settlement. On December 13, 2001, the terms of a proposed settlement, which were subject to approval by the Board, were placed on the record. Counsel for both parties further set forth the reasons why a settlement would be in the public interest. Ms. Reynolds testified that she understood and voluntarily agreed to the aforesaid terms of settlement. On December 19, 2001, counsel appeared at the OAL and noted on the record that the Board had adopted a resolution approving the proposed settlement set forth on the record on December 13, 2001. Counsel, thereafter, forwarded a Settlement Agreement, along with the resolution of the Board approving the settlement, which the OAL received on January 2, 2001 and are attached hereto and incorporated in this Initial Decision.

Both parties have agreed to a proposed settlement subject to approval by the Commissioner. In accordance with *N.J.A.C.* 6A:3-5.6(a),

> Once tenure charges are certified to the Commissioner, such charges may be withdrawn or settled only with the Commissioner's approval. Any proposed withdrawal or settlement, whether submitted to the Commissioner or to the ALJ, shall address the following standards established by the State Board of Education in the matter entitled *In re Cardonick,* State Board decision of April 6, 1983 (1990 School Law Decisions (S.L.D.) 842, 846):
>
> 1. Accompaniment by documentation as to the nature of the charges;
>
> 2. Explication of the circumstances justifying settlement or withdrawal;
>
> 3. Consent of both the charged and charging parties;

4. Indication that the charged party entered into the agreement with a full understanding of his or her rights;

5. A showing that the agreement is in the public interest; and

6. Where the charged party is a teaching staff member, a showing that he or she has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

Based upon a review of the record, including the covenants and agreements set forth in the attached Settlement Agreement, I **FIND** that the proposed settlement is consistent with the public interest for the following reasons:

1. Krista Reynolds was hired as a teaching staff member by the Board on or about September 1, 1978. With the exception of maternity leaves, Ms. Reynolds has been employed by the Board since that date, as a teacher of reading, English, basic skills and German, without incident or disciplinary record through the time of the incident giving rise to the tenure charges in April 2001.

2. Prior to the field trip to Germany led by Ms. Reynolds in April 2001, Ms. Reynolds had led over five overnight ski trips to Vermont during the 1980's and an overnight field trip to Germany in 1999 without incident.

3. The parties agree that the sworn testimony of the students at the hearing was in many respects divergent from the statements which the students had placed into writing concerning the trip and upon which the Principal at Hopatcong High School and the Board had relied in filing and certifying the charges. As a result of the testimony of these students, the Board has concluded that the proofs it presented may not have established a *prima facie* case with respect to portions of the tenure charges as more particularly described in the attached Settlement Agreement.

4. From the Board's viewpoint, the settlement is in the public interest in that it represents a fair and equitable resolution of the charges since, while the facts as testified to by the students at the hearing constitute inappropriate conduct on the part of Ms. Reynolds (*i.e.,* she failed to assure that the students under her charge refrained

from the use of alcoholic beverages), the evidence did not support all of the allegations in the tenure charges and does not merit termination; Ms. Reynolds has agreed to accept a discipline for her less than exemplary conduct; and such conduct was an aberration in an otherwise long term satisfactory career with the Board.

5. Board counsel estimates that, if the matter continued, an additional hearing day would be required and further expenses would result relating to securing transcripts and preparing briefs.

6. Under the proposed terms of settlement, Ms. Reynolds consents to the withholding of her increment as voted upon and approved by the Board on the same date as it certified the tenure charges, *i.e.,* August 14, 2001. At the time of the certification of the charges, the Board suspended Ms. Reynolds without pay for 120 days pursuant to *N.J.S.A.* 18A:6-14. Ms. Reynolds agrees not to contest that suspension. In addition, Ms. Reynolds will be subject to an additional suspension without pay through January 31, 2002.

7. If the matter continued, it is unlikely that a final decision would be rendered prior to March 2002. Meanwhile, Ms. Reynolds would be entitled to a continuation of her pay following the expiration of the 120 day period in accordance with the provisions of *N.J.S.A.* 18A:6-14.

8. Before entering into this agreement, Ms. Reynolds fully understood her rights and had adequate opportunity to consult with legal counsel.

9. Under the terms of the proposed settlement there is no loss of position. As such, the provisions of *N.J.A.C.* 6A:3-5.6(a)6 regarding the charged party's understanding of the Commissioner's duty to refer tenure determinations resulting in a loss of position to the State Board of Examiners for a possible suspension or revocation of certification is not implicated.

10. On December 18, 2001, the Board adopted a resolution approving the terms of the proposed settlement placed on the record in this matter as memorialized in the attached Settlement Agreement.

11. The parties have voluntarily agreed to the settlement as evidenced on the record and/or as evidenced by their signatures or the signatures of their representatives.

12. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that the terms of the settlement are in the public interest. I further **CONCLUDE** that the settlement agreement meets the requirements of *N.J.A.C.* 6A:3-5.6 and that the settlement should be approved.

Accordingly, it is **ORDERED** that the parties comply with the settlement terms and that these proceedings are hereby concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

January 9, 2002
DATE

MARGARET M. MONACO, ALJ

Receipt Acknowledged:

January 15, 2002
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 18 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb/jb

OXFELD COHEN, LLC
50 Commerce Street
Newark, New Jersey 07102
(973) 642-0161
Attorneys for Respondent

RECEIVED
STATE OF NEW JERSEY
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DEC 33 9 01 AM '01

BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY AND THE
OFFICE OF ADMINISTRATIVE LAW
OAL DKT. NO. EDU 7443-01
AGENCY DKT. NO. 322-8/01

IN THE MATTER OF THE TENURE HEARING	:	
OF KRISTA REYNOLDS, SCHOOL DISTRICT OF	:	SETTLEMENT AGREEMENT
THE BOROUGH OF HOPATCONG, SUSSEX	:	
COUNTY.	:	

WHEREAS Krista Reynolds and the Hopatcong Board of Education have amicably agreed to resolve their differences, the parties hereby stipulate and agree that the matter entitled In The Matter of the Tenure Hearing of Krista Reynolds, School District of the Borough of Hopatcong, Sussex County, OAL DKT. NO. EDU 7443-01, Agency Dkt. No. 322-8/01 shall be settled upon the terms and conditions stated herein; and

WHEREAS the Board members of the Hopatcong Board of Education, having the authority to act on behalf of the Board of Education, have agreed after due consideration to settle the decision made by the Board in this matter related to the employment of Krista Reynolds in connection with her duties and responsibilities of a teaching staff member and the decision to certify tenure charges against Krista Reynolds pursuant to N.J.S.A. 18A:6-11 and the Hopatcong Board of Education and

Krista Reynolds having determined that it would be in the best interest of the Hopatcong Board of Education and Krista Reynolds to enter into such a settlement,

WHEREAS the aforesaid settlement is subject to the aforesaid conditions set forth below:

NOW THEREFORE the parties mutually covenant and agree as follows:

1. Krista Reynolds was hired as a teaching staff member by the Hopatcong Board of Education on or about September 1, 1978.

2. With the exception of maternity leaves, Krista Reynolds has been employed by the Board since that date, as a teacher of reading, English, basic skills and German, without incident or disciplinary record through the time of the incident giving rise to the tenure charges herein, the school sponsored trip to Germany led by Respondent in April 2001.

3. Prior to the field trip to Germany led by Respondent in April 2001, Respondent had led over five overnight ski trips to Vermont during the 1980's and an overnight field trip to Germany in 1999 without incident.

4. In April 2001, Respondent led a school sponsored trip to Germany which ran from April 5, 2001 through April 13, 2001. The chaperones on that trip were Respondent and her husband, John Reynolds. Ten students at Hopatcong High School were on that trip.

5. Emil Binotto is the Principal at Hopatcong High School. The students on the trip reported a number of allegations of inappropriate behavior on the part of Respondent to Binotto upon their return from Germany. To assure the accuracy of

those allegations, Binotto had each of the 10 students on that trip submit a written statement concerning the allegations.

6. As a result of and in reliance upon, the 10 written statements of the students on the trip, as well as interviews with the students, Binotto filed the tenure charges involved herein with the Board of Education. There were three counts in those charges: (1) that Reynolds failed to properly supervise the students in her charge (by allowing them to leave the hotel unsupervised at night, failing to assure that they remained in their hotel rooms after their curfew, failing to insure that they did not have alcoholic beverages in their hotel rooms and failing to supervise their activities on the flight to and from Germany), and that this lack of supervision continued even after the Respondent was made aware that the students were using their unsupervised time to visit nightclubs, where they consumed alcoholic beverages and became intoxicated; (2) that on one night students were deadbolted in their rooms making it impossible for the students to exit their rooms in the event of a fire or emergency; and (3) that Respondent failed to obtain proper medical attention for students who became ill on the trip.

7. The Petitioner voted to certify the charges to the Commissioner of Education, finding the alleged actions to be of a serious enough nature that they could warrant discipline up to and including termination of tenured employment.

8. Hearing dates were scheduled in this matter before the Honorable Margaret M. Monaco, A.L.J. on December 10, 11, 12 and 13, 2001.

9. At the first hearing dates in this matter, the Petitioner presented as its only available fact witnesses the students who had been on the trip to Germany and submitted written statements as to what took place. The sworn testimony of the students at the hearing was in many respects divergent from the statements which the students had placed into writing concerning the trip, upon which Binotto and the Petitioner had relied in filing and certifying these charges.

10. As a result of the testimony of these students, Petitioner has concluded that the proofs it presented may not have established a prima facie case with respect to the following portions of the tenure charges:

(a) With respect to Charge No. 1, while the testimony established that the Respondent allowed the students to leave the hotel unsupervised at night, the testimony also established that the amount of time during which the students left was limited, their destination was close by and known to the Respondent and the students always returned by curfew time; the testimony did not establish any failure to insure students remained in their hotel rooms after the time designated as their curfew, but rather established that Respondent took swift action to remedy the situation on the very few occasions on which students were not in their rooms after the designated curfew time; the testimony did not establish that Respondent failed to insure that there were no alcoholic beverages in their hotel rooms, and did not completely establish a failure to supervise activities on the flight to and from Germany. Further, the testimony of the students did not establish that the Respondent was aware that students were

consuming alcoholic beverages and became intoxicated, as the students testified to many ways in which they hid their conduct from Respondent.

(b) With respect to the second charge, while the testimony did establish that on one night the Respondent's husband with her knowledge and acquiescence deadbolted students in their room, the testimony did not contain adequate proof that there was a lack of egress from the rooms, i.e., a fire escape.

(c) With respect to the third charge, the students did not testify that there was a failure to obtain proper medical attention for these students nor did they testify that there was a failure to follow proper protocol relative to notifying the parents of these students, and the Board accordingly hereby withdraws this charge.

11. The Petitioner and Respondent agree that a settlement of the within matter is in the public interest for the following reasons: While the facts as testified to by the students at the hearing constitute inappropriate conduct on the part of the Respondent, in that Respondent failed to assure that the students under her charge on the field trip to Germany refrained from the use of any alcoholic beverages, as the Respondent has agreed to accept a discipline for such inappropriate conduct, there would be no point for the Board of Education to continue to prosecute these charges when it has finished presenting all of its witnesses and has been unable to prove all of the allegations in the tenure charges as set forth in Paragraph 10 as the students' sworn testimony under oath at the hearing differed from the students' statements in writing presented to Binotto, and in light of the fact that the Respondent's inappropriate conduct on the field

trip to Germany was an aberration in an otherwise long term satisfactory career with the Board of Education.

12. Therefore, Respondent consents to the withholding of her increment as voted upon and approved by the Petitioner on the same date as it certified the tenure charges herein, August 14, 2001, and whereas at the time of the certification of the charges Respondent was suspended without pay for 120 days pursuant to N.J.S.A. 18A:6-14, and agrees not to contest that suspension, and whereas both parties agree to an additional suspension without pay of Respondent through January 31, 2002, in recognition of the fact that while Respondent's conduct was not as alleged and does not merit termination, it was nevertheless a breach of Respondent's obligation to supervise the students in her charge.

13. The parties hereby agree to resolve these charges on the terms set forth in Paragraph 12.

14. All parties to this agreement and their counsel participated in the negotiation and drafting of this agreement as equals. No particular party shall be deemed to be the drafter or provider of this agreement, and the parties agree that the agreement shall not be construed against any particular party.

15. The parties acknowledge that they have consulted with their respective attorneys regarding this agreement, that the terms of this agreement have been explained to them and that they have represented to their attorneys that they have read this agreement and fully understand it and agree to be bound by it.

16. The parties believe that this agreement meets the standards established by the State Board of Education in In Re Cardonick, 1990 SLD 842, in that it contains documentation as to the nature of the charges, and explication of the circumstances justifying settlement of the charges, the consent of both the charged and charging parties, indication that the charged party entered into the agreement with the full understanding of her rights, a showing that the agreement is in the public interest. Pursuant to N.J.A.C. 6A:3-5.6(a) 6, as there is no loss of position, there is no need to set forth the charged party's understanding that the matter could be referred to the State Board of Examiners for a possible suspension or revocation of certificate.

17. This agreement is subject to the approval of the Administrative Law Judge and the Commissioner of Education.

Krista Reynolds
KRISTA REYNOLDS

John J. Reynolds
WITNESS

Dated: 12-19-01

HOPATCONG BOARD OF EDUCATION
By:

Theresa A. Stypul
THERESA A. STYPUL
Assistant Board Secretary

Robin Tort
WITNESS

Dated: 12-28-01

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
DEC 33 9 01 AM '01

RESOLUTION

WHEREAS, the Board of Education had previously filed tenure charges against Krista Reynolds, and

WHEREAS, the case proceeded for several days before the Office of Administrative Law, the Honorable Margaret M. Monaco presiding, and

WHEREAS, in the opinion of counsel and as conveyed to the Board, it appears that the evidence was not as strong as previously understood, and

WHEREAS, Krista Reynolds now has acknowledged that her supervision on the Germany trip was less than exemplary and realize that students need more extensive scrutiny on such trips, and

WHEREAS, the Board believes the settlement reached in this matter and placed on the record is just and equitable and vindicates the interest of the Board with regard to requirements for its teaching staff member,

THEREFORE be it Resolved that the Hopatcong Board of Education approves the settlement of the tenure charges in this matter and recommends that the Administrative Law Judge and the Commissioner approve the settlement placed on the record in this matter.

Theresa A. Stypul

THERESA A STYPUL, Asst. Board Secy

Passed December 18, 2001

OAL DKT. NO. EDU 7443-01
AGENCY DKT. NO. 322-8/01

IN THE MATTER OF THE TENURE	:	
HEARING OF KRISTA REYNOLDS,	:	
SCHOOL DISTRICT OF THE BOROUGH OF	:	COMMISSIONER OF EDUCATION
HOPATCONG, SUSSEX COUNTY.	:	DECISION
	:	

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

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983; *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to the parties' compliance with the terms of the settlement. A copy of this decision will be provided to the State Board of Examiners.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/1/02

Date of Mailing: 2/5/02

Date Faxed 2/4/02

39-02

K.J. AND F.P., JR., on behalf of minor child, J.T.P.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parents challenged the Board's residency determination.

The ALJ determined, based on the testimony presented and her credibility assessments, that petitioners' son was domiciled in the Board's District during the period in question and, thus, was entitled to a free education in the District.

The Commissioner affirmed the decision of the ALJ.

February 4, 2002

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5171-01

AGENCY DKT. NO. 137-5/01

K.J. AND F.P., JR., ON BEHALF
OF MINOR CHILD, J.T.P.,

Petitioners,

v.

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

Respondent.

K.J., and **F.P., Jr.**, parents of **J.T.P.**, appearing for petitioner pursuant to *N.J.A.C.* 1:1-5.4(a)7

Joseph M. Wenzel, Esq., appearing for respondent
(Lum, Danzis, Drasco, Positan & Kleinberg, attorneys)

Record Closed: December 4, 2001 Decided: December 14, 2001

BEFORE **MARGARET M. HAYDEN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners appealed the determination by respondent Board of Education of the Township of Union (District), that their minor child J.T.P. was not entitled to a free public

education in the District. Petitioners claimed that the minor child was entitled to a free public education pursuant to *N.J.S.A.* 18A:38-1(a) because he was domiciled within the District. Respondent answered that the minor child did not meet the requirements of domicile in the District and filed a counterclaim for payment of tuition.

On April 24, 2001, the District acted to remove J.T.P. from the public education rolls based upon its finding that J.T.P. did not live in the District. By letter dated May 14, 2001, K.J., his mother, and F.P., his father, appealed the decision to the Department of Education. The Department of Education transmitted the matter to the Office of Administrative Law (OAL) on June 7, 2001. The OAL held a prehearing conference on September 24, 2001. The OAL held the hearing on October 17, 2001. The record was held open until December 4, 2001, for the District to submit a certification concerning the per diem tuition rates and the amount of tuition requested.

FACTS

District's Evidence

Beginning in April 2001, Residency Investigators Maria Schmidtberg and Anthony Martino investigated a residency complaint from the District central office concerning J.T.P. On April 3, 2001, Investigator Schmidtberg began surveillance of a residence in Union where J.T.P. allegedly lived with his father. Investigator Schmidtberg arrived at 6:00 a.m. and ended her surveillance at 8:30 a.m. J.T.P. never exited the building but he was present at school that day. The investigator repeated the same surveillance on April 5, 2001, with the same result.

On April 16, 2001, at 6:00 a.m. the Investigator began surveillance at an address in Roselle where K.J., J.T.P.'s mother, lived. At 6:55 a.m. J.T.P. and his mother exited her residence, entered into a vehicle registered to K.J. and drove to the Burnett Middle School. On April 18, 20, 23, 25, 26 and May 1, 4 and 7, 2001, Investigator Schmidtberg continued surveillance at the Roselle address. On each of those dates the pupil and

his mother exited the Roselle residence and entered the mother's vehicle, then proceeded to the Burnett Middle School. On May 1 and 4, 2001, Investigator Schmidtberg was accompanied by Residency Investigator Martino.

In October 2000 Investigator R.W. Brownbridge had investigated the father's residence because of the complaint about J.T.P.'s younger step-brother. A surveillance of the Union address from October 19 to October 23, 2000 did not reveal any child or adults leaving the house although the children were confirmed to be in school. However, nothing ever became of that investigation.

The District has counterclaim for tuition. The per diem rate for District middle school for the year 2000-01 is $39.11. The District is seeking reimbursement from the beginning of the investigation on April 3, 2001 to the last day of school, which amounted to 47 school days. Thus, the total tuition sought is $1,838.17.

Parents' Testimony

The minor pupil's mother and father had lived together at the father's current address in Union until the summer of 1999. The father was raised in the two-family house and his parents still lived in the other unit. As the minor pupil had his roots, his friends and his grandparents living in Union, the parents determined when they separated that J.T.P. would stay in Union with his father.

After the separation the mother moved to a one-bedroom apartment in Roselle. However, she worked on Burnett Avenue in Union and the parents worked out an informal and liberal visitation schedule. Generally speaking the pupil stayed at his father's place in Union during the week and would often but not always be with his mother on the weekend. In Union at his father's home, J.T.P. had the majority of his clothes and his toys and athletic equipment. He also was very involved in the Union community sports activities. His grandfather ran a town basketball program. J.T.P. also attended the open gym after school which required an Union residency. The pupil

also participated in the Union summer basketball league as well as the town bowling league.

According to both parents, in the third marking period, approximately February through mid-April, J.T.P. began to have serious academic problems, ultimately flunking a majority of his substantive courses. Because of his grades the parents agreed that he would spend more time with his mother so that she could review his homework during the week. At times he came back to stay with his father and other times he spent the night with his mother. While J.T.P. had his own room in Union, which he shared with his stepbrother, he slept on the floor in the living room in his mother's one-bedroom apartment. By the end of June 2001 the family determined that he would live permanently with his mother and she applied for a two-bedroom apartment. J.T.P. moved permanently with his mother in early September 2001 when she got a two-bedroom apartment and began attending a Roselle District school.

FACTUAL AND LEGAL DISCUSSION AND CONCLUSION

Public education must be provided free to persons over five and under twenty years of age who are domiciled within the school district. *N.J.S.A.* 18A:38-1(a). "The domicile of a person is a place where he has his true, fixed, permanent home and principal establishment, into which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving . . . ." *In the Matter of Unanue* 255 *N.J. Super.* 362, 374 (Law Div. 1991). Minors lack the capacity to chose their own domicile and thus their domicile is that of their parent or guardian.

Where the facts are contested, the trier of fact must weigh the credibility of the witnesses in order to make factual findings concerning the disputed facts. Credibility is the value that a fact finder gives to a witness's testimony, requiring an overall assessment of the witness's story in light of its rationality, internal consistency, and manner in which it hangs together with other evidence. *Carbo v. United States*, 314

*F.*2d 718 (9th Cir. 1963). Credible testimony must proceed from the mouth of a credible witness and must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. *State v. Taylor*, 38 *N.J. Super.* 6, 24 (App. Div. 1955). A fact finder is expected to base credibility decisions on common sense, which is also referred to as intuition or experience. *Barnes v. United States*, 412 *U.S.* 837, 93 *S. Ct.* 2357, 37 *L. Ed.* 2d 380 (1973).

There is no reason in the record to doubt the credibility of the investigators who saw the student and his mother leaving the Roselle address numerous times in April and May 2001. However, having an opportunity to observe their demeanor and listen to their testimony I found the parents, who both testified, to also be quite credible. Moreover, I **FIND** their explanation that the arrangement that had begun in 1999 of J.T.P. staying with his father in Union was only eroded in the Spring 2001 when the mother had to help her son more with his failing grades quite plausible. Even when J.T.P. stayed more frequently with his mother for purposes of addressing his grades, his toys, bedroom, clothes and grandparents and sports clubs were still in Union. Thus I **FIND** that until the parents made a decision in June 2001 for him to move permanently to Roselle with his mother that the Union residence where he grew up was "J.T.P.'s true, fixed, permanent home and principal establishment." See *Unanue,* 255 *N.J. supra* at 374. Based on the foregoing, I **FIND** that J.T.P. was domiciled with his father in Union through the end of the school year 2001. Therefore, I **CONCLUDE** that the student was entitled to a free public education in Union as he resided in Union at that time.

ORDER

Based on the foregoing, it is **ORDERED** that as the petitioner was domiciled in Union the District's determination the petitioner's child was not entitled to attend Union school is hereby **REVERSED.** The District's request for reimbursement of past tuition is hereby **DENIED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Dec 14, 2001
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

12-19-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 31 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Exhibits

Joint:

J-1 K.J.'s lease renewal
J-2 K.J.'s lease
J-3 J.T.P.'s District Registration
J-4 Affidavit of Residency
J-5 J.T.P.'s Birth Certificate
J-6a Emergency Registration Card
J-6b Emergency Registration Card (reverse side)

For Petitioner:

P-1 through P-3 Photos of J.T.P.'s room

For Respondent:

R-1 Investigator Schmidtberg's Report
R-2 Investigator Martino's Report
R-3 Investigator Brownbridge's Report
R-4 District Tuition Rates 2000-01

OAL DKT. NO. EDU 5171-01
AGENCY DKT. NO. 137-5/01

K.J. AND F.P., JR., on behalf of minor child, J.T.P.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, and based on the Administrative Law Judge's (ALJ) credibility determinations, the Commissioner concurs that petitioners have demonstrated that J.T.P. was entitled to attend school in the Board's District, free of charge, through the end of the 2000-2001 school year, pursuant to *N.J.S.A.* 18A:38-1a.

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/4/02

Date of Mailing: 2/5/02

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

40-02

EDU #7831-01
C # 40-02S
SB # 12-02

A.M. and S.M., on behalf of minor child, M.M.,	:	
PETITIONERS-APPELLANTS,	:	STATE BOARD OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,	:	
RESPONDENT-RESPONDENT.	:	

Decision on motion by the Commissioner of Education, October 18, 2001

Decided by the Commissioner of Education, February 4, 2002

For the Petitioners-Appellants, David B. Rubin, Esq. and Joseph D. Pope, Esq., of Counsel

For the Respondent-Respondent, Riker, Danzig, Scherer, Highland & Perretti (Lance J. Kalik, Esq., of Counsel)

This matter is before us pursuant to an application for emergent relief filed on behalf of M.M., a middle school student who was expelled by the Livingston Board of Education on the basis of four incidents involving homemade explosive devices. Petitioners challenged M.M.'s expulsion by filing a petition of appeal with the Commissioner of Education, which was accompanied by an application for emergent relief. The matter was then transmitted to the Office of Administrative Law for hearing.

On October 4, 2001, the Administrative Law Judge ("ALJ") denied petitioners' motion for emergent relief, and, on October 18, 2001, the Commissioner adopted that determination. The matter then proceeded for consideration of the merits. At that point, the parties agreed that the merits would be decided on an expedited basis relying on the record developed in regard to the motion for emergent relief and certain additional exhibits.

On December 13, 2001, the ALJ issued his initial decision as to whether the Livingston Board had acted improperly in expelling M.M. Based on his findings with respect to the four incidents involving the homemade explosive devices, the ALJ concluded that the Board had not acted improperly in expelling M.M. with the provision that he could apply in May 2002 for readmission in the 2002-03 school year. In so concluding, the ALJ found that any of the three alterative education programs offered by the Board could provide an appropriate education for M.M. until that time.

In his decision of February 4, 2002, the Commissioner concurred with the ALJ. In doing so, the Commissioner placed particular emphasis on the facts that under the terms of the Board's action, M.M. could apply for readmission to Livingston High School in May and that the Board was affording him educational programming during the period of his expulsion.

On February 28, 2002, petitioners appealed to the State Board of Education from the Commissioner's decision sustaining the validity of the Board's action in expelling M.M. On March 12, 2002, petitioners filed an application for emergent relief seeking M.M.'s immediate reinstatement to Livingston High School while the merits of their

appeal are being considered by the State Board or, in the alternative, continuation of the home instruction that the Board had been providing to M.M. since his expulsion.

In support of their motion, petitioners contend that it is likely that they will prevail on the merits of their appeal because the Board's action was procedurally deficient and M.M.'s misconduct did not rise to the level required to justify that action. They argue that M.M. will be irreparably harmed unless he is either readmitted to Livingston High School or provided with home instruction because none of the alternative education programs being offered by the Board are adequate.

In order for us to grant emergent relief in this case, we must be satisfied that: 1) absent such relief, M.M. will suffer irreparable harm, 2) his claim is based on a settled legal right, 3) there are no material facts in dispute, and 4) M.M. will suffer greater hardship if relief is denied him than that which the Board will suffer if such relief is granted. Crowe v. De Gioia, 90 N.J. 126 (1982). In addition, the presence of an issue of public interest is a factor to be weighed. Samaritan Center, Inc. v. Borough of Englishtown, 294 N.J. Super. 437 (Law Div. 1996). See Yakus v. United States, 321 U.S. 414, 440 (1944). See P.H. and P.H., on behalf of minor child, M.C. v. Board of Education of the Borough of Bergenfield, decision on motion by the State Board of Education, October 3, 2001.

After careful review of the papers submitted in this case, we deny petitioners' application for emergent relief. Petitioners have not demonstrated a likelihood that they will succeed on the merits of their appeal. In this respect, we emphasize that Goss v. Lopez, 419 U.S. 565 (1975), does not entitle a student to a formal trial-type proceeding before a board of education may act to suspend him from school.

Nor have petitioners shown that absent the relief they are seeking, M.M. will suffer irreparable harm. The thrust of petitioners' argument is that M.M. has been sufficiently punished for any misconduct and that he should either be returned to Livingston High School or continue to be afforded home instruction pending disposition of petitioners' appeal to the State Board because he "poses no danger to the school environment," Petitioners' brief, at 48, and none of the alternative education programs being offered by the Board is appropriate for him. Specifically, petitioners point to the fact that M.M. is an outstanding student and had never been a discipline problem before engaging in the conduct that resulted in his expulsion. They assert that the alternative educational placements offered by the Board are not consistent with the requirements of the State Board as embodied in its decision in P.H. v. Board of Education of the Borough of Bergenfield, supra, contending that none of them provide an educational program that meets the core curriculum content standards. In support of this assertion, petitioners rely on an affidavit executed by M.M.'s father on November 21, 2001, and submitted to the Administrative Law Judge who considered this case. On this basis, petitioners contend that the Board is insisting that M.M. attend an "inadequate, inferior school" with "inferior teaching standards." Petitioners' brief, at 47-48.

We stress that the circumstances we are confronting in this case are far different than those presented by P.H. In P.H., the district board of education refused to provide a student with any education program while an appeal challenging his expulsion was pending before the State Board of Education. In stark contrast to the district board in that case, the Livingston Board has provided M.M. with home instruction since

completion of his incarceration[1] and is offering him the opportunity to select an alternative education program from among three suggested placements. In addition, it appears that the Board is willing to consider any suggestions from petitioners as to other alternative education programs. Board's brief, at 6.

All three of the alternative education programs being offered by the Board have been approved by the New Jersey Department of Education. While M.M.'s father attests that the Interim Alternative Education Program ("IAEP") located in Westfield is incapable of providing M.M. with instruction meeting the core curriculum content standards, this conclusion is based on M.M.'s father's perceptions and petitioners have provided no tangible evidence that the program offered through IAEP does not meet the criteria set forth in N.J.A.C. 6A:16-8.2 (application and approval process) or offered any justification for ignoring the Department of Education's approval. Nor have petitioners brought forth any evidence that the other two options being offered by the Board do not meet the approval criteria, which include the requirements that such programs provide individualized instruction that addresses the core curriculum content standards and that such instruction be provided by staff that is appropriately certified. N.J.A.C. 6A:16-8.2(a)(3) and (6).

As reflected in the certification of M.M.'s father, petitioners' objections center on the fact that IAEP, and presumably the other options being offered, may not offer an educational environment that "is even remotely like Livingston High School's" and their belief that such a program cannot meet the needs of M.M. "who all agree is a highly intelligent youngster who requires a challenging academic program." Certification of

[1] M.M. pleaded guilty to three violations of the New Jersey Criminal Code with regard to the incidents at issue and was adjudicated a delinquent. As a result of these incidents, he was detained at the Essex County Youth Detention Center.

A.M., at 3. Similarly, M.M.'s father objects to the therapy and counseling sessions that are part of the program as "entirely inappropriate and unnecessary for M.M." Id. at 9. Further, M.M.'s father contends that the absence of any ninth-grade students would be damaging to M.M., and he objects to the fact that physical education may only be offered three days a week, id. at 7, while at the same time preferring to keep his son on home instruction rather than enrolling him in IAEP.

Such objections do not render the options being offered by the Board inappropriate. All three options are approved educational programs, and there is no indication that any of them would deprive M.M. of "any meaningful or adequate education." Id. at 12. To the contrary, given the conduct for which M.M. is being disciplined, such placement is appropriate and, in offering these options, the Board properly recognized that under the circumstances here, home instruction on a long-term basis is not an appropriate educational option.

Therefore, for the reasons stated, we deny petitioners' application for emergent relief. Given our determination, it is not necessary to grant leave to petitioners so as to consider the letter they filed yesterday. Nor need we determine whether out-of-state co-counsel could file such letter without the signature of local counsel. See R. 1:21-2(b)(4).

April 3, 2002

Date of mailing APR 08 2002

41-02

IN THE MATTER OF THE TENURE	:	
HEARING OF CHARLES GREGG,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
ATLANTIC CITY, ATLANTIC COUNTY.	:	

February 5, 2002

OAL DKT. NO. EDU 10289-96
AGENCY DKT NO. 500-10/96

IN THE MATTER OF THE TENURE	:	
HEARING OF CHARLES GREGG,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
ATLANTIC CITY, ATLANTIC COUNTY.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. Upon such review, the Commissioner declines to approve the withdrawal.

The record here indicates that, by letter dated February 7, 2001, the Board attorney advised the Administrative Law Judge (ALJ) assigned to this matter that the Board had adopted a resolution withdrawing its charges against respondent. On December 20, 2001, this matter was returned to the Department of Education as a withdrawal. The parties are hereby reminded that, pursuant to *N.J.A.C.* 6A:3-5.6, once tenure charges have been certified to the Commissioner, these charges may be withdrawn or settled only with the approval of the Commissioner. Any proposed withdrawal or settlement of such charges, whether submitted to the Commissioner prior to transmittal of the case to the OAL, or to the ALJ subsequent to transmittal, shall address the requisite standard established in *In re Cardonick*, State Board decision of April 6, 1983, 1990 *S.L.D.* 842, 846, necessary to the consideration of a withdrawal or settlement request.

Accordingly, this matter is being returned to the OAL for further proceedings requisite to the resolution of the concerns expressed herein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/5/02

Date of Mailing: 2/5/02

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

42-02

42-02

D.P., on behalf of minor child, D.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

February 7, 2002

OAL DKT. NO. EDU 6503-01
AGENCY DKT. NO. 405-10/01

D.P., on behalf of minor child, D.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with a copy of notification sent to petitioner by the OAL on January 9, 2002, providing her ten days to submit an explanation for such nonappearance, have been reviewed.

On January 23, 2002, petitioner filed an explanation with the Commissioner for her failure to appear at hearing.[1] In her explanation, petitioner states that the matter with the Willingboro Board started in September 2001 when she and her daughter were assaulted at Willingboro High School and her civil rights were "denied by the 'Police and the Judge of Willingboro Township' by not allowing [her] to sign a complaint against the person who

[1] It is noted for the record that petitioner did not provide proof that she had served a copy of her comments on the Board, despite her being informed of this requirement in the OAL's Notice of Failure to Appear. Nor does it appear that petitioner provided a copy of her comments to the Administrative Law Judge (ALJ).

assaulted [her]***." (January 23, 2002 Explanation for Failure to Appear at 1) Petitioner further avers that the school unjustly suspended her daughter and that she did not keep the court date at the OAL because the night prior to the scheduled hearing, she was in municipal court with the school district, which had filed charges against her, and the woman who assaulted her. As to this, petitioner indicates that the school's case was postponed until February 14, 2002 because of the lateness of the proceeding in municipal court on January 3, 2002. (*Ibid.*) Moreover, petitioner avows that she was afraid of what was going to happen to her on February 14, 2002 in court with the charges that the school made up against her; therefore, she was "down Right affraid (sic) to show up at Court [OAL]" on January 4, 2002. (*Ibid.*) Petitioner does believe, however, that it was wrong for her not to call the OAL "but [she] was affraid (sic)***." (*Id.* at 2) Now, however, petitioner wants, for her daughter's sake, "to go through with this."[2] (*Ibid.*)

Upon review and due consideration of petitioner's explanation, the Commissioner finds and determines that petitioner has not advanced sufficient cause to countermand the return of this matter by the OAL due to petitioner's failure to appear at hearing as scheduled on January 4, 2002. Notwithstanding petitioner's comments, the fact remains that as recently as January 2, 2002, petitioner was in communication with the ALJ via a 32-page facsimile transmission regarding the municipal court proceeding, and that on January 3, 2002, the ALJ informed petitioner that the ALJ was without legal power to make any ruling on the municipal court charges the adults in the matter had filed against each other, and provided information as to the proceedings to occur the next day. (*See* January 3, 2002 Letter from Judge Duncan to

[2] Petitioner alleges that her daughter's ten-day suspension from school was arbitrary, capricious and unreasonable and seeks removal from her daughter's record any reference to the suspension served September 27–October 11, 2001 .

petitioner.) Nowhere in petitioner's explanation does she indicate why she could not and did not, at the very least, contact the judge to explain herself and request a change in the hearing date at the OAL. Rather, for her own reasons, petitioner chose not to appear at the hearing on January 4, 2002, without notice to the ALJ, or her adversary. The Commissioner cannot, on the basis stated by petitioner, countenance such disregard of the fundamental rules of this forum.

Accordingly, the within matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.[3]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/7/02

Date of Mailing: 2/8/02

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

43-02

43-02

S.T., on behalf of minor child, S.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOPE, WARREN COUNTY	:	DECISION
RESPONDENT.	:	
	:	

January 31, 2002

OAL DKT. NO. EDU 7552-00
AGENCY DKT. NO. 274-7/00

S.T., on behalf of minor child, S.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOPE, WARREN COUNTY	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 1/31/02

Date of Mailing: 2/13/02

CHARLES B. REGG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 31, 2002

OAL DKT. NO. EDU 12128-99
AGENCY DKT. NO. 361-12/99

CHARLES B. REGG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

Maria Kuncatello

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 1/31/02

Date of Mailing: 2/13/02

45-02

PLEASANTECH ACADEMY CHARTER SCHOOL EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES OF THE PLEASANTECH ACADEMY CHARTER SCHOOL,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning Association challenged the failure of respondent charter school to utilize the salary schedule set forth in its application for charter when negotiating the salaries of the Association's members. The appeal was first filed with the State Board of Education, which remanded the matter for an initial determination by the Commissioner.

The Commissioner forwarded the matter to the OAL and, after the parties stipulated to the operative facts, the ALJ determined that respondent was not bound by the salary schedule in the application for charter, as it did not constitute a salary policy adopted by the board of trustees.

The Commissioner affirmed the ALJ's conclusion, finding it consistent with a previous determination by the Commissioner that amendment of a school's charter, insofar as it addresses a salary policy, is not necessary because policies reflected in applications for charter are merely a guide for those reviewing the charter application, and are not binding on the board of trustees. The Commissioner also noted that, by law, only a board of education, or, in this case, a board of trustees, may establish a salary policy, and that the policy set forth in the application for charter was established by the founders, not the board of trustees, which did not exist as an official body until the charter was granted. The petition was dismissed.

February 11, 2002

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4214-00

AGENCY DKT. NO. 167-5/00

PLEASANTECH ACADEMY CHARTER SCHOOL EUDCATION ASSOCIATION,

Petitioner,

v.

BOARD OF TRUSTEES OF THE ACADEMY CHARTER SCHOOL,

Respondent.

Richard A. Friedman, Esq. for petitioner (Zazzali, Fagella & Nowak, attorneys)

Latha A. Gilliam, Esq., for respondent Board of Trustees of the Academy Charter School

Record Closed: April 23, 2001 Decided: December 20, 2001

BEFORE **DANIEL B. MC KEOWN,** ALJ (t/a)

PROCEDURAL HISTORY

The Commissioner of Education, pursuant to *N.J.S.A.*18A:36A-17, approved the charter application of the Pleasantech Academy Charter School to commence operation for the 1998-99 school year. Sometime before May 1999 the Pleasantech Academy Charter School Education Association (petitioner or Association), which represents non-supervisory support and certified staff and which is organized under the provisions of the New Jersey Public Employment

Relations Act, *N.J.S.A.* 34:13A:5.1, *et seq.*, filed a complaint under *N.J.S.A.*18A: 36A-15 with the Pleasantech Board of Trustees alleging that certain of its members were not being compensated according to the terms of the approved charter in violation of *N.J.S.A.* 18A:36A-11. The Board of Trustees denied the complaint on May 7, 1999, after which the Association filed a letter complaint with the Commissioner of Education on July 2, 1999 under the same referenced statute. The statute requires the Commissioner to "investigate and respond" to such filed complaints.

The Director of the Department of Education's Office of School Choice, Anne O'Dea, notified the Association by letter dated October 18, 1999 that the Office of Compliance was conducting an investigation into its complaint, and other fiscal complaints, regarding the conduct of Pleasantech. The investigation was completed and a report was filed on or about November 22, 1999. The report concluded that the allegation "concerning salaries was found to be without merit." (Investigative Report, Executive Summary)

By letter dated December 23, 1999 Ms. O'Dea notified the Association that the investigation completed by state auditors concluded teachers "were compensated in accordance with the terms of their contracts." The Association filed an appeal to the State Board of Education. By decision dated May 5, 2000 the State Board determined that contrary to the statute obligating the Commissioner to 'respond' to filed complaints alleging violations of the Charter School Program Act, the only response in this case was from Ms. O'Dea who, not being an assistant commissioner, was not authorized under *N.J.S.A.* 18A:4-34c to hear and determine disputes on the Commissioner's behalf. Consequently, the State Board remanded the matter to the Commissioner to render a determination on the complaint.

The Commissioner of Education transferred the matter to the Office of Administrative Law on May 25, 2000 as a contested case under *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F –1 to –13. After the matter was assigned this administrative law judge, a telephone prehearing conference was conducted September 13, 2000 at which time the Commissioner of Education was voluntarily dismissed as a respondent. The parties sought and received additional time to

review the record and determine whether a hearing was necessary. The parties ultimately agreed to develop a stipulation of fact and submit on cross motions for summary decision on the issue of whether "the Board of Trustees is obligated t compensate petitioning teachers according to salary ranges set out in its approved charter application for 1998-99 and, if sol to what relief are petitioners entitled." (See letter, September 13, 2000) Prior to the submission of the stipulation of fact and letter memoranda, the parties entered settlement discussions. When a settlement could not be reached, the parties submitted on the record. The record closed April 23, 2000. An extension of time within which to issue this initial decision was sought and received.

STIPULATED FACTS

The facts stipulated by the parties are reproduced here in full:

1. The [respondent], PleasantTech Academy Charter School, (the 'School'), is a charter school established pursuant to *N.J.S.A.* 18A:36A-1, et seq., and is governed by a Board of Trustees. The School is located at 535 Dr. Martin Luther King Jr. Avenue, Pleasantville, New Jersey 08232. The [petitioner], PleasantTech Academy Charter School Association (the 'Association'), is the majority representative of the School's non-supervisory (certified and support staff) employees, under the PERC Act, *N.J.S.A.* 34:13A-5.1, *et seq.*

2. By letter dated August 14, 1997 from Keith B. Mills, founder, the School submitted a Charter School Application to Commissioner Leo Klagholz, New Jersey State Department of Education, Office of Innovative Programs, CN 500, Trenton, New Jersey, for a charter school to be located in Pleasantville, New Jersey. The Charter School Application (the 'Application'), included financial information and a proposed budget, with projected revenues and expenditures. Salary ranges and costs were also included in the Application.

3. The School's Application provided in part, as follows:

> **Outline the policies and procedures regarding the following: Salaries, contracts, hiring and dismissal, and benefit packages.**
>
> Staff members will be asked to sign contracts of employment at time of hiring by the board. Hiring procedures involving the director and the board of trustees are outlined below: Charter school staff must have appropriate New Jersey certification for the **core topics** they will be applying to teach. The director will

be interviewed and hired by the board of trustees. The board will look for a philosophy commensurate with that of the charter school's mission statement. They will require experience and a proven management style. (Pg. 1-40)

Applicants for a teaching position will be interviewed initially by the Director and be asked general questions about educational philosophy as well as questions about their handling of very specific situations. Those applicants who seem to have the qualifications for the open positions will be scheduled to come to school to 'guest teach' for a day. At this time, they will present to the students their own experiential lesson plans for various age groups and demonstrate their control of the students and their methods of presentation. The directors and several staff members will evaluate teaching methods and classroom demeanor and recommend the best applicants to the board of trustees for a follow-up interview. The board will vote on which applicant will receive the position. (Pg. 1-40)

Salaries will be determined on an individual basis within the ranges listed below. Variables include credentials, experience and extra duties. Merit raise will be awarded after personal evaluations given by the director and the consulting certified school superintendent after the first year and continuing annually thereafter. The evaluations will be similar to those given by the state provisional teaching program for alternate route applicants and include elements form [from?] the review form, also attached. Directors' and Business Manager's salary will be determined by the Board. The Director will also be evaluated by the Superintendent and Board of Trustees.

RANGE	POSITION	CREDENTIALS
55K – 65K	Director	Bachelors or Masters Degrees
50K – 60K	Assoc. Director	Bachelors or Masters Degrees
40K – 55K	Business Mgr.	Bachelors or Masters Degrees
40K - 50K	Counselor/MSW	Masters Degree
40K – 50K	Teacher	[Multiple Dgrs/Certifications]
35K - 45K	Teacher	[Bachelors and Certification]
30K - 40K	Teacher	[Bachelor and Alt.Cert.Pend]
19K – 23K	Aide	Associate Degree
18K – 24K	Maint/Hskpg.	H.S. Diploma/GED
18K – 25K	Office Staff	Bachelor's Degree
17K – 21K	Office Staff	Degree Pending

Special Education Teacher Full-Time
Certified School Nurse Part-time
Computer/Research Teacher Full-time
Gym Teacher, Music Teacher Part-time
Bilingual Teachers Full-time whenever possible
Training Teacher who will also act as substitute Full-time

Teaching consultants who are in classrooms part-time:
Life Skills/problem resolution/self-esteem Teacher
Studio/Theatre Teacher
Sign Language Teacher (Pg. 1-42)

4. By letter dated November 12, 1997 from Keith B. Mills the School submitted certain revisions to the Charter School Application to the New Jersey State Department of Education, Office of Innovative Programs. The school was granted a charter to commence operating in the 1998-99 school year.

5. In or about July 1998, the School's Board of Trustees adopted a salary scale to govern the hiring of teachers. The salary scale adopted differed from the salary ranges set forth in the Charter School Application. The School negotiated individual salaries for each teacher, based upon the experience level of a teacher as set forth in the salary scale adopted by the Board of Trustees in or about July 1998. Individual final contracts for each teacher were adopted by the Board of Trustees, and each contract was accepted by the teacher. As of August of 1998, all individual teacher contracts had been adopted by the Board of Trustees, and accepted by each teacher.

6. In a letter dated May 7, 1999 to Mr. Davis, Ms. Smeddy and Ms. Koren, the School's Business Manager, Keith A. Szendrey, stated, in part:

> In response to your letter concerning conflicts with the school charter and New Jersey Law, I would like to provide the following information.
>
> Charter Conflicts
>
> It appears that the Board of Trustees failed to follow the appropriate procedure to formally request amendments to the PleasantTech Academy Charter School Charter.
>
> 2. Salary – Once it became obvious that the original funding levels would not be achieved, one area of the budget that required reductions was that of salaries. The Board intends to formally

> request that the scale being utilized at this point be added to the charter.

7. By letter dated July 2, 1999 from Richard A. Friedman, Esq., the Association filed a complaint with David C. Hespe, Commissioner of Education, alleging that its members (primarily teachers) were not being paid by the School in accordance with the charter, and requesting that the School be compelled to compensate teachers in accordance with the terms provided in the charter.

8. By letter dated September 2, 1999, Commissioner David C. Hespe of the New Jersey State Department of Education granted certain amendments requested by the School to its charter.

9. By letter dated October 18, 1999, Anne O'Dea, Director of the Office of School Choice of the Department of Education, informed Richard A. Friedman Esq., that the Office of Compliance was conducting an investigation based upon the Association's July 2, 1999 complaint.

10. By memorandum dated November 22, 1999, Thomas King, Director of the Office of Compliance, forwarded a report to Anne O'Dea, which found at page 4 of the report, that '[T]here is no merit to the argument that the charter school violated its charter by not paying salaries budgeted in their application.' The Association contests this determination.

11. By letter dated December 14, 1999 to Clarence Alston, David C. Hespe, Commissioner of Education, in granting the School's request to amend certain sections of its charter, and in indicating a salary amendment was not needed, stated that '* * * the contract between the employee and the board would stipulate the salary for individual staff members and the salary ranges reported in the charter school application serve only as a guide for reviewers.' (Pg.2) The Association contests this determination.

12. By letter dated December 23, 1999, Anne O'Dea informed Richard A. Friedman, Esq., that the Office of Compliance had conducted a 'thorough and detailed review of the fiscal concerns expressed in your correspondence.' Ms. O'Dea stated that:

> * * * the auditors reviewed the teachers' contracts and determined they were compensated in accordance with the terms of their contracts. The charter indicated salaries will be determined on an individual basis, thus ranges were provided. Further, although budgeted amounts are included in the charter, the amounts are projections. In fact, the department requires a new budget each year.

The Association contests this determination.

Attached to the Association's letter complaint to the Commissioner of Education on July 2, 1999 is a list of teachers and other certificated personnel who, it is alleged, are not being paid according to the salary ranges for the credentials they possess as set forth in the charter as reproduced above. It is noted there is no evidence to show each listed teacher possesses the required 'credentials' to qualify for each specific category of teacher in the salary ranges. But, for purposes of the cross-motions for summary decision, it will be assumed each teacher possesses the credentials necessary to make a colorable enforceable claim to the minimum of the respective class of 'teacher.'

The Association argues that *N.J.S.A.* 18A:36A-11 requires the Charter Board of Trustees to compensate its teachers in at least the minimum amounts set forth in the applicable ranges, depending on individual credentials, as set forth in its charter provisions. The Association cites *Cliffside Park Borough Bd. Of Ed. v. Mayor & Council*, 100 *N.J. Super.* 490, 493 (*App. Div.* 1968) and the New Jersey Supreme Court in *Bd. Of Ed. of the Twp. of Neptune v. Neptune Twp. Ed. Assoc.*, 144 *N.J.* 16 (1996) for the proposition that once a salary guide is established, it is binding and must be honored and funded. The Association demands its members whose salaries are not established within the range of the salary guides set forth in the approved Charter be made whole/

The Board to the contrary argues that neither cited case is applicable in this case because each is distinguishable on the facts. It says the *Cliffside* case involved a budget appeal to the Commissioner who restored $17,000 to cover the cost of health coverage for the Board's employees as negotiated by it with the Cliffside education association. Here, the Board notes there are no negotiated salary ranges. Rather, what occurred is nothing more than the Board of Trustees projecting salary guides for purposes of its fiscal plan while reserving the right to the establishment of specific initial salaries with individual teachers under its authority at *N.J.S.A.* 18A:29-9. The Board contends the *Neptune* case is also distinguishable from this matter on its facts. The Board argues Neptune considered an expired three-year salary policy that had been negotiated between the board and the association. The Court ruled that the policy could not be in

force and effect for a fourth year while awaiting a newly negotiated agreement because the statute, *N.J.S.A.* 18A:29-4.1, limits salary policies adopted by boards of education for a maximum three years.

In support of its position that it is not obligated to compensate teachers according to the salary ranges set forth in its Charter application, the Board of Trustees cites *In re Charter Application*, 320 *N.J. Super.* 174 (*App. Div.* 1999). The Board contends that this case recognizes substantial deference is to be given the Commissioner's interpretation of a statute particularly where, as here, the quality and efficiency of education in New Jersey is implicated. The Board notes that a thorough investigation by auditors of the Department of Education concluded that teachers were compensated in accordance with the terms of their contracts and it is not bound to the proposed ranges in establishing individual salary amounts. For these reasons, the Board seeks summary decision in its favor and a dismissal of the complaint.

ANALYSIS

This is not a case in which a teacher was promised a higher amount of compensation during the initial salary agreement process only to have that amount arbitrarily reduced when the final employment agreement was reached. To the contrary, there is no evidence that any teacher agreed to a rate of compensation prior to employment but was paid at a reduced rate after employment began. *N.J.S.A.*18A:29-9 provides that the initial place on the salary schedule shall be as may be agreed upon by the prospective teacher and the employing board of education which is what occurred in this case. The teachers and the Board of Trustees agreed upon initial salaries and an employment relationship was reached.

The Charter School Program Act of 1995, *N.J.S.A.*18A:36-1, et seq., provides at *N.J.S.A.*18A:36A-5 that applications for charter school shall include, among other items, "The financial plan for the charter school and the provisions which will be made for auditing the school * * *" *N.J.S.A.*18A:36A-14(a) provides that the board of trustees of a charter school

"shall have the authority to decide matters related to the operations of the school including budgeting, curriculum, and operating procedures, subject to the school's charter." *N.J.S.A.*18A:36A:11 provides that "A charter school shall operate in accordance with its charter and the provisions of law and regulation which govern other public schools * * *" State Board of Education rules governing the charter approval process require at *N.J.A.C.*6A:11-2.1(a) that "The Commissioner, with the authority of *N.J.S.A.* 18A:36A, may approve, grant or deny an application for a charter after review of the application submitted by an eligible applicant * * *." Paragraph (b) of the same rule provides that an eligible applicant for a charter school complete the *New Jersey Charter Schools Application* which includes a description of the areas listed in *N.J.S.A.*19A:36A-5 and a description of the school's mission, goals and objectives, founders, student discipline policy and expulsion criteria, special populations, transportation, self-evaluation process, insurance, and a timetable. There is nothing in the statutes, administrative regulations, nor in the *Charter School Application* that suggests salary ranges set out in an application's financial plan is to be considered a binding salary policy upon the Board of Trustees should the application be approved by the Commissioner.

It is stipulated that the Board of Trustees adopted a salary scale in July 1998, which differed from the ranges set forth in the Charter application. But, the ranges set forth in the application was part of the proposed financial plan in the application process for charter approval. The salary ranges did not otherwise constitute a salary policy adopted by the Board of Trustees.

CONCLUSION

Having considered the stipulated facts and arguments of the parties, I **CONCLUDE** the Association failed in its proofs to establish that the employees whose names are set out in the list attached to the complaint filed with the Commissioner of Education on July 2, 1999 had their compensation improperly set by the Board of Trustees. Accordingly, the complaint is **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 20, 2001
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ
By: Joseph A. Martone, ALJ

Receipt Acknowledged:

12/26/01
DATE

Deborah Antonaitis
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 27 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/lam

LIST OF EXHIBITS

None

LIST OF WITNESSES

None

OAL DKT. NO. EDU 4214-00
AGENCY DKT. NO. 167-5/00

PLEASANTECH ACADEMY CHARTER SCHOOL EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES OF THE PLEASANTECH ACADEMY CHARTER SCHOOL,	:	DECISION
RESPONDENT.	:	
	:	

The record and Initial Decision issued by the Office of Administrative Law have been reviewed. Exceptions were filed by petitioner in conformity with the requirements of *N.J.A.C.* 1:1-18.4. No reply exceptions were filed by respondent.

Petitioner's exceptions aver, *inter alia,* that, although the Administrative Law Judge (ALJ) correctly recognized that the law permits a school employee and employing board of education to individually negotiate the employee's initial placement on a salary schedule, he improperly held that respondent was not bound by the particular salary guide schedule established in, and made part of, its approved charter. Petitioner articulates three reasons why it believes the ALJ's conclusion is flawed:

> First and foremost, the terms of respondent's written charter clearly and unambiguously state that employee salaries were to be established at specific salary ranges which correlated to particular employee qualifications. Put another way, the charter expressly provided for defined salary ranges for each specific position according to the employee's educational background, which respondent blatantly ignored.

> Second, the particular salary levels at which the charter mandated that employees were to be paid was underscored by the budget submitted to the Commissioner's office in support of respondent's charter, wherein salaries were listed for positions at levels which corresponded to the specific ranges set forth in the charter. That budget provided for the same salary ranges as contained in the charter. Moreover, although the budget is a separate and distinct document from the charter, and it is the charter, of course not the budget, which controls the establishment and operation of the charter school, it is important to note that the budget also referenced those particular salary schedules established in the charter.
>
> Third, respondent itself admitted that it did not compensate its employees according to the charter and actually expressed its intent to try to correct the problem by formally amending the charter. This was substantiated by the May 7th letter response from respondent's business manager, Keith Szendry, to the Association's initial inquiry about employee salaries, wherein he conceded that employee salaries were not consistent with the charter, that original funding levels were not achieved, and that the respondent would formally request that the scale being utilized be added to the charter. (Petitioner's Exceptions at 3-4)

In support of its exceptions, petitioner reiterates the legal arguments set forth in its brief on motion for summary decision, which arguments were considered by the ALJ in rendering the Initial Decision.

Upon review of the record, including petitioner's exceptions, the Commissioner agrees with and adopts as his own the ALJ's recommendation to dismiss the petition for the reasons stated in the Initial Decision. Notwithstanding petitioner's arguments to the contrary, the Commissioner is in full agreement with the ALJ that there is nothing in statute, regulation, or the Charter School Application form suggesting that specific salary ranges proffered in an *application* for a charter school are to be considered a salary policy/schedule binding upon the Board of Trustees should the charter application be approved by the Commissioner. This conclusion is consistent with the determination reached by Commissioner Hespe on

December 14, 1999, wherein he did not accept a proposed amendment to the PleasanTech Academy's charter regarding reduction of the minimum starting salary for teachers and the removal of additional pay for multiple certifications, concluding instead that:

> [I]t is not necessary to request an amendment to reduce the minimum starting salary for teachers from $35,000 to $32,000 and remove additional pay for multiple certifications. According to N.J.S.A. 18A:36A-11(a), "a charter school shall operate in accordance with its charter and the provisions of law and regulation which govern other public schools." N.J.S.A. 18A:29-9 states that "whenever a person shall hereafter accept office, position or employment as a member in any school district of this state, his initial place on the salary scale shall be at such point as may be agreed upon by the member and the employing board of education." Therefore, the contract between the employee and the board would stipulate the salary for individual staff members and the salary ranges reported in the charter school application serve only as a guide for reviewers. (December 14, 1999 Letter from Commissioner Hespe to PleasanTech Academy Charter School at 2)

Moreover, *N.J.S.A.* 18A:29-4.1 provides that a board of education, or in this instance, the board of trustees of a charter school, not charter school founders, may adopt a one, two or three-year salary policy, including salary schedules for all full-time teaching staff members which shall not be less than those required by law. The statute further mandates, among other things, that such salary policy and schedules shall be binding upon the adopting board and upon all future boards from the effective date of such policy. Consequently, the specific salary schedule contained in the PleasanTech Academy's charter application, which constitutes planning information provided by the founders cannot be considered as binding on the charter school's *Board of Trustees*, because the Board, which did not exist as an official body and had no power to act in an official capacity until after the Commissioner's approval of the charter application, *N.J.A.C.* 6A:11-2.1(h), did not adopt the policy pursuant to statute.

Accordingly, for the reasons expressed in the Initial Decision and elaborated upon herein, the petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/11/02

Date of Mailing: 2/13/02

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

45-02

SB # 8-00
EDU # 4214-00
C # 45-02
SB # 16-02

PLEASANTECH ACADEMY CHARTER SCHOOL EDUCATION ASSOCIATION,

PETITIONER-APPELLANT,

V.

BOARD OF TRUSTEES OF THE PLEASANTECH ACADEMY CHARTER SCHOOL,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Remanded by the State Board of Education, May 3, 2000

Decided by the Commissioner of Education, February 11, 2002

For the Petitioner-Appellant, Zazzali, Fagella, Nowak, Kleinbaum & Friedman (Richard A. Friedman, Esq., of Counsel)

For the Respondent-Respondent, Latha A. Gilliam, Esq.

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

August 7, 2002

Date of mailing AUG 09 2002

49-02

49-02

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (BENJAMIN FRANKLIN SCHOOL #13) UNION COUNTY,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

February 19, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5577-01
AGENCY DKT. NO. 194-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH
(BENJAMIN FRANKLIN SCHOOL, #13), UNION COUNTY
Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION
Respondent.

Richard E. Shapiro, Esq., for petitioner,

Michael Lombardi, Deputy Attorney General, for respondent
(John J. Farmer, Attorney General of New Jersey, attorney)

Record Closed: November 13, 2001 Decided: December 19, 2001

BEFORE **EDITH KLINGER**, ALJ:

On June 13, 2001, the petitioner, Board of Education of the City of Elizabeth (Board), filed a Verified Petition of Appeal before the Commissioner of Education seeking adequate funding to implement its whole school reform plan for all of the schools in the District pursuant to the decision of the Supreme Court in *Abbott v. Burke*, 153 *N.J.* 480 (1998) and the statutes and regulations promulgated there under. The present appeal concerns the school-based budget for Benjamin Franklin School #13. The respondent, Department of Education, filed its answer on June 28, 2001. On July

9, 2001, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The hearing was held on October 1, 2, 3, 5, 11, 12, and 15, 2001. The record closed on November 13, 2001 when the final submission was received from the parties.

The school's request for additional funding for staff salaries was approved by the Department in August 2001. After additional clarification, the Department approved the addition of $4,762.00 to the budget and this issue was not litigated at hearing.

Only the following budgeted items for which funding was denied by the Department of Education, Offices of Program Review and Improvement and Fiscal Review, remained in issue at the time of the scheduled hearing in this matter.

Workpaper U-1: School Administration

The school requested $7,500.00 for attendance at retreats in connection with the Comer School Development Program Model. After discussions between the parties following testimony, the Department agreed that the expense was consistent with the basic requirements of the model and approved the funding. The $7,500.00 was restored to the budget. I **FIND** that this agreement fully resolves this issue with respect to the school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

Workpaper X-2: Breakfast and Lunch Duty

The school requested funding for teachers to staff the breakfast and lunch program. After discussions between the parties, it was agreed that this issue would be withdrawn from the present appeal to be resolved elsewhere. I **FIND** that this agreement fully resolves this issue with respect to the school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

Workpaper X-2: After School Teachers

The school requested funding for eight tutors for its after school program but only four were approved. Based upon the testimony of the witnesses, the Department learned that the purpose of the program was to permit students, unable to work and/or receive necessary support at home, to do their homework in the school building with teachers available to assist them in an atmosphere conducive to learning. It also learned that this program has resulted in improved student performance. The parties entered into discussions and it was agreed that funding for the additional four tutors was appropriate and should be approved. $33,120.00 was restored to the school-based budget for this purpose. I **FIND** that this agreement fully resolves this issue with respect to the school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

Two other budget requests, additional money for bathroom attendants and funding for the purchase of five laptop computers, were withdrawn by the school on the basis of discussions between the parties.

In resolving the dispute with respect to the salaries at which new staff could be hired, the Department denied that it intended to cap them at the second step of the District's salary guide. Where the District demonstrated that teachers with subject matter specialization, such as mathematics and science teachers with the necessary education and experience, could not be hired at the second step, the Department agreed that they could be hired at the step on the salary guide commensurable with their training and experience. The Department also agreed to work with the District to fill other teaching positions, such as gym, music and art teachers, if it were shown that these positions could not be filled at the second step of the salary guide. (R-1a)

With respect to all issues designated as settled for the purposes of the school-based budget appeals, the District reserves the right to raise any issues concerning the sufficiency of funding in a supplemental funding request. R-1a)

With the resolution of these outstanding issues on appeal with respect to the school-based budget, I **CONCLUDE** that this fully resolves the dispute between the Department and Benjamin Franklin School #13.

I **FIND** that the agreements between the parties are reasonable and it is, therefore, **ORDERED** that the items above be implemented in accord with these agreements.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 19, 2001
DATE

Edith Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

January 2, 2002
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 04 2002
DATE

ACTING DIRECTOR AND ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:

Thomas Dunn, Jr.

Linda G. King

Belinda Apruzzese

Pablo Muñoz

For Respondent:

Pernell Brice

Exhibits:

P-23 Guide for Implementing Urban Education Reform in Abbott Districts

P-50 Excerpts from the Whole School Reform Implementation Plan

P-51 SBB Fiscal Review Comments

P-52 SBB Fiscal Review Responses, February 2001

P-53 Letter, dated March 8, 2001, transmitting P-51 and P-52 to Pernell Brice

P-54 Letter, dated May 14, 2001, Couselo and Henry to Abruzzese

P-55 Letter, dated June 4, 2001, Abruzzese to Couselo and Henry, with attachments

P-56 Letter, dated August 17, 2001, Reid and Henry to Abruzzese

P-57 Class Size Reduction Plan

P-109 Issues on Appeal after August 17, 2001

P-113 Professional Staff Positions – Salary Dispute

R-1a Schools and Issues Resolved – Post Hearing

R-2 Schools and Issues Remaining – Post Hearing

OAL DKT. NO. EDU 5577-01
AGENCY DKT. NO. 194-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (BENJAMIN FRANKLIN SCHOOL #13) UNION COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his independent and careful review of this local "Abbott" District's appeal of the Department's determination on its whole school reform funding request for the 2001-2002 school year, the Commissioner affirms the Initial Decision, which essentially embodies the parties' agreements on each of the contested issues.

Accordingly, the recommended decision of the OAL is affirmed and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED*

COMMISSIONER OF EDUCATION

Date of Decision: 2/19/02

Date of Mailing: 2/19/02

* Pursuant to *P.L.* 2001, *c.* 130, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division at the New Jersey Superior Court.

50-02

50-02

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (NICHOLAS MURRAY BUTLER SCHOOL #23) UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

February 19, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5587-01
AGENCY DKT. NO. 201-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH
(NICHOLAS MURRAY BUTLER SCHOOL, #23), UNION COUNTY
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION
Respondent.

Richard E. Shapiro, Esq., for petitioner,

Michael Lombardi, Deputy Attorney General, for respondent
(John J. Farmer, Attorney General of New Jersey, attorney)

Record Closed: November 13, 2001 Decided: December 19, 2001

BEFORE **EDITH KLINGER**, ALJ:

On June 13, 2001, the petitioner, Board of Education of the City of Elizabeth (Board), filed a Verified Petition of Appeal before the Commissioner of Education seeking adequate funding to implement its whole school reform plan for all of the schools in the District pursuant to the decision of the Supreme Court in *Abbott v. Burke*, 153 *N.J.* 480 (1998) and the statutes and regulations promulgated there under. The present appeal concerns the school-based budget for Nicholas Murray Butler School #23. The respondent, Department of Education, filed its answer on June 28, 2001. On

July 9, 2001, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The hearing was held on October 1, 2, 3, 5, 11, 12, and 15, 2001. The record closed on November 13, 2001 when the final submission was received from the parties.

The school's request for additional funding for staff salaries was approved by the Department in August 2001. After additional clarification, the sum of $14,283.00 was added back into the budget for this purpose and the issue was not litigated at the hearing in this matter.

Only the following two budgeted items for which funding was denied by the Department of Education, Offices of Program Review and Improvement and Fiscal Review, remained in issue at the time of the scheduled hearing in this matter.

Workpaper X-1: Additional Resources

The school requested funding for four teacher tutors but only two were approved based upon the projected enrollment. After hearing testimony that the approved number of tutors was insufficient to provided tutoring services for the number of students reading below grade level, the Department agreed to provide funding for the two other tutors and $76,000.00 was added to the budget for this purpose. I **FIND** that this agreement fully resolves this issue with respect to this school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

Workpaper X-2: Substitute/Stipends

The school requested funding for all costs associated with the school breakfast and lunch program. After discussions between the parties, it was agreed that this issue would be withdrawn from the present appeal to be resolved elsewhere. I **FIND** that this

agreement fully resolves this issue with respect to the school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

In resolving the dispute with respect to the salaries at which new staff could be hired, the Department denied that it intended to cap them at the second step of the District's salary guide. Where the District demonstrated that teachers with subject matter specialization, such as mathematics and science teachers with the necessary education and experience, could not be hired at the second step, the Department agreed that they could be hired at the step on the salary guide commensurate with their training and experience. The Department also agreed to work with the District to fill other teaching positions, such as gym, music and art teachers, if it were shown that these positions could not be filled at the second step of the salary guide. (R-1a)

With respect to all issues designated as settled for the purposes of the school-based budget appeals, the District reserves the right to raise any issues concerning the sufficiency of funding in a supplemental funding request. (R-1a)

With the resolution of the only outstanding issues on appeal with respect to this school-based budget, I **CONCLUDE** that this fully resolves the dispute between the Department and Nicholas Murray Butler School #23.

I **FIND** that the agreements between the parties are reasonable and it is, therefore, **ORDERED** that the items above be implemented in accord with these agreements.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 19, 2001
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

January 2, 2002
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 04 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:

Linda G. King
Thomas Dunn Jr.
Pablo Muñoz
Francisco Questa
Harold Kennedy

For Respondent:

Pernell Brice

Exhibits:

P-23 Guide for Implementing Urban Education Reform in Abbott Districts
P-57 Class Size Reduction Plan
P-68 Excerpt from Whole School Reform Implementation Plan
P-69 SBB Fiscal Review Comments
P-70 Letter, dated March 1, 2001, Questa to Joan Tomlin, with attached responses to P-69
P-71 Letter, dated May 14, 2001, Couselo and Henry to Questa
P-72 Letter, dated May 31, 2001, Questa to Couselo and Henry
P-73 Letter, dated August 17, 2001, Reid and Henry to Questa
P-109 Salary issues on appeal.

R-1a Schools and Issues Resolved – Post Hearing
R-2 Schools and Issues Remaining – Post Hearing

OAL DKT. NO. EDU 5587-01
AGENCY DKT. NO. 201-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (NICHOLAS MURRAY BUTLER SCHOOL #23) UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his independent and careful review of this local "Abbott" District's appeal of the Department's determination on its whole school reform funding request for the 2001-2002 school year, the Commissioner affirms the Initial Decision, which essentially embodies the parties' agreements on each of the contested issues.

Accordingly, the recommended decision of the OAL is affirmed and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED*

COMMISSIONER OF EDUCATION

Date of Decision: 2/19/02

Date of Mailing: 2/19/02

* Pursuant to *P.L.* 2001, *c.* 130, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division at the New Jersey Superior Court.

51-02

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (THEODORE ROOSEVELT SCHOOL, #17) UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

February 19, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5582-01
AGENCY DKT. NO. 204-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH
(THEODORE ROOSEVELT SCHOOL, #17), UNION COUNTY
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION
Respondent.

Richard E. Shapiro, Esq., for petitioner,

Michael Lombardi, Deputy Attorney General, for respondent
(John J. Farmer, Attorney General of New Jersey, attorney)

Record Closed: November 13, 2001 Decided: December 19, 2001

BEFORE **EDITH KLINGER**, ALJ:

On June 14, 2001, the petitioner, Board of Education of the City of Elizabeth (Board), filed a Verified Petition of Appeal before the Commissioner of Education seeking adequate funding to implement its whole school reform plan for all of the schools in the District pursuant to the decision of the Supreme Court in *Abbott v. Burke*, 153 *N.J.* 480 (1998) and the statutes and regulations promulgated there under. The present appeal concerns the school-based budget for Theodore Roosevelt School #17. The respondent, Department of Education, filed its answer on June 29, 2001. On July

9, 2001, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The hearing was held on October 1, 2, 3, 5, 11, 12, and 15, 2001. The record closed on November 13, 2001 when the final submission was received from the parties.

The school's request for additional funding for staff salaries was approved by the Department in August 2001. After additional clarification, the Department approved the addition of $57,132.00 to the budget for salaries and this issue was not litigated at hearing.

Only the following budgeted items for which funding was denied by the Department of Education, Offices of Program Review and Improvement and Fiscal Review, remained in issue at the time of the scheduled hearing in this matter.

Workpaper M-1: Breakfast and Lunch Programs

The school requested funding for the costs associated with supervision of the breakfast and lunch programs. After discussions between the parties, it was agreed that this issue would be withdrawn from the present appeal to be resolved elsewhere. I **FIND** that this agreement fully resolves this issue with respect to the school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

Workpaper T-1: Instructional Staff Training Services

The school requested funding in the amount of $35,626.00 for travel and lodging expenses to attend the Success For All (SFA) training in mathematics and reading. Only $23,000.00 of this request was approved. Math Wings is part of the SFA model chosen by this school to implement its whole school reform. The Department learned through testimony that the SFA model required teachers to attend conferences and be trained in two new programs during the summer to avoid disrupting the school year.

This school had been written up the prior year for not complying with the requirements of its whole school reform model. Based upon this testimony, the Department agreed to restore $12,626.00 to the budget for Math Wings training and conferences. I **FIND** that this agreement fully resolves this issue with respect to this school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

With the resolution of these outstanding issues on appeal with respect to this school-based budget, I **CONCLUDE** that this fully resolves the dispute between the Department and Theodore Roosevelt School #17.

In resolving the dispute with respect to the salaries at which new staff could be hired, the Department denied that it intended to cap them at the second step of the District's salary guide. Where the District demonstrated that teachers with subject matter specialization, such as mathematics and science teachers with the necessary education and experience, could not be hired at the second step, the Department agreed that they could be hired at the step on the salary guide commensurate with their training and experience. The Department also agreed to work with the District to fill other teaching positions, such as gym, music and art teachers, if it were shown that these positions could not be filled at the second step of the salary guide. (R-1a)

With respect to all issues designated as settled for the purposes of the school-based budget appeals, the District reserves the right to raise any issues concerning the sufficiency of funding in a supplemental funding request. (R-1a)

I **FIND** that the agreements between the parties are reasonable and it is, therefore, **ORDERED** that the items above be implemented in accord with these agreements.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 19, 2001
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

1/2/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 04 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:

Thomas Dunn, Jr.
Linda G. King
Ellen Linart-Spiridon
Patrick Mullen
Pablo Muñoz
Harold Kennedy

For Respondent:

Pernell Brice

Exhibits:

P-23 Guide for Implementing Urban Education Reform in Abbott Districts
P-57 Class Size Reduction Plan
P-58 Excerpts from the Whole School Reform Implementation Plan
P-59 Letter, dated May 15, 2001, Couselo and Henry to Cecelia Cosgrove
P-60 Letter, dated June 5, 2001, Paul Macciachera to Couselo and Scott
P-61 Letter, dated August 17, 2001, Reid and Henry to Cosgrove
P-109 Issues on Appeal after August 17, 2001
P-113 Professional Staff Positions – Salary Dispute

R-1a Schools and Issues Resolved – Post Hearing
R-2 Schools and Issues Remaining – Post Hearing

OAL DKT. NO. EDU 5582-01
AGENCY DKT. NO. 204-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (THEODORE ROOSEVELT SCHOOL, #17) UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his independent and careful review of this local "Abbott" District's appeal of the Department's determination on its whole school reform funding request for the 2001-2002 school year, the Commissioner affirms the Initial Decision, which essentially embodies the parties' agreements on each of the contested issues.

Accordingly, the recommended decision of the OAL is affirmed and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED*

COMMISSIONER OF EDUCATION

Date of Decision: 2/19/02

Date of Mailing: 2/19/02

* Pursuant to *P.L.* 2001, *c.* 130, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division at the New Jersey Superior Court.

52-02

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (VICTOR MRAVLAG SCHOOL #21) UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

February 19, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5586-01
AGENCY DKT. NO. 188-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH
(VICTOR MRAVLAG SCHOOL, #21), UNION COUNTY
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION
Respondent.

Richard E. Shapiro, Esq., for petitioner,

Michael Lombardi, Deputy Attorney General, for respondent
(John J. Farmer, Attorney General of New Jersey, attorney)

Record Closed: November 13, 2001 Decided: December 19, 2001

BEFORE **EDITH KLINGER**, ALJ:

On June 13, 2001, the petitioner, Board of Education of the City of Elizabeth (Board), filed a Verified Petition of Appeal before the Commissioner of Education seeking adequate funding to implement its whole school reform plan for all of the schools in the District pursuant to the decision of the Supreme Court in *Abbott v. Burke*, 153 *N.J.* 480 (1998) and the statutes and regulations promulgated there under. The present appeal concerns the school-based budget for Victor Mravlag School #21. The respondent, Department of Education, filed its answer on June 28, 2001. On July 9,

2001, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The hearing was held on October 1, 2, 3, 5, 11, 12, and 15, 2001. The record closed on November 13, 2001 when the final submission was received from the parties.

The school's request for additional funding for staff salaries was approved by the Department in August 2001. After additional clarification, the Department added $4,761.00 to the budget for salaries and this issue was not litigated at hearing.

Only the following budgeted item for which funding was denied by the Department of Education, Offices of Program Review and Improvement and Fiscal Review, remained in issue at the time of the scheduled hearing in this matter.

Workpaper M: Stipends Lunch Program

The school requested funding for teachers to supervise the lunch program. After discussions between the parties, it was agreed that this issue would be withdrawn from the present appeal to be resolved elsewhere. I **FIND** that this agreement fully resolves this issue with respect to the school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

In resolving the dispute with respect to the salaries at which new staff could be hired, the Department denied that it intended to cap them at the second step of the District's salary guide. Where the District demonstrated that teachers with subject matter specialization, such as mathematics and science teachers with the necessary education and experience, could not be hired at the second step, the Department agreed that they could be hired at the step on the salary guide commensurable with their training and experience. The Department also agreed to work with the District to fill other teaching positions, such as gym, music and art teachers, if it were shown that these positions could not be filled at the second step of the salary guide. (R-1a)

With respect to all issues designated as settled for the purposes of the school-based budget appeals, the District reserves the right to raise any issues concerning the sufficiency of funding in a supplemental funding request. (R-1a)

With the resolution of these outstanding issues on appeal with respect to this school-based budget, I **CONCLUDE** that this fully resolves the dispute between the Department and Victor Mravlag School #21.

I **FIND** that the agreements between the parties are reasonable and it is, therefore, **ORDERED** that the items above be implemented in accordance with these agreements.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 19, 2001
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

January 2, 2002
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 04 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:

Thomas Dunn, Jr.
Linda G. King
Jacqueline Jennings
Pablo Muñoz
Harold Kennedy

For Respondent:

Pernell Brice

Exhibits:

P-8 Letter, dated May 14, 2001, Couselo and Henry to Jane Bodzioch
P-9 Letter, dated May 30, 2001, Bodzioch to Couselo and Henry with attached responses to SBB Fiscal Review Comments
P-10 Letter, dated August 17, 2001, Reid and Henry to Bodzioch
P-23 Guide for Implementing Urban Education Reform in Abbott Districts
P-57 Class Size Reduction Plan
P-109 Issues on Appeal after August 17, 2001
P-113 Professional Staff Positions – Salary Dispute

R-1a Schools and Issues Resolved – Post Hearing
R-2 Schools and Issues Remaining – Post Hearing

OAL DKT. NO. EDU 5586-01
AGENCY DKT. NO. 188-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (VICTOR MRAVLAG SCHOOL #21) UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his independent and careful review of this local "Abbott" District's appeal of the Department's determination on its whole school reform funding request for the 2001-2002 school year, the Commissioner affirms the Initial Decision, which essentially embodies the parties' agreements on each of the contested issues.

Accordingly, the recommended decision of the OAL is affirmed and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED*

COMMISSIONER OF EDUCATION

Date of Decision: 2/19/02

Date of Mailing: 2/19/02

* Pursuant to *P.L.* 2001, *c.* 130, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division at the New Jersey Superior Court.

53-02

53-02

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (LAFAYETTE SCHOOL #6) UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

February 19, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5585-01
AGENCY DKT. NO. 198-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH
(LAFAYETTE SCHOOL #6), UNION COUNTY
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION
Respondent.

Richard E. Shapiro, Esq., for petitioner,

Michael Lombardi, Deputy Attorney General, for respondent
(John J. Farmer, Attorney General of New Jersey, attorney)

Record Closed: November 13, 2001 Decided: December 19, 2001

BEFORE **EDITH KLINGER**, ALJ:

On June 13, 2001, the petitioner, Board of Education of the City of Elizabeth (Board), filed a Verified Petition of Appeal before the Commissioner of Education seeking adequate funding to implement its whole school reform plan for all of the schools in the District pursuant to the decision of the Supreme Court in *Abbott v. Burke*, 153 *N.J.* 480 (1998) and the statutes and regulations promulgated there under. The present appeal concerns the school-based budget for Lafayette School #6. The respondent, Department of Education, filed its answer on June 29, 2001. On July 9,

2001, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The hearing was held on October 1, 2, 3, 5, 11, 12, and 15, 2001. The record closed on November 13, 2001 when the final submission was received from the parties.

The school's request for additional funding for staff salaries was approved by the Department in August 2001. After additional clarification, the Department approved the addition of $59,513.00 to the budget and this issue was not litigated at hearing.

Only the following three budgeted items for which funding was denied by the Department of Education, Offices of Program Review and Improvement and Fiscal Review, remained in issue at the time of the scheduled hearing in this matter.

Workpaper M-1: Non-Salary Costs, Substitutes/Stipends, Supervision of Breakfast and Lunch

The school requested funding for all costs, including breakfast supervision, pertaining to the child nutrition program. After discussions between the parties, it was agreed that this issue would be withdrawn from the present appeal to be resolved elsewhere. I **FIND** that this agreement fully resolves this issue with respect to this school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

Workpaper W-1: Non-Salary Costs, Improvement of Instructional Services

The school requested funding for an FM amplifying system for regular classrooms to overcome the extremely noisy school environment so that students would be able to hear their teachers' instruction and directions. The system had worked well for this purpose in a prior year's trial. After hearing the testimony, the Department learned that the purpose of this system was not clearly understood when the funding was denied. It was agreed that $18,000.00 should be restored to the

school budget for the system. I **FIND** that this agreement fully resolves this issue with respect to the school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

Workpaper X-2: Non-Salary Costs, Stipends/Substitutes, Professional Development, Other

The school requested $20,000.00 to send four students to the Alternative Middle School. After discussions between the parties, it was agreed that this issue would be withdrawn from the present appeal to be resolved elsewhere. I **FIND** that this agreement fully resolves this issue with respect to the school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

In resolving the dispute with respect to the salaries at which new staff could be hired, the Department denied that it intended to cap them at the second step of the District's salary guide. Where the District demonstrated that teachers with subject matter specialization, such as mathematics and science teachers with the necessary education and experience, could not be hired at the second step, the Department agreed that they could be hired at the step on the salary guide commensurable with their training and experience. The Department also agreed to work with the District to fill other teaching positions, such as gym, music and art teachers, if it were shown that these positions could not be filled at the second step of the salary guide. (R-1a)

With respect to all issues designated as settled for the purposes of the school-based budget appeals, the District reserves the right to raise any issues concerning the sufficiency of funding in a supplemental funding request. (R-1a)

With the resolution of the outstanding issues on appeal with respect to this school-based budget, I **CONCLUDE** that this fully resolves the dispute between the Department and Lafayette School #6.

I **FIND** that the agreements between the parties are reasonable and it is, therefore, **ORDERED** that the items above be implemented in accordance with these agreements.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 19, 2001
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

January 2, 2002
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 04 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:

Thomas Dunn, Jr.
Linda G. King
Caridad Alfaro
Pablo Muñoz
Harold Kennedy

For Respondent:

Pernell Brice

Exhibits:

P-23 Guide for Implementing Urban Education Reform in Abbott Districts
P-35 Excerpts from the Whole School Reform Implementation Plan
P-36 Excerpts from the Whole School Reform Implementation Plan, Educational Technology
P-37 Memorandum, John P. Delaney to Alfaro, February 9, 2001
P-38 Letter, Alfaro to Delaney, dated February 13, 2001, with attached responses to Fiscal Evaluation Questions.
P-39 Letter, dated May 16, 2001, Couselo and Henry to Alfaro
P-40 Letter, dated May 31, 2001, Alfaro to Couselo and Henry with attached responses
P-41 Letter, dated August 17, 2001, Reid and Henry to Alfaro
P-57 Class Size Reduction Plan
P-109 Issues on Appeal after August 17, 2001
P-113 Professional Staff Positions – Salary Dispute

R-1a Schools and Issues Resolved – Post Hearing
R-2 Schools and Issues Remaining – Post Hearing

OAL DKT. NO. EDU 5585-01
AGENCY DKT. NO. 198-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (LAFAYETTE SCHOOL #6) UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his independent and careful review of this local "Abbott" District's appeal of the Department's determination on its whole school reform funding request for the 2001-2002 school year, the Commissioner affirms the Initial Decision, which essentially embodies the parties' agreements on each of the contested issues.

Accordingly, the recommended decision of the OAL is affirmed and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED*

COMMISSIONER OF EDUCATION

Date of Decision: 2/19/02

Date of Mailing: 2/19/02

* Pursuant to *P.L.* 2001, *c.* 130, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division at the New Jersey Superior Court.

54-02

54-02

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (CHARLES HUDSON SCHOOL #25) UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

February 19, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5580-01
AGENCY DKT. NO. 191-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH
(CHARLES HUDSON SCHOOL, #25), UNION COUNTY
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION
Respondent.

Richard E. Shapiro, Esq., for petitioner,

Michael Lombardi, Deputy Attorney General, for respondent
(John J. Farmer, Attorney General of New Jersey, attorney)

Record Closed: November 13, 2001 Decided: December 13, 2001

BEFORE **EDITH KLINGER**, ALJ:

On June 13, 2001, the petitioner, Board of Education of the City of Elizabeth (Board), filed a Verified Petition of Appeal before the Commissioner of Education seeking adequate funding to implement its whole school reform plan for all of the schools in the District pursuant to the decision of the Supreme Court in *Abbott v. Burke*, 153 *N.J.* 480 (1998) and the statutes and regulations promulgated there under. The present appeal concerns the school-based budget for Charles J. Hudson School #25. The respondent, Department of Education, filed its answer on June 28, 2001. On July

9, 2001, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The hearing was held on October 1, 2, 3, 5, 11, 12, and 15, 2001. The record closed on November 13, 2001 when the final submission was received from the parties.

The school's request for additional funding for staff salaries, purchased professional services for CFL/ALEM training and material and supplies were approved by the Department in August 2001. After additional clarification, the Department approved the addition of $14,283.00 for salaries, $9,000.00 for professional services and $2,425.00 for materials and supplies to the budget. These issues were not litigated at hearing.

The following budgeted items for which funding was denied by the Department of Education, Offices of Program Review and Improvement and Fiscal Review, remained in issue at the time of the scheduled hearing in this matter: breakfast-lunch program supervision and cafeteria tables; alternative middle school placement for four students; two new bilingual education teachers; funding for attendance celebrations; uniforms for security guards; teacher tutors; and substitute coverage.

Following the testimony of the witnesses, the parties agreed to resolve the following issues:

1. The school requested stipends for three teachers to provide breakfast and lunch supervision to students at a cost of $12,693.00 and funding for the purchase of tables for the cafeteria at a cost of $7,080.00. After discussions between the parties, it was agreed that these issues would be withdrawn from the present appeal to be resolved elsewhere. I **FIND** that this agreement fully resolves these issues with respect to this school-based budget, and I **CONCLUDE** that they are no longer in dispute in this appeal.

2. The school requested $20,000.00 to send four students to the Alternative Middle School. After discussions between the parties, it was agreed that this issue would be withdrawn from the present appeal to be resolved elsewhere. I **FIND** that this agreement fully resolves this issue with respect to this school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

The school's request for two bilingual education teachers, funding for attendance celebrations, uniforms for security guards, teachers, tutors and substitute coverage were withdrawn by the school on the basis of discussions between the parties.

In resolving the dispute with respect to the salaries at which new staff could be hired, the Department denied that it intended to cap them at the second step of the District's salary guide. Where the District demonstrated that teachers with subject matter specialization, such as mathematics and science teachers with the necessary education and experience, could not be hired at the second step, the Department agreed that they could be hired at the step on the salary guide commensurate with their training and experience. The Department also agreed to work with the District to fill other teaching positions, such as gym, music and art teachers, if it were shown that these positions could not be filled at the second step of the salary guide. (R-1a)

With respect to all issues designated as settled for the purposes of the school-based budget appeals, the District reserves the right to raise any issues concerning the sufficiency of funding in a supplemental funding request. (R-1a)

With the resolution of the outstanding issues on appeal with respect to this school-based budget, I **CONCLUDE** that this fully resolves the dispute between the Department and Charles Hudson School #25.

I **FIND** that the agreements between the parties are reasonable and it is, therefore, **ORDERED** that the items above be implemented in accordance with these agreements.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 19, 2001
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

January 2, 2002
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 04 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:

Linda G. King

Thomas Dunn, Jr.

Pablo Muñoz

Harold Kennedy

For Respondent:

Daryl Minus-Vincent

Exhibits:

P-23 Guide for Implementing Urban Education Reform in Abbott Districts

P-57 Charles J. Hudson, Class Size Reduction Plan

P-109 Salary issues on appeal.

R-1a Schools and Issues Resolved

R-2 Schools and Issues Remaining

OAL DKT. NO. EDU 5580-01
AGENCY DKT. NO. 191-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (CHARLES HUDSON SCHOOL #25) UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his independent and careful review of this local "Abbott" District's appeal of the Department's determination on its whole school reform funding request for the 2001-2002 school year, the Commissioner affirms the Initial Decision, which essentially embodies the parties' agreements on each of the contested issues.

Accordingly, the recommended decision of the OAL is affirmed and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED*

COMMISSIONER OF EDUCATION

Date of Decision: 2/19/02

Date of Mailing: 2/19/02

* Pursuant to *P.L.* 2001, *c.* 130, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division at the New Jersey Superior Court.

55-02

55-02

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (WILLIAM HALLORAN SCHOOL #22) UNION COUNTY	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

February 19, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5579-01
AGENCY DKT. NO. 193-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH
(WILLIAM HALLORAN SCHOOL, #22), UNION COUNTY
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION
Respondent.

Richard E. Shapiro, Esq., for petitioner,

Michael Lombardi, Deputy Attorney General, for respondent
(John J. Farmer, Attorney General of New Jersey, attorney)

Record Closed: November 13, 2001 Decided: December 19, 2001

BEFORE **EDITH KLINGER**, ALJ:

On June 13, 2001, the petitioner, Board of Education of the City of Elizabeth (Board), filed a Verified Petition of Appeal before the Commissioner of Education seeking adequate funding to implement its whole school reform plan for all of the schools in the District pursuant to the decision of the Supreme Court in *Abbott v. Burke*, 153 *N.J.* 480 (1998) and the statutes and regulations promulgated there under. The present appeal concerns the school-based budget for William Halloran School #22. The respondent, Department of Education, filed its answer on June 28, 2001. On July

9, 2001, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The hearing was held on October 1, 2, 3, 5, 11, 12, and 15, 2001. The record closed on November 13, 2001 when the final submission was received from the parties.

A request for additional funding for staff salaries was included in error as an issue in this appeal. Since there is no budget dispute about salaries, the issue will not be considered here.

Only the following budgeted item for which funding was denied by the Department of Education, Offices of Program Review and Improvement and Fiscal Review, remained in issue at the time of the scheduled hearing in this matter.

Workpaper M-1: Stipends - Lunch Supervision

The school requested funding for the costs associated with supervision of the lunch program. After discussions between the parties, it was agreed that this issue would be withdrawn from the present appeal to be resolved elsewhere. I **FIND** that this agreement fully resolves this issue with respect to the school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

With the resolution of this outstanding issue on appeal with respect to the school-based budget, I **CONCLUDE** that this fully resolves the dispute between the Department and William Halloran School #22.

With respect to all issues designated as settled for the purposes of the school-based budget appeals, the District reserves the right to raise any issues concerning the sufficiency of funding in a supplemental funding request. (R-1a)

I **FIND** that the agreements between the parties are reasonable and it is, therefore, **ORDERED** that the items above be implemented in accord with these agreements.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 19, 2001
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

January 2, 2002
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 04 2002
DATE

ACTING DIRECTOR AND ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:

Thomas Dunn, Jr.

Linda G. King

Pablo Muñoz

Harold Kennedy

For Respondent:

Daryl Minus-Vincent

Exhibits:

P-11 Letter, dated May 14, 2001, Couselo and Henry to Stan Jaskot

P-12 Letter, dated May 31, 2001, Jaskot to Couselo and Henry with attached responses to the SBB review

P-13 Letter, dated August 17, 2001, Reid and Henry to Jaskot

P-23 Guide for Implementing Urban Education Reform in Abbott Districts

P-57 Class Size Reduction Plan

P-109 Issues on Appeal after August 17, 2001

R-1a Schools and Issues Resolved – Post Hearing

R-2 Schools and Issues Remaining – Post Hearing

OAL DKT. NO. EDU 5579-01
AGENCY DKT. NO. 193-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (WILLIAM HALLORAN SCHOOL #22) UNION COUNTY	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his independent and careful review of this local "Abbott" District's appeal of the Department's determination on its whole school reform funding request for the 2001-2002 school year, the Commissioner affirms the Initial Decision, which essentially embodies the parties' agreements on each of the contested issues.

Accordingly, the recommended decision of the OAL is affirmed and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED*

COMMISSIONER OF EDUCATION

Date of Decision: 2/19/02

Date of Mailing: 2/19/02

* Pursuant to *P.L.* 2001, *c.* 130, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division at the New Jersey Superior Court.

56-01

56-02

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (MABEL G. HOLMES MIDDLE SCHOOL #71) UNION COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

February 19, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5578-01
AGENCY DKT. NO. 192-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH
(MABEL G. HOLMES MIDDLE SCHOOL, #71), UNION COUNTY
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION
Respondent.

Richard E. Shapiro, Esq., for petitioner,

Michael Lombardi, Deputy Attorney General, for respondent
(John J. Farmer, Attorney General of New Jersey, attorney)

Record Closed: November 13, 2001 Decided: December 19, 2001

BEFORE **EDITH KLINGER**, ALJ:

On June 13, 2001, the petitioner, Board of Education of the City of Elizabeth (Board), file a Verified Petition of Appeal before the Commissioner of Education seeking adequate funding to implement its whole school reform plan for all of the schools in the District pursuant to the decision of the Supreme Court in *Abbott v. Burke*, 153 *N.J.* 480 (1998) and the statutes and regulations promulgated there under. The present appeal concerns the school-based budget for Mabel G. Holmes Middle School #71. The respondent, Department of Education, filed its answer on June 28, 2001. On

July 9, 2001, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The hearing was held on October 1, 2, 3, 5, 11, 12, and 15, 2001. The record closed on November 13, 2001 when the final submission was received from the parties.

The school's requests for additional funding for staff salaries; texts, materials and supplies for the ESL program; and workbooks for the ESL program, were resolved in August 2001. After additional clarification of the requests by the school, the sum of $19,044.00 was approved by the Department for salaries and $2,440.00 and $3,230.00 were approved for the respective requests for the ESL program. These issues were not litigated at the hearing in this matter.

Only the following two budgeted items for which funding was denied by the Department of Education, Offices of Program Review and Improvement and Fiscal Review, remained in issue at the time of the scheduled hearing in this matter.

Workpaper M-1: Stipends – Breakfast Program (Object Code 101)

The school requested $4,186.00 for one teacher to work in the breakfast program. After discussions between the parties, it was agreed that this issue would be withdrawn from the present appeal to be resolved elsewhere. I **FIND** that this agreement fully resolves this issue with respect to the school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

Workpaper N-1: Regular Classroom Expenses – Alternative Education Program

The school requested $20,000.00 to send four students to the Alternative Middle School. After discussions between the parties, it was agreed that this issue would be withdrawn from the present appeal to be resolved elsewhere. I **FIND** that this

agreement fully resolves this issue with respect to the school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

With the resolution of the only two outstanding issues on appeal with respect to this school-based budget, I **CONCLUDE** that this fully resolves the dispute between the Department and George Washington School #1.

In resolving the dispute with respect to the salaries at which new staff could be hired, the Department denied that it intended to cap them at the second step of the District's salary guide. Where the District demonstrated that teachers with subject matter specialization, such as mathematics and science teachers with the necessary education and experience, could not be hired at the second step, the Department agreed that they could be hired at the step on the salary guide commensurate with their training and experience. The Department also agreed to work with the District to fill other teaching positions, such as gym, music and art teachers, if it were shown that these positions could not be filled at the second step of the salary guide. (R-1a)

With respect to all issues designated as settled for the purposes of the school-based budget appeals, the District reserves the right to raise any issues concerning the sufficiency of funding in a supplemental funding request. (R-1a)

I **FIND** that the agreements between the parties are reasonable and it is, therefore, **ORDERED** that the items above be implemented in accord with these agreements.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 19, 2001
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

January 2, 2002
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 04 2002
DATE

OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:

Thomas Dunn, Jr.

Linda G. King

Pablo Muñoz

Harold Kennedy

For Respondent:

Daryl Minus-Vincent

Exhibits:

P-23 Guide for Implementing Urban Education Reform in Abbott Districts

P-57 Class Size Reduction Plan

P-109 Salary issues on appeal

P-113 Re: Professional Staff Positions

R-1a Schools and Issues Resolved – Post Hearing

R-2 Schools and Issues Remaining – Post Hearing

OAL DKT. NO. EDU 5578-01
AGENCY DKT. NO. 192-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (MABEL G. HOLMES MIDDLE SCHOOL #71) UNION COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his independent and careful review of this local "Abbott" District's appeal of the Department's determination on its whole school reform funding request for the 2001-2002 school year, the Commissioner affirms the Initial Decision, which essentially embodies the parties' agreements on each of the contested issues.

Accordingly, the recommended decision of the OAL is affirmed and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED*

COMMISSIONER OF EDUCATION

Date of Decision: 2/19/02

Date of Mailing: 2/19/02

* Pursuant to *P.L.* 2001, *c.* 130, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division at the New Jersey Superior Court.

57-02

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (MADISON-MONROE SCHOOL #16) UNION COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

February 19, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5575-01
AGENCY DKT. NO. 196-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH
(MADISON MONROE SCHOOL #16), UNION COUNTY
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION
Respondent.

Richard E. Shapiro, Esq., for petitioner,

Michael Lombardi, Deputy Attorney General, for respondent
(John J. Farmer, Attorney General of New Jersey, attorney)

Record Closed: November 13, 2001 Decided: December 19, 2001

BEFORE **EDITH KLINGER**, ALJ:

On June 13, 2001, the petitioner, Board of Education of the City of Elizabeth (Board), filed a Verified Petition of Appeal before the Commissioner of Education seeking adequate funding to implement its whole school reform plan for all of the schools in the District pursuant to the decision of the Supreme Court in *Abbott v. Burke*, 153 *N.J.* 480 (1998) and the statutes and regulations promulgated there under. The present appeal concerns the school-based budget for Madison Monroe School #16. The respondent, Department of Education, filed its answer on June 28, 2001. On July

'9, 2001, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The hearing was held on October 1, 2, 3, 5, 11, 12, and 15, 2001. The record closed on November 13, 2001 when the final submission was received from the parties.

The school's request for additional funding for staff salaries was approved by the Department in August 2001. After additional clarification, the sum of $9,522.00 was added back into the budget for this purpose and the issue was not litigated at the hearing in this matter.

Only the following budgeted item for which funding was denied by the Department of Education, Offices of Program Review and Improvement and Fiscal Review, remained in issue at the time of the scheduled hearing in this matter.

Workpaper M-1: Stipends – Breakfast and Lunch Program Supervision (Object Code 101)

The school requested stipends for two teachers to provide breakfast supervision to students at a total of $2,081.00. After discussions between the parties, it was agreed that this issue would be withdrawn from the present appeal to be resolved elsewhere. I **FIND** that this agreement fully resolves this issue with respect to the school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

In resolving the dispute with respect to the salaries at which new staff could be hired, the Department denied that it intended to cap them at the second step of the District's salary guide. Where the District demonstrated that teachers with subject matter specialization, such as mathematics and science teachers with the necessary education and experience, could not be hired at the second step, the Department agreed that they could be hired at the step on the salary guide commensurable with their training and experience. The Department also agreed to work with the District to

fill other teaching positions, such as gym, music and art teachers, if it were shown that these positions could not be filled at the second step of the salary guide. (R-1a)

With respect to all issues designated as settled for the purposes of the school-based budget appeals, the District reserves the right to raise any issues concerning the sufficiency of funding in a supplemental funding request. (R-1a)

With the resolution of the only outstanding issue on appeal with respect to this school-based budget, I **CONCLUDE** that this fully resolves the dispute between the Department and Madison Monroe School #16.

I **FIND** that the agreements between the parties are reasonable and it is, therefore, **ORDERED** that the items above be implemented in accord with these agreements.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 19, 2001
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

January 2, 2002
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 04 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:

Linda G. King

Thomas Dunn Jr.

Pablo Muñoz

Harold Kennedy

For Respondent:

Daryl Minus-Vincent

Exhibits:

P-4 Letter, dated May 14, 2001, Couselo and Henry to Webb

P-5 Letter, dated May 31, 2001, Webb to Couselo and Henry

P-6 No Exhibit

P-7 Letter, dated August 17, 2001, Reid and Henry to Webb

P-23 Guide for Implementing Urban Education Reform in Abbott Districts

P-57 Class Size Reduction Plan

P-109 Salary issues on appeal.

R-1a Schools and Issues Resolved – Post Hearing

R-2 Schools and Issues Remaining – Post Hearing

OAL DKT. NO. EDU 5575-01
AGENCY DKT. NO. 196-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (MADISON-MONROE SCHOOL #16) UNION COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his independent and careful review of this local "Abbott" District's appeal of the Department's determination on its whole school reform funding request for the 2001-2002 school year, the Commissioner affirms the Initial Decision, which essentially embodies the parties' agreements on each of the contested issues.

Accordingly, the recommended decision of the OAL is affirmed and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED*

COMMISSIONER OF EDUCATION

Date of Decision: 2/19/02

Date of Mailing: 2/19/02

* Pursuant to *P.L.* 2001, *c.* 130, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division at the New Jersey Superior Court.

58-02

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (BATTIN MIDDLE SCHOOL #75) UNION COUNTY,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

February 19, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5573-01
AGENCY DKT. NO. 197-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH
(BATTIN MIDDLE SCHOOL #75), UNION COUNTY
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION
Respondent.

Richard E. Shapiro, Esq., for petitioner,

Michael Lombardi, Deputy Attorney General, for respondent,
(John J. Farmer, Attorney General of New Jersey, attorney)

Record Closed: November 13, 2001 Decided: December 19, 2001

BEFORE **EDITH KLINGER**, ALJ:

On June 13, 2001, the petitioner, Board of Education of the City of Elizabeth (Board), file a Verified Petition of Appeal before the Commissioner of Education seeking adequate funding to implement its whole school reform plan for all of the schools in the District pursuant to the decision of the Supreme Court in *Abbott v. Burke*, 153 *N.J.* 480 (1998) and the statutes and regulations promulgated there under. The present appeal concerns the school-based budget for Battin Middle School #75. The respondent, Department of Education, filed its answer on June 29, 2001. On July 9,

2001, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The hearing was held on October 1, 2, 3, 5, 11, 12, and 15, 2001. The record closed on November 13, 2001 when the final submission was received from the parties.

The school's requests for additional funding for staff salaries and bus supervision were approved by the Department in August 2001. After additional clarification, the Department approved the addition of $28,566.00 to the budget for salaries and $8,280.00 for bus supervision and these issues were not litigated at hearing.

Only the following two budgeted items for which funding was denied by the Department of Education, Offices of Program Review and Improvement and Fiscal Review, remained in issue at the time of the scheduled hearing in this matter.

Workpaper M: Breakfast Program

The school requested funding for teachers to supervise the breakfast program. After discussions between the parties, it was agreed that this issue would be withdrawn from the present appeal to be resolved elsewhere. I **FIND** that this agreement fully resolves this issue with respect to this school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

Workpaper R: Tuition for Alternative School

The school requested $20,000.00 to send four students to the Alternative Middle School. After discussions between the parties, it was agreed that this issue would be withdrawn from the present appeal to be resolved elsewhere. I **FIND** that this agreement fully resolves this issue with respect to the school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

In resolving the dispute with respect to the salaries at which new staff could be hired, the Department denied that it intended to cap them at the second step of the District's salary guide. Where the District demonstrated that teachers with subject matter specialization, such as mathematics and science teachers with the necessary education and experience, could not be hired at the second step, the Department agreed that they could be hired at the step on the salary guide commensurable with their training and experience. The Department also agreed to work with the District to fill other teaching positions, such as gym, music and art teachers, if it were shown that these positions could not be filled at the second step of the salary guide. (R-1a)

With respect to all issues designated as settled for the purposes of the school-based budget appeals, the District reserves the right to raise any issues concerning the sufficiency of funding in a supplemental funding request. (R-1a)

With the resolution of these outstanding issues on appeal with respect to this school-based budget, I **CONCLUDE** that this fully resolves the dispute between the Department and Battin Middle School #75.

I **FIND** that the agreements between the parties are reasonable and it is, therefore, **ORDERED** that the items above be implemented in accord with these agreements.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 19, 2001
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

January 2, 2002
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 04 2002
DATE

ACTING DIRECTOR AND ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:

Thomas Dunn, Jr.

Linda G. King

Pablo Muñoz

Harold Kennedy

For Respondent:

Pernell Brice

Exhibits:

P-14 Letter, dated May 14, 2001, Couselo and Henry to Aaron Goldblatt

P-15 Letter, dated May 30, 2001, Goldblatt to Couselo and Henry with attached responses to SBB Fiscal Review Comments

P-16 Letter, dated August 22, 2001, Reid and Henry to Goldblatt

P-23 Guide for Implementing Urban Education Reform in Abbott Districts

P-57 Class Size Reduction Plan

P-109 Issues on Appeal after August 17, 2001

P-113 Professional Staff Positions – Salary Dispute

R-1a Schools and Issues Resolved – Post Hearing

R-2 Schools and Issues Remaining – Post Hearing

OAL DKT. NO. EDU 5573-01
AGENCY DKT. NO. 197-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (BATTIN MIDDLE SCHOOL #75) UNION COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his independent and careful review of this local "Abbott" District's appeal of the Department's determination on its whole school reform funding request for the 2001-2002 school year, the Commissioner affirms the Initial Decision, which essentially embodies the parties' agreements on each of the contested issues.

Accordingly, the recommended decision of the OAL is affirmed and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED*

COMMISSIONER OF EDUCATION

Date of Decision: 2/19/02

Date of Mailing: 2/19/02

* Pursuant to *P.L.* 2001, *c.* 130, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division at the New Jersey Superior Court.

61-02

61-02

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (PETERSTOWN SCHOOL #3) UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

February 19, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5581-01
AGENCY DKT. NO. 182-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH
(PETERSTOWN SCHOOL, #3), UNION COUNTY
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION
Respondent.

Richard E. Shapiro, Esq., for petitioner,

Michael Lombardi, Deputy Attorney General, for respondent
(John J. Farmer, Attorney General of New Jersey, attorney)

Record Closed: November 13, 2001 Decided: December 19, 2001

BEFORE **EDITH KLINGER**, ALJ:

On June 13, 2001, the petitioner, Board of Education of the City of Elizabeth (Board), filed a Verified Petition of Appeal before the Commissioner of Education seeking adequate funding to implement its whole school reform plan for all of the schools in the District pursuant to the decision of the Supreme Court in *Abbott v. Burke*, 153 *N.J.* 480 (1998) and the statutes and regulations promulgated there under. The present appeal concerns the school-based budget for Peterstown School #3. The respondent, Department of Education, filed its answer on June 28, 2001. On July 9,

2001, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The hearing was held on October 1, 2, 3, 5, 11, 12, and 15, 2001. The record closed on November 13, 2001 when the final submission was received from the parties.

The school's request for additional funding for staff salaries was approved by the Department in August 2001. After additional clarification, the Department approved the addition of $23,806.00 to the budget and this issue was not litigated at hearing.

Only the following budgeted items for which funding was denied by the Department of Education, Offices of Program Review and Improvement and Fiscal Review, remained in issue at the time of the scheduled hearing in this matter.

Workpaper M-1: Non-Salary Costs Breakfast/Lunch Supervision

The school requested funding for teachers to staff the breakfast and lunch programs. After discussions between the parties, it was agreed that this issue would be withdrawn from the present appeal to be resolved elsewhere. I **FIND** that this agreement fully resolves this issue with respect to this school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

Workpaper L: In School Suspension Teachers

The school requested funding for continuation of the existing in-school suspension program. The purpose of the program is to eliminate out-of-school suspensions for the safety of the students and for their continuing instruction. After discussions between the parties following testimony, the Department agreed that the expense was appropriate and approved the funding. As a result, $28,000.00 was restored to the budget. I **FIND** that this agreement fully resolves this issue with respect

to this school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

Two other budget requests, additional money for a health and social service position and funding for the purchase of laptop computers, were withdrawn by the school on the basis of discussions between the parties.

With the resolution of these outstanding issues on appeal with respect to this school-based budget, I **CONCLUDE** that this fully resolves the dispute between the Department and Peterstown School #3.

In resolving the dispute with respect to the salaries at which new staff could be hired, the Department denied that it intended to cap them at the second step of the District's salary guide. Where the District demonstrated that teachers with subject matter specialization, such as mathematics and science teachers with the necessary education and experience, could not be hired at the second step, the Department agreed that they could be hired at the step on the salary guide commensurate with their training and experience. The Department also agreed to work with the District to fill other teaching positions, such as gym, music and art teachers, if it were shown that these positions could not be filled at the second step of the salary guide. (R-1a)

With respect to all issues designated as settled for the purposes of the school-based budget appeals, the District reserves the right to raise any issues concerning the sufficiency of funding in a supplemental funding request. (R-1a)

I **FIND** that the agreements between the parties are reasonable and it is, therefore, **ORDERED** that the items above be implemented in accordance with these agreements.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 19, 2001
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

January 2, 2002
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 04 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:

Thomas Dunn, Jr.
Linda G. King
Olga Hugelmeyer
Pablo Muñoz
Harold Kennedy

For Respondent:

Pernell Brice

Exhibits:

P-23 Guide for Implementing Urban Education Reform in Abbott Districts
P-29 Local Particularized Need for Supplemental Program or Service
P-30 SBB Fiscal Review Comments
P-31 SBB Fiscal Review Responses, March 23, 2001
P-32 Letter, dated May 14, 2001, Couselo and Henry to Lillian Martinez
P-33 Letter, dated June 12, 2001, Martinez to Couselo and Henry, with attachments
P-34 Letter, dated August 17, 2001, Reid and Henry to Martinez
P-57 Class Size Reduction Plan
P-109 Issues on Appeal after August 17, 2001
P-113 Professional Staff Positions – Salary Dispute

R-1a Schools and Issues Resolved – Post Hearing
R-2 Schools and Issues Remaining – Post Hearing

OAL DKT. NO. EDU 5581-01
AGENCY DKT. NO. 182-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (PETERSTOWN SCHOOL #3) UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his independent and careful review of this local "Abbott" District's appeal of the Department's determination on its whole school reform funding request for the 2001-2002 school year, the Commissioner affirms the Initial Decision, which essentially embodies the parties' agreements on each of the contested issues.

Accordingly, the recommended decision of the OAL is affirmed and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED*

COMMISSIONER OF EDUCATION

Date of Decision: 2/19/02

Date of Mailing: 2/19/02

* Pursuant to *P.L.* 2001, *c.* 130, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division at the New Jersey Superior Court.

59-02

59-02

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (GEORGE WASHINGTON SCHOOL #1), UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

February 19, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5788-01
AGENCY DKT. NO. 184-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH
(GEORGE WASHINGTON SCHOOL, #2), UNION COUNTY
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION
Respondent.

Richard E. Shapiro, Esq., for petitioner,

Michael Lombardi, Deputy Attorney General, for respondent
(John J. Farmer, Attorney General of New Jersey, attorney)

Record Closed: November 13, 2001 Decided: December 19, 2001

BEFORE **EDITH KLINGER**, ALJ:

On June 13, 2001, the petitioner, Board of Education of the City of Elizabeth (Board), filed a Verified Petition of Appeal before the Commissioner of Education seeking adequate funding to implement its whole school reform plan for all of the schools in the District pursuant to the decision of the Supreme Court in *Abbott v. Burke*, 153 *N.J.* 480 (1998) and the statutes and regulations promulgated there under. The present appeal concerns the school-based budget for George Washington School #1. The respondent, Department of Education, filed its answer on June 29, 2001. On July

18, 2001, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The hearing was held on October 1, 2, 3, 5, 11, 12, and 15, 2001. The record closed on November 13, 2001 when the final submission was received from the parties.

The school's request for additional funding for staff salaries was approved by the Department in August 2001. The issue was appealed because the District was not clear as to the Department's position on the level at which the salaries would be funded. After clarification, the sum of $40,469.00 was added back into the budget for this purpose and this issue was not presented at hearing.

Only the following budgeted item for which funding was denied by the Department of Education, Offices of Program Review and Improvement and Fiscal Review, remained in issue at the time of the scheduled hearing in this matter.

Workpaper M-1: Substitutes/Stipends-Other(101) & Workpaper M-1 Substitutes/Stipends-Other(106)

The school requested $52,000 for a teacher-in-charge of lunch supervision and $8642 for a teacher-in-charge of breakfast supervision of students. After discussions between the parties, it was agreed that this issue would be withdrawn from the present appeal to be resolved elsewhere in another proceeding. I **FIND** that this agreement fully resolves this issue with respect to this school-based budget and I **CONCLUDE** that it is no longer in dispute in this appeal.

With the resolution of the only outstanding issue on appeal with respect to this school-based budget, I **CONCLUDE** that this fully resolves the dispute between the Department and the George Washington School #1.

In resolving the dispute with respect to the salaries at which new staff could be hired, the Department denied that it intended to cap them at the second step of the District's salary guide. Where the District demonstrated that teachers with subject matter specialization, such as mathematics and science teachers with the necessary education and experience, could not be hired at the second step, the Department agreed that they could be hired at the step on the salary guide commensurable with their training and experience. The Department also agreed to work with the District to fill other teaching positions, such as gym, music and art teachers, if it were shown that these positions could not be filled at the second step of the salary guide. (R-1a)

With respect to all issues designated as settled for the purposes of the school-based budget appeals, the District reserves the right to raise any issues concerning the sufficiency of funding in a supplemental funding request. (R-1a)

I **FIND** that the agreements between the parties are reasonable and it is, therefore, **ORDERED** that the items above be implemented in accord with these agreements.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 19, 2001
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

January 2, 2002
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 04 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:

Thomas Dunn, Jr.

Linda G. King

Pablo Muñoz

Harold Kennedy

For Respondent:

Pernell Brice

Exhibits:

P-19 Letter, dated May 14, 2001, Reid and Henry to Finch-Johnson

P-20 Letter, dated June 7, 2001, Reid and Henry to Finch-Johnson

P-21 Letter, dated August 17, 2001, Reid and Henry to Finch-Johnson

P-23 Guide for Implementing Urban Education Reform in Abbott Districts

P-57 Class Size Reduction Plan

P-109 Salary issues on appeal

P-113 Re: Professional Staff Positions

R-1a Schools and Issues Resolved – Post Hearing

R-2 Schools and Issues Remaining – Post Hearing

OAL DKT. NO. EDU 5788-01
AGENCY DKT. NO. 184-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (GEORGE WASHINGTON SCHOOL #1), UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his independent and careful review of this local "Abbott" District's appeal of the Department's determination on its whole school reform funding request for the 2001-2002 school year, the Commissioner affirms the Initial Decision, which essentially embodies the parties' agreements on each of the contested issues.

Accordingly, the recommended decision of the OAL is affirmed and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED*

COMMISSIONER OF EDUCATION

Date of Decision: 2/19/02

Date of Mailing: 2/19/02

* Pursuant to *P.L.* 2001, *c.* 130, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division at the New Jersey Superior Court.

62-02

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (CHRISTOPHER COLUMBUS SCHOOL #15), UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

February 19, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5591-01
AGENCY DKT. NO. 186-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH
(CHRISTOPHER COLUMBUS SCHOOL, #15), UNION COUNTY
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION
Respondent.

Richard E. Shapiro, Esq., for petitioner,

Michael Lombardi, Deputy Attorney General, for respondent
(John J. Farmer, Attorney General of New Jersey, attorney)

Record Closed: November 13, 2001 Decided: December 19, 2001

BEFORE **EDITH KLINGER**, ALJ:

On June 13, 2001, the petitioner, Board of Education of the City of Elizabeth (Board), filed a Verified Petition of Appeal before the Commissioner of Education seeking adequate funding to implement its whole school reform plan for all of the schools in the District pursuant to the decision of the Supreme Court in *Abbott v. Burke*, 153 *N.J.* 480 (1998) and the statutes and regulations promulgated there under. The present appeal concerns the school-based budget for Christopher Columbus School #15. The respondent, Department of Education, filed its answer on June 28,

2001. On July 9, 2001 the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The hearing was held on October 1, 2, 3, 5, 11, 12, and 15, 2001. The record closed on November 13, 2001 when the final submission was received from the parties.

The school's request for additional funding for staff salaries was approved by the Department in August 2001. After additional clarification, the Department approved the addition of $40,411.00 to the budget for salaries and this issue was not litigated at hearing.

Only the following budgeted item for which funding was denied by the Department of Education, Offices of Program Review and Improvement and Fiscal Review, remained in issue at the time of the scheduled hearing in this matter.

Workpaper M-1: Non-Salary Costs - Breakfast and Lunch Programs

The school requested funding for the costs associated with supervision of the breakfast and lunch programs. After discussions between the parties, it was agreed that this issue would be withdrawn from the present appeal to be resolved elsewhere. I **FIND** that this agreement fully resolves this issue with respect to this school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

With the resolution of these outstanding issues on appeal with respect to this school-based budget, I **CONCLUDE** that this fully resolves the dispute between the Department and the Christopher Columbus School #15.

I **FIND** that the agreements between the parties are reasonable and it is, therefore, **ORDERED** that the items above be implemented in accord with these agreements.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 19, 2001
DATE

Edith Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

January 2, 2002
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 04 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:

Thomas Dunn, Jr.

Linda G. King

Pablo Muñoz

Harold Kennedy

For Respondent:

Pernell Brice

Exhibits:

P-1 Letter, dated May 14, 2001, Couselo and Henry to Stephen Liddawi

P-2 Letter, dated May 29, 2001, Liddawi to Couselo and Henry with attached SBB review responses

P-3 Letter, dated August 17, 2001, Reid and Henry to Liddawi

P-23 Guide for Implementing Urban Education Reform in Abbott Districts

P-57 Class Size Reduction Plan

P-109 Issues on Appeal after August 17, 2001

P-113 Professional Staff Positions – Salary Dispute

R-1a Schools and Issues Resolved – Post Hearing

R-2 Schools and Issues Remaining – Post Hearing

OAL DKT. NO. EDU 5591-01
AGENCY DKT. NO. 186-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (CHRISTOPHER COLUMBUS SCHOOL #15), UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his independent and careful review of this local "Abbott" District's appeal of the Department's determination on its whole school reform funding request for the 2001-2002 school year, the Commissioner affirms the Initial Decision, which essentially embodies the parties' agreements on each of the contested issues.

Accordingly, the recommended decision of the OAL is affirmed and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED*

COMMISSIONER OF EDUCATION

Date of Decision: 2/19/02

Date of Mailing: 2/19/02

* Pursuant to *P.L.* 2001, *c.* 130, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division at the New Jersey Superior Court.

63-02

63-02

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (ROBERT MORRIS SCHOOL #18), UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

February 19, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5588-01
AGENCY DKT. NO. 203-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH
(ROBERT MORRIS SCHOOL, #18), UNION COUNTY
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION
Respondent.

Richard E. Shapiro, Esq., for petitioner,

Michael Lombardi, Deputy Attorney General, for respondent
(John J. Farmer, Attorney General of New Jersey, attorney)

Record Closed: November 13, 2001 Decided: December 19, 2001

BEFORE **EDITH KLINGER**, ALJ:

On June 14, 2001, the petitioner, Board of Education of the City of Elizabeth (Board), filed a Verified Petition of Appeal before the Commissioner of Education seeking adequate funding to implement its whole school reform plan for all of the schools in the District pursuant to the decision of the Supreme Court in *Abbott v. Burke*, 153 *N.J.* 480 (1998) and the statutes and regulations promulgated there under. The present appeal concerns the school-based budget for Robert Morris School #18. The respondent, Department of Education, filed its answer on June 29, 2001. On July 9,

2001, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The hearing was held on October 1, 2, 3, 5, 11, 12, and 15, 2001. The record closed on November 13, 2001 when the final submission was received from the parties.

The school's request for additional funding for staff salaries was approved by the Department in August 2001. After additional clarification, the sum of $13,331.00 was added back into the budget for this purpose and the issue was not litigated at the hearing in this matter. The school's request for laptop computers was withdrawn pursuant to discussions between the parties.

Only the following budgeted items for which funding was denied by the Department of Education, Offices of Program Review and Improvement and Fiscal Review, remained in issue at the time of the scheduled hearing in this matter.

Workpaper M-1: Substitute/Stipends Grades 1-5 Other

The school requested funding for supervision of the school breakfast and lunch program. After discussions between the parties, it was agreed that this issue would be withdrawn from the present appeal to be resolved elsewhere. I **FIND** that this agreement fully resolves this issue with respect to this school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

Workpaper W-1: Technology

The school requested funds to purchase four desk-top computers and printers for tutors based upon the Success For All (SFA) model. The request was denied because the Department determined that sufficient funds were already provided for technology. Under the SFA model, the teacher tutors require access to computers to input grades, prepare lesson plans and assessments, and track students' records.

After hearing testimony that the building's computers and those to be purchased in the technology budget are unavailable to the teacher tutors because they are in use by teachers or are located in classrooms for the use of students, the Department reconsidered its denial and agreed to replace $9,800.00 in the budget for this purpose. I **FIND** that this agreement fully resolves this issue with respect to the school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

With the resolution of the only outstanding issues on appeal with respect to this school-based budget, I **CONCLUDE** that this fully resolves the dispute between the Department and Robert Morris School #18.

In resolving the dispute with respect to the salaries at which new staff could be hired, the Department denied that it intended to cap them at the second step of the District's salary guide. Where the District demonstrated that teachers with subject matter specialization, such as mathematics and science teachers with the necessary education and experience, could not be hired at the second step, the Department agreed that they could be hired at the step on the salary guide commensurate with their training and experience. The Department also agreed to work with the District to fill other teaching positions, such as gym, music and art teachers, if it were shown that these positions could not be filled at the second step of the salary guide. (R-1a)

With respect to all issues designated as settled for the purposes of the school-based budget appeals, the District reserves the right to raise any issues concerning the sufficiency of funding in a supplemental funding request. (R-1a)

I **FIND** that the agreements between the parties are reasonable and it is, therefore, **ORDERED** that the items above be implemented in accord with these agreements.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 19, 2001
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

January 2, 2002
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 04 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:

Linda G. King
Thomas Dunn Jr.
Pablo Muñoz
Harold Kennedy
Maria Guarraci

For Respondent:

Pernell Brice

Exhibits:

P-23 Guide for Implementing Urban Education Reform in Abbott Districts
P-57 Class Size Reduction Plan
P-85 Excerpt from Whole School Reform Implementation Plan
P-86 Letter, dated May 15, 2001, Couselo and Henry to Eduardo Perez
P-87 Letter, dated May 30, 2001, Perez to Couselo and Henry, with attached responses to SBB Fiscal Review Comments
P-88 Letter, dated August 17, 2001, Reid and Henry to Perez
P-109 Salary issues on appeal.

R-1a Schools and Issues Resolved – Post Hearing
R-2 Schools and Issues Remaining – Post Hearing

OAL DKT. NO. EDU 5588-01
AGENCY DKT. NO. 203-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (ROBERT MORRIS SCHOOL #18), UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his independent and careful review of this local "Abbott" District's appeal of the Department's determination on its whole school reform funding request for the 2001-2002 school year, the Commissioner affirms the Initial Decision, which essentially embodies the parties' agreements on each of the contested issues.

Accordingly, the recommended decision of the OAL is affirmed and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED*

COMMISSIONER OF EDUCATION

Date of Decision: 2/19/02

Date of Mailing: 2/19/02

* Pursuant to *P.L.* 2001, *c.* 130, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division at the New Jersey Superior Court.

60-02

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (WINFIELD SCOTT SCHOOL #2), UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

February 19, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5593-01
AGENCY DKT. NO. 187-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH
(WINFIELD SCOTT SCHOOL, #2), UNION COUNTY
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION
Respondent.

Richard E. Shapiro, Esq., for petitioner,

Michael Lombardi, Deputy Attorney General, for respondent
(John J. Farmer, Attorney General of New Jersey, attorney)

Record Closed: November 13, 2001 Decided: December 19, 2001

BEFORE **EDITH KLINGER**, ALJ:

On June 13, 2001, the petitioner, Board of Education of the City of Elizabeth (Board), filed a Verified Petition of Appeal before the Commissioner of Education seeking adequate funding to implement its whole school reform plan for all of the schools in the District pursuant to the decision of the Supreme Court in *Abbott v. Burke*, 153 *N.J.* 480 (1998) and the statutes and regulations promulgated there under. The present appeal concerns the school-based budget for Winfield Scott School #2. The respondent, Department of Education, filed its answer on June 28, 2001. On July 9,

2001, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The hearing was held on October 1, 2, 3, 5, 11, 12, and 15, 2001. The record closed on November 13, 2001 when the final submission was received from the parties.

The school's requests for additional funding for staff salaries and mathematics and reading workbooks were approved by the Department in August 2001. After additional clarification, the Department approved the addition of $33,327.00 to the budget for salaries and $2,201.00 for workbooks and these issues were not litigated at hearing.

Only the following budgeted items for which funding was denied by the Department of Education, Offices of Program Review and Improvement and Fiscal Review, remained in issue at the time of the scheduled hearing in this matter.

Workpaper J-1: Non-Instructional Staffing

The school requested funding for the salary of a half-time psychologist. After hearing testimony that the services of the psychologist were part of the requirement of the Comer School Development Program, the Department agreed to restore $24,500.00 to the budget for this purpose. I **FIND** that this agreement fully resolves this issue with respect to the school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

Workpaper M-1: Non-Salary Costs – Grades 1-5 – Other

The school requested funding for all costs associated with the breakfast and lunch programs, including supervision. After discussions between the parties, it was agreed that this issue would be withdrawn from the present appeal to be resolved

elsewhere. I **FIND** that this agreement fully resolves this issue with respect to this school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

With the resolution of these outstanding issues on appeal with respect to this school-based budget, I **CONCLUDE** that this fully resolves the dispute between the Department and Winfield Scott School #2.

In resolving the dispute with respect to the salaries at which new staff could be hired, the Department denied that it intended to cap them at the second step of the District's salary guide. Where the District demonstrated that teachers with subject matter specialization, such as mathematics and science teachers with the necessary education and experience, could not be hired at the second step, the Department agreed that they could be hired at the step on the salary guide commensurate with their training and experience. The Department also agreed to work with the District to fill other teaching positions, such as gym, music and art teachers, if it were shown that these positions could not be filled at the second step of the salary guide. (R-1a)

With respect to all issues designated as settled for the purposes of the school-based budget appeals, the District reserves the right to raise any issues concerning the sufficiency of funding in a supplemental funding request. (R-1a)

I **FIND** that the agreements between the parties are reasonable and it is, therefore, **ORDERED** that the items above be implemented in accord with these agreements.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 19, 2001
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

January 2, 2002
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 04 2002
DATE

ACTING DIRECTOR AND ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:

Thomas Dunn, Jr.
Linda G. King
Alexander King
Pablo Muñoz
Harold Kennedy

For Respondent:

Pernell Brice

Exhibits:

P-22 Letter, Excerpts from the Whole School Reform Implementation Plan
P-23 Guide for Implementing Urban Education Reform in Abbott Districts
P-24 SBB Fiscal Review/Issues
P-25 Letter, dated March 15, 2001, Alexander King to Frank Van Camp with attached responses to SBB Fiscal Review Comments
P-26 Letter, dated May 14, 2001, Couselo and Henry to King
P-27 Letter, dated May 31, 2001, King to Couselo and Henry with attached responses to P-26
P-28 Letter, dated August 17, 2001, Reid and Henry to King
P-57 Class Size Reduction Plan
P-109 Issues on Appeal after August 17, 2001
P-113 Professional Staff Positions – Salary Dispute

R-1a Schools and Issues Resolved – Post Hearing
R-2 Schools and Issues Remaining – Post Hearing

OAL DKT. NO. EDU 5593-01
AGENCY DKT. NO. 187-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (WINFIELD SCOTT SCHOOL #2), UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his independent and careful review of this local "Abbott" District's appeal of the Department's determination on its whole school reform funding request for the 2001-2002 school year, the Commissioner affirms the Initial Decision, which essentially embodies the parties' agreements on each of the contested issues.

Accordingly, the recommended decision of the OAL is affirmed and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED*

COMMISSIONER OF EDUCATION

Date of Decision: 2/19/02

Date of Mailing: 2/19/02

* Pursuant to *P.L.* 2001, *c.* 130, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division at the New Jersey Superior Court.

64-02

64-02

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (JOHN MARSHALL SCHOOL #20), UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

February 19, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5590-01
AGENCY DKT. NO. 189-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH
(JOHN MARSHALL SCHOOL, #20), UNION COUNTY
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION
Respondent.

Richard E. Shapiro, Esq., for petitioner,

Michael Lombardi, Deputy Attorney General, for respondent
(John J. Farmer, Attorney General of New Jersey, attorney)

Record Closed: November 13, 2001 Decided: December 19, 2001

BEFORE **EDITH KLINGER**, ALJ:

On June 13, 2001, the petitioner, Board of Education of the City of Elizabeth (Board), filed a Verified Petition of Appeal before the Commissioner of Education seeking adequate funding to implement its whole school reform plan for all of the schools in the District pursuant to the decision of the Supreme Court in *Abbott v. Burke*, 153 *N.J.* 480 (1998) and the statutes and regulations promulgated there under. The present appeal concerns the school-based budget for John Marshall School #20. The respondent, Department of Education, filed its answer on June 28, 2001. On July

9, 2001, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The hearing was held on October 1, 2, 3, 5, 11, 12, and 15, 2001. The record closed on November 13, 2001 when the final submission was received from the parties.

The school's request for additional funding for staff salaries was approved by the Department in August 2001. After additional clarification, the Department added $4,761.00 to the budget for salaries and this issue was not litigated at hearing.

Only the following budgeted items for which funding was denied by the Department of Education, Offices of Program Review and Improvement and Fiscal Review, remained in issue at the time of the scheduled hearing in this matter.

Workpaper D: Bilingual – Not Self Contained

The school requested funding for an additional full time bilingual education teacher. The Department learned through testimony that the school meant to request a new English as a Second Language (ESL) teacher rather than an additional bilingual education teacher. The addition of a half-time ESL teacher was found to be justified based upon enrollment. The Department agreed to restore $19,113.50 to the budget for this purpose and the school agreed. I **FIND** that this agreement fully resolves this issue with respect to this school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

Workpaper M-a: Stipends - Lunch Program

The school requested funding for the costs associated with supervision of the school lunch program. After discussions between the parties, it was agreed that this issue would be withdrawn from the present appeal to be resolved elsewhere. I **FIND**

that this agreement fully resolves this issue with respect to this school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

With the resolution of these outstanding issues on appeal with respect to this school-based budget, I **CONCLUDE** that this fully resolves the dispute between the Department and John Marshall School #20.

In resolving the dispute with respect to the salaries at which new staff could be hired, the Department denied that it intended to cap them at the second step of the District's salary guide. Where the District demonstrated that teachers with subject matter specialization, such as mathematics and science teachers with the necessary education and experience, could not be hired at the second step, the Department agreed that they could be hired at the step on the salary guide commensurate with their training and experience. The Department also agreed to work with the District to fill other teaching positions, such as gym, music and art teachers, if it were shown that these positions could not be filled at the second step of the salary guide. (R-1a)

With respect to all issues designated as settled for the purposes of the school-based budget appeals, the District reserves the right to raise any issues concerning the sufficiency of funding in a supplemental funding request. (R-1a)

I **FIND** that the agreements between the parties are reasonable and it is, therefore, **ORDERED** that the items above be implemented in accord with these agreements.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 19, 2001
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

January 2, 2002
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 04 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:

Thomas Dunn, Jr.
Linda G. King
Thelma C. Hurd
Pablo Muñoz
Harold Kennedy

For Respondent:

Pernell Brice

Exhibits:

P-23 Guide for Implementing Urban Education Reform in Abbott Districts
P-57 Class Size Reduction Plan
P-89 Workpaper D-1
P-90 SBB Fiscal Review Comments
P-91 Letter, dated March 12, 2001, Thelma Hurd to Brice with attached responses to P-90
P-92 Letter, dated May 15, 2001, Couselo and Henry to Hurd
P-93 Letter, dated June 4, 2001, Hurd to Couselo and Henry with attached responses to P-92
P-94 Letter, dated August 17, 2001, Reid and Henry to Hurd
P-109 Issues on Appeal after August 17, 2001
P-113 Professional Staff Positions – Salary Dispute

R-1a Schools and Issues Resolved – Post Hearing
R-2 Schools and Issues Remaining – Post Hearing

OAL DKT. NO. EDU 5590-01
AGENCY DKT. NO. 189-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (JOHN MARSHALL SCHOOL #20), UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his independent and careful review of this local "Abbott" District's appeal of the Department's determination on its whole school reform funding request for the 2001-2002 school year, the Commissioner affirms the Initial Decision, which essentially embodies the parties' agreements on each of the contested issues.

Accordingly, the recommended decision of the OAL is affirmed and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED*

COMMISSIONER OF EDUCATION

Date of Decision: 2/19/02

Date of Mailing: 2/19/02

* Pursuant to *P.L.* 2001, *c.* 130, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division at the New Jersey Superior Court.

65-02

65-02

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (TERRENCE C. REILLY MIDDLE SCHOOL #76), UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

February 19, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5789-01
AGENCY DKT. NO. 195-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH
(TERRENCE C. REILLY MIDDLE SCHOOL #76), UNION COUNTY
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION
Respondent.

Richard E. Shapiro, Esq., for petitioner,

Michael Lombardi, Deputy Attorney General, for respondent
(John J. Farmer, Attorney General of New Jersey, attorney)

Record Closed: November 13, 2001 Decided: December 19, 2001

BEFORE **EDITH KLINGER**, ALJ:

On June 13, 2001, the petitioner, Board of Education of the City of Elizabeth (Board), filed a Verified Petition of Appeal before the Commissioner of Education seeking adequate funding to implement its whole school reform plan for all of the schools in the District pursuant to the decision of the Supreme Court in *Abbott v. Burke*, 153 *N.J.* 480 (1998) and the statutes and regulations promulgated there under. The present appeal concerns the school-based budget for Terrence C. Reilly Middle School #76. The respondent, Department of Education, filed its answer on June 29, 2001. On

July 18, 2001, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The hearing was held on October 1, 2, 3, 5, 11, 12, and 15, 2001. The record closed on November 13, 2001 when the final submission was received from the parties.

Only the following four budgeted items for which funding was denied by the Department of Education, Offices of Program Review and Improvement and Fiscal Review, remained in issue at the time of the scheduled hearing in this matter.

Workpaper M-1: Non-Salary Costs

The school requested funding lunchtime supervision. After discussions between the parties, it was agreed that this issue would be withdrawn from the present appeal to be resolved elsewhere. I **FIND** that this agreement fully resolves this issue with respect to the school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

Workpaper N: Supplies – Language Workbooks

The Department denied funding for an additional set of 270 Spanish workbooks because it believed that these were unnecessary and a sufficient number were already provided. It appeared from the testimony that the school was actually seeking 270 Spanish textbooks, not workbooks. Moreover, this number was required to supply every student and teacher with a textbook, to retain a few extra in reserve for expected attrition, and to provide special education students with a textbook at home as well as in school in accord with their individualized educational programs. I **FIND** that this agreement fully resolves this issue with respect to this school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

Workpaper T: Support Service

The school requested $2,000.00 for a professional consultant to enhance teachers' educational strategies in working with students with behavioral problems. The request was denied because the Department believed that this consultant was meant to work with special education teachers. When the testimony showed that the consultant would work with all teachers, the Department agreed to restore the funding for this service to the budget. I **FIND** that this agreement fully resolves this issue with respect to this school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

Workpaper R-1: Salary Costs Improvement

The school requested $20,000.00 to send four students to the Alternative Middle School. After discussions between the parties, it was agreed that this issue would be withdrawn from the present appeal to be resolved elsewhere. I **FIND** that this agreement fully resolves this issue with respect to this school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

In resolving the dispute with respect to the salaries at which new staff could be hired, the Department denied that it intended to cap them at the second step of the District's salary guide. Where the District demonstrated that teachers with subject matter specialization, such as mathematics and science teachers with the necessary education and experience, could not be hired at the second step, the Department agreed that they could be hired at the step on the salary guide commensurate with their training and experience. The Department also agreed to work with the District to fill other teaching positions, such as gym, music and art teachers, if it were shown that these positions could not be filled at the second step of the salary guide. (R-1a)

With respect to all issues designated as settled for the purposes of the school-based budget appeals, the District reserves the right to raise any issues concerning the sufficiency of funding in a supplemental funding request. (R-1a)

With the resolution of these outstanding issues on appeal with respect to this school-based budget, I **CONCLUDE** that this fully resolves the dispute between the Department and Terrence C. Reilly Middle School #76.

I **FIND** that the agreements between the parties are reasonable and it is, therefore, **ORDERED** that the items above be implemented in accord with these agreements.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 19, 2001
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

January 2, 2002
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 04 2002
DATE

ACTING DIRECTOR AND ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:

Thomas Dunn, Jr.
Linda G. King
Richard Pulsfort
Pablo Muñoz
Harold Kennedy

For Respondent:

Pernell Brice

Exhibits:

P-23 Guide for Implementing Urban Education Reform in Abbott Districts
P-57 Class Size Reduction Plan
P-104 Excerpts from the Whole School Reform Implementation Plan
P-105 Letter, dated March 7, 2001, Deborah DeMattia to Brice, with attached responses to SBB Review Comments.
P-106 Letter, dated May 14, 2001, Couselo and Henry to DeMattia.
P-107 Letter, dated June 1, 2001, DeMattia to Couselo and Henry, with attached clarifications.
P-108 Letter, dated August 17, 2001, Reid and Henry to Couselo
P-109 Issues on Appeal after August 17, 2001
P-113 Professional Staff Positions – Salary Dispute

R-1a Schools and Issues Resolved – Post Hearing
R-2 Schools and Issues Remaining – Post Hearing

OAL DKT. NO. EDU 5789-01
AGENCY DKT. NO. 195-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (TERRENCE C. REILLY MIDDLE SCHOOL #76), UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his independent and careful review of this local "Abbott" District's appeal of the Department's determination on its whole school reform funding request for the 2001-2002 school year, the Commissioner affirms the Initial Decision, which essentially embodies the parties' agreements on each of the contested issues.

Accordingly, the recommended decision of the OAL is affirmed and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED*

COMMISSIONER OF EDUCATION

Date of Decision: 2/19/02

Date of Mailing: 2/19/02

* Pursuant to *P.L.* 2001, *c.* 130, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division at the New Jersey Superior Court.

66-02

66-02

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (CHRISTA MCAULIFFE MIDDLE SCHOOL #77) UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

February 19, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5583-01
AGENCY DKT. NO. 183-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH
(CHRISTA MCAULIFFE MIDDLE SCHOOL, #22), UNION COUNTY
Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION
Respondent.

Richard E. Shapiro, Esq., for petitioner,

Michael Lombardi, Deputy Attorney General, for respondent
(John J. Farmer, Attorney General of New Jersey, attorney)

Record Closed: November 13, 2001 Decided: December 19, 2001

BEFORE **EDITH KLINGER**, ALJ:

On June 13, 2001, the petitioner, Board of Education of the City of Elizabeth (Board), filed a Verified Petition of Appeal before the Commissioner of Education seeking adequate funding to implement its whole school reform plan for all of the schools in the District pursuant to the decision of the Supreme Court in *Abbott v. Burke*, 153 *N.J.* 480 (1998) and the statutes and regulations promulgated there under. The present appeal concerns the school-based budget for Christa McAuliffe School #22. The respondent, Department of Education, filed its answer on June 29, 2001. On July

9, 2001, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The hearing was held on October 1, 2, 3, 5, 11, 12, and 15, 2001. The record closed on November 13, 2001 when the final submission was received from the parties.

The school's requests for additional funding for staff salaries and bus supervision were approved by the Department in August 2001. After additional clarification, the Department approved the addition of $35,708.00 to the budget for salaries and $3,910.00 for bus supervision and these issues were not litigated at hearing.

Only the following three budgeted items for which funding was denied by the Department of Education, Offices of Program Review and Improvement and Fiscal Review, remained in issue at the time of the scheduled hearing in this matter.

Workpaper M-1: Non-Salary Costs, Substitutes and Stipends, Breakfast Program, Lunch Program

The school requested funding for teachers to supervise the breakfast and lunch programs. After discussions between the parties, it was agreed that this issue would be withdrawn from the present appeal to be resolved elsewhere. I **FIND** that this agreement fully resolves this issue with respect to this school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

Workpaper M-1: Substitutes and Stipends – Secretaries' Evening Phone Call to Parents (Object Code 240)

The school requested funding in the amount of $5,250.00 for two secretaries to make evening telephone calls to parents regarding student attendance. The Department allowed $2,625.00 to fund one secretary to perform this duty. After hearing testimony that two secretaries, one English-speaking and one Spanish-speaking, were

required to complete the calls, the Department agreed to provide funding for the second secretary in the amount of $2,625.00 and restored this amount to the school budget. I **FIND** that this agreement fully resolves this issue with respect to the school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

The school's requests for attendance and social work supplies were withdrawn pursuant to discussions between the parties.

In resolving the dispute with respect to the salaries at which new staff could be hired, the Department denied that it intended to cap them at the second step of the District's salary guide. Where the District demonstrated that teachers with subject matter specialization, such as mathematics and science teachers with the necessary education and experience, could not be hired at the second step, the Department agreed that they could be hired at the step if the salary guide was commensurable with their training and experience. The Department also agreed to work with the District to fill other teaching positions, such as gym, music and art teachers, if it were shown that these positions could not be filled at the second step of the salary guide. (R-1a)

With respect to all issues designated as settled for the purposes of the school-based budget appeals, the District reserves the right to raise any issues concerning the sufficiency of funding in a supplemental funding request. (R-1a)

With the resolution of these outstanding issues on appeal with respect to this school-based budget, I **CONCLUDE** that this fully resolves the dispute between the Department and Christa McAuliffe School #22.

I **FIND** that the agreements between the parties are reasonable and it is, therefore, **ORDERED** that the items above be implemented in accordance with these agreements.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 19, 2001
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

January 2, 2002
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 04 2002
DATE

ACTING DIRECTOR AND ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:

Thomas Dunn, Jr.
Linda G. King
Jacqueline Jennings
Pablo Muñoz
Harold Kennedy

For Respondent:

Daryl Minus-Vincent

Exhibits:

P-23 Guide for Implementing Urban Education Reform in Abbott Districts
P-57 Class Size Reduction Plan
P-100 Workpaper M-1
P-101 Letter, dated May 14, 2001, Couselo and Henry to Jennings
P-102 Letter, dated May 31, 2001, Jennings to Couselo and Henry with attached responses to P-101
P-103 Letter, dated August 21, 2001, Reid and Henry to Jennings
P-109 Issues on Appeal after August 17, 2001
P-113 Professional Staff Positions – Salary Dispute

R-1a Schools and Issues Resolved – Post Hearing
R-2 Schools and Issues Remaining – Post Hearing

OAL DKT. NO. EDU 5583-01
AGENCY DKT. NO. 183-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (CHRISTA MCAULIFFE MIDDLE SCHOOL #77) UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his independent and careful review of this local "Abbott" District's appeal of the Department's determination on its whole school reform funding request for the 2001-2002 school year, the Commissioner affirms the Initial Decision, which essentially embodies the parties' agreements on each of the contested issues.

Accordingly, the recommended decision of the OAL is affirmed and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED*

COMMISSIONER OF EDUCATION

Date of Decision: 2/19/02

Date of Mailing: 2/19/02

* Pursuant to *P.L.* 2001, *c.* 130, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division at the New Jersey Superior Court.

67-02

67-02

OCTAVIO DIAZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JOHN KNUDSEN, DANNY DE FRANCISCO, AND THE BOARD OF EDUCATION OF UNION CITY, HUDSON COUNTY,	:	DECISION
RESPONDENTS.	:	

February 15, 2002

OAL DKT. NO. EDU 5385-01
AGENCY DKT. NO. 108-4/01

OCTAVIO DIAZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JOHN KNUDSEN, DANNY DE FRANCISCO, AND THE BOARD OF EDUCATION OF UNION CITY, HUDSON COUNTY,	:	DECISION
RESPONDENTS.	:	

This matter was returned to the Department of Education as a withdrawal, pursuant to *N.J.A.C.* 1:1-19.2, based on a letter, dated November 9, 2001, from counsel for the Board to the Administrative Law Judge reporting that Octavio Diaz, the *pro se* petitioner, died on November 6, 2001, as a result of a motorcycle accident which occurred during the prior weekend.

Under these unique and unfortunate circumstances, this matter has been rendered moot and the Commissioner dismisses it accordingly.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/15/02

Date of Mailing: 2/15/02

* This decision, as the Commissioner's final determination may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:2-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

68-02

68-02

R.C.S., on behalf of minor child, K.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF UNION TOWNSHIP, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

February 20, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5394-01

AGENCY DKT. NO. 115-5/01

R.C.S. ON BEHALF OF

MINOR CHILD, K.S.,

Petitioner,

v.

BOARD OF EDUCATION OF UNION

TOWNSHIP, UNION COUNTY,

Respondent.

R.C.S., *pro se*

Joseph M. Wenzel, Esq., appearing for respondent
(Lum, Danzis, Drasco, Positan & Kleinberg, attorneys)

Record Closed: November 19, 2001 Decided: January 3, 2002

BEFORE **MARGARET M. HAYDEN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appealed the determination by respondent Board of Education of the Township of Union (District) that her minor child, K.S., was not entitled to a free public education in the District. Petitioner claimed that the minor child was entitled to a free

public education pursuant *N.J.S.A.* 18A:38-1(a) because the child was domiciled within the District. Respondent answered that the minor child did not meet the requirements of domicile in the District and filed a counterclaim for payment of tuition.

On May 21, 2001, petitioner submitted an appeal of the District's residency determination. The Department of Education transmitted the matter to the Office of Administrative Law (OAL) on June 22, 2001. The OAL scheduled a prehearing conference for August 29, 2001. As the petitioner did not make herself available, the prehearing conference could not be held. The hearing was scheduled for November 7, 2001 and again the petitioner failed to appear. The undersigned's secretary called petitioner's Union phone number and was told by a man, who identified himself as petitioner's father, that he had no idea where his daughter was. The OAL opened the record to entertain the District's motion to dismiss petitioner's appeal and to hear evidence on the District's counterclaim for back tuition. The record was held open until November 19, 2001, for the submission of an affidavit concerning the *per diem* tuition rate.

In the afternoon of November 7, 2001, a woman identifying herself as petitioner's mother called and stated that her daughter had forgotten about the hearing. The caller was instructed to have the petitioner submit a letter explaining the reason that she did not appear and asking for the matter to be rescheduled. To date the petitioner has not sent any such explanation or any other writing.

FACTS

The following facts are undisputed and I **FIND** them to be **FACTS** in the case.

On or about March 6, 2001, Inspector Richard W. Brownbridge received a residency investigation request concerning K.S., a second grade pupil in the District. Surveillance conducted at the Union address provided by petitioner revealed that the student did not reside at this address although the Union address was the home of the pupil's grandparents. On each of fourteen separate occasions R.C.S. was observed

driving into Union from Maplewood and dropping her child off at a school bus stop. The investigator identified the origin of the parent's trip as a street in Maplewood.

The District began its residency investigation on March 6, 2001. The last day of school was June 15, 2001. There were sixty-seven school days between those two dates. The petitioner's child did not re-enroll in the Union public school for the 2001-02 school year. The cost of educating a second grade student in the District amounted to $7108 per year for the 2001-02 school year with the *per diem* rate of $39.49. Thus, the amount of tuition owed by petitioner for the period of ineligible attendance in 2000-01 amounted to $2,645.83 (67 school days x $39.49).

LEGAL DISCUSSION AND CONCLUSION

Public education must be provided free to persons over five and under twenty years of age who are domiciled within the school district. *N.J.S.A.* 18A:38-1(a). The converse is also true that a person is not entitled to a free public education if they are not domiciled within the District. I **FIND** that the undisputed evidence showed that petitioner's minor child was living with her mother in Maplewood. Hence, I **CONCLUDE** that K.S. was not domiciled in Union and was not entitled to receive a free public education from that District. I further **CONCLUDE** that at the *per diem* rate of $39.49 petitioner owes the District tuition for sixty-seven school days in the 2000-2001 year amounting to $2,645.83.

ORDER

Based on the foregoing it is **ORDERED** that the District's request to dismiss petitioner's appeal for failure to appear is **GRANTED.** It is further **ORDERED** that the District's request for reimbursement of past tuition in the amount of $2,645.83 is hereby **GRANTED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 3, 2007
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

1/8/07
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 15 2007
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

jb

OAL DKT. NO. EDU 5394-01
AGENCY DKT. NO. 115-5/01

R.C.S., on behalf of minor child, K.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF UNION TOWNSHIP, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions.

Upon careful and independent review, the Commissioner finds that, because petitioner neither appeared for the hearing nor provided any explanation for her nonappearance as directed by the Administrative Law Judge, she has failed to sustain her burden of proving that she is domiciled in Union Township so as to permit her daughter, K.S., to attend the District's schools free of charge.

Accordingly, the Initial Decision of the OAL is affirmed for the reasons expressed therein. The Petition of Appeal is dismissed and petitioner is directed to reimburse the Board a total of $2,645.83, representing tuition for the 67 days of K.S.'s ineligible attendance in the District's schools during the 2000-2001 school year.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/20/02

Date of Mailing: 2/20/02

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:2-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

70-02

BERGEN COMMUNITY COLLEGE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,	:	DECISION
RESPONDENT.	:	

February 19, 2002

OAL DKT. NO. EDU 9204-00
AGENCY DKT. NO. 228-6/00

BERGEN COMMUNITY COLLEGE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,	:	DECISION
RESPONDENT.	:	

The record of this matter and Joint Stipulation of Settlement, returned by the Office of Administrative Law, have been reviewed. This agency being a party to the present matter, the stipulation of settlement is deemed the final decision, pursuant to *N.J.A.C.* 1:1-19.2(b) and (c), and the within matter is accordingly dismissed.

COMMISSIONER OF EDUCATION

Date of Decision: 2/19/02

Date of Mailing: 2/25/02

72-02

S.M., on behalf of minor child, J-D.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the Board's residency determination. Petitioner failed to attend the hearing and the ALJ dismissed the petition and awarded $8,250 in tuition to the Board. Petitioner sent a letter of explanation for missing the hearing to the Commissioner stating that she forgot the hearing date because of the length of time between the notice of hearing and the date of the hearing.

The Commissioner found that petitioner's explanation, raised for the first time some six weeks after the ALJ's decision, did not advance sufficient basis to compel overturning the ALJ's decision. The Commissioner noted that petitioner's forgetting of the hearing date and her failure to comply with numerous discovery directives represented significant disregard for the fundamental requirements of this forum and could not be countenanced.

The petition was dismissed and tuition assessed in the amount of $8,250.

February 22, 2002

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9920-00
AGENCY DKT. NO. 324-9/00

S.M. ON BEHALF OF MINOR CHILD, G.,

Petitioner,

v.

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

Respondent.

No appearance by or for petitioner

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

Record Closed: December 21, 2001 Decided: December 27, 2001

BEFORE **RICHARD McGILL**, ALJ:

S.M. (hereinafter "petitioner") filed a letter petition with the Commissioner of Education challenging a residency determination by the Board of Education of the South Orange and Maplewood School District (hereinafter "respondent") in regard to minor child, G. Respondent counterclaims for tuition reimbursement for an alleged period of ineligible attendance.

PROCEDURAL HISTORY

Petitioner filed her petition with the Commissioner of Education on October 11, 2000, invoking the Commissioner's authority to hear and determine controversies arising under the school laws pursuant to *N.J.S.A.* 18A:6-9. After respondent filed an answer and counterclaim on October 20, 2000, the matter was transmitted to the Office of Administrative Law on November 27, 2000, for determination as a contested case.

The matter was originally scheduled for a hearing on May 29, 2001. That hearing was adjourned at respondent's request, because respondent's witness was unavailable due to medical reasons and because petitioner had not responded to discovery requests. The hearing was rescheduled for December 20, 2001, at the Office of Administrative Law in Newark, New Jersey, and notices were sent to both parties.

Petitioner did not appear for the hearing on December 20, 2001, or provide any explanation for the nonappearance. Respondent submitted proofs with respect to its counterclaim for tuition reimbursement, and the record closed on December 21, 2001, after giving petitioner an additional day to provide an explanation for her nonappearance.

ISSUES

The issues in this proceeding are whether pupil G. is eligible to attend respondent's public schools free of charge in accordance with *N.J.S.A.* 18A:38-1 and, if not, whether respondent's counterclaim for tuition reimbursement should be granted.

FACTS

The only witness in the proceeding was Nancy Bradley, who is employed by respondent as its district registrar. Her testimony was fully credible and is accepted as true. Based upon the evidence presented at the hearing, I **FIND** as follows. Ms. Bradley took petitioner's application to enroll G. in respondent's public schools. The application was denied because there was no demonstration of a family or economic hardship. Upon receipt of the petition in this matter,

respondent admitted G. to Columbia High School on October 2, 2000, as a twelfth-grade student. G. graduated in June 2001 and is no longer a student at Columbia High School. G. attended respondent's public schools for 165 days through the end of the 2000-2001 school year. At a per diem rate of $50.00, the tuition for the 2000-2001 school year is $8,250.00.

LAW AND ANALYSIS

Attendance at public schools shall be free to any person who meets the requirements set forth in *N.J.S.A.* 18A:38-1. Under certain circumstances, a child who is kept in the home of a person who is domiciled in a school district may attend the public schools free of charge. *N.J.S.A.* 18A:38-1(b)1. If the board of education denies admission to the child, the resident may contest that determination before the Commissioner of Education. *Ibid.* In the proceeding before the Commissioner of Education, the resident has the burden of proof by a preponderance of the evidence to establish that the child meets the requirements for eligibility. *Ibid.* If the evidence does not support the claim, the resident shall be assessed tuition for the student prorated to the time of the student's ineligible attendance in the school district. *Ibid.*

Here, petitioner did not appear for the hearing and did not provide any explanation for the nonappearance. Under the circumstances, petitioner failed to carry the burden of proof that G. meets the requirements to receive a free education in respondent's public schools. Therefore, I **CONCLUDE** that the petition in this matter should be dismissed.

It follows from the dismissal of the petition that G. was ineligible for attendance at respondent's public schools during the period in question. Therefore, petitioner must be assessed tuition for the period of ineligible attendance. Based upon the findings above, I **CONCLUDE** that petitioner should be assessed tuition in the amount of $8,250 for the period of G.'s ineligible attendance.

Accordingly, it is **ORDERED** that:

1. The petition in this matter is dismissed.

2. The counterclaim for assessment of tuition in the amount of $8,250 is granted.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Dec. 27, 2001
DATE

RICHARD McGILL, ALJ

Receipt Acknowledged:

1/8/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 15 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cml

APPENDIX

WITNESS LIST

For petitioner:

None

For respondent:

Nancy Bradley

EXHIBIT LIST

None

OAL DKT. NO. EDU 9920-00
AGENCY DKT. NO. 324-9/00

S.M., on behalf of minor child, J-D.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. On February 4, 2002, petitioner filed a letter of explanation with the Commissioner for her failure to appear at hearing which, in pertinent part, stated "[a] letter in regard to a court date was sent tome [sic] about four to five months before the court date, therefore[,] when the court date arrived I forgot about it." Petitioner requests that this matter be reopened "so that [she] can provide the additional information requested by the Board of Education and to possibly reschedule another court date." (*Ibid.*)

After due consideration of petitioner's explanation, proffered for the first time almost six weeks after the Administrative Law Judge's (ALJ) decision in this matter was rendered, the Commissioner finds and determines that petitioner has not advanced sufficient cause to compel the reversal of the ALJ's recommended disposition of this matter. In so concluding, the Commissioner was particularly influenced by the apparent indifference petitioner has heretofore displayed with respect to the importance of her responsibilities in bringing this matter before him. Such indifference is evidenced not only by her "forgetting" the scheduled

Court date, but also by the within record which is replete with requests from Board counsel to the ALJ requesting assistance from the Court to compel petitioner to fulfill her discovery obligations pursuant to the administrative rules and prior directives of the Court.[1] The Commissioner cannot, on the basis stated by petitioner, countenance such disregard of the fundamental rules of this forum.

Thus, upon his careful review, the Commissioner concurs with the ALJ that, because petitioner neither appeared for the hearing scheduled in this matter, nor provided an acceptable explanation for such nonappearance, she has failed to carry her requisite burden of proof that J-D.G. was entitled to attend the District's schools free of charge.

Accordingly, the Initial Decision of the OAL is affirmed for the reasons expressed therein. The petition of appeal is dismissed and petitioner is directed to reimburse the Board a total of $8,250, representing tuition for the 165 days of J-D.G.'s ineligible attendance in the District's schools during the 2000-2001 school year.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 2/22/02

Date of Mailing: 2/25/02

[1] See letters dated December 19, 2001, August 15, 2001, August 13, 2001, and May 22, 2001 from Board counsel to ALJ Richard McGill.

[2] This decision, as the Commissioner's final determination may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:2-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

73-02

73-02

T.H., on behalf of minor child, D.S.H., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY, : DECISION

RESPONDENT. :

:

February 22, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 07063-01
Agency Reference No. 149-5/01

T. H., ON BEHALF OF MINOR CHILD, D.S.H.,

PETITIONER,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

Respondent.

T. H., petitioner, *pro se*

Stephen J. Christiano, Esq., for petitioner

Record Closed: December 20, 2001 Decided: December 26, 2001

BEFORE **MICHAEL L. RAVIN,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, T.H. on behalf of minor child D.S.H., appealed respondent's, the Board of Education of the Township of West Orange, Essex County, residency determination. The matter was transmitted to the Office of Administrative on August 6, 2001 for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

A telephone status conference was scheduled for January 3, 2002. On December 13, 2002, prior to the scheduled conference date, the parties informed the Administrative Law Judge that the matter had been amicably settled. The parties have prepared the attached Stipulation of Settlement setting forth the terms of the settlement.

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

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

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

Therefore, I **ORDER** that the parties comply with the settlement terms and that these proceedings be and are hereby concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 26, 2001
DATE

Michael L. Ravin
MICHAEL L. RAVIN, ALJ

Receipt Acknowledged:

1/8/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 15 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jrp

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
DEC 28 2 03 PM '01

Stephen J. Christiano
Attorney for Respondent
49 Mt. Pleasant Avenue
West Orange, NJ 07052
(973) 736-1636

BEFORE THE COMMISSIONER OF
EDUCATION OF NEW JERSEY
OAL DOCKET NO. EDU 07063-01
AGENCY REF. NO. 149-5/01

T.H,. ON BEHALF OF MINOR CHILD, D.S.H.,	
Petitioner,	
vs.	STIPULATION OF SETTLEMENT
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	
Respondent.	

The parties having amicably adjusted the differences between them, it is hereby stipulated as follows:

(1) Petitioner withdraws her petition of appeal.

(2) Respondent withdraws its counterclaim for tuition charges.

(3) D.S.H. will be disenrolled from West Orange High School no later than December 1, 2001.

(4) Petitioner agrees to pay respondent the sum of $1,800 in full settlement of all tuition charges by December 15, 2001.

(5) If petitioner does not make payment by December 15, 2001, respondent shall be entitled to the entire amount of tuition for the period of D.S.H.'s school attendance in West Orange.

(6) This settlement is subject to approval by the Commissioner of Education. If the Commissioner rejects this settlement, any tuition payment previously made by petitioner shall be refunded by respondent.

(7) This stipulation of settlement constitutes the entire agreement of and understanding between the parties.

Dated: 12/3, 2001

Tonya Henry, Petitioner

ATTEST:

Secretary

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE

By: President

OAL DKT. NO. EDU 7063-01
AGENCY DKT. NO. 149-5/01

T.H., on behalf of minor child, D.S.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/2/2/02

Date of Mailing: 2/25/02

74-02

IN THE MATTER OF THE TENURE	:	
HEARING OF JANET DILLON,	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT	:	DECISION
OF HUMAN SERVICES.	:	
	:	

February 22, 2002

AGENCY DKT. NO. 355-9/01

IN THE MATTER OF THE TENURE HEARING OF JANET DILLON, NEW JERSEY STATE DEPARTMENT OF HUMAN SERVICES.	:	COMMISSIONER OF EDUCATION DECISION

For the Petitioner, Anita Pinkas, Acting Assistant Director of Employee Relations

For the Respondent, Janet Dillon, *Pro Se*

This matter having been opened before the Commissioner of Education on September 7, 2001, through certification of tenure charges of chronic and excessive absenteeism against Janet Dillon, a tenured teacher of developmentally disabled students, by the New Jersey State Department of Human Services; and

The Commissioner having directed respondent, on September 10, 2001, to file an Answer to the tenure charges against her; and

Such communication clearly having provided respondent notice that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified shall have *15 days from the date such charges are filed with the Commissioner* to file a written response to the charges, and that failure to answer within the prescribed period, where no extension has been applied for and granted, or where there has been no submission by the charged employee of a responsive filing indicating that s/he does not contest the charges, will result in the charges being deemed admitted by the charged employee; and

By letter dated September 20, 2001, respondent requested an extension of time within which to file an Answer to the charges against her in order to seek union or legal advice. She further reported that she had "filed for an appeal hearing" pursuant to her union contract, and was seeking a delay in the tenure matter "pursuant to the State disciplinary action appeal fact finding hearing"; and

By letter dated September 25, 2001, via both certified and regular mail, the certified copy having been returned as unclaimed, the regular mail not returned and, therefore, presumed received, respondent was accorded an additional week from her receipt of such letter to file an Answer in the tenure matter and advised that an extension of any greater length could not be granted given the strict timelines mandated by the governing statute, *N.J.S.A.* 18A:6-16; and

In that respondent has failed to file a response to the Department's charges or communicate with the Commissioner in any other manner, either herself or through a representative, each count of the charges against respondent is deemed to be admitted; and

The tenure charges certified against respondent and the statement of evidence in support of those charges indicate that she was absent from her work duties as a teacher of developmentally disabled students responsible for implementing students' educational, therapeutic and behavior programs, all or part of the day January 4, 5, 8, 9, 11, 12, 16, 22, 23, 24, 25, 26, 30, 31, February 1, 2, 7, 20, March 27, 29, April 17, 18, May 29, 30, July 30, August 1, 2, 3, and 6, 2001. As such, respondent has been chronically and excessively absent from her required duties; and

Having deemed such charges to be admitted by operation of rule, the Commissioner finds respondent's absences constitute chronic and excessive absenteeism and are sufficient to warrant a ten-day unpaid suspension; now therefore

IT IS ORDERED this 22nd day of February 2002, a ten-day suspension, without pay, is the appropriate penalty against respondent in this matter.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/22/02

Date of Mailing: 2/25/02

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

75-02

75-02R

IN THE MATTER OF THE TENURE	:	
HEARING OF NICHOLAS VARANELLI,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
ORANGE TOWNSHIP, ESSEX COUNTY.	:	DECISION ON REMAND
	:	

February 22, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3594-00

On Remand from

OAL DKT. NO. EDU 1674-99

AGENCY DKT NO.: 11-1/99

SCHOOL DISTRICT OF THE CITY

OF ORANGE TOWNSHIP, ESSEX COUNTY,

Petitioner,

v.

NICHOLAS VARANELLI,

Respondent.

Melvin C. Randall, Esq., for petitioner
(Love & Randall, attorneys)

James M. Weinberg, Esq., for respondent

Record Closed: December 17, 2001 Decided: January 4, 2002

BEFORE **ARNOLD SAMUELS**, ALJ/ta:

This matter involves the settlement of a contested case before the Office of Administrative Law (OAL) that was remanded by the Commissioner of Education in a decision dated March 31, 2000. The relevant details were set forth in the Initial Decision/Settlement, OAL Dkt. No. EDU 1674-99, decided February 9, 2000. Both of

the above decisions (the Final/Remand decision of the Commissioner of Education and the preceding Initial Decision) are incorporated herein by reference. This decision amends the prior disposition of the matter.

The Commissioner's comments in his Decision and Order of Remand are duly noted, particularly the language relating to *Cardonick* standards and the Commissioner's concern for the public interest that extends beyond the boundaries of the particular district certifying the tenure charges. (*In Re Cardonick, dec'd by the Comm'r,* April 7, 1982, *aff'd. St. Bd. of Ed.,* April 6, 1983, 1990 *SLD* 842, 846.; *In the Matter of the Tenure Hearing of Kenneth Smith, School District of Orange, Essex County, dec'd by the Comm'r* March 22, 1982, decision on Remand June 16, 1983, *aff'd. with modification by the St. Bd. of Ed.* November 2, 1983, *aff'd. Superior Court* January 30, 1986; *In the Matter of the Tenure Hearing of Corey Younger, State Operated School District of the City of Jersey City, Hudson County*, dec'd December 7, 1999 and *In the Matter of the Tenure Hearing of Elmena Jean, State Operated School District of the City of Newark, Essex County*, dec'd October 4, 1999). This judge has also taken notice of a subsequent decision: *In The Matter of the Tenure Hearing of Lenore M. Allen, School District of the Township of Old Bridge, Middlesex County*, dec'd by the *Comm'r of Educ.* on June 19, 2000 and subsequently decided by the *St. Bd. of Educ.* on November 1, 2000.

The agreement in the instant matter was accordingly remanded to the OAL for revision of the settlement in a manner that would be consistent with the Commissioner's concerns, or for plenary hearing on the merits, if such a modification could not be reached.

The respondent subsequently decided that he was unable or unwilling to enter into a revised settlement agreement. Therefore, a plenary hearing on the merits was scheduled and held over a period of 6 days, beginning in April 2001 through July 2001. Although the hearing was not concluded, the parties engaged in renewed settlement negotiations.

After protracted consultation by and between Counsel, including several conferences at the OAL, it was agreed that the attorneys would draft a revised agreement that would be acceptable to both parties and the Commissioner of Education. A further lengthy of time elapsed, while counsel and the parties engaged in continuing discussions relating to the exact language of the agreement. A final conference with this judge and counsel resulted in complete agreement on December 5, 2001. A copy of the revised Stipulation of Settlement, dated December 11, 2001 and signed by Mr. Varanelli and the President of the Township of Orange Board of Education, is attached hereto.

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

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

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

The revised agreement conforms with the *Cardonick* standards and with the concerns of the Commissioner of Education, as set forth in his March 31, 2000 decision. In addition, the settlement also complies with the principles enunciated in the cases cited above; and the record and settlement agreement presents a reasonably specific explanation of why the charges need no longer be pursued and why it is in the public's interests not to pursue them.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

January 2, 2002
DATE

ARNOLD SAMUELS, ALJ/ta

Receipt Acknowledged:

1/8/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 15 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sej

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

SETTLEMENT AGREEMENT

THIS AGREEMENT is made and entered into on this DEC 17 day of DECEMBER 2001, by and between the Orange Township Board of Education with offices located at 451 Lincoln Avenue, Orange, New Jersey 07050 (hereinafter referred as the "Board"), and

Nicholas Varanelli, whose address is 88 Bell Street, Orange, New Jersey 07050.

WITNESSETH:

WHEREAS, Nicholas Varanelli (hereinafter "Varanelli") is a tenured teacher with The Orange Township Board of Education, since September 1985; and

WHEREAS, during his employment, Varanelli has never been disciplined or reprimanded for any misconduct in his dealing with students or the teaching of his students with the exception of the incident which occurred on October 21, 1998; and

WHEREAS, on October 21, 1998 it is alleged that Varanelli slapped a student and used expletives in his classroom; and

WHEREAS, on November 10, 1998 following a suspension with pay, Varanelli met with the Board in closed session to discuss the incident and thereafter the Board voted to vacate the suspension; and

WHEREAS, on December 10, 1998 the Board after further consideration of the incident, filed a Petition of Appeal with Commissioner of Education; and

WHEREAS, on January 7, 1999, Varanelli filed an Answer to Petition of Appeal denying the charges filed against him; and

WHEREAS, the parties agree that a settlement would be in the best interest of the Orange Township Board of Education and Nicholas Varanelli; and

WHEREAS, further litigation of these charges would necessitate disruption of the Board's Educational Program due to the time involvement of Administrators, Teachers, and Students; and

WHEREAS, the Board would incur substantial financial cost by continuing this litigation that would significantly exceed the cost of settlement; and

WHEREAS, the Board is no longer interested in prosecuting the charges since Varanelli has resigned his position and relinquished his tenure thereby rendering the matter moot and any further proceedings involving Varanelli's tenure and employment with the Board will involve protracted litigation at the expense of the Board and its tax payers, which, if concluded with a decision favorable to the Board would only confirm Varanelli's removal from employment and lost of tenure, which have already occurred without any such continued litigation; and

WHEREAS, the Varanelli resignation effectively ended his position and tenure in the School district, putting, an immediate end to the considerable amount of time, effort, legal expense and administrative cost; and

WHEREAS, the parties wish to amicably resolve their differences without the need to resort to any further litigation; and

WHEREAS, Varanelli understands that this settlement between the parties does not affect the possibility of any proceedings which may be pursued by the State Board of Examiners relative to his Teaching Certificate.

NOW, THEREFORE, in consideration of the aforementioned mutual promises, covenants, and understanding of the parties, the parties hereby agree as follows:

1. Varanelli, hereby resigns his position of employment with the Orange Township Board of Education, together with all tenure and seniority rights, effective immediately. See letter of resignation annexed hereto and made a part hereof. Said resignation is subject to approval of this agreement by the Administrative Law Judge and the Commissioner of Education.

2. Varanelli, hereby agrees to waive any and all claims he has, or could have against the Board, its Agents, Employees and Representatives including but not limited to claims for discrimination, contract, tort or constitutional violations contemporaneously with the execution of this agreement. This agreement shall also release and discharge the Board as such and all other individuals from any and all claims, liabilities and expenses, including claims for tenure and any contractual or statutory benefits they may be subject to or which may have arisen from Varanelli's employment with the Board

3. Varanelli, specifically acknowledges that he has been advised and has the explicit understanding that the Commissioner of Education can refer this matter to the State Board of Examiners for possible action which could result in the revocation of his teaching certificate, pursuant to Cardonick vs Brooklawn Board of Education, 1983 S.L.D. (State Board of Education April 6, 1983)

Consult further the decision In The Matter Of The Tenure Hearing Of Lenore M. Allen, School District Of The Township Of Old Bridge, Middlesex County decided by the State Board Of Education, November 2000.

4. The Orange Township Board of Education agrees to compensate Varanelli for three (3) months lost wages in the amount of Seventeen Thousand Five Hundred Dollars ($17,500.00)

5. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

IN WITNESS, WHEREOF, the parties have hereunto set their hands and seals the date any year aforesaid.

12/11/01
Date

Nicholas Varanelli
Mr. Nicholas Varanelli

Witness

12/11/01
Date

Township of Orange Board Of Education

Reginald T. Jack
Board President

Board Secretary

NICHOLAS VARANELLI
88 Bell Street
Orange, New Jersey 07050

Orange Township Board of Education

Orange, New Jersey

Re: Orange Board of Education - Letter of Resignation

Pursuant to the terms and conditions of agreement previously entered into between the Orange Board of Education, this letter shall serve as my notice that I am resigning from employment with the Orange Board of Education effective immediately.

Nicholas Varanelli

Nicholas Varanelli

Witness:

Dated: December 6, 2001

OAL DKT. NOS. EDU 3594-00 AND EDU 1674-99 (ON REMAND)
AGENCY DKT. NO. 11-1/99

IN THE MATTER OF THE TENURE	:	
HEARING OF NICHOLAS VARANELLI,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
ORANGE TOWNSHIP, ESSEX COUNTY.	:	DECISION ON REMAND
	:	

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

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement. The within record will be transmitted to the State Board of Examiners for action as that body deems appropriate.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/22/02

Date of Mailing: 2/26/02

* Should the State Board of Examiners determine to issue an Order to Show Cause in this matter, the District is reminded of its obligation, pursuant to *N.J.A.C.* 6:11-3.5, to cooperate with the State Board of Examiners in ascertaining and presenting the facts underlying the District's allegations.

76-02

IN THE MATTER OF THE TENURE HEARING	:	
OF MAXINE KING, SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
OLD BRIDGE TOWNSHIP, MIDDLESEX	:	DECISION
COUNTY.	:	
	:	

SYNOPSIS

The Board certified tenure charges of unbecoming conduct, inefficiency, incapacity and insubordination against respondent art teacher. Respondent contended that the Board was retaliating against her for filing a Workers' Compensation claim or a Law Against Discrimination case due to her disability, Reactive Airways Dysfunction Syndrome (RADS).

Following consideration of extensive testimony at hearing and review of the record, the ALJ found that the Board made reasonable accommodations for respondent's RADS condition and that there was no convincing proof presented that the charges were filed in retaliation for her complaints. Moreover, the ALJ found that respondent's actions constituted conduct unbecoming a teacher because: she made several inappropriate remarks about her students; she engaged in threatening and unacceptable behavior toward students; she used profanity; and she employed an inappropriate, rigid and punitive method of student discipline. As to the charge of insubordination, the ALJ found that respondent's failure to fully comply with administrators' requests and reasonable directives and her reluctance to participate in programs because they created additional work for her constituted insubordination. Citing the courts' decisions in *Laba* and in *Redcay*, the ALJ concluded that in light of the substantial number of incidences of inappropriate conduct and insubordination, the appropriate penalty was removal of respondent from her teaching position.

Having reviewed the record, including transcripts from 12 of the 14 days of hearing, the Commissioner determined that the ALJ's factual findings were well-grounded in the record before her and her credibility determinations were entitled to the Commissioner's deference. The Commissioner concurred with the ALJ that respondent engaged in conduct unbecoming a teaching staff member and insubordination. The Commissioner adopted the findings and determination in the Initial Decision as his own. He ordered respondent dismissed from her tenured teaching position as of the date of this decision and referred this matter to the State Board of Examiners for action against respondent's certificate as it deems appropriate.

February 25, 2002

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4241-00

AGENCY DKT. NO. 152-5/00

IN THE MATTER OF THE TENURE HEARING OF MAXINE KING, SCHOOL DISTRICT OF OLD BRIDGE TOWNSHIP, MIDDLESEX COUNTY

James S. Rothschild, Jr. Esq., and **Beth Ann Stemmler**, Esq., for the petitioner (Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Arnold M. Mellk, Esq., for the respondent (Wills, O'Neill & Mellk, attorneys)

Record Closed: August 27, 2001 Decided: January 10, 2002

BEFORE **BEATRICE S. TYLUTKI**, ALJ:

This matter concerns the tenure charges filed by the petitioner, the Board of Education of the School District of Old Bridge Township (Board) against the respondent, Maxine King. The tenure charges certified to the Commissioner of Education (Commissioner) are unbecoming conduct, inefficiency, incapacity and insubordination. For each of these charges, the Board has listed specifications, and alleges that the specifications, if proven, will show that the respondent is guilty of the specific charges.

In her answer, filed with the Commissioner on May 23, 2000, the petitioner denied any wrongdoing as set forth in the tenure charges and raised as affirmative defenses the allegation that the Board violated *N.J.A.C.* 6A:24-5.1(c) (the previous citation for an inefficiency charge), violated the New Jersey Law Against Discrimination (LAD) by failing and refusing to accommodate the respondent's disability, and that the Board retaliated against the respondent because she had filed a workers' compensation claim.

I had a telephone prehearing conference with the parties on June 21, 2000, and I issued a prehearing order on the following day. In that order, I identified the following issues in this matter:

1. Whether the petitioner has proven the tenure charges, and if so, what is the appropriate discipline to be imposed on the respondent.

2. Whether the petitioner has complied with the statutory requirements for an inefficiency charge pursuant to *N.J.A.C.* 6A:3-5.1(c).

3. Whether the petitioner has failed to accommodate the respondent's alleged disability.

4. Whether the petitioner has retaliated against the respondent for filing a Workers' Compensation claim.

After the prehearing conference, I received a motion from the Board requesting partial summary decision to strike the respondent's second affirmative defense as set forth in the respondent's answer to the tenure charges. This defense states:

> Petitioner is in violation of the New Jersey Laws Against Discrimination in that it has failed and refused to accommodate Respondent with regard to her disability.

After receiving briefs and discussing the motion with the parties during a telephone conference on August 21, 2000, I decided that the second affirmative defense should be deleted since the Commissioner does not have jurisdiction to decide LAD cases; however, I also found that the respondent has the right to present proof as to her allegation that the Board failed to

accommodate her alleged disability during the period that gave rise to the tenure charges. As part of my September 11, 2000 order, I amended the issues as set forth in my prehearing order. The fourth issue in the prehearing order was revised to read:

> Whether the petitioner has retaliated against the respondent for filing a Workers' Compensation claim or a Law Against Discrimination case.

The Board in its June 4, 2001 brief incorrectly stated that I had not rendered a decision on this motion (Brief, p.55).

The hearing in this matter started on August 28, 2000. During the presentation of the Board's case, it became evident that the Board planned to present only the hearsay testimony of parents as to the allegation of the physical and verbal abuse of students, which is part of specification three for the unbecoming conduct charge. After receipt of briefs, I issued an order on September 22, 2000, and concluded that non-hearsay testimony is necessary to prove the alleged student abuse allegations.

In this order, I also concluded that the Board had made a persuasive showing that it had prepared its witness list based on its opinion that the students' testimony was not necessary and I allowed the Board to amend its list of witnesses. Additionally, I concluded that pursuant to the tenure hearing procedure statute, *N.J.S.A.*52:14B-10.1, I was not prohibited from allowing the respondent to engage in additional discovery after the initiation of the hearing as to the new witnesses that the Board planned to call. I concluded that such discovery was warranted and necessary for the respondent's preparation for hearing and that the delay did not prejudice the parties.

The Board completed the presentation of its case on the tenth day of the hearing, January 30, 2001, and Arnold M. Mellk, Esq., on behalf of the respondent, orally argued that the tenure charges should be dismissed. James S. Rothschild, Esq., on behalf of the Board, opposed the motion during his oral presentation which was completed on February 1, 2001.

After reviewing the arguments of the parties, I issued an order granting partial summary decision on February 6, 2001. In this order, I concluded that Charge 1, unbecoming conduct, should not be dismissed except for that portion of Specification 3, which alleges that the respondent engaged in corporal punishment, since there was no persuasive testimony to support the allegation of corporal punishment. As to Charge 2, inefficiency, I concluded that this charge should be dismissed, without prejudice, since the Board failed to comply with the legal requirements for a revised Professional Improvement Plan (PIP), *N.J.A.C.* 6A:3-5.1(c), 6A:3-4.3(f), 6A:3-5.1(c)4. As to Charge 3, incapacity, I concluded that this charge should be dismissed since the Board did not show that the respondent was unable to perform the functions and duties of an art instructor. As to Charge 4, insubordination, I concluded that this charge should not be dismissed.

After I issued this order, the hearing resumed and after a total of fourteen hearing days, the hearing ended on February 27, 2001. After the submission of briefs, the record in the matter closed on August 27, 2001. At my request, the time period for the submission of this initial decision was extended until January 10, 2002.

FINDINGS OF FACTS

It was stipulated that King was hired by the Board in September 1972 as an art teacher, and that she remained continuously employed by the Board as an art teacher through the 1999-2000 school year* (J-1). Except for one school year about 15 years ago, King taught art to the kindergarten to fifth grade classes and she usually taught in two schools.

During the 1998-99 and 1999-2000 school years, King was the art teacher at the Leroy Gordon Cooper Elementary School (Cooper School) (J-1). King was also the art teacher at the Memorial School. She was at the Cooper School two days a week and at the Memorial School three days a week. King taught about 700 students.

* King was suspended on May 8, 2000.

It was stipulated that King has Reactive Airways Dysfunction Syndrome (RADS), a condition which is similar to asthma. King testified that she has had RADS since 1992. During the hearing, the parties stipulated to the following facts:

1. Douglas A. Hutt, M.D., is a pulmonary physician. Dr. Hutt is employed with Pulmonary & Critical Care, located at 6 Cornwall Court, Suite A, East Brunswick, New Jersey 08816.

2. Maxine King ("King") was treated by Dr. Hutt for several years, beginning in or about January 1995.

3. On or about January 6, 1995, Dr. Hutt diagnosed King with a respiratory disorder and provided her with a written opinion that she "should not be exposed to chemical odors emanating from an oil spray on a laminating machine." *See* Letter of Hutt dated January 6, 1995, attached hereto as Exhibit 1.

4. On or about September 19, 1995, Dr. Hutt diagnosed King with Reactive Airways Dysfunction Syndrome (RADS) and provided King with a written opinion that RADS would be "exacerbated by exposure to fumes and chemicals." As a result, Dr. Hutt advised King not to be exposed to a laminating machine when it is being used or warmed up and, if possible, that she minimize her exposure to photocopying. *See* Letter of Hutt dated September 19, 1995, attached hereto as Exhibit 2.

5. On or about September 19, 1996, Dr. Hutt provided King with a third written opinion which states that she should be working in an environment that "limits exposure to volatile substances . . . [such as] exhaust from cars and busses, fumes from laminating machines, cleaning and other organic volatile solvents, extremes in temperature . . . smoke . . . and fumes from photocopying machines." *See* Letter of Hutt dated September 19, 1996, attached hereto as Exhibit 3.

6. On August 21, 1998, Dr. Hutt provided King with a fourth written opinion which states that she should be working in an environment that "limits exposure to volatile substances . . . [such as] fumes from laminating machines, organic solvents, exhaust from busses and cars, smoke, extremes in temperature and toner and fumes from photocopying machines." *See* Letter of Hutt dated August 21, 1998, attached hereto as Exhibit 4.

7. On August 12, 1999, Dr. Hutt provided King with a fifth written opinion which states that she "should be working in an environment that limits exposure to volatile substances . . . [such as] exhaust from cars and busses, fumes from laminating machines, cleaning and other organic volatile solvents and fumes from photocopying machines." Dr. Hutt then noted that he does not expect King's symptoms to appreciably change in the near future and that he believes that she will "need to stay in this relatively 'clean' environment for the rest of her career." *See* Letter of Hutt dated August 12, 1999, attached hereto as Exhibit 5. [same as P-95]

8. King shared the opinions of Dr. Hutt with the Board.
[J-2]

There was extensive testimony at the hearing about King's complaints and problems relating to her RADS condition.

Dr. R. Gregory Quirk, the Assistant Supervisor for Schools, testified that he became aware of King's sensitivity to fumes in 1993 where she filed a workers' compensation claim. King filed a number of workers' compensation claims (P-89, 90), and was directed to see Dr. Samuel D. Kahnowitz regarding her problem with bus exhaust fumes, and laminating and photocopier fumes (P-87). In his report, Dr. Kahnowitz stated that he did not disbelieve that King often experienced "clinical discomfort during the course of her job" but he found "no evidence for any degree of permanent partial respiratory disability that can be attributed with any

degree of confident to Ms. King's work for the Old Bridge Board of Education" (P-88). There was a settlement as to some of her workers' compensation claims in 1996 (P-92).

Frank J. Frazzitta, the Director of Plant Services, was informed about King's complaints about fumes from the coping and laminating machines, and he checked the filter and ventilator system for the machines and suggested what could be done to accommodate King (P-93, P-94, P-58, P-59, P-60).

In order to accommodate King, the Board:

1) Informed the principals of her concerns,
2) changed her duty station to inside the school,
3) asked the bus drivers to shut off the bus engines when waiting for the students,
4) cleaned out the storage of some paint and cleaning material from King's room,
5) moved the photocopier and checked other equipment, and
6) provided an extra vent for the laminator and limited its use when King was at the school

King filed a LAD complaint on March 26, 1996, alleging that the Board had not accommodated her RADS problem. The matter was dismissed on June 12, 1988, based on the accommodations made by the Board (P-11).

Quirk denied that the tenure charges in this matter were filed as a retaliation for either the workers' compensation claims or the LAD complaint filed by King. Quirk stated that some teachers had filed more workers' compensation claims than King, and that none of these teachers were dismissed because of the claims.

Veronica DeBruin, R.N., stated that she works as a nurse at both the Cooper and Memorial School. She stated that King talked to her on several occasions regarding her RADS condition, and her feeling that her colleagues were doing things to endanger her health.

DeBruin stated that King complained about the laminating machines and DeBruin was aware that teachers in both the Cooper and Memorial Schools were told not to use the machine on the days that King was in the school. King complained that the machine was used when she was there and DeBruin offered to put up a sign by the machine. King testified that she felt it would not help and that the sign would be ignored. DeBruin stated that the laminating machine was a distance from King's room at the Memorial School (P-42).

DeBruin stated that King complained that the administration was slow in obtaining powder free vinyl gloves for her. DeBruin stated that King asked her to write a letter on her behalf to Young regarding her glove problem (P-43). After King left a meeting in the room with a burning candle, she told DeBruin that she felt that the administration was out to get her and were doing things to make her uncomfortable. DeBruin stated that she questioned whether anyone knew she had a problem with candles.

King testified that she felt the candle was lit in the office intentionally to disturb her (12T81). King testified that she felt insufficient accommodations were made for her RADS condition. She stated that only a small fan was placed near the copying machine in the Cooper School. Although a memorandum was written limiting the use of the laminating machine (P-56), King testified that the machine was used while she was in the building.

King testified that some accommodations were made prior to the dismissal of her LAD case but were dropped or not enforced after the dismissal of the case. King testified that in her opinion the tenure charges were filed in retaliation for her workers' compensation claims and LAD case.

Dr. Daniel M. Rodriguez, the Superintendent of Schools for the Board, testified that the administrators started to think about filing tenure charges against King during the 1998-99 school year.

The tenure charges were served on King on December 28, 1999 (P-1, P-2), and later amended (P-3). Since inefficiency was one of the tenure charges, King was afforded a 90-day

period to correct the alleged inefficiencies (P-2). The 90-day period started on January 3, 2000 and ended on April 3, 2000 (P-2, P-4). The Board certified the tenure charges against King on May 4, 2000, and she was suspended on May 8, 2000 (P-5). Rodriguez stated that the unbecoming conduct charge was based on complaints from parents and the comments of the administrators who worked with King, and that the insubordination charge was based on the comments of the administrators.

Rodriquez was aware that King filed a number of workers' compensation claims but denied that this was a factor in the decision to file the tenure charges. Also, Rodriguez stated that King filed a LAD complaint in 1996, which was dismissed (P-11, P-12). He stated that tenure charges were not filed in retaliation because of the LAD case.

Dr. Joan M. George, the Assistance Superintendent for Personnel, testified that her duties include the review of teachers' evaluations, and the handling of grievances and parents' complaints. When a parent complains about a teacher, George has the school principal handle the matter. Pursuant to the union contract, the teacher is told about any complaints by parents.

George testified that a number of parents wrote letters complaining about King; K.F. (P-13), K.M. (P-14, P-15), B.R. (P-17), M.E.W. (P-18, P-41), D.K. (P-19), D.Q. (P-20, P-22) and R.F. (P-23). She was aware that Dr. Elizabeth A. Young, who is currently the principal at the Cooper School (since September 1999), and who evaluates all the art teachers employed by the Board, meet with King on several occasions about complaints from parents and also made suggestions to King on ways to improve her relationship with parents (P-16).

George stated that King did not have good relations with parents since she did not try to defuse a situation, and that King did not respond well to criticism and suggestions. She stated that sometimes King was loud and used profanity (P-27, P-28).

George stated that King only minimally complied with the request for a display of her students' art and did not cooperate with the student recognition program (P-29, P-30, P-31, P-32). She stated that King did not follow Young's instructions as to grade criteria and lesson

plans (P-33, 34), and was late with her budget (P-36). George stated that King changed her post for the monitoring of the arrival and departures of students without informing the principal.

George recommended that tenure charges be filed against King. She felt that King's performance as a teacher was harmful to the students and that King was not receptive to recommendations for improvement. George stated that she considered King to be the worst teacher employed by the Board. She stated that several parents had removed their children from King's classes and that this occurs rarely and never before as to art classes. George denied that the charges were in retaliation for King's workers' compensation claims or her LAD complaint.

Dr. Nicole L. Okun, the current Assistant Superintendent for Curriculum and Instructions (since July 1, 1999), testified that the 1989 curriculum for art is being revised and that in 1999 King attended several meetings regarding the art program.

Okun stated that the existing unwritten policy is that art teachers have 3 to 5 projects in a marking period, and that in the elementary school a project should be completed in a 1 to 2 week period. Okun stated that teachers are aware of this policy through the review of lesson plans and by attending art meetings.

Although Okun never observed King in a classroom or conducted an evaluation of King, she did interview King in her classroom, as part of her investigation of a complaint. Okun stated that King's room did not have many students' art works on display. Okun also saw King's art display during the 1999 winter holiday in the Administration Building (P-10), and though that part of the display was inappropriate since it had art projects for other seasons of the year and had art projects that were several years old.

Dennis Kostulakos, who is currently involved with adult education, was the principal at the Cooper School from January 1994 to June 1999.

Kostulakos evaluated King while he was principal at the Cooper School and stated that he considered her performance as the worst of the teachers at the Cooper School. He stated that she

was aloof, had a too strict discipline program and did not have enough art projects during the school year. Kostulakos stated that King was not receptive to any suggestions for improvement.

Kostulakos' negative comments about King's conduct during the development of the 1995 PIP, during his classroom observations and at conferences will be discussed hereinafter as part of the specifications for the tenure charge.

Young stated that she called King twice during the summer in 1999 to introduce herself, and arranged for King to have an office at the Cooper School after the custodian told her King did not have one. Young stated that King did not attend the teachers' orientation prior to the start of the 1999-2000 school year, because of her concern regarding the air quality in the room used for the orientation.

During the 1999-2000, Young was concerned when she received a number of complaints from parents regarding King, and Young's involvement as to these complaints will be discussed hereinafter as part of the specifications for the unbecoming conduct charge.

Based on her observations, Young testified that she had various additional concerns about King's performance which she discussed with King during the 1999-2000 school year. These concerns included:

1) King's lesson plans, which did not follow the suggested format, and did not indicate what King planned to do on any specific day (P-71);

2) King's method of teaching art which Young felt was too rigid and stifled creativity;

3) King's discipline system (P-75) and the fact that King ignored her suggestion for a revised system which includes awards;

4) concern about how King related to special education students;

5) not enough art projects during the school year and the limited variety as to art media (P-71);

6) lack of a grade book and grade criteria (P-73, P-33); and

7) the late submission of her art budget (P-74, P-36).

Young spoke to King about her concerns, and saw no improvement by King during the 1999-2000 school year (P-7).

King testified that she submitted appropriate lesson plans with timelines for projects and that she had an adequate grade records and grade criteria. King stated that she did not stifle creatively; however, she expected her students to abide by her directions. King stated that she did not want rushed projects and wanted her students to produce quality work. As to her budget, King stated that she was late since she got the supply catalog late.

Young stated that she asked all the teachers at the Cooper School to participate in the student recognition program and that King was the only teacher who complained about being too busy and having too many students. After several requests, King did participate (P-30, P-31).

JoAnn Agoglia, who is currently the Assistant Director of Technology, supervised King during the 1998-99 and 1999-2000 school years while she was the principal at the Memorial School. King was at the Memorial School on Tuesday, Wednesday and Thursday.

Agoglia stated that she asked King to participate in the student recognition program which required her to select a student's art project to be displayed for each marking period. King was the only teacher who did not want to participate and complained that it was difficult. King initially submitted nothing and then submitted only the names of students (P-29).

Based on her observations, Agoglia prepared the November 3, 1999 evaluation of King (P-76). King received a poor evaluation because her classes had few projects, and very little was done in King's classes since she instructed each child separately while the other students waited.

Agoglia stated that the students also wasted time finding their smocks. Agoglia stated that she made suggestions but that King did not follow her suggestions and was unwilling to make changes.

On November 30, 1999, King sent 9 students to the office for detention; this is about 1/3 of her class (P-77). Agoglia stated that King felt that the students were out of control but that no other teacher had discipline problems with these children.

Agoglia stated that King wanted a special education child removed from her class and Agoglia suggested that King discuss the matter with the student's child study team.

Agoglia's involvement with parents' complaints against King will be discussed hereinafter as part of the specifications for the unbecoming conduct charge.

King testified that Young and Agoglia treated her unfairly and only made negative comments about her. King felt that Young and Agoglia asked the parents to write the negative letters about her, that she was not given time to work out the problems regarding the students and that they were trying to build a case against her.

Based on the testimony presented at the hearing, I **FIND** that the Board has made reasonable accommodations for King's RADS condition, and that there was no convincing proof presented that the filing of the tenure charges against King was in retaliation for either her workers' compensation claims or for her LAD complaint.

The pertinent facts as to the specifications for the remaining charges of unbecoming conduct and insubordination will be discussed in the order they appear in the tenure charges.

UNBECOMING CONDUCT CHARGE

The first specification for the unbecoming conduct charge states:

> Over the course of her employment, King has failed to develop a positive relationship with parents and has engaged in unprofessional conduct.

In support of this specification, there is a reference to an alleged June 1998 comment made by King to K.M., the mother of three children who attended the Cooper School, about K.M.'s son, C.M. The specification alleges that King said:

> I feel sorry for you that you had to experience giving birth to such a child. I don't know how you can tolerate living with him when I can't tolerate having him in my class. . . I'm sorry to say this but it is true.

At hearing, K.M. testified that she was in the school's hallway discussing her son, J.M., with a teacher, Audra O'Malley, when King walked out of her classroom with her son, C.M. King then made the comment about C.M. in front of C.M. and O'Malley. K.M. stated that she was upset about King's comment and that she found the comment to be "unprofessional, immoral [and] hurtful" (8T61)*. K.M. informed George about the comment.

O'Mally testified that to the best of her recollection King stated:

> I can't believe how you could be – live at home with this child because I can't – and deal with him at home on a daily basis, cause I can't even deal with him in the – classroom for just – even a minute.
> [14T10, lines 11-5]

O'Mally testified that King was upset about C.M.'s conduct but that she was surprised and shocked that a teacher would make such a derogatory statement to a parent about her child.

At the hearing, King testified that she was watching C.M. during a detention since he had placed balloons filled with water in a classroom (12T14). King denied making any derogatory statement about C.M. to K.M. (12T12). King felt that C.M. manipulated his mother and she told K.M. that she felt sorry for her (12T15).

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* As to the references to the transcripts of the hearing in this matter, the number before the "T" represents the numerical order of the hearing dates, see Appendix A, and the number after the "T" represents that page in the transcript for that day.

K.M. testified that shortly thereafter, she was told that when her son, J.M., was absent, King told the art class "thank god I don't have to listen to him today! Maybe he got suspended and I won't have to deal with him." No witness was presented who heard King make this comment and King testified that she made no such remark.

On another occasion, K.M. testified that she saw King pull J.M. out of a line and she went over to talk to King. K.M. testified that King told her "I don't have to teach your children, and I don't have to speak to you; take it up with the principal" (8T71, lines 17-9).

After these incidents, K.M. took C.M. and J.M. out of King's classes and asked Kostulakos to take action against King (P-14,8T61). K.M. stated that no other teacher had complained about her sons.

The second example in the first specification refers to a complaint from K.F. about the problems her two sons were having in King's art classes. There is no specific allegation of any inappropriate conduct as to K.F.; however, at the hearing, K.F. testified that one day when she was walking in the school's hallway to drop off some cupcakes, she heard King screaming loudly at her students. When K.F. stopped by the door to King's classroom, she stated that King slammed the door in her face (2T94). K.F. talked to Young about this incident.

I **FIND** that K.M. is a credible witness and that King made several inappropriate remarks to her about her children which constitute conduct unbecoming a teacher. Although I believe K.F.'s testimony that King slammed the door while she was near King's classroom door, I **FIND** that this impolite conduct does not rise to the level of unbecoming conduct.

The second specification for the unbecoming conduct charge states:

> Over the course of her employment, King has engaged in threatening and unacceptable behavior toward students.

In support of the specification, there is a reference to the harassment complaint of M.W.'s parent, dated November 15, 1999 (P-37).

At the hearing, M.E.W., M.W.'s mother testified that during the 1998-99 school year, her son complained that King, his fourth grade art teacher, told him that he annoyed her and that she did not like him (3T10). When M.E.W. spoke to King, she stated that King denied there was any problem and stated that M.W. was doing fine in her class (3T104, 107). M.E.W. wrote a letter to George, dated June 30, 1999, to express her concerns about King's attitude and her inappropriate comments to her son (P-41).

In the beginning of the next school year, M.E.W. stated that M.W. began coming home crying on the days he attended King's art class, was upset about how King treated him in class and he did not want to go to her class. M.E.W. stated that M.W. was disciplined for complimenting another student's artwork (P-16, 3T109), and for reporting a problem with another student to King (P-16, 3T111). M.W. did not testify at the hearing.

M.E.W. contacted Young about M.W.'s problems in King's class, and Young suggested a meeting with King. On October 25, 1999, M.W.'s parents meet with King. M.E.W. stated that King told them that M.W.'s work was "simple" (3T113). M.E.W. stated that she was aware that her son was not gifted in art but was angry that his work was called "simple". M.E.W. stated that King also stated that M.W. had a severe behavior problem and M.E.W. questioned why they had not been previously informed about M.W.'s behavior problem. King told them that there were too many behavior problems in her classes and that she did not have the time to deal with a single student (3T113-4). M.E.W. felt that King had targeted M.W. because of their prior complaint. M.E.W. complained to Young about King's comments at the meeting (P-18), and M.E.W. filed a harassment complaint against King on November 19, 1999 (P-37) and had her son removed from King's art class.

Okun who is the Board's Affirmative Action Officer, testified that she investigated the November 15, 1999 complaint (P-37) filed by M.E.W. alleging that King harassed her son, M.W. Okun testified that she interviewed a number of the students in the art class M.W. had with King. All of the students interviewed told her that they did not like art, that King yelled and screamed

and made them feel uncomfortable in her class. Some of the students said that King did not like M.W.; some students were upset by King's criticism of other students and some students felt "threatened" by King (P-38, 3T25-6, 67-8).

Okun had a meeting with King and her union representative on November 22, 1999 in Young's office. Apparently Young had lunch in her office before the meeting and had lit a candle to remove the lunch (onion) smell in the office. Okun stated that she did not smell the candle; however, after the meeting started King said she could not breath and had to leave. Okun later found out that King had filed a workers' compensation claim for the day and alleged she had a problem because of the candle and the chemical spray Okun used to clean her glasses (P-39).

In her report, Okun concluded that King's behavior in the classroom was inappropriate and that disciplinary action might be considered but that her conduct did not constitute harassment (P-40). She concluded that King acted inappropriately to all the students. Okun concluded that King inappropriately yelled and screamed, criticized the students' work, made comments that made students feel uncomfortable in the classroom, and that the students were not receiving appropriate art instruction because of King's conduct (3T34-5,67-8). King testified that the complaint was dismissed and no disciplinary action was taken against her, and that she felt she was the one discriminated against (13T55).

King testified that at the October 25, 1999 meeting she did not call M.W.'s work "simple" but stated that he did not work hard on any project and his work was not on a par with the other students. Also, King stated that she had mentioned M.W.'s behavioral problems on several occasions to his mother prior to the October 25, 1999 meeting. King testified that M.W. fooled around, wasted time and caused problems in her classroom (12T20). King stated that M.W.'s compliment of the other student's work and his complaint about a student were done in a way as to disrupt the class. King stated that M.W. picked on her (13T54-5). King also stated that M.W. was the "son of a PTA person" and implied that as such he could do no wrong (13T52, P-47).

During the October 25, 1999 conference, King stated that M.E.W's husband yelled at her, was very agitated and spoken to her in a threatening manner (12T19-20). King accused M.W.'s parents of discriminating against her (13T157). King admitted that she said that she could not keep parents informed about all problems since she had 700 students.

Also in support for the second specification, there is a reference to other parents' complaints about King's treatment of their children. At the hearing, the Board presented the testimony of five additional parents and five students who testified as to King's alleged unacceptable behavior towards her students.

K.M., who testified as to the first specification, stated that Young had a meeting with K.M. and King. Young convinced K.M. to allow her children to attend King's classes during the 1999-2000 school year. Young testified that King did not participate in the discussion during the meeting nor did she try to resolve the problems that concerned K.M. (5T15). Young suggested that K.M. go with her for an observation in King's class. King agreed.

K.M. testified that King did not greet the class even though it was the first class after the summer recess, that she told the students to be quiet, and that she reviewed her warning system which was on the blackboard. K.M. felt that King did not offer any guidance or assistance to the students (8T65).

As to this class observation, Young testified that King instructed the class in a very rigid manner, made several derogatory remarks toward some students and ignored other students (5T17). Young stated that a student had placed her book bag next to her desk, and the bag was slightly in the aisle. When King tripped on the bag, she accused the student by saying "Oh, you did that on purpose. You did that to trip me" (5T17, lines 21-2). Young observed that a special education student who was seated in the rear of the classroom did not receive any attention from King.

At the hearing, King testified that she felt it was improper for K.M. to have been in her classroom and that the students looked at K.M. and each other in such a way as to imply that the parent had the "upper hand" (13T146).

Since K.M. continued to complain about King, and she received other complaints, Young testified that she meet with King on October 15, 1999 (P-16). Young made several suggestions for improving King's relationship with K.M. and other parents and developing the climate for a successful classroom. During the 1999-2000, Young stated that she meet with King about once a week and continued to make suggestions and recommendations for improvement (6T67-8).

K.M. testified that she continued to be displeased with King's instruction of her children, and after she heard King yell at her child, J.M., while she was visiting the school, she removed her children from King's classes in April 2000.

K.F., who was also mentioned in the first specification, testified that both of her sons had King for art for several years while they were at the Cooper School. During the 1998-99 school year, K.F. testified that her children complained to her about how King criticized students and yelled at them, and she felt that her children were intimidated by King (2T89, 93, P-13). K.F. testified that she felt King was unduly critical when King told her eldest child that his drawing of an alien was wrong, and told her youngest child that his Christmas tree was ugly, threw it away and made him draw another one (2T93). K.F. felt that her eldest child's art projects in the fifth grade were more simplistic and less creative then his art projects in pre-school (2T98).

D.Q. stated that two of her three children had King for art at the Cooper School and that she was concerned about the small number of art projects they brought home and about their complaints that they had to strictly follow King's format for projects (3T75-6). On December 12, 1999, D.Q. wrote Young to complain that King had embarrassed her daughter, TB., for not exactly following King's instructions as to a wreath project (P-20). Young notified King regarding the complaint.

T.B. testified that:

> ... I was cutting out my, um, leaves and I had put them all in a bunch, and I didn't paste them down yet because . . . and then when Ms. King came over, she said to me, 'Cut and paste, cut and paste, that's how you do it,' and she yelled at me . . .'
> [10T23, lines 16-21]

T.B. testified that later King asked her if she was embarrassed about her project. When T.B. said no, King told her that King would be embarrassed if Young came in and saw her project (10T24). T.B. testified that she was upset and embarrassed by King's remarks (10T25).

After receiving the December 12, 1999 complaint, Young had a meeting with D.Q., T.B. and King. Young and D.Q. stated that King did not dispute T.B.'s account of what had occurred and that King stated that T.B. was on the student council and that her power and popularity was going to her head (P-64,13T5, 33, 36-7). After T.B. described what had occurred and started to cry, King apologized. Young stated that King suggested that other teachers were having a problem with T.B.'s behavior but that no other teachers reported such a problem (5T40).

D.Q. felt that King may have been retaliating against her through T.B., due to D.Q.'s status as PTA President at Cooper School (P-20, 3T82-3). Prior to the incident involving T.B., D.Q. stated that the PTA had a school bazaar and used King's classroom. The next day King complained that she could not locate a number of items and D.Q. apologized about rearranging her things. D.Q. stated that King refused her apology and stated that she was a victim of the PTA function (3T82).

A few weeks later, D.Q.'s son, J.B. wrote a letter to Young to complain about King (P-21). In his letter, J.B. stated that King came to him with "fire in her eyes" and "slammed her hand" on his desk, said "you're doing it wrong" and threw it into the garbage. At the hearing, J.B. testified that:

> ... So I was cutting and she came over to me and said 'Warning.' 'Warning.' She drops everything that she had, came up to my

> desk, she smacked me on my hand, and she said, 'That is not what you do.' She took my project and she threw it in the garbage. [10T37, lines 22-5 - 38, lines 1-2]

Although in my order, I found that J.B. exaggerated in his testimony that King had hit his hand, I **FIND** his testimony credible as to King's insistence that he exactly followed her directions and that she yelled at him.

Thereafter, D.Q. took both of her children out of King's classes (3T91). D.Q. testified that, in her opinion, King's classroom atmosphere did not foster a positive self image, that she embarrassed and humiliated students and that King did not have the patience to be a teacher (3T93).

King testified that J.B. could have done better in her art class if he paid attention and was not a discipline problem. King testified that when she corrected J.B. as to how he was doing his project, she did not embarrass him and King did not understand why he felt he had to write to the principal about the matter.

King stated that T.B. was working slow on her project, that she was the only one who did not finish the project, and that King asked her if she was embarrassed about being so slow.

King denied yelling at J.B. or T.B. and stated that their mother, D.Q. did not want to hear anything negative about her children and wanted preferential treatment for her children since she was the PTA president. King stated that she apologized to T.B. at the meeting regarding the December 12, 1999 complaint only because she wanted to end the conflict. King felt D.Q. had no justification for removing her children from King's classes. King saw K.M. and D.Q. talking together in the school's parking lot and thought they were conspiring against her (13T37).

R.F. testified that her son, C.J.F. did not want to attend King's fifth grade art class during the 1999-2000 school year at the Memorial School. Although C.J.F. liked to draw, he complained about King, stated that she was mean and that she yelled "warning" to the students (9T31-2). R.F. stated that her son frequently got detentions from King but had no problems with his other teachers. She wrote a letter to Agoglia regarding her complaints (P-23).

C.J.F. testified that he liked to draw but did not like King's class because she was mean, laughed at him, and gave him detentions (9T41-2).

Agoglia meet with King and King's union representative regarding R.F.'s complaint (P-83). Agoglia stated that King denied that there was a basis for the complaint, and that King stated that she was having problems with C.J.F.'s class. During her testimony, King stated that C.J.F. was disruptive in her class and described R.F. as "a Spanish speaking person" who was pushed by Agoglia to write the complaint (13T158-9).

B.R.'s two children, N.R. and J.R., had art classes with King during the 1999-2000 school year. B.R. wrote to Young on November 15, 1999, and complained about the slow pace in King's classes, her lack of creativity, and her failure to use varied art media (P-17). Young asked King to respond to B.R. King wrote B.R. and sent her several art projects done by her children. B.R. testified that art was to be the child's expression and that King should not tell the students how to do everything (9T13). B.R. stated that her children did not like King's art classes (9T10).

N.R. testified that she did not enjoy King's art class, that it was boring since she had to exactly follow King's instructions or do it over (10T12-3). N.R. stated that King yelled at the students and that she felt intimidated by King. J.R. also criticized King's requirement that the class exactly follow her directions (10T16-7). J.R. testified that he got scared when King yelled at the students (10T17).

King denied yelling at or embarrassing N.R. and J.R., and did not recall having any problems with either of them in her art classes. King felt that Young got B.R. to write the November 15, 1999 complaint letter against her.

During the 1999-2000 school year, D.K. wrote Agoglia (P-19). In her letter, D.K. stated that her son, L.K. loved art but was losing interest in art because of King's rigid rules. Neither D.K. or her son testified at the hearing.

Agoglia meet with King after receiving D.K.'s December 9, 1999 letter. Agoglia testified that King refused to acknowledge that there was any basis for D.K.'s complaint and stated that L.K.'s behavior was not up to par, that L.K. was not putting any effort into his projects and that L.K.'s execution was poor (8T34). As an example, King stated that L.K. wanted to use purple leaves on a wreath project. King felt that purple was not an autumn color and did not "fit in the prescription of what we're doing" (13T112).

Agoglia was concerned about the time it took to complete the project when she learned that the fall wreath had become a winter wreath. Agoglia stated that King saw no reason to change her instructional program (8T35).

Mrs. L. told Young that her son disliked going to King's art class, and that he had a stomach ache every day he was scheduled for art (P-16). Neither Mrs. L. or her son testified at the hearing.

At the hearing, Young testified that King regularly sent children to the office for a "time out" even though she advised the teachers not to do so. On one occasion King sent D.O., a special education student to her office. She spoke to D.O. and he was not sure what he did wrong. D.O. agreed to apologize to King and Young took him to King's class. After D.O. apologized, King said "sure" and walked away. Young felt that King's response was not appropriate.

King testified that D.O. misbehaved in class frequently and she discussed his disciplinary problems with Young. King felt Young was emotionally concerned about D.O.'s special need problems and did not encourage him to obey the school's rules. According to King, D.O. offered her a half-hearted apology. Since King did not feel it was a sincere apology, she said "sure" and walked away.

On November 1, 1999, Young stated that King required three students in her class to copy her class rules as a discipline for misbehavior (P-68). One of the students was D.C., a special education student. Because of his disabilities, it was difficult for D.C. to write the rules, and Young felt it was not an appropriate discipline to impose on him (P-68).

In support of the second specification, the Board presented the testimony of three administrators (Kostulakos, Dr. Young, and Ms. Agoglia), six parents and five students, all of whom testified as to King's threatening and unacceptable conduct towards her students. I **FIND** their testimony to be credible and that King's inappropriate classroom demeanor, her loud and overzealous application of her disciplinary rules, her rigid requirement for conformity constitute conduct unbecoming a teacher.

The third specification for theunbecoming conduct charge states:

> King has engaged in corporal punishment and the use of profanity.

I dismissed in my order that portion of the third specification which alleges that King had engaged in corporal punishment. The remainder of the specification deals with an incident that occurred on November 25, 1997. In support of the portion of the specification, it is alleged that:

> the principal received a report that King was screaming by her room. Upon investigation, King was asked to lower her voice, but she became louder and began using profanity. She was directed to stop this behavior by the principal and the principal maintained his presence outside her classroom for the remainder of the day.
>
> When questioned about the above incidents, King failed to offer an explanation or apology for her behavior. Instead, King threatened to sue the investigating principal for harassment.

Kostulakos testified that he contacted the Division of Youth and Family Services (DYFS) and was instructed to investigate an incident involving King's alleged corporal punishment of M.M. (dismissed portion of this specification).

Several days after the incident involving M.M., King found out that Kostulakos had notified DYFS. Kostulakos received a report that a teacher was screaming in her office and when he arrived he heard King screaming in her office (P-25, 4T57-8). Kostulakos asked her to lower her voice since she could be heard in the hallway and classrooms by students and visiting parents. He stated that King became louder and used profanity (P-26, 4T58-9, 7T32).

Afterward, Kostulakos stated that he stayed by her classroom for the rest of the day. Later, Kostulakos testified that he questioned King about the incident and she offered no explanation but threatened to sue him for harassment (P-26).

King stated that she found out about the call to DYFS and Kostulakos' investigation from her union representative. King admitted she was upset and mortified, and was talking to the union representative in a loud voice but denied that she was screaming or that she used profanity. When Kostulakos came into the office, King said that she was going to sue him and she did later file a grievance against him.

King denied that Kostulakos remained by her classroom since she did not see Kostulakos thereafter when she greeted her students by her classroom's door or when she glanced into the hallway through the window in her classroom's door.

King admitted she was upset upon finding out about the call to DYFS since she did not "smack" M.M. and there was no reason for Kostulakos to contact DYFS. King felt that the incident was used to investigate her (13T72).

I **FIND** that Kostulakos is a credible witness and that King was loud and used profanity when she found out about the DYFS investigation, and that her action constitutes conduct unbecoming a teacher.

The fourth specification for the unbecoming conduct charge states:

> King uses an inappropriate method of student discipline.

As part of the support for this specification, it is noted that in his May 30, 1997 evaluation, Kostulakos criticized King's "over zealous means of disciplining students" (P-47). In her response, King justified her discipline system by saying she had difficult classes due to special education students and other uncooperative students, especially those students whose parents are in the PTA (P-47). The Board alleges that King continued to use the same harsh disciplinary system in 1998-99 and 1999-2000 school year.

King had used the same disciplinary system (P75) for about ten years, the system was posted on the blackboard in her classroom, and every year she informed her students and their parents of the system. King's supervisors were aware of her system. The system contains a number of steps of increased discipline starting with an oral warning. The tenure charge alleges that one of the steps is the forfeiture of the child's lunch period. At the hearing, it was clearly established that this was not correct and that King only imposed a detention during the recreational portion of the lunch break.

At the hearing, King testified that she insisted on orderly behavior in her classes and that she used her disciplinary system if any student misbehaved. It was clear from her testimony that King felt her disciplinary system was appropriate and she stated that no administrator told her that she had to change her system.

Based on her classroom observations, Young stated that King's disciplinary system is punitive (5T59). Young described her observations as follows:

> I can't think of an instance where she has complimented a child in my presence. But I've heard her on many instances reprimanding children. She has a set of rules that she follows very rigidly in the classroom and she often walks around saying, 'warning, warning, warning.' It produces a whole environment of fear ... children are supposed to go to Art to be relaxed, to be creative, to have their creative juices flow. They're scared to death in there. They're afraid to make the wrong move. They're afraid to cut when they're not supposed to be cutting. They're afraid to make a line when they're not supposed to be making a line because they get in trouble. They have to sit and they have to wait. And she doles out punishment sometimes that is very inappropriate.
> [5T59, lines 20-25 – 60, lines 1-10]

Both Young and Agoglia criticized King's strict discipline of students and made suggestions which they stated were ignored by King (P-67, P-77).

The Board received complaints from a number of parents regarding King's discipline program, including complaints from MEW (P-18), D.Q. (P-20), and K.F. (P-13). Also five of

King's former students testified at the hearing and they complained about the strictness of her discipline program; C.J.F. (9T44), N.R. (10T11-2), J.R. (10T17-8), T.B. (10T27), and J.B. (10T37-8, 40-4, 49-50).

I **FIND** that King used a unreasonably rigid classroom disciplinary system. Kostulakos, Young and Agoglia all criticized her program and suggested that she change it. King ignored the suggestions and retained her program since no one specifically ordered her to change it. I **FIND** that the continued use of the discipline program by King constitutes conduct unbecoming a teacher.

The fifth specification for the unbecoming conduct charge states:

> King has engaged in unprofessional conduct and is unable to behave appropriately with colleagues.

Kostulakos testified that it was typical for King, when confronted with constructive criticism, to respond by becoming loud and agitated (7T36-8, 42).

Kostulakos testified that on May 12, 1995, he met with King to develop a PIP. This PIP was rejected by the administration because it included the funding of a professional day for King at an unknown cost. Kostulakos revised the PIP to exclude the professional day and had a second meeting with King on May 24, 1995. When informed that the initial PIP was unacceptable, King became aggressive and argumentative, and refused to sign the revised PIP(P-44, 4T61).

Kostulakos stated that King again asked for funding for the administrative day in September 1995, and it was again rejected.

King testified that Kostulakos agreed with her that she should go to the conference and use a professional day, and she felt the Board should pay for the cost of attending the conference. King denied that she again asked for funding for the conference but stated that she submitted a voucher for her expenses which was denied.

Kostulakos testified that he was in King's third grade art class for an observation on March 25, 1996. Kostulakos stated that King distributed to the students the tickets for the Board's "Lunch with the Principal Program." One student asked about the program, and King responded in a sarcastic tone, that "[h]e made the game, I just play it." In his evaluation, Kostulakos stated that her comment was inappropriate and he testified that he criticized King's statement since he felt it compromised the program (P-45, P-46, 4T65). Two days later, during a post-observation conference, King objected to Kostulakos' statement about her comment, refused to sign the observation form, became very emotional, began to cry, and verbally criticized Kostulakos (4T66, 7T40). Afterwards, King went to see the school nurse and she was sent home (P-46).

In her written rebuttal to Kostulakos' comment in the evaluation, King stated that she did not make any disparaging or inappropriate comments to the students about the Lunch with the Principal Program and asked Kostulakos to remove his comment from the written evaluation (P-45). King felt that Kostulakos was using the evaluation procedure to retaliate against her for her negative comments about the program at a faculty meeting.

At the hearing, King stated that during his observation in her classroom, Kostulakos interfered with her lesson and talked to the students. She felt that the negative comment in the evaluation was malicious and she became so upset during the post-conference meeting that she went to see the nurse and was sent home.

Young had a number of meetings with King regarding her performance and she stated that:

> [King] is not receptive to criticism. She's not a listener. She blocks out, I believe a lot of things that people try to do to really be genuine and help her. She gets very defensive. She doesn't want to listen. She doesn't want to take constructive criticism. She feels that whatever she is doing is the correct thing and she won't hear anything different. When she's in parent conferences, she doesn't have a good recollection of the incident. Or else she does not reveal that she has a recollection of it. She gets parents very angry because she talks down to them and is rather nasty ...
> [4T57, lines 13-24]

On March 28, 2000, King became upset after a classroom observation by Donna Kibbler, a supervisor (P-9), and she locked herself in a hallway bathroom (P-28). King cried so loudly in the bathroom that she was heard by DeBruin, whose office in the Memorial School is across the hall from the bathroom. DeBruin stated that several students were in her office and they were upset when they heard the crying.

DeBruin testified that she tried to talk to King but King said that no one could help her and refused to open the door. DeBruin stated that King was wailing – loudly and uncontrollably – and that she never heard such an outburst by a teacher (P-27, P-28, 4T12-3). After about ten minutes, King calmed down, came out and went back to her classroom.

I **FIND** the testimony of Kostulakos and Young to be persuasive that King acted inappropriately when she did not get the funding for the conference and when she was criticized by her supervisors. I **FIND** such inappropriate responses to be conduct unbecoming a teacher.

INSUBORDINATE CHARGE

The first specification for the insubordination charge states:

> King has refused to follow written directives relating to her assignment duties.

The support for this specification relates to King's assignment in September 1996 to an internal post about twenty-five feet from the Cooper School exit which the students use to get to the school buses (4T86). Kostulakos stated that King objected to and refused to be at this post (P-49, P-49, P-50, P-51, P-53), and he discussed the matter with George. It was decided that the post did not have to be changed since it was located a substantial distance from where the school buses were located (P-54) and the school bus drivers had been told to turn off their motors. Kostulakos spoke to King about the matter and she indicated that he was harassing her. King traded posts with another teacher without telling Kostulakos (4T106). Kostulakos stated that King had a similar post at the Sheppard School and did not object to the assignment (P-53).

At the hearing, King testified that for eight years she had informed the administrators about her RADS condition, and that they failed to adequately accommodate her need to avoid motor fumes. In September 1996, King stated that her assigned post was changed to a post closer to the school door and she complained about the assignment because of the school buses' exhaust fumes. She stated that the school bus drivers did not always turn off their motors. According to King, she changed posts with another teacher so that she would not be near the door. King stated that there was never no one at her assigned post as suggested by Kostulakos' October 3, 1996 memorandum (P-50).

When Kostulakos reassigned King's post as of September 1996 at the Cooper School, I **FIND** that he thought the post was far enough away from where the buses parked so as not to cause a problem for King. King objected to the post since she felt it was too close to the door, and I **FIND** that her decision to change posts with another teacher without telling Kostulakos was inappropriate but does not constitute insubordination.

The second specification for the insubordination charge states:

> King has refused to follow oral and written directives regarding deficiencies in her classroom planning.

Young testified that she meet with King on several occasions regarding her inadequate lesson plans and her deficiencies in classroom planning and stated that there was no improvement.

On November 16, 1999, Agoglia sent King a memorandum stating that she had twice talked to King about adding project timelines into her lesson plans and that King was still not adding time frames in her lesson plans (P-35). By memorandum dated February 22, 2000, Agoglia notified King that she was still not placing time frames in all of her lesson plans (P-84).

At the hearing, King testified that she did add project timelines to her lesson plans starting in the 1999-2000 school year (R-5).

On November 16, 1999, King was among the special area teachers requested to meet with Young to discuss grading criteria and recording. King attended the rescheduled meeting on December 10, 1999. Young stated that King indicated that she could not keep a grade book due to carpal tunnel syndrome. Young offered her extra copies of the classroom rosters to help her keep grades. Young stated that King never submitted any medical documentation to show she had carpal tunnel syndrome (P-34).

At the hearing, King stated she was being tested for carpal tunnel syndrome at the time and later it was determined that she did not have this problem. King testified that she did grade her pupils based on their work and that her grading criteria was listed in her lesson plans (R-5).

I **FIND** the testimony of Agoglia and Young to be credible and that King did not fully comply with their requests as to the contents of her lesson plans, and the grading criteria and recording. Also, I **FIND** that King's reluctance to fully comply with these reasonable directives of her supervisors constitutes insubordination.

The third specification for the insubordination charge states:

> King is reluctant to display student work and participate in student recognitions.

Agoglia and Young testified that during the 1999-2000 school year they separately meet with King on several occasions regarding her apparent reluctance to participate in the student recognition program (P-29, P-30, P-31). They stated that King's failed to fully participate in the program throughout the 1999-2000 school year (P-89). Agoglia stated that King objected to the program because of the additional work.

King testified that the student recognition program created a lot of work for her (13T127-8). King testified that she did participate in the program and, when requested, she did submit the names of students to be recognized.

George testified that King disregarded instructions to display student art work in December 1999 in the Administrative Building, and only put up the display after receiving a written directive from George (P-32, 2T179-80, 187). As already stated, George found that some of the art work displayed was inappropriate – art work from prior school years and for other seasons of the year (P-10, 2T188-9).

King testified that the photograph of the exhibit introduced into evidence (P-10) only shows a small part of the art exhibit she prepared for the Administrative Building. King admitted that one of the student's projects is labeled "winter of the 1998" (P-10), and stated that important events occurred in the student's life in 1998.

I **FIND** that George, Agoglia and Young presented persuasive testimony that King was reluctant to display student work and participate in the student recognition program because it created additional work for her. There was no evidence that the additional work was an unreasonable responsibility, and I **FIND** that King's reluctancy to participate in these programs constitutes insubordination.

ARGUMENTS OF THE PARTIES

The Board argued that the legal basis for a charge of conduct unbecoming a teacher is the teacher's unfitness to discharge his or her duties and functions, *Laba v. Newark Board of Education*, 23 *N.J.* 364, 384 (1957); and that the courts have held that it can be shown that a person is unfit for a position by a pattern of conduct or by one incident if sufficiently flagrant. *Redcay v. State Board of Education*, 130 *N.J.L.* 369, 371 (S. Ct. 1943), aff'd., 131 *N.J.L.* 326 (E&A 1944).

The Board argued that in this matter it has shown that King engaged in several incidences of flagrant conduct which in themselves warrant dismissal; citing the inappropriate comments made to K.M. about her sons and the inappropriate actions towards T.B. and J.B. Additionally, the Board argued that there was a series of less egregious incidences which taken together demonstrates a pattern of unbecoming conduct by King.

The Board argued that the testimony of the parents, students and administrators clearly established that King had created a environment of rigidity and fear in her classrooms and that she routinely yelled at students and embarrassed them when they do not exactly follow her instructions on how to do a project. The Board argued that the facts in this matter are similar to those in *School District of Flemington- Raritan Regional v. Van Gilson*, 93 *N.J.A.R.* 2d (EDU) 378, aff'd. by Comm'r of Educ., 93 *N.J.A.R.* 2d (EDU) 386, aff'd by State Bd. of Educ., 93 *N.J.A.R.* 2d (EDU) 630, and clearly constitute unbecoming behavior.

The Board argued that it had shown that on two occasions King failed to control her behavior and maintain a professional demeanor which constitutes conduct unbecoming a teacher. The Board noted that case law has held that teachers, as instructors of impressionable children, must control their behavior and exercise self restraint, and cited the decisions of *In the Matter of the Tenure Hearing of Brody*, 1980 S.L.D. 449, aff'd by Comm'r of Educ., 1980 S.L.D. 456; *In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional*, 1972 S.L.D. 302, 321.

Also, the Board argued that King failed to exercise mature and sound professional judgment as shown by her inappropriate comments to K.M., the inappropriate comment regarding the lunch with the principal program, her use of profanity and her crying tirade, her refusal to consider suggestions for improvements and her unfounded allegation that there was a conspiracy against her by parents, primarily by PTA officers.

The Board noted that it has the authority to issue directives to its teaching staff, *N.J.S.A.* 18A:1-1 and that the Board's employees are expected to show a reasonable respect for the authority of their administrators, *In the Matter of the Tenure Hearing of McCormick, School District of Hunterdon Central Regional High School*, 1980 S.L.D. 145, 147, aff'd. by Comm'r of Educ., 1980 S.L.D. 155, aff'd by State Bd. of Ed., 1980 S.L.D. 157; *Scarpignato v. Edgewater Bd. of Educ.,* 1983 S.L.D. 311, aff'd as modified by Comm'r of Educ., 1983 S.L.D. 335, aff'd by State Bd. of Educ., 1983 S.L.D. 338, aff'd by App. Div., 1984 S.L.D. 2013. In this matter, the Board argued that it has presented the credible testimony of George, Quirk, Young, Agoglia and Kostulakos to show King's blatant disregard of directives. The Board further argued that on several occasions when given directives, King responded with explosive and irrational behavior.

Further, the Board argued that there was no evidence presented during the hearing to support King's affirmative defense that the Board failed to provide her with reasonable accommodations for her RADS condition. The Board noted that accommodations had been made, and argued that there was no support for King's testimony that the Board's administrators were purposely trying to harm her and to inhibit her from doing her job. The Board argued that King irrationally felt that there was a conspiracy against her when a meeting was held in Young's office where there was a burning candle. Additionally, the Board noted that when she was criticized for the lack of grade recording, King alleged that she had corporal tunnel syndrome, and at the hearing, admitted that she did not have this condition. Further, King complained about the type vinyl gloves provided for her classes even though none of the administrators ever recalled observing King wearing any type of gloves during classes.

The Board also argued that there was no proof presented that the tenure charges were filed against King in retaliation for her filing workers' compensation claims or the LAD complaint.

Arnold Mellk, Esq., on behalf of King, argued that the Board had not sustained its burden as to the tenure charges, *In re Polk License Revocation*, 90 *N.J.*550, 560 (1982), and that the charges should be dismissed. Mr. Mellk argued that the Board improperly compared King's behavior to that of the teacher in the *Van Gilson* case. In the *Van Gilson* case, Mellk argued that the teacher ridiculed and abused students and that King never engaged in such conduct. Further, he argued that no administrator had ever ordered that King revamp her disciplinary system. Mellk noted that King has received better than satisfactory evaluations with only a few negative statements. In the evaluation of March 25, 1996, she received an acceptable evaluation which included the comment that she had good control over her classes and that the only negative statement concerned her comments regarding the lunch with principal program (P-45). In the evaluation dated May 30, 1997, Kostulakos stated that King communicated well with students and identified no areas that needed improvement (P-47). There was only one unsatisfactory evaluation which was dated November 3, 1999 (P-76) (Exhibit M attached to tenure charges, P-3), and Mellk argued that this negative evaluation was intentionally prepared because the Board intended to file the tenure charges. I disagree with Mellk's argument that there was only

one negative evaluation, and note that three other negative evaluations were placed into evidence (P-7, P-8, P-9).

Mellk argued that King never refused to follow directives and that the Board failed to accommodate her needs. Mellk argued that King was improperly assigned monitoring duty at the front door of the Cooper School even though she had made it clear that because of her RADS condition she could not be exposed to diesel exhaust. Mellk argued that Kostulakos improperly rejected her request for a change of her front door post. Mellk noted that when King did not appear at her front door post, she traded post duties with another teacher and there was always somebody at the front door.

Further, Mellk argued that the Board has failed to prove that King was insubordinate. Mellk argued that the Board had failed to show that King refused to attend any conferences or that she had blatantly disregarded any directive.

Lastly, Mellk argued that even if the Board had proven some aspects of its tenure charges that removal was too harsh of a penalty, and cited *In re Falcomer*, 93 *N.J. Super.* 404, 421 (App. Div. 1967).

Having reviewed the testimony of the witnesses as well as the arguments of the parties, I **CONCLUDE** that the Board has proven that King engaged in unbecoming conduct and that she was insubordinate on a number of occasions. King's performance as a teacher was adequate for a number of years and apparently deteriorated in her last two years of employment. I have found that there was credible evidence to support the numerous acts of inappropriate conduct towards students as well as school administrators and that Ms. King's reluctance to follow the suggestions and directives of the administrators constitutes insubordination. Based on the testimony of the substantial number of witnesses as to the incidents of unbecoming conduct and insubordination, I **CONCLUDE** that there is no basis for King's allegation that the tenure charges were initiated in retaliation for her workman's' compensation claims or for the LAD complaint. Additionally, although I recognize that there was some question in the minds of some of the Board's administrators as to the existence or extent of King's RADS condition, the Board presented persuasive testimony that it provided reasonable accommodations for King's RADS

condition. Therefore, I **CONCLUDE** that there is no support for the petitioner's affirmative defense that the Board failed to accommodate her disability due to RADS.

As to the penalty to be imposed, I agree with the Board's argument that in light of the substantial number of incidences of inappropriate conduct and insubordination that the appropriate penalty is the removal of King from her teaching position.

I **ORDER** that King be removed from her tenured teaching position.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 10, 2002
DATE

BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

January 10, 2002
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 10 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cad

EXHIBITS ADMITTED INTO EVIDENCE:

Joint Exhibits:

J-1 Stipulation of Facts, dated August 2000
J-2 Stipulation of Facts, dated December 7, 2000, with exhibits

For the Petitioner:

P-1 Tenure charges as to Ms. King
P-2 Letter to Ms. King from Dr. Rodriguez, dated December 28, 1999
P-3 Revised tenure charges filed against Ms. King
P-4 Board's letter to Ms. King, dated April 12, 2000
P-5 Board's resolution certifying the tenure charges against Ms. King, dated May 4, 2000
P-6 Board's policy on corporal punishment
P-7 Teacher evaluation of Ms. King, dated January 10, 2000
P-8 Teacher observation of Ms. King, dated March 17, 2000
P-9 Teacher observation of Ms. King, dated March 28, 2000
P-10 Photographs of student's art work, December 1999
P-11 Findings of the Division of Civil Rights, dated June 12, 1998
P-12 Letter from the United States Equal Rights Commission, dated August 4, 1998
P-13 Letter from K.F. to Dr. Young, dated December 20, 1999
P-14 Letter from K.M. to Mr. Kostulakos, dated June 3, 1998
P-15 Letter from K.M. to Dr. Young, dated October 11, 1999
P-16 Memorandum prepared by Dr. Young regarding a meeting on October 15, 1998
P-17 Letter from B.R. to Dr. Young, dated November 15, 1999
P-18 Letter from M.E.W. to Dr. Young, dated November 3, 1999
P-19 Letter from D.K. to Ms. Agoglia, dated December 9, 1999
P-20 Letter from D.Q. to Dr. Young, dated December 12, 1999
P-21 Letter from J.B. to Dr. Young, dated February 4, 2000
P-22 Letter from D.Q. to Dr. Young, dated February 11, 2000
P-23 Letter from R.F. to Ms. Agoglia, dated January 19, 2000
P-24 Memorandum from Dr. Young to Ms. King, dated January 14, 2000
P-25 Letter from Dr. Young to Ms. King, dated January 28, 2000
P-26 Summary of Complaint Investigation, dated December 5, 1997
P-27 Memorandum from Ms. DeBruin to Dr. George, dated March 29, 2000
P-28 Memorandum from Ms. Kibbler to Dr. George, March 31, 2000
P-29 Memorandum from Ms. Agoglia to Ms. King, dated May 6, 1999
P-30 Memorandum from Dr. Young to Ms. King, dated December 10, 1999
P-31 Memorandum from Dr. Young to Ms. King, dated December 13, 1999
P-32 Letter from Dr. George to Ms. King, dated December 3, 1999
P-33 Memorandum from Dr. Young to Ms. King, dated December 3, 1999
P-34 Memorandum from Dr. Young to Ms. King, dated December 10, 1999

P-35 Memorandum from Ms. Agoglia to Ms. King, dated November 16, 1999
P-36 Memorandum from Dr. Young to Ms. King, dated January 24, 2000
P-37 Complaint filed by M.E.W, dated November 15, 1999
P-38 Notes relating to an interview conducted by Dr. Okun with J.P., dated December 18, 1999
P-39 Workers' Compensation Claim filed by Ms. King, dated November 29, 1999
P-40 Letter from Dr. Okun to Ms. King, dated January 4, 2000
P-41 Letter from M.E.W. to Dr. George, dated June 30, 1999
P-42 Map of the inside of the Memorial School
P-43 Memorandum from Ms. DeBruin to Dr. Young, dated November 17, 1999
P-44 Memorandum from Mr. Kostulakos to Dr. George, dated May 31, 1996
P-45 Teacher observation of Ms. King, dated March 25, 1996
P-46 Memorandum from Mr. Kostulakos to Dr. George, dated March 29, 1996
P-47 Staff Evaluation of Ms. King, dated May 30, 1997
P-48 Memorandum from Mr. Kostulakos to Ms. King, dated September 27, 1996
P-49 Memorandum from Mr. Kostulakos to Ms. King, dated September 30, 1996
P-50 Memorandum from Mr. Kostulakos to Ms. King, dated October 3, 1996
P-51 Memorandum from Mr. Kostulakos to Ms. King, dated October 9, 1996
P-52 Memorandum from Mr. Kostulakos to Ms. King, dated October 18, 1996
P-53 Memorandum from Mr. Kostulakos to Dr. George, dated December 2, 1996
P-54 Memorandum from Mr. Kostulakos to Ms. King, dated December 20, 1996
P-55 Drawing of the Cooper School
P-56 Information sent to the Cooper School staff regarding the use of the laminating machine, dated January 24, 1995
P-57 Product Information Sheet for the laminating machine
P-58 Memorandum from Mr. Kostulakos to Dr. George, dated March 24, 1995
P-59 Memorandum from Mr. Kostulakos to Mr. Frazzitta, dated April 11, 1995
P-60 Memorandum from Mr. Frazzitta to Mr. Kostulakos, dated April 5, 1995
P-61 Marked for identification only
P-62 Marked for identification only
P-63 Memorandum from Dr. Young to Dr. Rodriguez, dated October 24, 1999
P-64 Memorandum from Dr. Young to Ms. King, dated December 17, 1999
P-65 Memorandum from Dr. Young to Ms. King, dated February 11, 2000
P-66 Letter from Dr. Young to Ms. King, dated November 3, 1999
P-67 Memorandum from Dr. Young to special area teachers, dated October 25, 1999
P-68 Memorandum from Dr. Young to Ms. King, dated November 3, 1999
P-69 Memorandum from Dr. Young to Ms. King, dated October 8, 1999
P-70 Copy of Ms. King's lesson plans submitted to Dr. Young
P-71 Memorandum from Dr. Young to Ms. King, dated October 11, 1999
P-72 Memorandum from Dr. Young to Ms. King, dated November 16, 1999
P-73 Memorandum from Dr. Young to special area teachers, dated November 11, 1999
P-74 Memorandum from Dr. Young to Ms. King, dated November 8, 1999
P-75 Copy of Ms. King's discipline rules
P-76 Formal observation of Ms. King by Ms. Agoglia, dated November 3, 1999
P-77 Memorandum from Ms. Agoglia to Ms. King, dated November 30, 1999
P-78 Letter from Ms. Agoglia to Ms. King, dated December 9, 1999
P-79 Memorandum from Ms. Agoglia to Ms. King, dated December 23, 1999

P-80 Memorandum from Ms. Agoglia to Ms. King, dated January 7, 2000
P-81 Memorandum from Ms. Agoglia to Ms. King, dated January 24, 2000
P-82 Memorandum from Ms. Agoglia to Ms. King, dated January 27, 2000
P-83 Memorandum from Ms. Agoglia to Ms. King, dated February 7, 2000
P-84 Memorandum from Ms. Agoglia to Ms. King, dated February 22, 2000
P-85 Memorandum from Ms. Agoglia to Ms. King, dated February 22, 2000
P-86 Memorandum from Ms. Agoglia to Ms. King, dated March 23, 2000
P-87 Letter from Dr. Quirk to Ms. King, dated May 25, 1995
P-88 Memorandum from Ms. Mongon to Dr. Quirk dated August 29, 1995, and attached report from Dr. Kahnowitz
P-89 Workmans' Compensation Claim filed by Ms. King, dated November 25, 1996
P-90 Workmans' Compensation Claim filed by Maxine King, dated February 11, 1998
P-91 Letter from Dr. Quirk to Ms. King, dated November 8, 1996
P-92 Memorandum from Ms. Mongon to Dr. Quirk, dated December 16, 1996
P-93 Memorandum from Mr. Frazzitta to Dr. Quirk, dated March 29, 1995
P-94 Memorandum from Mr. Frazzitta to Mr. Cimis, dated May 9, 1995
P-95 Letter from Dr. Hutt regarding Ms. King, dated August 12, 1999

For the Respondent:

R-1 Marked for identification only
R-2 Subpoena issued to Dr. Rodriguez by Arnold M. Mellk, Esq., January 16, 2001
R-3 Letter to Dr. Rodriguez from Arnold M. Mellk, Esq., dated January 16, 2001
R-4 Letter to Arnold M. Mellk, Esq., from James S. Rothschild, Jr., Esq., dated January 18, 2001
R-5 Interrogatories of J.B.
R-6 Lesson plans prepared by Maxine King

WITNESSES:

For the Petitioner:

Dr. Daniel M. Rodriguez
K.F.
Dr. Joan M. George
Dr. Nicole L. Okun
D.Q.
M.E.W.
Veronica DeBruin, R.N.
Dennis Kostulakos
Dr. Elizabeth A. Young
Frank J. Frazzitta
JoAnn Agoglia
Dr. R. Gregory Quirk
K.M.
B.R.
R.F.
C.J.F.
N.R.
J.R.
T.B.
J.B.
Audra O'Malley

For the Respondent:

Maxine King

APPENDIX A

Numerical Order	Calendar Date
1	August 28, 2000
2	September 5, 2000
3	September 6, 2000
4	September 12, 2000
5	October 5, 2000
6	October 13, 2000
7	October 18, 2000
8	November 16, 2000
9	December 7, 2000
10	January 30, 2001
11	February 1, 2001
12	February 7, 2001
13	February 15, 2001
14	February 27, 2001

OAL DKT. NO. EDU 4241-00
AGENCY DKT. NO. 152-5/00

IN THE MATTER OF THE TENURE HEARING	:	
OF MAXINE KING, SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
OLD BRIDGE TOWNSHIP, MIDDLESEX	:	DECISION
COUNTY.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Respondent's exceptions and the Board's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4.

Respondent submits the following exceptions to the recommended decision of the Administrative Law Judge (ALJ): 1) The ALJ has established no basis for finding that K.M. is credible, and thus, that Ms. King made several inappropriate remarks to her which constitute unbecoming conduct (Respondent's Exceptions at 1-3); 2) The ALJ failed to properly consider the testimony in finding that the Board proved its allegation that Ms. King engaged in threatening and unacceptable behavior toward students (*id.* at 3-13); 3) Principal Dennis Kostulakos' testimony that Ms. King used profanity is unsupported, but, assuming *arguendo*, that she did use profanity, a single instance does not constitute unbecoming conduct (*id.* at 14-15); 4) The ALJ improperly concluded that the discipline program utilized by Ms. King constitutes unbecoming conduct (*id.* at 15-16); 5) The ALJ improperly found that Ms. King responded inappropriately when she was denied funding to attend a professional day as requested in her PIP and when she was criticized by her supervisors (*id.* at 16-19); 6) The ALJ erred in finding that the Board proved by the necessary preponderance of the evidence that

Ms. King has engaged in unbecoming conduct (*id.* at 19-21); 7) The ALJ erred by concluding that Ms. King was insubordinate, as the ALJ completely disregarded Ms. King's testimony regarding the insubordination charges (*id.* at 21-25); 8) The ALJ erred in finding that the Board proved by the necessary preponderance of the credible evidence that Ms. King was insubordinate (*id.* at 25-26); and 9) Removal is too harsh a penalty (*id.* at 26).

To these objections, the Board counters that: 1) The ALJ properly found that respondent engaged in unbecoming conduct by virtue of her unprofessional commentary with district parents (Board's Replies at 3); 2) The ALJ properly found that respondent engaged in unbecoming conduct by virtue of her unacceptable behavior toward students (*id.* at 4-12), and respondent's objection thereto is "largely based on the argument that the poor behavior or artistic ability of her young students justified her threatening and unacceptable conduct" (*id.* at 5); 3) The Board has proven, with the credible testimony of Mr. Kostulakos, several incidents involving respondent which, individually, are sufficiently flagrant to warrant dismissal, as well as the testimony of a number of credible witnesses as to less egregious incidents which, taken together, demonstrate a pattern of unbecoming conduct (*id.* at 12-13); 4) The ALJ properly credited the testimony from many witnesses which provided "multiple examples of King's unacceptable practice of enforcing a strict disciplinary system designed to stifle creativity and belittle and embarrass students***" (*id.* at 14); 5) The ALJ properly found that respondent reacted to Mr. Kostulakos on the issue of her PIP with a degree of unprofessionalism that constitutes unbecoming conduct (*id.* at 14-15); 6) The ALJ properly found that the Board has proven that respondent's actions rise to the level of unbecoming conduct a teaching staff member (*id.* at 16-17); 7) The ALJ properly weighed and credited the evidence to conclude that respondent was insubordinate (*id.* at 17-21); 8) The Board has proven that respondent has

engaged in repeated and willful insubordinate conduct (*id.* at 22); and 9) Respondent is properly dismissed from her tenured position (*id.* at 24-27).

Upon careful and independent review of the complete record in this matter, which included transcripts from 12 of the 14 days of hearing, together with exhibits, post-hearing briefs, exception and reply arguments, the Commissioner determines to affirm the Initial Decision of the ALJ.

As the parties recognize, this matter turns on the issue of the credibility of the witnesses. In this regard, the Commissioner is satisfied that the ALJ's recitation of testimony is both accurate and thorough, and that she carefully measured conflicts, inconsistencies and potential biases in deciding which testimony to credit. *See In the Matter of the Tenure Hearing of Frank Roberts, School District of the City of Trenton, Mercer County*, 94 *N.J.A.R.*2d (EDU) 284, 294, *aff'd* 95 *N.J.A.R.*2d (EDU) 349, *aff'd* App. Div. 96 *N.J.A.R.*2d (EDU) 549.

Furthermore, the ALJ's credibility determination is entitled to the Commissioner's deference. "The reason for this rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses, and, consequently, is better qualified to judge their credibility. *In the Matter of the Tenure Hearing of Tyler*, 236 *N.J. Super.* 478, 485 (App. Div.), *certif. denied*, 121 *N.J.* 615 (1990)." *In the Matter of the Tenure Hearing of Frank Roberts, supra,* at 550. The Appellate Division recently affirmed this principle, underscoring that "[u]nder existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor based judgments." *Whasun Lee v. Board of Education of the Township of Holmdel*, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14. The Court also noted *then* pending legislation providing that "'the agency head may not reject or modify any findings of fact on the issues of

credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent and credible evidence in the record."' (*Ibid. citing* A. 1484, 209th Leg., §10(b), later enacted as *P.L.* 2001, *c.* 5 and now codified at *N.J.S.A.* 52:14B-10(c))

The Commissioner further determines that, contrary to respondent's contentions, the ALJ's factual findings are well-grounded in the record before him.[1] The Commissioner, therefore, affirms the ALJ's findings and conclusions that the Board has proven that respondent has engaged in conduct unbecoming a teaching staff member and insubordination, and that respondent has failed to demonstrate that the charges brought against her were initiated in retaliation for her Workers' Compensation claims or her LAD complaint. (Initial Decision at 35)

With respect to the appropriate penalty, the Commissioner is mindful, in affirming the conclusions of the ALJ, that the consequences for respondent are serious. "Factors to be taken into account in making a penalty determination include the nature and circumstances of the incidents or charges, the teacher's prior record and present attitude, the effect of such conduct on the maintenance of discipline among the students and staff, and the likelihood of such behavior recurring. *In the Matter of the Tenure Hearing of Deborah Suitt-Green, State-operated School District of the City of Newark, Essex County*, Commissioner Decision No. 538-97, October 14, 1997, slip. op. at 32, *citing In re Hearing of Ostergren, Franklin School District*, 1966 S.L.D. 185, 187; *In re Hearing of Kittell, Little Silver School District*, 1972 *S.L.D.* 535, 541; *In re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967). In the instant matter, notwithstanding

[1] The Commissioner notes that the ALJ interpreted the residuum rule, *N.J.A.C.* 1:1-15.5(b), to require that the Board present non-hearsay testimony in order to prove its specifications for the unbecoming conduct charge which involve the abuse of students by Mrs. King. (ALJ's Interlocutory Order, September 22, 2000 at 3) However, to the extent this interpretation does not strictly comport with the Appellate Division's decision in *In the Matter of the Tenure Hearing of Cowan*, 224 *N.J. Super.* 737, 751 (App. Div. 1988), thereby resulting in holding the Board to a higher standard, the Commissioner finds it unnecessary to modify the ALJ's findings, since the Board has clearly met the higher burden of proof.

that respondent has never before been disciplined during her lengthy employment with the District, the Commissioner can find scant evidence on this record that would otherwise mitigate against the penalty the Board seeks. Particularly unsettling in this regard is respondent's failure to acknowledge *any* problematic conduct on her part, let alone be repentant for it. Respondent's reactions to the charges sounding in unbecoming conduct ranged from complete denials of the behavior alleged by the Board, as, for instance, in the profanity incident (Tr. 2/7/00 at 29), to rationalizations based on the bad behavior or ill-motives *of others*. Neither does the Commissioner find that the record before him provides any promise that respondent will, in the future, yield to the authority of the administration without continued conflict. Both Dr. Young and Ms. Agoglia were resolute in their view that respondent was not receptive to criticism (Tr. 10/5/02 at 57) and is unwilling to change. (Tr. 11/16/00 at 25) In the course of her testimony Ms. King accused the administration of harassment (Tr. 2/15/01 at 14) biased evaluations (*id.* at 18); manufacturing evidence "for a certain end," (*id.* at 50, 51) soliciting unfavorable letters from parents in order to gather "a thick pile of accusations" against her (*id.* at 63, 99); "gunning" for her with unreasonable budget preparation expectations (*id.* at 124); failing to listen to her concerns because "they were only interested in their agenda," (*id.* at 134); and blaming her for students' behavioral problems, rather than helping her to solve the problem (*id.* at 143). Regarding her refusal to comply with her assigned station for bus duty on the basis of her health concerns, respondent replied, "If someone tells you to jump off a tall building in a single bound you don't have to. Because if you're smart enough to realize you get crushed when you're at the bottom or the street." (*Id.* at 121) Respondent maintained that she was too overburdened with responsibilities to willingly participate in student recognition programs that were a priority in her schools. (*Id.* at 128-129)

As to the numerous complaints received from parents, respondent countered that the parents who had withdrawn their children from her classroom were engaged in a "conspiracy" (Tr. 2/15/00 at 37); that Mrs. M., an "antagonistic parent" was permitted to observe her class to evaluate her performance in order to build a stronger case against her (*id.* at 149); that D.Q., a PTA president, "took advantage of her position," was trying to make a "fluffy life" for her child, and, therefore, simply did not want her son to accept his school obligations (*id.* at 151, 152); and that, PTA parents, in general, had "political influence" in the school, so that where a problem arises concerning their children, "the teacher's always wrong but the child is right***." (*Id.* at 155)

The Commissioner recognizes that "teachers carry a heavy responsibility by their actions and comments in setting examples for the pupils with whom they have contact." *In the Matter of the Tenure Hearing of Blasko, School District of the Twp. of Cherry Hill*, 1980 *S.L.D.* 987 at 1003. As such, some actions are "so foreign to the expectations of the deeds and actions of a professionally certificated classroom teacher as to raise manifest doubts as to the continued performance of that person in the profession." (*Ibid.*) Based on the total record before him, the Commissioner finds that removal is the appropriate penalty herein, where respondent has demonstrated an ongoing insensitivity to students and parents, an inability to cooperate with administration, despite "ample opportunity of a reasonable and appropriate nature" to do so, *Scarpignato, supra,* at 336, and, at times, a severe lack of self-control. Moreover, based on this record, it cannot be said that respondent's behavior is an aberration; nor can it be said that it is more likely than not that such conduct would not be repeated in the future. *See Morris School District Board of Education v. Brady*, 92 *N.J.A.R.*2d (EDU) 410, 420. Indeed, respondent's steadfast refusal to accept responsibility for her conduct, as clearly demonstrated by her

testimony, does not portend a positive learning environment for the students entrusted to her care, or a harmonious working relationship with those administrators who supervise her.[2] As the Board aptly noted, "Administrative attempts to provide King with constructive recommendations for improvement were met with a blanket denial of personal responsibility and the transference of blame to others.***" (Board's Reply at 23) (citations omitted) Furthermore, as the Board recognizes, respondent's behavior has created a significant administrative burden to the district, in that

> [d]uring the 1999-00 school year alone, [a]dministrators needed to: address parent and student complaints concerning King at least 13 times; hold informal meetings and formal conferences with King on at least 17 occasions; and issue directives and related correspondence to King on at least 18 occasions.*** King fails to offer any credible explanation for this inordinate need for administrative intervention. If King is not dismissed, she will require almost daily oversight in order to ensure that students are no longer subject to punitive and inappropriate disciplinary measures and to ensure that they receive adequate instruction. (*Id.* at 26, 27) (citations omitted)

Accordingly, the Initial Decision of the ALJ is affirmed for the reasons expressed therein and amplified above.[3] Respondent is deemed dismissed from her tenured teaching position in the Old Bridge Township School District as of the date of this decision. This matter

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[2] Contrast, *Randolph Twp. Board of Education v. DiPillo*, 93 *N.J.A.R.*2d (EDU) 13, *aff'd* 95 *N.J.A.R.*2d (EDU) 206, wherein respondent was charged with unbecoming conduct involving her students, and many persons, including students, parents and colleagues compellingly testified on her behalf. *DiPillo* at 23, 24. Therein, the ALJ was persuaded that "she was and can still be a good teacher who I trust has learned a lot about herself during these proceedings and will in the future take pains to be more in tune to her pupils' sensitivities and needs if she returns to the classroom." *Id.* at 24.

[3] The Commissioner herein clarifies that, with respect to the ALJ's Order dated September 22, 2000, he may, under certain circumstances, share concurrent jurisdiction with the Division of Civil Rights. *Hinfey v. Matawan Regional Board of Education*, 77 *N.J.* 514, 520 (1978).

is hereby referred to the State Board of Examiners for action against respondent's certificate as it deems appropriate.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 2/25/02

Date of Mailing: 2/27/02

[4] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

77-02

IN THE MATTER OF THE TENURE :

HEARING OF DONALD HAMMARY, :

SCHOOL DISTRICT OF THE CITY OF : COMMISSIONER OF EDUCATION

ASBURY PARK, MONMOUTH COUNTY. : DECISION

:

SYNOPSIS

Board filed tenure charges of unbecoming conduct and other just cause against respondent special education teacher/guidance counselor.

At the OAL, the parties agreed to a settlement.

The Commissioner rejected the settlement, as it did not comport with the *Cardonick* standards for settling tenure matters in that it failed to set forth the nature of the charges and the circumstances justifying settlement, was not approved by the Board, and failed to reflect respondent's understanding that the matter will be referred to the Board of Examiners for possible revocation of his certificates. The matter was remanded to OAL for further proceedings.

February 25, 2002

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6138-01
AGENCY DKT. NO. 327-8/01

BOARD OF EDUCATION FOR THE SCHOOL DISTRICT OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,

Petitioner,

v.

DONALD HAMMARY,

Respondent.

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

Marcie Corbo, Esq., for respondent (Chamlin, Rosen, Cavanagh and Uliano, attorneys)

Record Closed: January 4, 2002 Decided: January 4, 2002

BEFORE **ROBERT S. MILLER**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 14, 2001, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 4, 2002
DATE

ROBERT S. MILLER, ALJ

Receipt Acknowledged:

1-9-02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 9 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

tmp

BEFORE THE OFFICE OF
ADMINISTRATIVE LAW /
COMMISSIONER OF EDUCATION

In the Tenure Charges Against
Donald Hammary, Asbury
Park Board of Education,
Monmouth County
OAL Dkt. No. EDU TH 06138-01S
AGENCY Dkt. No. 327-8/01

Stipulation of Settlement
(dated January 4, 2002)

The parties, wishing to resolve the within matter, hereby stipulate to settle same, subject to the terms and conditions set forth herein, upon approval by the Court and the Commissioner:

1. Respondent, Donald Hammary, hereby tenders his resignation from all employment with the Asbury Park Board of Education, effective upon the date of approval of this settlement by the Commissioner.

2. Respondent, Donald Hammary, agrees to surrender to the State Board of Examiners all certificates which have been issued to him in the State of New Jersey.

3. During the pendency of the within matter, Mr. Hammary shall remain suspended and shall refrain from entry on to school premises and shall ~~not~~ not be permitted to attend or participate in any school sponsored affairs, events or activities. During

in accordance with the provisions of N.J.S.A. 18:A-6-14

~~4. In consideration of the foregoing~~

4. Mr. Hammary shall forthwith surrender all school keys and property in his possession to his below named legal counsel, who, in turn, shall forward same to the Board's counsel. Mr. Hammary will be permitted to make an appointment to retrieve his personal property from School, under supervision.

5. In consideration of the foregoing, the Board shall accept Mr. Hammary's resignation, to be effective as of the date of the Commissioner's approval of the within Settlement.

6. The Board agrees, upon approval of the within Settlement by the Commissioner, that the subject Tenure Charges shall be moot.

7. This Stipulation is subject to official approval by the Board of Education at a duly convened meeting of the Board.

In witness whereof, the parties or their duly authorized representatives have set forth their respective signatures.

Donald Hammary

Donald Hammary

FOR PETITIONER

Nicholas Celso, III, Esq.

Witness:

Marcia Mack

3b

OAL DKT. NO. EDU 6138-01
AGENCY DKT. NO. 327-8/01

IN THE MATTER OF THE TENURE	:	
HEARING OF DONALD HAMMARY,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
ASBURY PARK, MONMOUTH COUNTY.	:	DECISION
	:	

The record of this matter, Initial Decision of the Office of Administrative Law (OAL) and Stipulation of Settlement have been reviewed. Initially, the Commissioner notes that, pursuant to *N.J.A.C.* 6A:3-5.6(a), once tenure charges are certified to him, such charges may be settled only with his approval; any proposed settlement, whether submitted to the Commissioner or to the Administrative Law Judge, must address the standards established by the State Board of Education in the matter entitled *In re Cardonick*, 1990 *S.L.D.* 842, 846. Specifically, the proposed settlement must: 1) Be accompanied by documentation as to the nature of the charges; 2) Include an explanation of the circumstances justifying the settlement or withdrawal; 3) Evidence the consent of both the charged and the charging parties; 4) Indicate that the charged party entered into the agreement with a full understanding of his or her rights; 5) Demonstrate that the agreement is in the public interest; and 6) Where the charged party is a teaching staff member, indicate that he or she has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible loss of certificate. *N.J.A.C.* 6A:3-5.6. Because the proposed agreement does not comport with these standards, the Commissioner is compelled to reject it and remand this matter, as specified below.

At the outset, the Commissioner finds that the parties fail to set forth the nature of the charges and the circumstances justifying the proposed settlement. It is well-established that, having once taken up the burden of tenure charges, the District may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges can no longer be pursued or why it is now in the public interest not to pursue them. *See In the Matter of the Tenure Hearing of Kenneth S. Smith, School District of the City of Orange, Essex County,* decided by the Commissioner March 22, 1982, decision on remand June 16, 1983, 1983 *S.L.D.* 420; *affirmed with modification* by the State Board of Education November 2, 1983, 1983 *S.L.D.* 489; *affirmed* N.J. Superior Court, Appellate Division, January 30, 1986. The Commissioner notes that his determination in this regard was highly influenced by the serious nature of the charges against respondent, *i.e.*, allegations of gross misconduct involving students.

Additionally, the Commissioner recognizes that there is no provision in law for the voluntary surrender of a teaching staff member's certificates. Rather, in accordance with *Cardonick, supra,* a settlement agreement which results in the loss of a position must reflect the respondent's understanding that he was advised of the Commissioner's duty, pursuant to *N.J.A.C.* 6:11-3.6, to refer such tenure determinations to the State Board of Examiners for possible revocation of certificate.[1]

While the Commissioner does not preclude the possibility of settlement in this matter, he stresses that in order for him to meet his own obligation to the schools and children of this state, he must be assured that any settlement is consistent with appropriate standards for setting aside tenure matters as expressed in *Cardonick, supra.*

[1] A revised agreement may, nonetheless, also include a statement that respondent will not oppose such revocation proceedings before the State Board of Examiners.

Accordingly, the proposed settlement is rejected for the reasons expressed herein. The Commissioner hereby remands this matter to the OAL for expansion of the record and revision of the documents, consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 2/25/02

Date of Mailing: 2/28/02

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

81-02

P.E.W. AND C.J.W., on behalf of minor children, H.W. AND P.W.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF LINWOOD AND THOMAS BARUFFI, CAMDEN COUNTY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioners, parents of twin fourth grade students in the Board's District, sought an order placing the children in the homeroom of a teacher other than the teacher whose classroom to which they were assigned.

After petitioners' request for emergent relief was denied, the matter was settled. The settlement was approved by the ALJ. Subsequent to his approval of the settlement, the ALJ received a Motion to Enforce Litigants' Rights from petitioners, which he forwarded to the Commissioner requesting that it be considered as exceptions to the Initial Decision approving the settlement.

Upon review of the settlement and petitioners' submission, the Commissioner determined to reject the settlement and remand the matter for further proceedings, since the exceptions reveal that an amicable resolution of the matter had not, in fact, been reached. The Commissioner also noted that the settlement was couched primarily as a Section 504 plan and that he has no jurisdiction over 504 claims. Accordingly, the Commissioner reminded the parties that issues concerning such plans must be adjudicated in the appropriate forum.

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

March 11, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6408-01

AGENCY DKT. NO. 366-12/99

P.E.W. and C.J.W. O/B/O

MINOR CHILDREN,

Petitioner,

v.

LINWOOD BOARD OF EDUCATION

AND THOMAS BARUFFI,

Respondent.

Marc Friedman, Esq., for petitioner

William S. Donio, Esq., for respondent

Record Closed: January 31, 2002 Decided: January 31, 2002

BEFORE **EDGAR R. HOLMES,** ALJ:

This matter was transmitted to the Office of Administrative Law on October 13, 2001, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have set forth the following settlement terms on the record:

1. Respondent shall provide to Petitioner the names of at least three qualified professionals to conduct necessary and appropriate evaluations of the Petitioner's minor daughter H.W. regarding or relating to Petitioners' allegations that H.W. suffers from migraine headaches during the school day.

2. Petitioners shall select the appropriate professionals to evaluate H.W. from the list supplied by Respondent and the expense of any evaluation conducted shall be borne by Petitioners;

3. Respondent shall cooperate with any reasonable and necessary request in the evaluations of H.W., including but not limited to, allowing reasonable and necessary access for any evaluator to observe Respondent's school or H.W.'s classroom;

4. Any report generated by any evaluation shall belong to Petitioners who reserve the right to forward any such report to Respondent;

5. Subject to Respondent's affirmative obligations under applicable federal or state law, Respondent shall agree to accommodation recommendations contained in any report generated by any evaluation which is forwarded by Petitioners;

6. Unless otherwise expressly agreed to by both parties, or instituted according to applicable federal or state law, any accommodation or any accommodation plan recommended from any evaluation shall be considered a "504 Accommodation" plan as that term is generally understood and not as a request or requirement to provide services to a child entitled to special education services;

7. Respondent agrees at this time to provide the following accommodations to H.W.;

a. If H.W. notifies her teacher that she feels a migraine headache is occurring or like to occur, H.W., in addition to the receipt of any appropriate medical treatment from the school nurse, shall be allow to proceed to the school library to complete her work; and

b. While at the school library H.W. shall be allowed work independently on her school work, subject to appropriate supervision.

After being placed under oath, the parties stated that they fully understood and consented to all of the terms and conditions of this settlement.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

January 31 2002
DATE

EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

2/6/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 6 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

rj

DONIO BERTMAN & DONIO
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137 South White Horse Pike
P.O. Box 1208
Hammonton, NJ 08037
(609)561-6500
Attorneys for Respondent Linwood Board of Education

P.E.W. and C.J.W. o/b/o minor children,	:	NEW JERSEY STATE
	:	DEPARTMENT OF EDUCATION
Petitioners,	:	
	:	Agency Dkt. No: 385-9/01
v.	:	OAL Dkt. No.: EDU 6408-01
	:	
LINWOOD BOARD OF EDUCATION and THOMAS BARUFFI,	:	
	:	
Respondents.	:	ORDER
	:	

This matter having come before the Court by the filing of a Petition and a Motion for Emergent Relief by P.E.W. & C.J.W. o/b/o minor children, H.W. & P.W. ("Petitioners") and Marc Friedman, Esq., appearing on behalf of Petitioners P.E.W. and C.J.W.; and William S. Donio, Esq., Donio Bertman & Donio, appearing on behalf of Respondent Linwood Board of Education ("Respondent"); and the Court having previously denied Petitioners Motion for Emergent Relief; and the Petitioners having requested withdrawal of the Petition on the record; and the Court having accepted the Petitioners' request on the record;

IT IS on this 30 day of ~~November, 2001~~ January 2002

ORDERED that Petitioners' petition be **DISMISSED WITHOUT PREJUDICE**; and

IT IS FURTHER ORDERED that by agreement of the parties:

1. Respondent shall provide to Petitioners the names of at least three qualified professionals to conduct necessary and appropriate evaluations of the Petitioners' minor daughter H.W. regarding or relating to Petitioners' allegations that H.W. suffers from migraine headaches during the school day [Respondent's letters

forwarding the names shall be attached to this Order.];

2. Petitioners shall select the appropriate professionals to evaluate H.W. from the list supplied by Respondent and the expense of any evaluation conducted shall be borne by Petitioners;
3. Respondent shall cooperate with any reasonable and necessary request in the evaluations of H.W., including but not limited to, allowing reasonable and necessary access for any evaluator to observe Respondent's school or H.W.'s classroom;
4. Any report generated by any evaluation shall belong to Petitioners who reserve the right to forward any such report to Respondent;
5. Subject to Respondent's affirmative obligations under applicable federal or state law, Respondent shall agree to accommodation recommendations contained in any report generated by any evaluation which is forwarded by Petitioners;
6. Unless otherwise expressly agreed to by both parties, or instituted according to applicable federal or state law, any accommodation or any accommodation plan recommended from any evaluation shall be considered a "504 Accommodation" plan as that term is generally understood, and not as a request or requirement to provide services to a child entitled to special education services;
7. Respondent agrees at this time to provide the following accommodations to H.W.;
   a. If H.W. notifies her teacher that she feels a migraine headache is occurring or likely to occur, H.W., in addition to the receipt of any appropriate medical treatment from the school nurse, shall be allowed to proceed to the school library to complete her work; and
   b. While at the school library H.W. shall be allowed to work independently on her school work, subject to appropriate supervision.

IT IS FURTHER ORDERED that a copy of this Order be served upon all parties within 5 days.

Edgar R. Holmes, ALJ

For Respondents

BY: _____
WILLIAM S. DONIO, ESQ.
Attorney for Respondents

_____
THOMAS BARUFFI,
Superintendent of Schools

For Petitioners

BY: _____
MARC FRIEDMAN, ESQ.
Attorney for Petitioners

_____
P.E.W., Petitioner

OAL DKT. NO. EDU 6408-01
AGENCY DKT. NO. 385-9/01

P.E.W. AND C.J.W., on behalf of minor children, H.W. AND P.W.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF LINWOOD AND THOMAS BARUFFI, CAMDEN COUNTY,	:	DECISION
RESPONDENTS.	:	

The record, Order setting forth the parties settlement agreement[1], and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. On February 25, 2002, the Administrative Law Judge (ALJ) forwarded to the Commissioner a communication petitioners submitted to the ALJ, which the ALJ requested be treated as exceptions to the Initial Decision.[2] The "Order to Enforce Litigant's Rights," which is set forth in petitioners' "exceptions," seeks an order which reads in pertinent part:

> a. The Respondents are to immediately comply with the expert's recommendation to switch the Petitioner's daughter from her current primary classroom setting;
>
> b. Require Respondents to reimburse Petitioners $525.00 for the cost to conduct the medical evaluation and report;
>
> c. Legal fees and costs awarded in the amount of $_____ which is to paid [sic] by the Respondent within ____ days of the execution of this Order;

[1] The Commissioner notes that *N.J.A.C.* 1:1-19.1(a) requires that, where settlement terms are disclosed in writing, by consent order or stipulation, the document must be signed by all parties or their attorneys. In the instant matter, the document setting forth the settlement terms was not signed by petitioners or their attorney.

[2] *N.J.A.C.* 1:1-18.4(e) provides that in all settlements, exceptions shall not be filed, unless permitted by the ALJ or agency head.

d. Any other relief the Court may deem equitable and just.

Upon review of the record and petitioners' "exceptions," the Commissioner declines to approve the settlement as the final decision in this matter. The "exceptions" clearly indicate that amicable resolution of the dispute has not been reached. Moreover, the "exceptions," which were submitted to the ALJ less than one week from the date the ALJ issued his decision, are seeking enforcement of terms which had no force or effect, because the Initial Decision, including the settlement terms, had not been reviewed or approved by the Commissioner. *See N.J.A.C.* 1:1-18.6. Consequently, the Commissioner finds and determines that this matter shall be remanded to the OAL for modification of the settlement terms or plenary hearing on the merits, if the parties are unable to agree on modification of the settlement terms.

In so holding, however, the Commissioner notes that the settlement terms set forth in the Initial Decision appear to be elements of an accommodation plan under Section 504 of the Rehabilitation Act of 1973. As such, the Commissioner reminds the parties that he has no jurisdiction over the evaluation, determination of eligibility for and/or the development and implementation of Section 504 accommodation plans for students with disabilities.[3] Therefore, the Commissioner cautions that such issues must be adjudicated consistent with procedures for, and in a forum of, appropriate jurisdiction, and any settlement herein must be confined to issues properly before the Commissioner. *See, for example, S.A., a minor child, By His Parents, L.A. and A.A.. v. Monroe Township Board of Education,* OAL DKT. NO. EDS 331-00 (May 8, 2001), 2001 WL 670837 (N.J. Adm.)

[3] The Commissioner notes for the record that there was no indication in the initial papers filed with the Commissioner that Section 504 was at issue.

Accordingly, the matter is hereby remanded to the OAL for further proceedings in conformity with this decision.[4]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/11/02

Date of Mailing: 3/11/02

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

78-02

App. Div. # 5517-99T1
SB # 7-00
C # 78-02R
SB # 18-02

PATRICIA OSMAN, :

PETITIONER-APPELLANT, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY, :

RESPONDENT-RESPONDENT. :

STATE BOARD OF EDUCATION

DECISION

Remanded by the Appellate Division, October 17, 2001

Remanded by the State Board of Education, December 5, 2001

Decision on Remand by the Commissioner of Education, March 4, 2002

For the Petitioner-Appellant, Wills, O'Neill & Mellk (Arnold M. Mellk, Esq., of Counsel)

For the Respondent-Respondent, John T. Barbour, Esq.

This case arose when the Board of Education of the Township of Delran (hereinafter "Board") terminated the employment of Patricia Osman (hereinafter "petitioner") on January 13, 1997 after it was notified by the Burlington County Superintendent of Schools that the English endorsement she possessed on her Instructional Certificate appeared to be fraudulent on its face.[1] On January 23, 1997,

[1] The petitioner also held an elementary and a reading endorsement on her instructional certificate. The legitimacy of those endorsements has not been challenged.

the State Board of Examiners issued an Order to Show Cause why the petitioner's Certificate should not be revoked or suspended. The petitioner successfully contested the Order to Show Cause and, in a decision rendered on September 24, 1998 and mailed on October 13, 1998, the State Board of Examiners dismissed the matter, agreeing with the Administrative Law Judge ("ALJ") that, while there was ample evidence of wrongdoing, there was no evidence that the petitioner was the responsible party.

On December 18, 1998, the petitioner filed a petition with the Commissioner of Education alleging that the Board had improperly terminated her employment in January 1997 in violation of her tenure rights. The petitioner claimed that she had achieved tenure in the district as a teacher as a result of her service under her elementary and reading endorsements, and she sought reinstatement to a teaching position.

In the ensuing administrative appeals process, the ALJ, the Commissioner and the State Board of Education all agreed that the petitioner was tenured at the time of her termination. However, they also concurred that the petitioner's claim was time-barred by N.J.A.C. 6:24-1.2(c) [now codified at N.J.A.C. 6A:3-1.3(d)], which requires that a petition be filed within 90 days of notice of the action being challenged.

In dismissing the petition, the Commissioner indicated in a footnote that he was not considering whether the circumstances warranted relaxation of the 90-day time limit since the petitioner had not argued that issue. In affirming the Commissioner's decision, the State Board made no comment concerning relaxation.

The Appellate Division affirmed the State Board's determination that, although the petitioner was tenured at the time of her termination, her petition was time-barred.

Nonetheless, given the informal nature of administrative proceedings and in the absence of a controlling rule, the Court found that the petitioner should not be prejudiced by a failure to formally request relaxation of the 90-day time limitation. Since the Commissioner had not considered whether the circumstances warranted relaxation and because the State Board had not commented on the question, the Court determined that it was necessary to remand this matter to the State Board so that we could return it to the Commissioner for his findings and determination of whether the 90-day rule should be relaxed in this instance. Pursuant to that directive, we remanded this matter to the Commissioner on December 5, 2001.

On March 4, 2002, the Commissioner concluded that the facts of this matter did not warrant relaxation of the 90-day rule, and he dismissed the petition. The Commissioner rejected the petitioner's contention that she could not have filed a petition challenging the termination of her employment until after the Board of Examiners had rendered a determination on the Order to Show Cause. In so doing, the Commissioner observed that when the petitioner was notified that the Board was terminating her employment in January 1997, "a determination by the Board of Examiners was in no way necessary in order for petitioner to pursue her initial claim that she had acquired tenure and that the Board had violated her tenure rights by dismissing her without following the procedures of N.J.S.A. 18A:6-10," Commissioner's decision, slip op. at 2-3 (emphasis in original), "although her reinstatement...would eventually have been subject to any action by the State Board of Examiners to suspend or revoke her still-valid certificates." Id. at 2.

The Commissioner stressed that the petitioner's claim that she had achieved tenure and could not be summarily dismissed "did not require, as petitioner and her counsel contended, a finding by the State Board of Examiners as to the fate of the two valid endorsements under which petitioner believed she had acquired tenure; therefore, there was no reason for her to await such a decision from the State Board of Examiners before challenging her termination." Id. at 4. In addition, the Commissioner pointed out that the Board had "vigorously disputed" the petitioner's contention that she had achieved tenure, and he found that the Board's "action to summarily terminate petitioner's employment on January 13, 1997 was not, on its face, frivolous or 'particularly suspicious' as suggested by the Appellate Court." Id. at 3. Under these circumstances, the Commissioner concluded that holding the petitioner to the 90-day rule was not unduly harsh.

The petitioner filed the instant appeal to the State Board.

After a careful review of the record, we affirm the decision of the Commissioner. We find that the facts herein do not present the exceptional circumstances that would compel relaxation of the 90-day limitation. See Kaprow v. Board of Educ. of Berkeley Tp., 131 N.J. 572, 590-91 (1993). As the ALJ pointed out, the petitioner knew in January 1997 "that she was a tenured employee holding a valid instructional certificate with two valid endorsements which entitled her to continued employment in the district." Initial Decision of October 29, 1999, slip op. at 8. The petitioner's claim that she had achieved tenure and could not be removed from her tenured position except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to the requirements of the Tenure Employees Hearing Law,

N.J.S.A. 18A:6-10 et seq., arose on January 13, 1997 when the Board acted to terminate her employment and "was not in any way affected by the September 24, 1998 determination of the Board of Examiners." Id. at 6. As the ALJ explained:

> When respondent purported to terminate her employment without complying with the requirements of the tenure law, petitioner had 90 days within which to challenge the board's action before the Commissioner of Education by filing a petition of appeal. For whatever reason petitioner chose not to do that, perhaps also for strategic legal reasons. She too waited to see whether the New Jersey State Board of Examiners would take actions against her legitimate instructional certificate/endorsements. There is no question that the 90-day period mandated by N.J.A.C. 6:24-1.2(c) applies to an alleged violation of statutory tenure rights. Like the teaching staff member in Nissman v. Board of Educ., 272 N.J. Super. 373 (App. Div. 1994), petitioner herein could have presented the same substantive argument in January 1997 as she did when she filed her petition in December 1998, well beyond the 90-day period which commenced with her termination of employment in January 1997. As in Nissman, the respondent herein had a right to know within 90 days of January 13, 1997 whether its action was going to be challenged.

Id. at 8.

Accordingly, we affirm the Commissioner's decision to dismiss the petition in this matter.

August 7, 2002

Date of mailing AUG 09 2002

82-02

EDITH MELIE,

PETITIONER,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning teacher challenged the withholding of her increment for the 1999-2000 school year.

After hearing testimony and receiving evidence, the ALJ determined that the District properly withheld petitioner's increment based, *inter alia*, on her failure to use effective instructional methods, establish and maintain discipline and failure to appraise the effectiveness of her own instructional program and methods.

The Commissioner affirmed the decision of the ALJ and dismissed the petition.

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

March 11, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10217-00
AGENCY DKT. NO. 410-11/00

EDITH MELIE,
Petitioner,
v.
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,
Respondent.

Eugene Liss, Esq., for petitioner

Joseph Verga, Esq., Associate Counsel, for respondent

Record Closed: November 27, 2001 Decided: January 16, 2002

BEFORE **EDITH KLINGER**, ALJ:

PROCEDURAL HISTORY

On November 20, 2000, Edith Melie filed a Petition of Appeal with the Commissioner of Education (Commissioner) alleging that respondent, the State Operated School District of the City Of Newark (District), wrongfully withheld her annual increment for the 1999-2000 school year in violation of *N.J.S.A.* 18A:6-10 and *N.J.S.A.* 18A:29-14. On November 30, 2000, the District filed its answer and affirmative

defenses. On December 21, 2000, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The hearing was held on October 22 and 23, 2001. A briefing schedule was established and the record closed on November 27, 2001 when the final submissions were received from the parties.

Melie, a seventh grade teacher in the Newark District, was served with a letter, dated August 30, 2000, from Marion Bolden, State District Superintendent. In it, Bolden informed Melie that her increment for the 1999-2000 school year would be withheld pursuant to *N.J.S.A.* 18A:29-14 for the following reasons:

1. Failure to satisfactorily establish learning objective and plan instruction consistent with appraisals of individual students needs and requirements.
2. Failure to satisfactorily use effective instructional methods.
3. Failure to satisfactorily establish and maintain effective classroom discipline and management.
4. Failure to satisfactorily appraise the effectiveness of one's own instructional program and methods.
5. Failure to satisfactorily function as a member of the total school program.

Petitioner appealed stating that the increment withholding was arbitrary and capricious because her professional conduct and performance were satisfactory and she met all acceptable standards of her profession.

REVIEW OF EVIDENCE

Dorothy Yellow-Duke has been employed by the District for thirty-three years. For the past five months she has been the Health and Social Services Coordinator for the District's Vailsburg Middle School. Between September 1999 and March 2000, she was Interim Vice-Principal of Vailsburg Middle School and the immediate supervisor of Melie, a seventh grade teacher at the time.

According to Yellow-Duke and Tony Motley, who succeed Yellow-Duke as Vice-Principal in March 2000, unannounced informal classroom observations of teachers are conducted periodically during the school year. These are intended to pinpoint a teacher's weaknesses and strengths. This information is recorded and shared with the teacher so that, when formal observations are conducted during the year, the teacher will have been given the opportunity to improve areas of weakness. The informal observations are not counted toward the teacher's overall rating for the school year which relies solely upon the formal observations. In fact, Motley stated that he was specifically instructed not to give any weight to informal observations

Yellow-Duke performed eight unannounced informal classroom observations of Melie between September 29, 1999 and January 24, 2000 and recorded the results in a series of observation forms. (P-10) These observations show that a consistent effort was made by Yellow-Duke to improve Melie's performance in her areas of weakness. The information provided to Melie following the observations was supported by repeated offers of assistance in correcting her limitations.

On September 29, 1999, Yellow-Duke informally observed Melie teaching literature to her seventh graders. She noted on the observation form that Melie had not displayed student work, attractive classroom bulletin boards were "in process," and the classroom management was effective "today while I observed." (P-10) Yellow-Duke testified that this last comment was significant because she had received a complaint about the discipline in Melie's class and Melie herself had asked for assistance in this respect.

Yellow-Duke observed Melie informally again on October 14, 1999. Petitioner was teaching a language arts class to her seventh graders. Yellow-Duke noted that Melie's classroom management still needed improvement. She wrote on the observation form that there was an "Advisory – Disciplinary Concerns." (P-10) Yellow-Duke testified that the class discipline needed improvement. She also said that the children were not engaged in the lesson being taught.

Yellow-Duke observed Melie informally again on October 25, 1999 teaching literacy and language arts. She saw that the students were distracted and inattentive. Not until the class settled down was work accomplished. Once more Yellow-Duke noted on the observation form that Melie's classroom management skills needed improvement.

During September and October 1999, Yellow-Duke met with Melie after each observation and also at other times. Yellow-Duke suggested a number of ways in which Melie could improve her classroom management. The ideas she shared with petitioner included, among other things, changing students' seats, speaking to parents, imposing detentions and giving students jobs in the classroom to keep them busy and engaged. Melie later told Yellow-Duke that she had tried some of these suggestions and appeared to have implemented some of them.

Petitioner's first formal observation was conducted by Yellow-Duke on November 4, 1999. (P-15) Formal observations are announced and Yellow-Duke received Melie's lesson plan in advance so that she knew what was to be covered during the class. This is the same procedure that is used with every teacher.

Melie was ranked satisfactory or better in all areas except her classroom management. She was ranked as "needs improvement" in four out of the eight criteria in this area. These four are:

A. Exhibits a neat, attractive classroom with rules and procedures posted.
C. Implements the District's Discipline Plan and Policy when appropriate.
E. Maintains "centers of interest" in subject areas where appropriate.
H. Organizes and utilizes classroom time effectively.

In the written portion of the Teacher Observation Report, Yellow-Duke explained more specifically the areas in which Melie needed improvement. Although only the Report's summary of these areas is given here, the Report itself sets out in great detail the classroom observations leading Yellow-Duke to her conclusions.

AREAS NEEDING IMPROVEMENT:

1. Provide sufficient time for closure. Too much activity at end of period. The lesson should have been stopped much sooner to prepare for dismissal. When the bell rings pupils should be packed and ready to leave.
2. Learning center needs to be organized more.
3. It is imperative that teachers stand at the door during class changes to move the pupils along so that they get to class on time and avoid playing around and possible fights. This can also cut down on the noise if you have established rules and regulations.
4. A naughty boy (who was identified by pupils) removed the rules, schedule and other materials from a small bulletin board near the door 3 days before my visit. Dr. Melie informed me the day that it happened. She was really upset. This will be replaced.

As a result of this last comment, the "needs improvement" rating was withdrawn with respect to the posting of rules.

Yellow-Duke rated the observation "needs improvement" overall because of Melie's classroom management. The report was given to petitioner and she met with Yellow-Duke on November 19, 1999. At the meeting, Melie was given a copy of the observation but she refused to sign it stating that she did not need improvement in managing her class.

Yellow-Duke observed Melie informally again on November 10, 1999 and found everything satisfactory. (P-10) She observed informally again on November 19, 1999 and once more everything was satisfactory. Yellow-Duke noted on the corresponding Informal Classroom Observation form (P-10) that the class was well behaved and that the two problem students in the class were on suspension at the time of these observations.

On December 6, 1999, Yellow-Duke found Melie's classroom management in need of improvement again. (P-10) She noted that Melie had rearranged her pupils to change or improve their behavior and lectured the students on "Critical Class Rules" in an attempt to improve her management. She asked Yellow-Duke for additional ideas and Yellow-Duke agreed and provided them in writing.

Yellow-Duke conducted informal observations again on January 7 and 24, 2000. (P-10) During the former, Yellow-Duke noted that Melie's bulletin boards needed improvement and her class management was "fair." During the latter, Yellow-Duke found Melie's performance satisfactory but noted "Ninety percent of the class was attentive and taking notes."

In her testimony, Yellow-Duke explained that she expected all students in a class to be seated and actively participating in the lesson with no disruptions. If any student is inattentive or disruptive, it is a problem that needs to be addressed. On cross-examination, she clarified that she meant that class activity must be controlled and directed, not necessarily quiet.

On January 27, 2000, Yellow-Duke conducted a second announced formal observation of Melie. (P-16) She found Melie satisfactory or better in all areas except Classroom Management/Environment. Yellow-Duke noted that Melie needed improvement to consistently administer "control with understanding, firmness and consideration for the rights of others." In the written comments, Yellow-Duke stated that Melie's classroom management needed improvement. She explained:

> Dr. Melie displays enthusiasm and desire to do a good job. She has the knowledge, skills and attempts to use innovative techniques to make the lessons interesting. She sometimes brings props and materials from home to use. However, many of the pupils don't seem to appreciate her efforts. If all of them would be attentive every day for the entire period, they would leave with a wealth of knowledge in June.

Melie's performance was rated satisfactory overall.

Yellow-Duke had informal discussions with Melie about improving her performance through January 2000. In March 2000, Yellow-Duke returned to her former position and was replaced as Vice-Principal by Tony Motley.

On March 6, 2000, Yellow-Duke wrote a letter of recommendation for Melie for the position of Facilitator/Coordinator – Whole School Reform in the District. Yellow-

Duke explained in testimony that, aside from Melie's weak class management skills, she was well qualified for the new position which did not require full time involvement in a classroom with students. Melie would work mainly with adults allowing her to make the most of her talents. She felt that Melie would be happier and more effective in the new position and agreed to recommend her.

On cross-examination, Yellow-Duke revealed that she had received only one complaint from a family of Melie's students concerning the manner in which Melie conducted her class. The complainer, the principal of a school in Irvington, New Jersey, was the grandmother of a student in petitioner's class. Motley testified that this grandmother requested that her grandson be removed from Melie's class. He said that he received complaints from other parents that her classroom was disorganized. Other teachers complained that the noise coming from Melie's room disrupted their classes. Motley discussed these complaints with her.

Motley assumed all of Yellow-Duke's duties including the supervision of Melie. He met with the teaching staff when he started in the new position. Then, every morning he made the rounds of the classrooms and spoke to each teacher on an informal basis.

An attempt was made to discredit Motley's testimony based upon his youth and years of service, however, he appeared a thoughtful, incisive and highly professional educator and his testimony was given weight accordingly.

On March 15, 2000, Motley conducted his first informal classroom observation of Melie. He indicated on the Informal Classroom Observation form (P-10) that he did not observe the students actively participating in the lesson, the student work displayed in the classroom was not current and the students were not using their notebooks. He testified that the students were talking to each other and not paying attention to the lesson. He explained that it is Newark school policy to have the students use their notebooks, or share with others, to make sure they are focusing on the lesson.

Motley reviewed one of Melie's lesson plans on March 21, 2000 (P-9) and told her it needed to be revised. He said that it should have contained more activities to better engage the students' attention. He also told her to include more note-taking in her plan.

On March 27, 2000, Motley sent Melie a Memo (P-36) that her Daily Students Sign-out Log, her substitute plans and her Retention Form and Book Inventory had not been submitted when due. The sign-out log is used to track student patterns of leaving their classrooms. The substitute plans are for the use of a substitute teacher in the event of a regular teacher's absence. These two documents were received shortly and Motley could not remember whether the others were handed in. The timely submission of lesson plans and other documents did not constitute a reason for the increment withholding and the testimony with respect to this issue will not be further addressed.

On March 30, 2000, Motley conducted a formal announced observation of Melie. (P-17) The planned lesson was biography (critical analysis). Motley found her to be in need of improvement in five different areas of Lesson Implementation. These areas were:

E. Uses motivational techniques appropriate to the learner and objectives.
H. Encourages students' leadership and responsibility. Develops student skills in individual and group decision making.
I. Provides activities which develop critical thinking, resourcefulness, responsibility and creativity.
J. Makes provisions for analyzing, evaluating and reviewing the lesson.
K. Uses results of lesson assessment in planning.

In the area of Teacher Characteristics, Motley found Melie in need of improvement in the area of communicating "clearly and thoroughly; verbally and non-verbally to various constituents."

In the area of Classroom Environment/Management, Motley found Melie in need of improvement in displaying students' work since the work displayed in her classroom was out of date. He said that work on display should be current, that is, within two weeks of assignment. He found her unsatisfactory in maintaining "centers of interest" in

subject areas where appropriate. Finally, he found her unsatisfactory in organizing and utilizing classroom time effectively. Melie was given an overall rating of "needs improvement."

Melie disagreed with the observation and submitted her comments, mainly that the things deemed to be her areas of strength or where she was rated satisfactory should have cancelled out the areas that Motley designated as in need of improvement or unsatisfactory.

Motley explained that not all factors that make up the observations are given equal weight. Some are more important than others. For example, he attached greater significance to a teacher's ability to communicate with students and engage them actively in the learning process than to Melie's knowledge of her subject matter and her ability to construct a good lesson plan on paper

No matter how good the plan and how great the knowledge, if students are not paying attention or participating in the learning process, the teacher's classroom management needs improvement. Among other things, Motley said that Melie should have planned fewer teacher-directed activities so that students could participate more fully. He also said that her lessons were not paced well so that there was not enough time for closure at the end of the class.

This lack of closure time was deemed to be responsible for excessive noise and confusion at the end of many of Melie's classes. One class was not completed in time for the next class's orderly transition into the room. There was also insufficient time for the exiting class to clean up so that the next class entered a room littered with paper.

Motley checked the grades of Melie's students and found that a lot of them were low compared to the way the same students were performing in other classes. He thought that this was another result of her poor class control.

Motley testified that Melie's students were neither engaged in her lessons nor motivated to learn. Her lesson plans simply did not coincide with what was actually happening in her classroom. One of Motley's major criticisms of Melie's teaching style was her lack of ability to critically assess the effectiveness of her performance so that she continued to produce good lesson plans that did not produce results in the classroom.

It was clear that Motley attributed a good deal of the disciplinary problems Melie had with her students to her inability to command their attention and keep them occupied. Yellow-Duke, who praised Melie's lesson planning but expressed concern about her classroom management, did not specifically make this connection in her observation reports. She did, however, continually make suggestions as to how Melie could make her classes more interesting to her students. Contrary to petitioner's assertion, the two observers did not apply different standards in observing Melie, they merely had different interpretations as to the causes of her problems. It is, however, indisputable that the same management problems were perceived by both of them.

At some time during the year, Motley became aware of a seminar/workshop to be given by an expert in classroom management. He offered to allow Melie to attend but she did not go. She gave him no explanation for not going. She testified at hearing that she had already attended such a workshop when she previously taught at the Fifteenth Street School and she did not think another one was necessary.

Motley met with Melie on April 6, 2000 to discuss the observation of March 30, 2000. They went over the problems she was having with her class. She told him that some of her students were challenging so he went through the District's discipline policy with her. The District policy is as follows: she is supposed to give the child a verbal warning and, if necessary, contact the parents; if warnings fail to improve the conduct, the next step is to refer the child for detention. He also suggested to Melie that she make her classes more interesting to minimize disruptive student behavior. They further discussed better pacing for her classes.

During April 2000, Motley periodically discussed student behavior problems with Melie. He continued to notice that her students were still not engaged in the lessons as he passed her classroom. Later, Motley worked with Melie on a professional improvement plan for the 2000-2001 school year with better class management and discipline as goals.

On May 12, 2000, Don Marinaro, Assistant Superintendent of the District, made a routine visit to Vailsburg and informally visited classrooms. When he entered Melie's class, he became concerned that the students were seated in groups loudly conversing among themselves. The students' conversations were clearly too disorganized to reflect any organized class activity. He observed for seven to ten minutes and then asked Melie what was happening. She told him they were engaged in a reading assignment. He testified that it was apparent that the students were not on task and there was no order in the classroom. There was no reason for the level of noise present.

When Marinaro mentioned his observations to Michael Daniels, principal of Vailsburg Middle School, he learned that this was an ongoing issue with Melie. He discussed the situation with Daniels and Motley. Marinaro then wrote a memorandum (P-18), dated May 17, 2000, to Melie on his observation. The memorandum stated the following:

> On entering your room on May 12, 2000, on an informal visit, I observed that students were not attentive to tasks at hand. Upon questioning, you informed me that students were assigned to a reading assignment; however, they were engaged in conversation and inattentive.
>
> When you were assigned to Vailsburg Middle School you were informed that behavioral management was an area of need for your professional improvement. As of this date, I have not observed any improvement in this area. The final evaluation for all teachers includes professional standards for classroom management.

Due to the pressure of time constraints, Motley conducted an unannounced formal observation of Melie on May 22, 2000. (P-19). After all of the observations and discussions with petitioner, he found no improvement in the areas where she was told

her performance was not satisfactory. The areas checked off on the Lesson Implementation portion of the observation form included four needing improvement and five that were unsatisfactory. One area on the Teacher Characteristics portion of the form was marked in need of improvement and another was unsatisfactory. Two areas on the Classroom Environment/Management portion were in need of improvement and three were unsatisfactory. Her overall rating was unsatisfactory.

The narrative prepared by Motley during this observation gives a much clearer picture of the observed class than any check marks on the form. During the lesson, the students were talking to each other, the floor was littered with paper from a previous class and only five of the fourteen students had textbooks. The students continued to hold private conversations in spite of Melie's attempts to focus their attention. Two students became restless waiting for the others to complete an in-class assignment and began to walk about the room. The students who completed the assignment early did not receive positive reinforcement nor were they given anything else to do. Students were not given sufficient time to complete the in-class assignment initially so the allotted time had to be extended repeatedly. Melie lacked enthusiasm for the lesson and communicated her attitude to the children. The lesson consisted of reading and answering questions without engaging the students or fostering their creativity or resourcefulness. Motley wrote:

> Students should have been given an opportunity to critique the answers of other students and also to write answers on the board or engage in any other activity that allowed them to assume some responsibility for instruction.

The students were asked to write a short paragraph on the reading assignment and only four to five of them did so; the others continued to talk to each other. Students who disrupted the class were repeatedly reprimanded but no discipline was imposed in accord with the District's policy. The lesson did not provide time for closure, students' questions or teacher clarifications.

Later that day, Motley held a post-observation conference with Melie to discuss his report.

Melie's annual evaluation report (P-20) was typed up and given to her on the same day as this observation. She was rated unsatisfactory for the year based upon Motley's formal observations and those of Yellow-Duke. The areas in which she needed improvement were her classroom management, implementation of the District's discipline policy and her failure to provide student centered lesson plans and instruction. The problems were the same ones that Melie had been given advice and assistance to correct all year.

Motley explained that he conducted her final observation, prepared the observation report, held a post-observation conference with her and prepared her annual evaluation on the same day at the instruction of Daniels. Motley only learned that day the school was required to perform one more formal observation of Melie before her annual evaluation so they were done consecutively on the same day for lack of time.

Motley and Daniels discussed the lack of improvement in Melie's performance. The two had previously considered that her increment should be withheld and the final observation only confirmed this for them. On May 23, 2000, Daniels sent a memorandum (P-39) to Marinaro recommending that Melie's increment be withheld for the following year based upon her unsatisfactory teaching performance.

Daniels testified that he did not conduct observations of Melie but, on occasion, passed by her classroom during the year and noticed the amount of noise coming from it. He discussed her performance first with Yellow-Duke, then with Motley. Daniels received monthly reports from the two vice-principals on Melie's progress and incorporated the information into his monthly reports to Marinaro. Daniels also discussed Melie with Marinaro.

In their testimony, both Daniels and Marinaro confirmed the statements by Motley and Yellow-Duke that the informal observations are conducted for the benefit of the teachers. These periodic critiques of their performance gave them the opportunity

to recognize their strengths and improve their areas of weakness before they were formally observed and rated. In Daniels's opinion, Melie was given more than enough warning during the year that her performance needed to improve.

Marinaro testified that, in September 1999, when Melie was assigned to Vailsburg from the Fifteenth Avenue School, her classroom management was an area of concern on her Annual Evaluation Report of June 1999 (P-35). She was rated unsatisfactory in the area of establishing and maintaining effective classroom discipline and management procedures. Melie's increment was never previously withheld, however, according to Marinaro, they had considered terminating her at one time because of her performance. It did not improve at Vailsburg. Marinaro said that the 1999-2000 school year was the third year that her classroom management and discipline were not satisfactory and she was told to improve them.

When Marinaro received Daniel's memorandum of May 23, 2000 recommending that Melie's increment be withheld for the following year, Marinaro read the supporting documentation, that is, the formal observations, provided by Daniels and agreed that this should be done. On August 8, 2000, Marinaro sent a memorandum to Randall Kanter, State District Assistant Superintendent, recommending that her increment be withheld. This resulted in Bolden's letter to Melie, dated August 30, 2000, from which this appeal was taken.

Melie testified that the observation of May 22, 2000 was unfair because she was sick on that day and should have gone home instead of staying with her class. She stated that she tried to implement the District's disciplinary policy and thought that she was doing it correctly because she called parents and tried to work with them to improve students' behavior. Melie believed that her class was generally well-behaved. She tried to adopt the suggestions and strategies provided to her by the vice-principals and thought she was improving her performance. In spite of the persistence of her deficiencies and the assistance she received from her supervisors over the years, Melie

insisted that she did not receive enough notice of her weaknesses or enough help in dealing with them.

Melie stressed the things she did well during the relevant school year. She got all of her paperwork in on time. She worked tirelessly to make the costumes for various school productions and received no reimbursement for the money she expended in buying the materials. She presented a long and impressive list of her contributions to various school activities. Daniels said that he considered these things before he rated her performance unsatisfactory but her evaluations were based upon her performance in the classroom as a teacher.

Melie obtained the position of Facilitator/Coordinator in the District for the 2000-2001 school year and, as predicted by Yellow-Duke, is performing satisfactorily in her new job. This occurred subsequent to her increment withholding and does not constitute a reason for restoring her increment. In fact, improved performance is one of the goals of the increment withholding process.

THE APPLICABLE LAW

Any board of education may withhold the employment increment of a teacher for inefficiency or other good cause. *N.J.S.A.* 18A:29-14. The decision to withhold an increment for unsatisfactory performance lies within the discretion of the local board and "may not be upset unless patently arbitrary without rational basis or induced by improper motives." *Kopera v Board of Education of the Town of West Orange*, 60 *N.J.Super* 288, 295 (App.Div. 1960) The burden of proving unreasonableness rests with the teacher. *Id*, at 297.

Melie raised the argument that she had an insufficient number of informal and formal observations and feedback before her Annual Evaluation. In fact, she received an inordinate number of informal observations with feedback during the year. She failed to include the observation by Marinaro and his ensuing memorandum. She also

failed to consider that the weaknesses found during the 1999-2000 school year were also called to her attention in her prior annual evaluation and earlier.

The unfortunate timing of her final formal observation, the observation report and the annual evaluation report were raised by petitioner to defeat the withholding of her increment. However, what Motley observed in her classroom that day was consistent with all prior observations and conclusively demonstrated the lack of improvement in her performance from the beginning of the year in spite of all continuing attempts to assist her. The District is not obligated to reward a teacher financially for unsatisfactory performance simply because formal evaluation requirements are not satisfied to the letter. *Dore v. Board of Education of the Township of Bedminster*, 185 *N.J. Super.* 447, 455 (App. Div. 1982) I **CONCLUDE** that this is the case even when the requirements are embodied in a union contract rather than statute or regulation.

FINDINGS OF FACT AND CONCLUSIONS

Based upon the testimony and the documentation of the two vice-principals who observed and evaluated Melie, I **FIND** that it was reasonable for them to deem her class management and teaching style to be unsatisfactory. They observed her classes to be noisy and disorganized to the point where it affected her students' desire and/or ability to grasp the material presented. The lesson plans she prepared were not geared to her students' needs and requirements because she appeared to lack the ability to appraise her performance and adapt her plans accordingly. As a result of her inability to capture the attention of her students, members of the class presented discipline problems that she failed to address in accord with the District's discipline policy. The discipline problems arising in her classroom led to excessive noise and the disruption of other classes.

The same deficiencies observed by Yellow-Duke and Motley were also observed by Daniels and Marinaro. These were the same deficiencies noted in her evaluations when she taught at the Fifteenth Street School during the prior year.

1. Failure to satisfactorily establish learning objective and plan instruction consistent with appraisals of individual students needs and requirements.
2. Failure to satisfactorily use effective instructional methods.
3. Failure to satisfactorily establish and maintain effective classroom discipline and management.
4. Failure to satisfactorily appraise the effectiveness of one's own instructional program and methods.
5. Failure to satisfactorily function as a member of the total school program.

I **FIND** that Melie was continuously given feedback, followed by advice and assistance to improve her performance but, nevertheless, her performance failed to improve. I **FIND** that her other contributions to the school community are not relevant to the present hearing since the fundamental duty of a teacher is to teach. Consequently, I **FIND** that it was reasonable for the District to base her evaluation upon her classroom performance.

I, therefore, **CONCLUDE** that it was reasonable, not arbitrary and capricious, for the District to withhold Melie's increment for the 1999-2000 school year for the reasons stated and she is entitled to no relief as the result of this appeal.

ORDER

Accordingly, it is **ORDERED** that the District's decision to withhold petitioner's increment for the 1999-2000 is hereby **AFFIRMED** and the petition herein is **DISMISSED WITH PREJUDICE**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 16, 2002
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

1/23/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 25 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:

Edith Melie

For Respondent:

Dorothy Yellow-Duke
Tony Motley
Don Marinaro
Michael Daniels

Exhibits:

Joint

J-1 Agreement between the Newark Public Schools and the Newark Teachers Union Local 481 – Teacher – Clerk, July 1, 1997 – June 30, 2001, p.46, sec. 9 – Teacher Performance Evaluation and Personnel File, Paragraph B. Evaluations.

J-2 Teacher Annual Evaluation Report, dated June 26, 1996.

J-3 Teacher Annual Evaluation Report, dated June 25, 1997.

J-4 Teacher Annual Evaluation Report, dated June 15, 1998.

J-5 Letter of Recommendation from Joyce A. Kornegay, Principal, to the Division of Human Resource, dated November 8, 1999.

J-6 Letter of Recommendation from Corrine Kylis, Staff Developer, to the Division of Human Resource, dated February 20, 2000.

J-7 Letter of Recommendation from Dorothy Yellow-Duke, Interim Vice Principal, to The Division of Human Resource, dated March 6, 2000.

J-8 (ID only)
Letters from Students in Petitioner's 1999-2000 Classroom.

J-9 School Leadership Team V Lesson Plan Review from September 13, 1999 – June 5, 2000.

J-10 SLT Informal Classroom Observations from September 29, 1999 – June 5, 2000.

J-11 Parent/Guardian Contract Form from April 3, 2000 – June 8, 2000.

J-12 Student Classroom Leave/Destination Form.

J-13 Black History Celebration flier.

J-14 Program for production of Hamlet, dated June 22, 2000

J-15 Newark Public Schools Teacher Observation Report of Dorothy Yellow-Duke, Interim Vice Principal, dated November 4, 1999.

J-16 Newark Public Schools Teacher Observation Report of Dorothy Yellow-Duke, Interim Vice Principal, dated January 27, 2000.

J-17 Newark Public Schools Teacher Observation Report of Tony Motley, Interim Vice Principal, dated March 30, 2000.

J-18 Memorandum from Don Marinaro, Ed.D., Assistant Superintendent, to Edith Melie, dated May 17, 2000.

J-19 Newark Public Schools Teacher Observation Report of Tony Motley, Interim Vice Principal, dated May 22, 2000.

J-20 Newark Public Schools Teacher Annual Evaluation Report of Tony Motley, Interim Vice Principal, dated May 22, 2000.

J-21 Letter from Marion A. Bolden, State District Superintendent, to Edith Melie, dated August 30, 2000.

J-22 Newark Public Schools Teacher Observation Report of M. Brown, Vice Principal, dated February 7, 2001.

J-23 Newark Public Schools Teacher Observation Report of M. Brown, Vice Principal, dated June 7, 2001.

J-24 Newark Public Schools Teacher Annual Evaluation Report of Gregory Stewart, Principal, dated June 20, 2001.

J-25 Petitioner's Daily Lesson Plans for the 1999-2000 school year.

J-26 Newark Public Schools Performance Evaluation Procedures for Teaching Staff Members.

J-27 (ID only)
Pictures from a presentation, dated December 6, 1990.

J-28 (ID only)
Pictures from a presentation, dated March 10, 1991

J-29 (ID only)
Pictures from a presentation, dated February, 1996.

J-30 (ID only)
Pictures from Avenue Elementary School, 1997-1999

J-31 Pictures from Black History Celebration, dated February, 2000.

J-32 Professional Improvement Plan Evaluation, 1999-2000.

J-33 Picture

J-34 Job Description – Teacher.

J-35 Teacher Annual Evaluation Report, dated June, 1999.

J-36 Memorandum from Tony Motley, Vice Principal, to Edith Melie (copy to Mr. Daniels, Principal), dated March 27, 2000.

J-37 Memorandum from Tony Motley, Vice Principal, to Edith Melie (copy to Mr. Daniels, Principal), dated May 8, 2000.

J-38 Memorandum from Mr. Daniels, Principal, to Mr. Don Marinaro, Assistant Superintendent, dated May 23, 2001.

J-39 Memorandum from Mr. Don Marinaro, Assistant Superintendent, to Human Resource, dated August 8, 2000.

J-40 Envelope for letter from Mr. Don Marinaro, Assistant Superintendent

OAL DKT. NO. EDU 10217-00
AGENCY DKT. NO. 410-11/00

EDITH MELIE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon careful and independent review of the record, which includes transcripts of the hearings conducted at the OAL on October 22 and October 23, 2001, the Commissioner determines to affirm the Initial Decision. As noted, it is petitioner's burden to prove, by a preponderance of the credible evidence, that the District's decision to withhold her increment was arbitrary, capricious or unreasonable, based on the facts. *See Kopera, supra.* Finding no cause to disturb the findings, credibility determinations and conclusions of the ALJ, the Commissioner concurs that petitioner has failed to meet her burden.

Accordingly, the within Petition of Appeal is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/11/02

Date of Mailing: 3/11/02

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

83-02

D.A.S. on behalf of minor child, B.S.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY	:	DECISION
RESPONDENT.	:	

March 13, 2002

OAL DKT. NO. EDU 9430-00
AGENCY DKT. NO. 313-9/00

D.A.S. on behalf of minor child, B.S.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING ASSISTANT COMMISSIONER

Date of Decision: 1/31/02

Date of Mailing: 3/13/02

84-02

DEBORAH RAY NEELEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

march 13, 2002

OAL DKT. NO. EDU 12129-99
AGENCY DKT. NO. 362-12/99

DEBORAH RAY NEELEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING ASSISTANT COMMISSIONER

Date of Decision: 1/31/02

Date of Mailing: 3/13/02

85-02

85-02

ELYSE NATHAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

March 13, 2002

OAL DKT. NO. EDU 9908-00
AGENCY DKT. NO. 267-7/00

ELYSE NATHAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING ASSISTANT COMMISSIONER

Date of Decision: 1/31/02

Date of Mailing: 3/13/02

SEC 2

IN THE MATTER OF THE SUSPENSION	:	
OF THE CERTIFICATION OF	:	COMMISIONER OF EDUCATION
MOHAMMED HAMID, SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	
_____	:	

March 13, 2002

OAL DKT. NO. EDU 1232-01
AGENCY DKT. NO. 425-11/00

IN THE MATTER OF THE SUSPENSION OF THE CERTIFICATION OF MOHAMMED HAMID, SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.	:	COMMISIONER OF EDUCATION DECISION

The record and [illegible]

OAL DKT. NO. EDU 121-00
AGENCY DKT. NO. 379-12/99

VALARIE BAKER, PETITIONER, V. BOARD OF EDUCATION OF HOLMDEL TOWNSHIP, MONMOUTH COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter

88-02

W.O'Q., on behalf of minor child, D. O'Q. and M.P.,

PETITIONERS,

V.

BOARD OF EDUCATION OF WASHINGTON TOWNSHIP, GLOUCESTER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

March 13, 2002

OAL DKT. NO. EDU 6954-00
AGENCY DKT. NO. 293-8/00

W.O'Q., on behalf of minor child, D. O'Q. and M.P.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF WASHINGTON TOWNSHIP, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING ASSISTANT COMMISSIONER

Date of Decision: 1/31/02

Date of Mailing: 3/13/02

89-02

IN THE MATTER OF THE TENURE HEARING OF GREGORY J. BREWER, SCHOOL DISTRICT OF THE BOROUGH OF ROSELLE, UNION COUNTY,

AND

IN THE MATTER OF THE TENURE HEARING OF GREGORY J. BREWER, SCHOOL DISTRICT OF THE BOROUGH OF ROSELLE, UNION COUNTY.

COMMISSIONER OF EDUCATION

DECISION

March 13, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

IN THE MATTER OF THE TENURE HEARING OF GREGORY J. BREWER, SCHOOL DISTRICT OF THE BOROUGH OF ROSELLE, UNION COUNTY,

And

IN THE MATTER OF THE TENURE HEARING OF GREGORY J. BREWER, SCHOOL DISTRICT OF THE BOROUGH OF ROSELLE, UNION COUNTY

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10124-00

On Remand from EDU 7083-98

AGENCY DKT NO.: 205-6/98

And

OAL DKT NO. EDU 1049-01

AGENCY DKT. NO. 449-12/00

CONSOLIDATED

Neil Cohen, Esq., for petitioner
(Gill & Cohen, P.C. attorneys)

Harold N. Springstead, Esq., for respondent
(Springstead & Maurice, attorneys)

Record Closed: January 2, 2002

Decided: January 25, 2002

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE PROCEDURAL HISTORY

This matter involves the settlement of a contested case before the Office of Administrative Law (OAL) that was remanded by the Commissioner of Education in a

decision dated December 11, 2000. The relevant details were set forth in the Initial Decision, OAL Dkt. No., EDU 7083-98, decided September 13, 2000. The Final/Remand decision of the Commissioner of Education and the Initial Decision are incorporated herein by reference.

On December 19, 2000, and subsequent to the remand, the District filed new tenure charges with the Commissioner against the respondent, Gregory J. Brewer, alleging unbecoming conduct. Specifically, the District alleged that the respondent was arrested on charges of 2nd degree arson. On January 3, 2001, the Commissioner transmitted that matter for hearing as a contested case. Further, the Commissioner requested that the matter be consolidated with the pending remanded tenure charges in OAL Dkt. No. EDU 10124-00. An Order of Consolidation was entered on January 17, 2002.

The matter was accepted by the OAL and assigned docket No. EDU 1049-01. Prehearing and hearing dates were established. Prior to the hearing, the undersigned was advised that settlement discussions were being held. Further, that the respondent plead guilty to 3rd degree arson on December 20, 2000. Finally, the parties advised that as a result of the initial decision and the Commissioner's remand decision, the District had paid the respondent the back pay award of $9,734.31 for wages owed for October 16 through December 15, 1998 and $2,363.25 for two weeks of salary related to wages owed for time prior to December 11, 2000.

On January 2, 2002, the parties filed a Stipulation of Settlement with the undersigned and the record closed on that date.

DISCUSSION

The instant settlement acknowledges that as a result of the respondent's entry of a guilty plea to violating *N.J.S.A.* 2C:17-1-(b)(1) or 3rd degree arson, he has automatically forfeited public employment, position and office pursuant to *N.J.S.A.*

OAL DKT. NOS.: EDU 1049-01, EDU 10124-00 & EDU 7083-98

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

1/25/02
DATE

IRENE JONES, ALJ

Receipt Acknowledged:

1/29/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 1 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

sej

Gill & Cohen
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
NIA H. GILL
NEIL M. COHEN

42 CHURCH STREET
MONTCLAIR, NEW JERSEY 07042
(973) 783-3410
FAX (973) 783-8051

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
JAN 2 9 36 AM '02

CERTIFIED MAIL/RRR

December 20, 2001

Honorable Irene Jones, A.L.J.
185 Washington Street
Newark, New Jersey 07102

Re: Roselle Board of Education v. Gregory Brewer
OAL Docket No.: EDUTH 07083-98N, REF. NO. 205-6/98
TERM HEARING

Dear Judge Jones:

Enclosed please find original and one copy of the fully executed Stipulation of Settlement in the above matter for your review and approval.

Thank you.

Respectfully submitted,

NEIL M. COHEN, ESQ.

NMC/jt
encl.

cc: Harold Springstead, Esq. (*via facsimile w/o enclosure 201-487-0212*)

GILL & COHEN, P.C.
42 Church Street
Montclair, New Jersey 07042
(973) 783-3410
Attorney s for Petitioner Roselle Board of Education

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
JAN 2 9 36 AM '02

IN THE MATTER OF THE TENURE HEARING OF GREGORY J. BREWER, SCHOOL DISTRICT OF THE BOROUGH OF ROSELLE, UNION COUNTY,	:	OFFICE OF ADMINISTRATIVE LAW OAL Docket No. EDUTH07083-98N Remand DKT NO EDU 10/24-00 Agency Ref. No. 205-6/98

STIPULATION OF SETTLEMENT
AND SETTLEMENT AGREEMENT

The parties to these matters, the School District of the Borough of Roselle, Union Count ("Board"), and Gregory J. Brewer ("Brewer"), having reached an agreement to resolve this matter, hereby requests that the Administrative Law Judge and the Commissioner of Education approve the following terms as the settlement agreement.

1. The parties state and agree that this agreement is contingent upon the approval by the Administrative Law Judge and the Commissioner of Education of all the terms of this agreement, and if any of the terms are rejected by the Administrative Law Judge or the Commissioner of Education, this agreement shall be deemed null and void and the matter shall be returned to the Office of Administrative Law for hearings in relation to the remand of OAL Docket No. EDU 7083-98 as ordered by the Commissioner on December 11, 2000 and for a hearing on the new tenure charges deemed filed on January 3, 2001 as OAL Docket No. EDUT 01049-01N; but that nothing in this paragraph or agreement shall, in such event, preclude the

parties from agreement to a new, revised or modified settlement agreement provided that such agreement shall be subject to the approval of the Administrative Law Judge and the Commissioner of Education.

2. The parties agree that based upon the respondent's conviction for a third degree offense on December 20, 2000 that the hearing on the remanded tenure charge is deemed moot and unnecessary.

3. The Board has paid to Brewer the sum of $9,734.31 representing back pay for the period of October 16 through December 15, 1998 by virtue of the Commissioner's Decision dated December 11, 2000. In addition, the Board will pay two weeks salary to Brewer at the 1998 rate for the two weeks prior to December 20, 2000 in the amount of $2,363.25.

4. The basis for the settlement is as follows:

a. On or about May 22, 1998 tenure charges were certified by the Board and filed with the Commissioner of Education on June 18, 1998. The tenure charges alleged that Brewer engaged in unbecoming conduct contact in that he sexually harassed a 19 year old female student during class. Brewer denied the charges and the matter was heard before the Office of Administrative Law on July 28 and October 12, 1999. The initial decision by the ALJ found that Brewer committed sexual harassment and ordered him dismissed from his tenured position. The ALJ order the Board to pay him his salary from October 16 to December 15, 1998.

b. On December 11, 2000 the Commissioner of Education set aside the initial decision of the ALJ and ordered the matter reopened for the presentation of further proofs. In addition, the Commissioner sustained the ALJ's order that Brewer be paid for the period between October 16 and December 15, 1998.

c. By letter dated December 4, 2000, the Board advised Brewer that they would be considering tenure charges in an Executive Session on December6, 2000 based upon a newspaper article that stated he had been charged with second-degree arson. The Board voted the tenure charges on December 6, 2000 and removed Brewer from the payroll.

d. The Board never gave Brewer notice of his right to file a response within 15 days as required by N.J.A.C. 6A:3-5.1(b)(3). Instead of waiting the 15 days as required by N.J.A.C. 6A:L3-5.1(b)(4), the Board forwarded the tenure charges to the Commissioner of Education which were initially deemed filed as of December 19, 2000 but later indicated were filed on January 3, 2001. Brewer filed a timely answer to those tenure charges.

e. On December 20, 2000, Brewer entered a plea of guilty to third degree arson in violation of N.J.S.A. 2C:17-1-(b)(1) in the Superior Court of New Jersey, Union County, Accusation No. 00-112-01515A.

f. As a result of his plea of guilty to a third degree offense, he automatically forfeited his public employment, position and office pursuant to N.J.S.A. 2C:51.

5. Both the Board and Brewer are aware of the public's interest in the proper pursuit and handling of tenure charges to assure that qualified persons are in the schools of New Jersey. However, upon reviewing all the circumstances which include the Board's evaluation of time and expense in pursuing the initial tenure charges, the certainty on which the ultimate result might be obtained, both in sustaining the charges and the penalty which might be imposed and because Brewer has forfeited his tenured position and his right to public employment in the State of New Jersey as of December 20, 2000, both the Board and Brewer believe it is in the best interest of all parties and the public to resolve the matter by this settlement.

sd

6. Brewer acknowledges that he is waiving his right to a hearing before the Office of Administrative Law and the commissioner of Education on both the remanded matter and the second tenure charge. Brewer further acknowledges that he understands and agrees to the terms of this agreement and is fully satisfied with the legal representation he has received in this matter.

7. Brewer full understands that this settlement will be referred to the State Board of Examiners for further appropriate action.

8. The parties acknowledge that each has consulted with an attorney or a representative of their own choosing prior to signing this Stipulation of Settlement and that each signs this Stipulation of Settlement as their own voluntary act and deed, and that they fully understand the duties and obligations herein.

9. This Stipulation of Settlement shall be subject to the laws of the State of New Jersey.

10. The parties agree that a Settlement is consistent with the public interest, and the best interests of the Roselle School District.

52

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year of aforesaid.

BOARD OF EDUCATION OF THE
SCHOOL DISTRICT OF ROSELLE

By: _____
Board President

_____

_____
GREGORY BREWER

SPRINGSTEAD & MAURICE
Attorneys for Respondent

By _____
HAROLD N. SPRINGSTEAD, ESQ.

Dated: 2001

GILL & COHEN
Attorney for Petitioner

By _____
NEIL M. COHEN, ESQ.

Dated: 2001

OAL DKT. NO. EDU 10124-00 (ON REMAND FROM EDU 7083-98)
AGENCY DKT. NO. 205-6/98
AND
OAL DKT. NO. EDU 1049-01
AGENCY DKT. NO. 449-12/00
(CONSOLIDATED)

IN THE MATTER OF THE TENURE HEARING OF GREGORY J. BREWER, SCHOOL DISTRICT OF THE BOROUGH OF ROSELLE, UNION COUNTY,	
AND	COMMISSIONER OF EDUCATION
IN THE MATTER OF THE TENURE HEARING OF GREGORY J. BREWER, SCHOOL DISTRICT OF THE BOROUGH OF ROSELLE, UNION COUNTY.	DECISION

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *See In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/13/02

Date of Mailing: 3/13/02

97-02

PATRICIA DUDA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 14, 2002

OAL DKT. NO. EDU 8796-96
AGENCY DKT. NO. 365-8/96

PATRICIA DUDA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 1/31/02

Date of Mailing: 3/14/02

98-02

NICHOLAS DENTINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HADDONFIELD, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 14, 2002

OAL DKT. NO. EDU 2851-00
AGENCY DKT. NO. 144-5/00

NICHOLAS DENTINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HADDONFIELD, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 1/31/02

Date of Mailing: 3/14/02

99-02

MIRIAM R. LEWIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF CITY OF BRIDGETON, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 14, 2002

OAL DKT. NO. EDU 10051-99
AGENCY DKT. NO. 277-9/99

MIRIAM R. LEWIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF CITY OF BRIDGETON, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 1/31/02

Date of Mailing: 3/14/02

100-02

E.F., on behalf of minor child, B.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 14, 2002

OAL DKT. NO. EDU 5573-00
AGENCY DKT. NO. 203-6/00

E.F., on behalf of minor child, B.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 1/31/02

Date of Mailing: 3/14/02

101-02

A.N., on behalf of minor child, N.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 14, 2002

OAL DKT. NO. EDU 5336-00
AGENCY DKT. NO. 170-5/00

A.N., on behalf of minor child, N.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 1/31/02

Date of Mailing: 3/14/02

102-02

STEPHEN KOZAREK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 14, 2002

OAL DKT. NO. EDU 12134-99
AGENCY DKT. NO. 359-12/99

STEPHEN KOZAREK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 1/31/02

Date of Mailing: 3/14/02

103-02

GEORGE HEMIGHAUS,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, a janitor employed by the Board, challenged the imposition of a five-day suspension without pay as a disciplinary measure, alleging that it was a reduction in salary in violation of his tenure rights.

The ALJ concluded that petitioner had not acquired tenure and, therefore, appeal of his unpaid suspension was outside the Commissioner's jurisdiction. The ALJ additionally noted, however, that if petitioner *were* to have been found tenured as claimed, his suspension without pay would have been a minor disciplinary action lawfully imposed by the Board. Accordingly, the ALJ recommended dismissal of the petition.

The Commissioner affirmed the ALJ's determination and dismissed the petition.

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

March 14, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2397-01

AGENCY REF. NO. 54-2/01

GEORGE HEMIGHAUS,

Petitioner

v.

BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY,

Respondent.

John Morris, Esq., for petitioner

A. Paul Kienzel, Jr., Esq., for respondent (Casarow, Kienzel & Raczenbach, attorneys)

Record Closed: December 26, 2001 Decided: January 25, 2000

BEFORE LILLARD E. LAW, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, George Hemighaus, asserts that the Board of Education of the City of Bridgeton (Board) violated his tenure rights, pursuant to N.J.S.A. 18A:17-3, when it suspended him, without pay, for a term of five (5) days, in contravention of the Tenure Employees Hearing Law, N.J.S.A. 18A:6-9 to –25. The Board denies that petitioner has achieved a tenure status and, therefore, its action to discipline petitioner was proper and in accordance with the law.

The matter was transmitted from the Department of Education (Department), Bureau of Controversies and Disputes (Bureau) to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13. The hearing was held on October 23, 2001, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey. The parties were granted leave to submit post-hearing memoranda of law, with petitioner's memorandum due on November 26, 2001, and the Board's memorandum due on December 26, 2001.

On November 26, 2001, the undersigned was in receipt of petitioner's memorandum which, rather than arguing the points of law with respect to his petition, petitioner requested that the hearing record be reopened, pursuant to N.J.A.C. 1:1-18.5(c), for "extraordinary circumstances." On December 20, 2001, the Board responded to petitioner's motion requesting that the motion be denied and the undersigned decide the matter on the hearing record.

PETITIONER'S MOTION

In his memorandum, dated November 21, 2001, petitioner stated that he submits this letter memorandum in lieu of formal brief in support of the Motion to reopen the record. Pursuant to N.J.A.C. 1;1-18.5(c), procedurally such Motion is to be addressed "before an initial decision is filed." Substantively, such Motion may be granted "for extraordinary circumstances." Petitioner submits that a standard has been met in this matter.

Petitioner argues that one of the issues in this litigation is his status as a tenured janitorial employee pursuant to N.J.S.A. 18A:17-3. Mr. Hemighaus had reviewed his personnel file in its entirety earlier this year and the file produced at the hearing where it was reviewed by the respondent's Human Services Director. The June 19, 1987 letter attached to petitioner's Affidavit was not in petitioner's file and petitioner, as explained in the accompanying Affidavit, only obtained that letter after the conclusion of testimony

on October 23, 2001. Parenthetically, at one point during the cross examination of petitioner, he made reference to receiving information as to his tenured status from Union officials and was questioned as to whether he had any documents with him which would establish that assertion. At counsel's direction, petitioner referred to the Union after the conclusion of the testimony and was able to provide counsel with a letter, dated June 19, 1987, referenced in petitioner's Affidavit.

Additionally, petitioner notes that during the hearing the earliest correspondence in petitioner's personnel file dealing with his employment status was June 1988. While there were Board minutes and resolutions introduced by the Board concerning "fixed term" or yearly renewals, those minutes and resolutions only dealt with the year 1992 (Exhibit R-9) as well as most recent years of 1997-2001 (Exhibits R-5 through R-8). Parenthetically, Mr. Hager, who was the Business Administrator/Board Secretary until shortly before the October 23, 2001 hearing, testified that he was only aware of resolutions and fixed term contracts for the period of time during his tenure. Mr. Hager made no independent search for any documentation for the period of time preceding his position as Board Secretary nor was he requested to do so in preparation for the October 23, 2001, hearing.

Petitioner submits that with the absence of this documentation in petitioner's personnel file, the Board's production of resolutions only dating back to the year 1992 and the lack of any correspondence or documents concerning the hiring of petitioner before June 1988, that the enclosed correspondent significantly impact on the issue of tenure given the change in the hiring practices of the Bridgeton Board of Education in 1983 and the express recognition of petitioner's tenure rights by the Board's then Secretary.

In petitioner's Affidavit, dated November 21, 2001, petitioner asserts, among other things, that according to a letter, dated June 19, 1987, from the Bridgeton Custodial Association's representative, William Harris, Jr., the Board changed its hiring practice concerning custodial employees in 1983 to "fixed terms." Petitioner argues that since he

was hired before 1983, his name appears on the document as one of the employees who was tenured by the Board. The letter attached to petitioner's Affidavit states, in part, as follows:

June 19, 1987

Mr.Vincent Mento
Business Administrator/Board Secretary
Bridgeton Board of Education
Bank Street Administration Building
Bridgeton, N.J. 08302

Dear Mr. Mento;

In response to your correspondence dated June 17, 1987 and our phone conversation on June 18, 1987, please be advised that due to the past actions taken by the Bridgeton Board of Education, the following individuals are tenured employees:

. . . .
Hemighaus, G.
. . . . .

In 1983, when the Board changed its hiring practice, to "fixed terms", that action eliminated tenure rights for new hires. Listed below are those individuals who come under fixed term:

. . . .

If you have any questions or comments, please feel free to contact me.

Sincerely yours.
(Signed)
William F. Harris, Jr.
Bridgeton Middle School

THE BOARD'S RESPONSE

On December 20, 2001, the Board's attorney addressed a letter to the undersigned wherein he stated that he was in receipt of petitioner's letter requesting that the instant matter be reopened. The Board observed that although petitioner's letter was dated November 21, 2001, the letter was not delivered until the date that petitioner's Brief in support of petitioner's claim of tenure was due. The Board contends that since petitioner

failed to provide a Brief, it requests that the undersigned decide the case on the record established at the hearing.

The Board observes that petitioner makes reference to his request to reopen the record in the instant matter in order for petitioner to present information from an individual named William F. Harris, Jr. This is the same William F. Harris who is and has been the President of the Custodians Union for years in the school system. This is the same Mr. Harris who was part of the negotiations involving this matter to which petitioner testified and he participated in some years ago regarding the negotiated discipline for matters of this nature. This is the same Mr. Harris who continues to work in the Bridgeton School System and be actively involved as a Union Representative and remains its President.

The Board indicates that the letter that was sent in 1987 from Mr. Harris, who at that time was again the Union Representative, in nothing but a self-serving document and has no probative value. Very simply, petitioner's letter indicates that petitioner, for some reason, could not have presented Mr. Harris as a witness. Very simply, Mr. Harris remains the President of the Union that petitioner is involved in, and remains a person readily accessible and seen throughout the school district on a daily basis, and with a case where Mr. Harris is important to petitioner, Mr. Harris could have testified.

The Board observes that petitioner had months and months to prepare his case, as did his legal counsel. Petitioner has full access to his personnel file. There is no reason whatsoever that is cited by petitioner as to why he could not have discussed this matter with the Union Representatives, obtain any information prior to trial, but rather, he attempts now, after the fact, to present irrelevant matters to this tribunal. There certainly is no reason that the self-serving statement from the Union Representative of 1987 would be in petitioner's file or anyone else' file. The Board asserts that there are numerous items in the personnel file of petitioner's employment and all were presented and reviewed by petitioner and petitioner's counsel prior to and during the trial in this matter.

The Board vehemently resents the statement by petitioner's counsel that the Board produced resolutions of petitioner's employment for certain years and not for other years. The Board contends that such a production was its choice and it did not have to produce any resolutions. The fact that the most recent resolutions were presented in the Board's case was the Board's option and it was done merely to show by example the history involving custodians. The Board argues that it had no obligation to do otherwise and the intimation in petitioner's letter that the Board's production of resolutions has some after-the-fact effect is simply worthless. In the first instance, the Board argues, the letter attached to petitioner's Affidavit should not even have been presented to this tribunal as it does not constitute evidence and it should not have been referred to. Secondly, the statement in petitioner's letter that there was some recognition by the Board's Secretary in years past again is absolutely erroneous since the letter submitted was only a self-serving statement from the Union President and does not represent the acknowledgement of anyone in a position with the Board. The Board contends that is not obligated to present everything that occurs within the school system for the last 25 years by way of response to the case presented by the petitioner. The Board submitted resolutions, which were again stated on the record to be samples of resolutions passed by the Board over the years, the sample resolutions were never represented to be every resolution the Board has passed the last 25 years and, most importantly, the Board had not obligation whatsoever to produce any resolution of any kind, nature or description.

The Board observes that it is its position is twofold: i.e., that (1) petitioner has not acquired a tenured position with the Board and (2) the negotiated discipline upon petitioner is, in and of itself, dispositive of the matter in controversy.

The Board request that petitioner's deny the after-the-fact motion submitted by petitioner and render a decision dismissing the Petition of Appeal.

DECISION ON THE MOTION

The OAL regulations concerning motions to reconsider and reopen the proceedings state, at N.J.A.C. 1:1-18.5(c) that:

> Motions to reopen the record before an initial decision is filed must be addressed to the judge and may be granted only for extraordinary circumstances. (Emphasis supplied)

Petitioner relies upon a letter purportedly demonstrating that petitioner had achieved a tenured status with the Board. Unfortunately, the letter, dated June 19,1987, is written by a William F. Harris, Jr., who is not or was not acting in an official capacity with the Board. Petitioner provides no answer or acknowledgment of the letter of June 19, 1987, by anyone in an official capacity with the Board. The letter, dated June 19, 1987, is, for purposes of evidence, a hearsay document and may not be considered by this tribunal in the absence of any legally competent evidence to provide assurance of its reliability. See N.J.A.C. 1;1-15.5(b), Hearsay evidence; residuum rule.

I agree with the Board that petitioner had the right and ample opportunity to examine the Board's records concerning his employment and any and all resolutions pertaining thereto. Petitioner's failure to do so does not require the Board to produce such records.

I CONCLUDE that petitioner has failed to meet the requirement "for extraordinary circumstances," N.J.A.C. 1:1-18.5 (c). As our Supreme Court held in the matter of the Department of Labor v. Titan Const. Co. 102 N.J. 1, 19 (1985), the Commissioner of Labor did not abuse his discretion in refusing to grant Titan's motion to reopen the hearing.

Accordingly, **I CONCLUDE,** that petitioner's motion to reopen the record is hereby **DENIED** and, therefore, the instant matter shall be determined on the hearing record before me.

ISSUES

The issues to be determined by this administrative tribunal are twofold:

(1) Whether petitioner has acquired a tenure status with the Board and, therefore, is subject to disciplinary action by the Board under the provisions of N.J.S.A. 18A:6-9 to -25?
Or,

(2) Whether petitioner's five (5) day suspension from his employment position, without pay, was appropriate for alleged inappropriate contact with a student?

ISSUE NUMBER 1.

The hearing record shows that petitioner did not request any discovery from the Board. However, the Board provided petitioner the opportunity to review his personnel files, which he did.

Petitioner, whose date of birth is January 1, 1945, applied for and was employed as a custodian by the Board in or about November 1975. Petitioner testified that he understood that he would be tenured after a 90-day probationary period. Petitioner asserted he was advised of the Board's tenure policy for employment as a custodian by a representative of the Teamsters' union. Petitioner stated that only three custodians had been hired by the Board prior to petitioner's employment.

Petitioner testified that the practice to awarding tenure after a 90-day probationary period continued until 1982. He asserted that the Teamsters' union was replaced by the New Jersey Education Association (NJEA). However, petitioner did not indicate when this change occurred.

Petitioner testified that he had the opportunity to review his personnel file. He asserted that there was nothing in his personnel file concerning his initial hire with the Board. Petitioner stated that in 1998, the Board sent him a letter stating that he would be

reemployed for the subsequent year. The letter also indicated petitioner's salary for the ensuing year. Petitioner claims that he did not receive such a notice in 1975.

Petitioner provided no documentation, by way of Board Minutes or other written material, to show that he had acquired a tenure status with the Board. The Board, however, produced Minutes of its regularly scheduled meetings held on May 8, 2001 (R-5), May 13, 1997 (R-6), May 12, 1998 (R-7), April 19, 1999 (R-8), and May 5, 1992, all of which demonstrates that it reemployed petitioner, and other custodians, to a fixed term. While certain teachers, secretaries and other employees, are listed in the Board's minutes as having achieved a tenure status, none of the minutes in evidence identify any custodians as having achieved tenure.

Mr. James Hager, currently the School Business Administrator for the Pemberton Board of Education and the former School Business Administrator for the Bridgeton Board, testified, among other things, that he was not aware that the Board had conferred a tenure status on any custodian while he was in the Board's service. Hager asserted that all the terms of custodial employment were for a fixed term of one year and that he prepared all of the employment resolutions for the Board. Hager testified with regard to the Board's Minutes (R-5 through R-9) all of which shows that custodians were employed to a fixed term of one year. Petitioner's name is attached to the list for reemployment for the 1997-98 school year on the Board's Minutes for May 13, 1997 (R-6).

ISSUE NUMBER 2.

The Board charged petitioner with inappropriate contact with a pupil on May 16, 2000. On December 1, 2000, the Board suspended petitioner from his duties, without pay, for a term of five (5) days, beginning December 1, 2000. Petitioner was ordered to report for duty on December 8, 2000.

The Board presented evidence of petitioner having engaged in prior inappropriate conduct with teaching staff members during the 1992-93 school year, which resulted in, among other things, the Board having to transfer petitioner from day time custodial duties in an elementary school to night time duty at its the high school alternative school and petitioner having to serve a ten (10) day suspension from duty, without pay.

In a draft memorandum, dated July 21, 2000, from James A. Dunkins, AAO/IPC (Affirmative Action Office) addressed to Dr. Geraldyn Foster, Superintendent of Schools, Mr. Dunkins states the following:

> Dr. Foster, after reviewing all of the record we have on Mr. Heinighaus, there seems to be a long history of alleged sexual misconduct of a very serious nature and also some misrepresentations of injuries received while he was on the job. Now I know this latter is not my area, but it tends to go along with the erratic personality defined in the enclosed psychiatric evaluation that was also placed in his record. Just to give you an update as you have requested, the incident that involved the transferring of Mr. Heminghaus, to the High School started at the
> Indian Avenue School where he was custodian. On May 14, 1993, Mrs. Rebecca Guess, Principal, received a report after completing an evaluation of Mr. Heminghaus' work at Indian Avenue, that he had been telling people he was going to get her and when he got done with her she would have to leave town. (All of these reports are enclosed.) She contacted Mr. Thomas Lane, who was then Superintendent of Schools. Mrs. Guess then started talking to other women at the Indian Avenue School who came forward and stated that Mr. Hemighaus had approached them in a sexually inappropriate way. There were about four witnesses in all. These are very serious incidents, again, they are enclosed. Mr. Heminghaus was then suspended for ten days without pay, pending an investigation, the custodial association came forward and filed a grievance on his behalf. A mediation was worked out where Mr. Heminghaus was to receive a psychiatric evaluation before any permanent decision was rendered again you will find the enclosed psychiatric report within this file. As a result of Mr. Heminghaus agreeing to get the psychiatric evaluation, there was a suggestion from the psychiatrist that he be taken out of this environment with stipulations and place in another environment where he could probably function normally.
>
> The Board's decision was given in a June 30, 1993, memo by Mr. Thomas Lane, Superintendent of Schools, which states "any further breaking of rules would result in an immediate dismissal."

> After reading through the lengthy files it is quite evident that Mr. Heminghaus has some problems as you will gather from the enclosed memos, there are even memos of letters he had written to some of the teachers, so the allegations were proven. He was told not to approach, any female employees, not to have any contact with students, or anyone, therefore, he was place on the nightshift. It seems that Mr. Henighaus, now has violated this agreement by having another incident occur where he is again suspended. . . .
> (Exhibit P-5)

Robert Stevens, employed by the Board and in charge of security, testified, among other things, that he was responsible for the security for the entire school district; to oversee 12 certified police officers and 12 security monitors.

Mr. Stevens testified that on May 16, 2000, while at his home, he received a telephone call from the Board's Alternative School Principal, at approximately 4:30 p.m., concerning an incident at the high school. Mr. Stevens testified that he retuned to the high school and was advised by the Alternative School Head Teacher that petitioner had been involved in an incident with two pupils. Mr. Stevens conducted interviews on the evening of May 16, 2000, which revealed that two pupils were shooting craps in the boy's lavatory and were caught by petitioner. Petitioner told the boys to report to the principal's office, however, instead, the boys started to go to their assigned classroom.

Mr. Stevens investigation demonstrates that petitioner grabbed one of the pupils by the neck and directed the pupil to the principal's office when the pupils refused to go to the principal's office. Mr. Stevens interviewed Mr. Mark Smith, Security Monitor on duty at the time, who asserted that petitioner had observed two pupils in the lavatory. Stevens testified that he and Smith observed redness around the neck of one of the pupils. The pupil was 18 years of age at the time of the incident. Due to his age, Stevens advised the pupil that he could bring a charge in court against petitioner because the pupil was an adult.

Mr. Stevens testified that he did not interview petitioner. Petitioner did not have a union representative at the time Stevens asked petitioner for a statement and, therefore, petitioner would not discuss the incident with Stevens.

On cross-examination, Stevens asserted that the adult pupil admitted he was gambling in the lavatory. The adult pupil further admitted to Stevens that petitioner had instructed the pupil to go to the principal's office, however, the pupil went to his assigned classroom instead.

The adult pupil asserted to Stevens that petitioner had grabbed the pupil by the shoulder and neck to turn the pupil around to direct the pupil to the principal's office. While the incident occurred at approximately 3:50 p.m., Stevens testified that he observed a red mark on the adult pupil's neck at 5:00 p.m.

The juvenile pupil admitted to Stevens that petitioner had caught the two pupils gambling in the lavatory. The juvenile pupil stated to Stevens that petitioner grabbed the adult pupil by the neck.

James H. Hager, the Bridgeton Board's former School Business Administrator, testified, among other things, that at the time of the alleged incident concerning petitioner, he was in charge of the custodial staff for the Board. Mr. Vincent Smith was the head of all of the custodians and supervised two supervisors of custodians.

Mr. Hager testified that he became aware of the incident involving petitioner and the two pupils on May 17, 2000. Mr. Hager was advised of the alleged incident involving petitioner and the two pupils through a report by Mr. Smith and petitioner. Mr. Hager testified that he was in receipt of a memorandum and an Incident Report concerning the incident. Subsequently, Mr. Smith reported to Hager that Smith had met with petitioner.

Mr. Hager testified that he was concerned that petitioner had disciplined pupils in the school. Hager then made reference to the incident, which occurred in 1993 and which

caused petitioner to be transferred to the Bridgeton High School. Thereafter, Hager scheduled a meeting with himself, petitioner, Mr. Smith and Mr. Harris, the president of the union representing custodians. Petitioner attended the meeting where the events of May 16, 2000, were discussed. Hager testified that the meeting was to gather the facts of the allegations and was not adversarial in nature. Hager asserted that petitioner indicated that it was not true that he placed his hands on a pupil's neck.

Mr. Hager testified that petitioner was subsequently transferred from the high school and assigned to a different school. In light of the 1993 incident, Hager suspended petitioner with pay and ordered that petitioner submit to a psychological evaluation.

Mr. Hager concluded that a charge of a minor disciplinary action was appropriate in this instance. He asserted that a suspension of five days without pay and the authority to transfer petitioner was in accordance with the Agreement between the Board and the Custodial Association (Agreement) (R-1) and the Board's Custodial and Maintenance Manual (Manual) (R-2). As a consequence, Hager scheduled a meeting on November 22, 2000, with petitioner, petitioner's attorney, and others with knowledge of the May 16, 2000, incident involving petitioner and the two pupils. It was Hager's intention to discuss the whole disciplinary process including the incident of May 16, 2000, and the prior incident of 1993. Prior to opening the discussion of the incident, petitioner and his attorney requested that they be permitted to leave the meeting room. Hager testified that when petitioner and his attorney returned to the meeting room, they stated that there was nothing more to discuss and left. Hager asserted that he was disappointed that petitioner and his then attorney left the meeting without discussing the alleged incident.

Mr. Hager testified that the discipline of petitioner in this instance was based upon petitioner having placed his hands on a pupil to which, Hager asserted, petitioner had admitted. Hager asserted that such conduct was inappropriate at any time. He continued to state that there were professionals available to take care of the pupils and that petitioner's actions were inappropriate.

Petitioner testified on his own behalf asserting, among other things, that on May 16, 2000, he worked the second shift at the Bridgeton High School from 3:30 p.m. until midnight. He described his duties which included, among other things, the cleaning of rooms in lower C-hall and J-hall. Petitioner asserted that he checked the J-hall boys lavatory and discovered two boys shooting craps. Petitioner admits that he placed his hand on one of the boys arm and, petitioner testified, the boy brushed petitioner's hand aside.

Petitioner testified that he advised the Security Monitor of his observation of the two boys and what the boys had done. Petitioner testified that the one boy told the Security Monitor that petitioner had grabbed the boy by the neck.

Petitioner asserted that Mr. Hager had never advised petitioner that petitioner's action was inappropriate. Petitioner admitted that he was in receipt of a letter from the Superintendent of Schools, dated July 19, 2000, which states, in part, as follows:

> It has come to my attention that you have allegedly made inappropriate conduct with a student and may be unfit for duty as a Bridgeton Public School employee. This action constitutes conduct unbecoming, which is sufficient to warrant your suspension as a custodian in the Bridgeton School District.
>
> Your are hereby suspended with pay from all duties and assignment as an employee of Bridgeton Public Schools pending the outcome of the investigation surrounding this allegation. Due to the serious nature of the allegation, this suspension shall be effect immediately in accordance with N.J.A.C. (sic) 18A:25-6.
>
> During the period of suspension, you will not be able to participate in district activities, and you are not to return to the school, whether during working hours or after, unless prior arrangements have been made with Mr. Vince Smith, Building & Coordinator Supervisor. Your contact during this period should be with or through the Human Resource Administrator. If you have any questions, please contact Mr. Terrell Everett's office. It may be required that you check with him periodically by telephone. If you have not already done so, you should arrange to obtain your personal belongings and turn over district property currently in your possession. This will be scheduled after hours.

> If you have any questions concerning your status, your responsibilities, or the District's expectations during this period, please contact Mr. Terrell Everett, Human Resource Administrator, by July 21, 2000 for clarification. He can be reached at 455-8030 ext. 1400. (P-6)

Petitioner asserted that he was presented with memorandum addressed to him from Mr. Hager, dated November 27, 2000, and was asked to sign the document. The memorandum to petitioner from Mr. Hager, which concerns petitioner's return to work following his suspension without pay, states; as follows:

> I have completed my review and you are directed to return to work on Monday, December 4, 2000. Your return to work is contingent upon your adherence to the following conditions:
>
> > You complete a five-day suspension from work, without pay, starting November 27, 2000 returning December 1, 2000.
> >
> > Your permanent work assignment will be Bridgeton Middle School, afternoon shift. During the times when the afternoon shift does no work you will be assigned to the stadium.
> >
> > Another instance of inappropriate physical contact with a pupil will result in termination.
> >
> > Any other instance of inappropriate contact, including an incident similar to the one in 1993 will result in termination (see attached June 30, 1993 letter).
> > (P-7)

Petitioner testified that he was not afforded an opportunity to respond to P-7 and that was the reason he and his attorney left the meeting scheduled by Mr. Hager.

Petitioner admits that he was in receipt of a letter, dated December 1, 2000, from Mr. Hager, which states, as follows:

> I am disappointed that you and your attorney refused to discuss your suspension and return to work at our meeting.
>
> As of today December 1, 2000 you are suspended from work without pay for five days for the incident involving physical contact with a student on May 16, 2000. You are to report to work on

> December 8, 2000 at Mr. Smith's office. Mr. Vince Smith will give you your work assignment at that time.
>
> Any other incident of inappropriate physical contact between yourself and a pupil or another instance of inappropriate contact with staff, similar to the one in 1993 will result in a recommendation to terminate your employment (see attached June 30, 1993 letter). . . . . .
> (P-4)

Petitioner testified that he did not know what "inappropriate contact" meant. He asserted that Hager had never advised him that his conduct was inappropriate. Petitioner further contended that he had not been charged with any offense.

On cross-examination, petitioner conceded that his job description did not provide for him to discipline pupils. Petitioner admitted that his job description does not authorize him to place his hands on any pupil for any reason. Petitioner admitted further that he did not file a grievance concerning his five-day suspension, although the Agreement contains such a provision. He also admitted that the Manual provided for the discipline of custodians who strike a pupil, except in self-defense or defense of another (R-2, p.19).

FINDINGS OF FACT

Based upon the foregoing testimony and documentary evidence adduced at the hearing and having given fair weight thereto, and having assessed the credibility of the witnesses, **I FIND** the following **FACTS.**

With respect to Issue Number 1, petitioner asserts that he has acquired a tenure status with the Board in his position as custodian. Petitioner was unable to produce any evidence that the Board had conferred tenure upon any custodian in its employ. Too the contrary, the Board produced evidence that custodians in its employ are reemployed for a fixed term of one year each.

With respect to Issue Number 2, the Board has shown that its action to suspend petitioner for a term of five days without pay for petitioner's inappropriate physical

contact with a pupil was in accordance with the Agreement and Manual. The Board's evidence shows, by a preponderance of the credible evidence, that petitioner did, in fact, have inappropriate physical contact with a pupil in the Board's school.

CONCLUSIONS

ISSUE NUMBER 1.

In the matter of Frank Giandomenico v. Board of Education of the Township of Winslow, Camden County, 1975 S.L.D. 258, aff'd App. Div. 1996, the Commissioner observed, among other things, that:

> Petitioner's claim to a tenure status is contrary to a long series of decisions by the Commissioner, the State Board of Education, and the New Jersey Courts. Without exception, the decisions hold that tenure for janitors, unlike professional employees, is a matter of personal privilege which may be waived by the acceptance of employment for a definite term. Janitors my be employed without term, in which case they may not be dismissed without a showing of good cause. If, however, as in this instance, a janitor is appointed for a specific term, and he accepts the employment on that basis, no rights survive the expiration of the fixed term. (Citations omitted) Id. 259

The Commissioner continued to state, at 260, that:

> In view of the fact that petitioner was appointed in each instance as a janitor by separate actions of the Board for a specific period of time, the last four appointments being for one school respectively, the Commission finds that by accepting such employment for a specific period of time petitioner waived any rights to the acquisition of tenure. . . . . .

I CONCLUDE that petitioner has failed to demonstrate, by a preponderance of the credible evidence, that he had acquired a tenure status with the Board. Conversely, the Board has clearly shown that it has offered, and petitioner has accepted, one year contracts for his employment as a custodian. **I CONCLUDE,** therefore, that petitioner's claim of a tenure status with the Board is hereby **DISMISSED.**

ISSUE NUMBER 2

The evidence shows that petitioner was charged with a minor offense concerning his conduct with the adult pupil on May 16, 2000. Pursuant to the Agreement, Article XIV, petitioner was required to file a grievance subsequent to his five-day suspension without pay. Petitioner failed to do so. In the matter of LeRose v. Lacey Township Board of Education, 95 N.J.A.R.2d (EDU) 548, the State Board of Education overturned the Commissioner and upheld the determination to withhold a school custodian's salary increase. In its determination, the State Board noted that the petitioner had the statutory provisions found at N.J.S.A. 34:13A-26 and –27 available to him and stated, parenthetically that:

> all disputes regarding the withholding of increments of employees of boards of education for disciplinary reasons, excluding actions taken to withhold increments of teaching staff member for teaching performance, are to be resolved through the grievance procedure. Id. at 557.

Similarly, the statute, at N.J.S.A. 34:13A-24 a. also provides that:

> Notwithstanding any other law to the contrary, and if negotiated with the majority representative of the employees in the appropriate collective bargaining unit, an employer shall have the authority to impose minor discipline on employees. Nothing contained herein shall limit the authority of the employer to impose, in the absence of a negotiated agreement regarding minor discipline, any disciplinary sanction which is authorized and not prohibited by law.

I CONCLUDE that petitioner's remedy lies within the confines of the negotiated Agreement and not before the Commissioner of Education. In any event, **I CONCLUDE** that the Board's proofs demonstrate that the penalty of a five-day suspension, without pay, was a minor disciplinary action and should be sustained.

ORDER

Accordingly, it is **ORDERED** petitioner's claim to have acquired a tenure status with the Board is hereby **DISMISSED.** It is **FURTHER ORDERED** that the five day suspension without pay imposed upon petitioner by the Board is hereby **SUSTAINED.** It is **ORDERED** that the herein Petition of Appeal be and is hereby **DISMISSED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

24 January 2002
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

1/28/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 29 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/lam

WITNESSES

For Petitioner

Terrell Everett

George Hemighaus

For Respondent

Robert L Stevens

James H. Hager

DOCUMENTS IN EVIDENCE

For Petitioner

P-4 Letter, dated December 1, 2000, to Hemighaus from Hager with attachment

P-5 Draft memorandum to Dr. Foster from James A. Dunkins re: Hemighaus

P-6 Letter, dated July 19, 2000 to Hemighaus from Foster

P-7 Memorandum, dated November 27, 2000, to Hemighaus from Hager

For Respondent:

R-1 Bridgeton Public Schools, Agreement between Bridgeton Board of Education and Bridgeton Custodial Association, for School years 2000-2003.

R-2 Bridgeton Board of Education Custodial and Maintenance Procedural Manual

R-3 Bridgeton Public Schools, Referral Notice

R-4 Interoffice Memo, dated June 1, 2000 to Hager re: Student/Custodian Incident

R-5 Board of Education Minutes, May 8, 2001

R-6 Board of Education Minutes, May 13, 1997

R-7 Board of Education Minutes, May 12, 1998

R-8 Board of Education Minutes, April 19, 1999

R-9 Board of Education Minutes, May 5, 1992

OAL DKT. NO. EDU 2397-01
AGENCY DKT. NO. 54-2/01

GEORGE HEMIGHAUS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ that petitioner did not acquire tenure and, therefore, the appeal of his unpaid suspension falls outside the jurisdiction of the Commissioner. However, as the ALJ noted, even assuming, *arguendo*, that petitioner had been found tenured, his suspension without pay was a minor disciplinary action lawfully imposed by the Board.

Accordingly, the Commissioner affirms the Initial Decision for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/14/02

Date of Mailing: 3/14/02

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

105-02

AMY BERMAN-DALCERO,

PETITIONER,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

March 18, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10223-00
AGENCY DKT. NO. 421-11/00

AMY BERMAN-DALCERO,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

Charles I. Auffant, Esq., for petitioner

Joseph Verga, Esq., Associate Counsel, for respondent
(Hope R. Blackburn, General Counsel, attorney)

Record Closed: January 28, 2002 Decided: January 29, 2002

BEFORE **RICHARD McGILL,** ALJ:

Amy Berman-Dalcero filed a petition with the Commissioner of Education to contest the determination by the State-Operated School District of the City of Newark to withhold her increment for the 2000-2001 school year. The matter was transmitted to the Office of Administrative Law on December 21, 2000, for determination as a contested case.

Prior to hearing, the parties agreed to an amicable resolution of the matter and submitted a written Settlement Agreement. Having reviewed the record and the settlement terms, I **FIND:**

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Jan. 29, 2002
DATE

RICHARD MCGILL, ALJ

Receipt Acknowledged:

2-1-02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 4 2002
DATE

OFFICE OF ADMINISTRATIVE LAW

cml

NEWARK PUBLIC SCHOOL DISTRICT
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102
(973) 733-8358
Attorney for Respondent

AMY BERMAN, Petitioner, vs. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, Respondent.	:	OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. EDUOR-10223-00N SETTLEMENT AGREEMENT

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement that fully disposes of all issues in controversy between Petitioner and Respondent:

1. Petitioner withdraws, with prejudice, her appeal and request for a hearing, filed under OAL Docket No. EDUOR 10223-00N.

2. The withholding of Petitioner's employment and adjustment increments for the 2000-2001 school year will remain in effect until the conclusion of the 2001-2002 school year. If Petitioner earns an "Outstanding" or "Satisfactory" rating on her Annual Evaluation at the conclusion of the 2001-2002 school year, Respondent agrees to restore Petitioner's previously withheld employment and adjustment increments for the 2000-2001 school year, and to place Petitioner on the appropriate step or degree level of the salary guide prior to the commencement of the 2002-2003 school year. The withheld money from the 2000-2001 increment withholding will not be returned to Petitioner.

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

4. This Agreement will only become effective upon the approval of the State District Superintendent. Any disapproval by the Superintendent shall not interfere with the rights of either party to pursue the matter further.

5. Except as noted above, Petitioner waives all claims of any nature against Respondent with regard to this matter, including fees, or other monetary relief.

6. By entering this Stipulation, each party releases and discharges the other with respect to all claims or rights that either party may have against the other. This includes all claims, including those of which either party is not aware and those not mentioned herein. The releases by each party apply to all claims resulting from anything that has happened up to now. It specifically includes, without limitation, all claims that Petitioner may have respecting tenure, discrimination on any basis, rights under any collective bargaining agreement, disability payments, sick leave, salary or any other matter pertaining to her employment, with the exception of any claims pursuant to Workers' Compensation.

Dated: 1/12/02

AMY BERMAN, Petitioner

Dated: 1/12/02

CHARLES AUFFANT
Attorney for Petitioner

Dated: _____

MARION BOLDEN
State District Superintendent

Dated: 1/18/02

JOSEPH VERGA
Associate Counsel
Newark Public Schools

meG. 11

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
JAN 28 1 35 PM '02

The Newark Public Schools
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102-3091
Phone: 973-733-7139
Fax: 973-733-8771

Marion A. Bolden
State District Superintendent

Hope R. Blackburn, Esq.
General Counsel

Arsen Zartarian, Esq.
Joseph Verga, Esq.
Associate Counsel

William L. Librera
Acting Commissioner of Education

January 24, 2002

Hon. Kenneth R. Springer, ALJ
Office of Administrative Law
185 Washington Street
Newark, NJ 07102-3011

Re: Amy Berman v. State-operated School District of Newark
OAL Docket No. EDUOR-10223-00N

Dear Judge Springer:

Enclosed please find an original Stipulation of Settlement in the above-referenced matter that has been duly executed by both parties.

Respectfully submitted,

ARSEN ZARTARIAN

AZ:sew
Enclosure

c: Charles Auffant, Esq. (w/encl.)

3C

OAL DKT. NO. EDU 10223-00
AGENCY DKT. NO. 421-11/00

AMY BERMAN-DALCERO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Settlement Agreement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

Date of Decision: 3/18/02

Date of Mailing: 3/18/02

106-02

C.E.McC., on behalf of minor children, J.Q.S. AND J.Z.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 18, 2002

OAL DKT. NO. EDU 8414-99
AGENCY DKT. NO. 268-9/99

C.E.McC., on behalf of minor children, J.Q.S. AND J.Z.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING ASSISTANT COMMISSIONER

Date of Decision: 1/31/02

Date of Mailing: 3/18/02

107-02

K.S., on behalf of minor child, J.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY ET AL.,	:	
RESPONDENTS.	:	
	:	

March 18, 2002

OAL DKT. NO. EDU 3500-98
AGENCY DKT. NO.46-2/98

K.S., on behalf of minor child, J.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY ET AL.,	:	
RESPONDENTS.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

Maria Nunzetta
ACTING ASSISTANT COMMISSIONER

Date of Decision: 1/31/02

Date of Mailing: 3/18/02

108-02

KAREN JOHNSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE REGIONAL SCHOOL DISTRICT, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 18, 2002

OAL DKT. NO. EDU 7336-98
AGENCY DKT. NO. 213-6/98

KAREN JOHNSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE REGIONAL SCHOOL DISTRICT, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING ASSISTANT COMMISSIONER

Date of Decision: 1/31/02

Date of Mailing: 3/18/02

109-02

D.T.G., on behalf of Minor Son, A.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 18, 2002

OAL DKT. NO. EDU 5338-99
AGENCY DKT. NO. 59-3/99

D.T.G., on behalf of Minor Son, A.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING ASSISTANT COMMISSIONER

Date of Decision: 1/31/02

Date of Mailing: 3/18/02

110-02

110-02

CHARLES YARNALL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 31, 2002

OAL DKT. NO. EDU 954-97
AGENCY DKT. NO. 33-1/97

CHARLES YARNALL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

Maria Rivera

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 1/31/02

Date of Mailing: 3/19/02

111-02

GREGORY NICHOLSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 31, 2002

OAL DKT. NO. EDU 8555-00
AGENCY DKT. NO. 303-8/00

GREGORY NICHOLSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

Maria Rivera

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 1/31/02

Date of Mailing: 3/19/02

112-02

112-02

CHARLES GUARDINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

January 31, 2002

OAL DKT. NO. EDU 9520-00
AGENCY DKT. NO. 359-9/00

CHARLES GUARDINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 1/31/02

Date of Mailing: 3/19/02

113-02

113-02

CAROLYN W. GUNN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF PEMBERTON TOWNSHIP, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 31, 2002

OAL DKT. NO. EDU 06958-00
AGENCY DKT. NO. 227-6/00

CAROLYN W. GUNN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF PEMBERTON TOWNSHIP, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 1/31/02

Date of Mailing: 3/19/02

114-02

PATRICIA L. PASIERB,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKFORD, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 31, 2002

OAL DKT. NO. EDU 9214-98
AGENCY DKT. NO. 380-8/98

PATRICIA L. PASIERB,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKFORD, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 1/31/02

Date of Mailing: 3/19/02

115-02

VALERIE FULLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 31, 2002

OAL DKT. NO. EDU 3802-99
AGENCY DKT. NO. 399-9/98

VALERIE FULLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

Maria Kuncatto

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 1/31/02

Date of Mailing: 3/19/02

116-02

116-02

MARY L. CLARK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 21, 2002

OAL DKT. NO. EDU 09337-00
AGENCY DKT. NO. 348-10/00

MARY L. CLARK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 3/21/02

Date of Mailing: 3/21/02

117-02

PAUL CARUSO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 21, 2002

OAL DKT. NO. EDU 10337-98
AGENCY DKT. NO. 448-9/98

PAUL CARUSO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal* transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 3/21/02

Date of Mailing: 3/21/02

* It is noted that the record includes a copy of a Stipulation of Settlement, signed by the parties, which they entered into to amicably resolve this matter and submitted to the Administrative Law Judge. Since the matter was returned to the Commissioner as a *withdrawal* by the Office of Administrative Law, the instant decision does not in any way signify approval of the settlement agreement by the Commissioner.

118-02

BOARD OF DIRECTORS OF THE SUSSEX COUNTY CHARTER SCHOOL FOR TECHNOLOGY, SUSSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTAGUE, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 21, 2002

OAL DKT. NO. EDU 5312-00
AGENCY DKT. NO. 105-3/00

BOARD OF DIRECTORS OF THE SUSSEX COUNTY CHARTER SCHOOL FOR TECHNOLOGY, SUSSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTAGUE, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 3/21/02

Date of Mailing: 3/21/02

120-02

JAMES HAGGENMILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 21, 2002

OAL DKT. NO. EDU 10347-00
AGENCY DKT. NO. 285-9/99

JAMES HAGGENMILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 3/21/02

Date of Mailing: 3/21/02

104-02

104-02

Y.F., on behalf of minor child, C.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

March 15, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5175-01
AGENCY DKT. NO. 37-2/01

Y.F., o/b/o C.A.,,

Petitioner,
v.

BOARD OF EDUCATION OF WEST ORANGE,

Respondent.

Y.F., petitioner, *pro se*

Stephen J. Christiano, Esq., for respondent

Record Closed: January 17, 2002 Decided: January 25 , 2002

BEFORE **DIANA C. SUKOVICH,** ALJ:

On February 21, 2001, Y.F. (petitioner) filed an appeal with the State Department of Education (DOE) of a determination by the West Orange Board of Education (respondent) that petitioner's niece, C.A., was not entitled to a free public education in the district because of residency considerations. Respondent filed an answer, and the DOE transmitted the matter to the Office of Administrative Law on June 7, 2001 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to –13.

A hearing was scheduled for November 20, 2001. The parties appeared on that date, conferred, and reached a resolution of the matter. The terms of the settlement were placed on the record, and petitioner testified that she understood the terms and entered into them voluntarily. Respondent's counsel agreed to draft a stipulation of settlement for execution by the parties.

Petitioner subsequently sent a letter to the DOE, dated December 15, 2001, expressing concerns regarding the agreement. Respondent's counsel forwarded a copy of petitioner's letter to this judge by letter dated December 27, 2001. By letter dated January 3, 2002 to petitioner, with a copy to respondent's counsel, this judge advised that although it was my understanding that a settlement had been reached on November 20, 2001, another hearing date, so that petitioner could proceed to a full hearing, would be scheduled, subject to consideration of any objection filed by respondent. Petitioner was requested to advise, within five days, whether she requested that another hearing date be scheduled or, alternatively, intended to adhere to the settlement terms which were placed on the record on November 20. Petitioner did not file a reply to the judge's letter. However, on January 11, 2002, respondent's counsel advised that he had received an executed settlement agreement from petitioner and that such would be considered by respondent at a meeting on January 14, 2002. A stipulation of settlement, executed by both parties, was subsequently filed on January 17, 2002, on which date the record was closed. Attached herewith is a copy of the stipulation.

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

January 15, 2002
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

1/29/02
DATE

Debbie Contaratis
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB - 1 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

OAL DKT. NO. EDU 5175-01
AGENCY DKT. NO. 37-2/01

Y.F., on behalf of minor child, C.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/15/02

Date of Mailing: 3/15/02

122-02

S.R.R., on his own behalf and on behalf of minor child, S.R.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY, WILLIAM L. LIBRERA, COMMISSIONER OF EDUCATION, AND NEW JERSEY STATE BOARD OF EDUCATION,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

March 22, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON MOTION FOR EMERGENT RELIEF
OAL DKT. NO. EDU 1914-02
AGENCY DKT. NO. 35-2/02

S.R.R. ON HIS OWN BEHALF AND ON BEHALF OF MINOR CHILD, S.R.,

Petitioner,

v.

ROSELLE BOROUGH BOARD OF EDUCATION, WILLIAM L. LIBRERA, COMMISSIONER OF EDUCATION OF NEW JERSEY, AND NEW JERSEY STATE BOARD OF EDUCATION,

Respondents.

David R. Giles, Esq., for petitioner

Allan C. Roth, Esq., for Roselle Borough Board of Education (Ruderman & Glickman, attorneys)

No appearance by or for William L. Librera, Commissioner of Education, or the State Board of Education in regard to the motion for emergent relief

BEFORE **RICHARD McGILL**, ALJ:

S.R.R. filed a petition of appeal with the Commissioner of Education seeking relief in regard to the expulsion of his fourteen-year-old son, S.R., by the Roselle Borough Board of Education (respondent). S.R.R. also filed a request for a due process hearing with the Office of Special Education Programs. In conjunction with both matters, S.R.R. (petitioner) filed a single motion for emergent relief.

The petition of appeal was received by the Bureau of Controversies and Disputes on February 14, 2002, and the request for a due process hearing was filed with the Office of Special Education Programs on February 19, 2002. The motion for emergent relief was also filed on February 19, 2002, accompanied by a request for consolidation of the two matters mainly because they involve the same parties and are based on the same underlying facts. The motion requests various types of emergent relief falling within the areas of both regular and special education.

The petition of appeal and the request for a due process hearing were transmitted separately to the Office of Administrative Law on February 28, 2002, for determination as contested cases. Oral argument in regard to the motion for emergent relief was conducted on March 7, 2002. The matters were consolidated for hearing only.

As set forth in *N.J.A.C.* 6A:3-1.6(b), an application for emergent relief will be granted only if it meets the following four requirements:

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

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

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

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

The first requirement is that a denial of the requested relief will cause irreparable harm. Several of the forms of relief requested by petitioner fall within the area of regular education. First, petitioner requests a stay of the expulsion and reinstatement of S.R. to his regular high school program. Alternatively, petitioner requests immediate placement of S.R. in an alternative high school program. Second, petitioner requests actions to prevent bullying of S.R. by peers. Third, petitioner requests an order requiring respondent to provide a copy of its policies and procedures related to student conduct and discipline and a tape recording of respondent's meeting at which it decided to expel S.R.

In regard to the first request, S.R. has been out of his regular high school since October 2, 2001, and he has had no educational program since November 12, 2001. It is evident that a fourteen-year-old child needs an appropriate educational program for proper personal development. It follows that expulsion with no alternative program is likely to cause irreparable harm to S.R. The second request is for actions to prevent bullying of S.R. by his peers. However, there is conflicting evidence as to whether bullying was a cause of the incidents in question. Under the circumstances, petitioner has not shown that S.R. would suffer irreparable harm without this type of relief. The third request involves provision of copies of documents and a tape recording. These items can be obtained during discovery for the plenary hearing in this matter. Therefore, there will be no irreparable harm if these items are not provided on an emergent basis.

The second consideration is whether the legal right underlying petitioner's claim is settled. Certainly, it is settled that petitioner and S.R. have the right to due process of law under the United States Constitution and that S.R. has a right to a thorough and efficient education under the New Jersey Constitution. Likewise, it is undisputed that a board of education cannot engage in arbitrary, capricious or unreasonable action.

The third consideration is whether petitioner has a likelihood of prevailing on the merits of the underlying claim. The petition of appeal sets forth eight counts alleging generally that there were various procedural defects, that the charges should not be sustained and that the disciplinary action of an expulsion was excessive and unnecessary.

The underlying series of incidents began a few days before October 2, 2001. According to petitioner, several boys were bullying S.R., who took steps to stop them. In contrast, respondent relies on evidence to the effect that S.R. felt that one of the boys owed him money and that S.R. threatened the student to obtain payment. Irrespective of S.R.'s motivation, three boys reported to a security officer that S.R. was going to shoot them. At the request of the security officer, S.R. opened his book bag. Therein, the security officer found an objection that appeared to be a gun. The police later determined that the object was an inoperable pellet gun. These circumstances indicate that S.R. did not intend to shoot the other boys. However, he did

intend to place them if fear of being shot. In addition, S.R. sent an e-mail which could be read as threatening to kill another student. Prior to the incidents in question, S.R. was a very good student with no disciplinary record.

Respondent initially suspended S.R. on or about October 2, 2001, and by letter dated October 9, 2001, respondent provided notice of two charges against S.R. After a hearing on October 19, 2001, respondent sent a letter dated November 16, 2001, advising that S.R. was expelled from school.

It has long been recognized that "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." *Scher v. West Orange Bd. of Educ.*, 1968 *S.L.D.* 92, 96. Before taking the dire step of expulsion, a board of education should make certain that less draconian courses of action were considered and found to be inappropriate under the particular circumstances of the case. *Id.*, at 97; *C.S. v. Township of Piscataway*, 97 *N.J.A.R.* 2d (EDU) 573, 577.

Here, various factors weigh in S.R.'s favor. He was a very good student, and he had no prior disciplinary problems. Although the incident was serious, it is evident that S.R. could not have shot the other students with an inoperable pellet gun. In addition, S.R. was only fourteen years old at the time of the incident. In view of these mitigating circumstances, it appears that S.R.'s situation does not warrant the drastic action of an expulsion terminating all of his rights to an education. It follows that petitioner has demonstrated a likelihood of prevailing on the merits at least to the extent that an expulsion terminating S.R.'s right to an education was an excessive and unnecessary step. On the other hand, petitioner has not demonstrated a likelihood of prevailing on the merits to the extent that the charges against S.R. would be dismissed and no disciplinary action would be imposed on him.

In regard to the equities and interests of the parties, it is evident that S.R. has brought this situation on himself through his own misconduct and that respondent has to be concerned about the safety of the students and others in the schools. On the other hand, petitioner and S.R. have a strong interest that S.R. does not suffer the consequences of not having an education past the age of fourteen. Balancing these equities and interests, I **CONCLUDE** that S.R. should be promptly

placed in an appropriate educational program such as home instruction pending final disposition of this matter.

Accordingly, it is **ORDERED** that:

1. Respondent promptly place S.R. in an appropriate educational program pending final disposition of this matter.

2. All other requested relief in regard to regular education is denied

This order on application for emergency relief may be adopted, modified or rejected by the Commissioner of Education, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of Education does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

Mar. 13, 2002
DATE

RICHARD McGILL, ALJ

S.R.R., on his own behalf and on behalf of minor child, S.R.,	
PETITIONER,	
V.	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY, WILLIAM L. LIBRERA, COMMISSIONER OF EDUCATION, AND NEW JERSEY STATE BOARD OF EDUCATION,	DECISION ON MOTION
RESPONDENTS.	

The record of this emergent matter and the recommend decision of the Office of Administrative Law (OAL) have been reviewed.

Upon his independent and careful review of the record, the Commissioner determines to affirm the Administrative Law Judge's (ALJ) grant of emergent relief in this matter, as he concurs with the ALJ, for the reasons clearly stated in the Initial Decision, that petitioner has satisfied the requisite standards for the granting of such relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the recommended decision on motion of the OAL is affirmed, and this matter shall proceed at the OAL for a hearing on its merits. The Board is hereby directed to

place S.R. in an appropriate educational program pending final disposition of this matter.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/22/02

Date of Mailing: 3/22/02

* This decision, as the Commissioner's final determination on motion may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:2-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

96-02

D.M., on behalf of minor, B.N.,

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, B.N.'s aunt, challenged the Board's determination to remove B.N. from its schools because her mother was not domiciled in the District and she did not meet the criteria for admitting an "affidavit student."

The ALJ concluded that B.N.'s mother was not domiciled in the District, and that B.N. did not meet the "affidavit student" criteria and, thus, was not entitled to attend the Board's schools. The ALJ ordered reimbursement of tuition by petitioner.

The Commissioner reversed the ALJ, determining that the ALJ improperly analyzed the matter under the affidavit student provision of the statute, rather than the domicile provisions. Because B.N.'s aunt obtained legal guardianship of her by court order, and is domiciled in the District, B.N. is legally entitled to a free education in the Board's District.

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

March 13, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6113-01

AGENCY REF. NO. 252-7/00

D.M., o/b/o B.N.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING,

Respondent.

D.M., petitioner, *pro se*

Jeffrey F. Belz, Esq., for respondent

Record Closed: December 4, 2001

Dated: January 18, 2002

BEFORE **ANTHONY T. BRUNO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Respondent ("Ewing BOE") determined that B.N., a student in the Ewing Township School District, did not reside in Ewing Township with her aunt, petitioner, D.M., but lived with her mother, L.N., in the City of Trenton (Exhibit R-2). On July 18, 2000 D.M. appealed that determination to the Commissioner of Education.

On August 23, 2000 D.M.'s appeal was transmitted to the Office of Administrative Law for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13 and assigned the docket number EDU 6448-00. The matter was scheduled for expedited action with September 19, 2000 fixed as the hearing date. Because of a request by D.M. for adjournment of the hearing date the matter was listed for hearing on January 25, 2001. The hearing commenced on that day, but after D.M. completed her case and a Ewing BOE witness was testifying D.M. became ill. The hearing was immediately stopped. Subsequently the hearing was scheduled for February 22 but adjourned because of a death in the family of Ewing BOE's attorney. The hearing was next scheduled for April 10, 2001. Because D.M. did not appear for the hearing and did not contact the Office of Administrative Law to advise of her unavailability a "failure to appear" was entered and the matter returned to the Commissioner of Education.

On August 27, 2001 D.M. petitioned the Commissioner for a reconsideration of the dismissal of her appeal. In the interest of fundamental fairness the Commissioner returned the matter to the Office of Administrative Law for further proceedings. The haring was reconvened on November 21, 2001 with the continuation of all testimony and exhibits presented at the earlier hearing.

Witnesses who testified and exhibits admitted into evidence are listed in the appendix. At the conclusion of the hearing the parties were granted leave to submit post-hearing memoranda. The submittals of both parties were received on December 4, 2001, and that date constitutes the closing date of the hearing record.

FACTUAL CONSIDERATIONS

D.M. points out in her summation, as she testified, that her sister L.N. gave D.M. custody of B.N. and because L.N. was unstable, struggling to overcome drug abuse and having very difficult financial problems. L.N. consented to D.M.'s petition to Superior Court for an Order of Temporary Custody (Exhibit J-1) because L.N. agreed that it was in B.N.'s best interest to be in the custody of D. M. unless the Order of Temporary Custody granted "liberal and reasonable" visitation of L. N. with B.N. "as agreed" between L. N. and D. M.

D.M testified that she is responsible for the care of B.N. because L.N. is not capable of providing that care. B.N. visits not only her mother, but also periodically stays with her grandmother and another aunt, all of whom live in Trenton. L.N. maintains a small bedroom in her two-bedroom apartment for B.N., but B.N. and six of D. M.'s grandchildren live with D. M. If D.M. has to work late and B.N. has been visiting with L.N., B.N. will sleep overnight at her mother's apartment. On those occasions B.N. will bring her clothes for the next day with her.

Investigator Pete Manetto never observed B.N. beginning her day at D. M.'s home. Manetto's report of his surveillance of L.N.'s home at the 131 G. Street, Trenton and in D. M.'s home at 90 K. Avenue, Ewing (Exhibit R-3) revealed B.N. leaving L.N.'s home each of the mornings of the surveillance and, when Manetto could complete the surveillance, arrive at D.M.'s home before going to school. Manetto 's observations began in March 2000 and was resumed randomly thereafter in July, August, September, October, and November. Manetto's observations were made over 25 separate school and non-school days.

David Mikalauskas, Attendance and Residency Officer for Ewing BOE, testified concerning the Host Family Affidavit (Exhibit R-4) for B.N. Mikalauskas testified that B.N. answered all of the questions in the affidavit before L.N. signed it. The affidavit was given to Ewing BOE as the result of the residency complaint received in Spring of 1999. Another residency complaint was received in early 2000 causing B.N.'s case to be reopened. Mikalauskas's inquiry of the post office returned the advice that L.N. did not live at 90 K. Avenue, Ewing, and that her mail was delivered to 232 N.W. Street, Trenton (Exhibit R-5).

Disenrollment action ensued (Exhibits R-6 and R-7) and concluded with the Ewing BOE Resolution (Exhibit R-8) finding B.N.'s disenrolled from the Ewing Township School District. Mikalauskas's testimony concluded with the explanation of the Ewing BOE's charge of $7837 for B.N.'s attendance (Exhibits R-11 and R-14).

ANALYSIS AND CONCLUSION

Ewing BOE brought disenrollment proceedings against B.N. pursuant to *N.J.S.A.* 18A:38-16)2):

> If the superintendent or administrative principle of the school district finds that the parent or guardian of the child who is attending the schools of the district is not domiciled within the school district and supported by him gratis as if the child was the person's own child...the superintendent or administrative principle may apply to the board of education for removal of the child.

D.M. responds with the allegation that she is the court ordered provider of the care and custody of B.N. (Exhibit J-1), that B.N. visits her mother whenever it is reasonable and convenient as specified in the said Order of Temporary Custody, and that because L.N. cannot and has not provided for B.N.'s keeping support, D. M. has to provide the same gratis.

The statute further states, "The resident...shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed...". *N.J.S.A.* 18A:38-1b(1). I **CONCLUDE** D. M. failed to meet that burden of proof.

Although the Order granting care and custody of B. N. to D. M. cannot be questioned as to its authenticity, the Order of Temporary Custody under the *N.J.S.* 9:2-1 *et seq.* must be evaluated according to its statutory purpose. An Order of Temporary Custody is used to further the legislatively defined public policy to "assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and...to encourage parents to share the rights and responsibilities of child-rearing and order to effect this policy." *N.J.S.A.* 9:2-4. The court's order may include "any other custody arrangement as the court may determine to be in the best interest of the child." *N.J.S.A.* 9:2-4C.

Therefore D.B. may have temporary custody of B..N., however, I **CONCLUDE** D. M. is not the guardian of B.N. "Custody" is defined at *N.J.S.A.* 9:2-13(c) as "continuing control and authority over the person or a child." Guardianship extends to the legal authority and duty to care for another's person or property. *Black's Law Dictionary, Seventh Edition*, p.566.

The final question is whether B.N. was kept in the home of D. M. and supported by D.M. as if B.N. was her own child. I **FIND** absolutely no evidence in the hearing record from which I can conclude that D.M. is providing any support to B.N. D.M. has not filed a sworn statement

with the Ewing BOE, as required by *N.J.S.A.* 18A:38-16 that D.M. is supporting B.N. gratis and that D.M. will assume all personal obligations for B.N. relative to school requirements and that D.N. intends to keep and support B.N. gratuitously for longer than the school term.

Lastly, and most to the point., I **FIND** as a Fact that B.N. resides with her mother in the City of Trenton. I **FIND** that D.M. is not keeping B.N. in her home as a resident but rather as a guest and only until B.N. leaves for school.

ORDER

Accordingly, it is **ORDERED** that the decision of the Board of Education of Ewing Township to disenroll B.N. from the Ewing Township School District is **AFFIRMED**. It is further **ORDERED** that D.M. be assessed $7,837 tuition for B.N. for the time of B.N.'s ineligible attendance in the Ewing Township School District.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 16, 2002
DATE

Anthony T. Bruno
ANTONY T. BRUNO, ALJ

Receipt Acknowledged:

1/23/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 24 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/lam

APPENDIX

LIST OF WITNESSES

For the petitioner:

D.M.

For the responded:

Pete Manetto

David Mikalauskas

LIST OF EXHIBITS

For the petitioner:

None

For the respondent:

R-1 Complaint for Custody

R-2 Letter from Ewing BOE to L. N.

R-3 Residency Report

R-4 Host Family affidavit

R-5 Request for postal address

R-6 Notice of this enrollment meeting

our -7 Notice of rescheduled meeting

R - 8 Ewing BOE Resolution

R-9 Letter from L. N. to Commissioner

R-10 Letter from L. N. to Jeffrey Belz, Esq.

R-11 Ewing BOE letter to D. M.

R-12 Student Cumulative Register for B. N.

R-13 Attendance Report for B. N.

R-14 1998-99 Per Pupil tuition costs statement

Judges:

J-1 Order of Temporary Custody

OAL DKT. NO. EDU 6113-01
AGENCY DKT. NO. EDU 252-7/00

D.M., on behalf of minor, B.N.,

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions were submitted in accordance with *N.J.A.C.* 1:1-18.4.

In her exceptions, petitioner underscores that, contrary to the Administrative Law Judge's (ALJ) ruling, it is her understanding that the custody order signed by Judge Grall of the Superior Court is "considered to be permanent and binding in a Court of Law, until one of the two parties make[s] changes to the agreement or the child turns 18 years old." (Petitioner's Exceptions at 1) Additionally, with respect to the amount of tuition determined due and owing, petitioner asserts that the Board never produced, as the ALJ requested, the basis for its calculations. Moreover, petitioner adds that she did not produce any financial documentation, since she was not requested to do so, and she also "assumed custody papers would suffice." (*Ibid.*) Finally, petitioner reiterates that B.N. "periodically" spends time with her mother and, therefore, conclusions should not be drawn as to her living arrangements based on merely 25

days of observation. (*Id.* at 2) Petitioner affirms, "I do provide financial support for [B.] as my tax records will indicate, and she does reside in my home at 90 King Ave." (*Ibid.*)

Upon careful and independent review of the record in this matter, the Commissioner determines to set aside the recommended decision of the ALJ. In so doing, the Commissioner initially finds that the ALJ applied the incorrect statute to arrive at his conclusion, on page four of the Initial Decision, that petitioner did not meet her burden of proving that B.N. was entitled to a free education. Petitioner's claim in her Petition of Appeal filed on July 18, 2000 clearly attests, "[a]s of 7-18-00 I've permanet [sic] custody. Custody of [B.] allows me to have her enrolled as my child." (Petition of Appeal) Indeed, there is nothing in the petition or accompanying documents to suggest that petitioner's allegation before the Commissioner was that she satisfied the requirements of the "affidavit student" statute and that B.N. should be permitted to attend school pursuant to *N.J.S.A.* 18A:38-1b(1). Therefore, petitioner's claim should have been analyzed under *N.J.S.A.* 18A:38-1a, and its implementing regulations, *N.J.A.C.* 6A:28-2.4(a)1.

A student is considered domiciled within the district "when he or she is living with a parent or legal guardian whose permanent home is located within the district.***" *N.J.A.C.* 6A:28-2.4(a)1i. Thus, the critical issues before the Commissioner are whether petitioner is B.N.'s "legal guardian" within the intendment of the statute and its operative regulations,[1] and whether B.N. is living with her legal guardian.

Although the Judge's Order, entered upon consent of the parties, is designated an "Order of Temporary Custody," on its face, the Order does not expire on a particular date but, instead, provides that the care and custody of B.N. is committed to D.M. until further order of the

[1] There is no dispute that petitioner is properly domiciled in the District.

Court. (Exhibit J-1) Therefore, the Commissioner finds that petitioner is B.N.'s "legal guardian" within the intendment of the statute and regulations. [2]

In addition, petitioner avers that B.N. lives in her home in Ewing, but acknowledges that her niece periodically visits and stays with her mother, who maintains a small bedroom for B.N. in her apartment. (Initial Decision at 3) There is no finding by the ALJ that petitioner's testimony in this regard was not credible. Petitioner's position is consistent with the custody order that provides for "liberal [and] reasonable" visitation, "as agreed between the parties." (Exhibit J-1)

Accordingly, the Commissioner finds that B.N. is entitled to a free education in the District pursuant to *N.J.S.A.* 18A:38-1a and *N.J.A.C.* 6A:28-2.4(a)1i. The Board is ordered to continue to admit her to its schools as long as there is no change in circumstances that would alter her entitlement.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 3/11/02

Date of Mailing: 3/13/02

[2] In this connection, the Commissioner does not concur with the ALJ's discussion on page four of the Initial Decision with respect to the "statutory purpose" of the Order of Temporary Custody. Indeed, the public policy statement cited by the ALJ clearly concerns custody orders *as between parents* who are living separately, as it stresses that their minor children are to be assured "frequent and continuing contact with both parents after the parents have separated or dissolved their marriage***." *N.J.S.A.* 9:2-4.

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

95-02

MARY MC EWAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BLOOMINGDALE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning nontenured teacher challenged the Board's determination not to renew her employment contract for the 1998-1999 school year, arguing that the determination was contrary to the recommendation of the superintendent, and arbitrary and capricious because it was motivated by a dispute between petitioner and a neighbor who was a Board member, as well as incidents involving petitioner and members of the community, rather than being based on petitioner's job performance.

The ALJ determined that the Board had a reasonable basis for denying petitioner tenure based on her conduct in the community and at school, and did not do so as reprisal for her dispute with a former Board member.

The Commissioner agreed with the ALJ that petitioner failed to demonstrate that the Board denied renewal of her employment contract for arbitrary reasons in violation of *N.J.S.A.* 18A:27-4.1(b), and also noted that petitioner failed to meet the limited standards for awarding relief to nontenured teachers whose employment is not renewed. The matter was dismissed.

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

March 13, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7075-98
AGENCY DKT. NO. 203/98

MARY MCEWAN,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BLOOMINGDALE, PASSAIC COUNTY,

Respondent.

Gail Oxfeld Kanef, Esq., for petitioner
(Oxfeld Cohen, attorneys)

James S. Rothschild, Jr., Esq., and **Beth Ann Stemmler**, Esq., for respondent
(Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Record Closed: December 19, 2001 Decided: January 18, 2002

BEFORE **RICHARD McGILL**, ALJ:

Mary McEwan (petitioner) was employed by the Board of Education of the Borough of Bloomingdale (respondent) as a teacher. At the end of petitioner's third year, respondent did not

renew her contract with the result that petitioner did not receive tenure. Petitioner challenges the nonrenewal of her contract.

PROCEDURAL HISTORY

Petitioner filed a petition with the Commissioner of Education on June 18, 1998, invoking the Commissioner's authority to hear and determine controversies arising under the school laws pursuant to *N.J.S.A.* 18A:6-9. Respondent filed an answer on July 2, 1998, and the matter was transmitted to the Office of Administrative Law on July 23, 1998, for determination as a contested case.

After hearing days on February 23 and 24, 2000, a hearing scheduled for April 27, 2000, was adjourned because of a tentative settlement. However, settlement papers were not forthcoming, and on January 5, 2001, respondent filed a motion to enforce the settlement agreement. That motion was denied by Order dated February 8, 2001.

An additional hearing was held on September 25, 2001, and the parties submitted briefs. The record closed on December 19, 2001, upon receipt of an exhibit retained by petitioner.

ISSUES

The issues in this proceeding are whether the nonrenewal of petitioner's contract, which resulted in the denial of tenure, was arbitrary and capricious and, if so, whether the relief requested in the petition should be granted.

STIPULATED FACTS

The parties submitted a Stipulation of Facts which stated as follows:

1. Mary McEwan ("McEwan") was hired by the Board of Education of Bloomingdale ("Board") as a resource room teacher for the 1995-96 school year. McEwan was renewed for the 1996-97 and 1997-98 school years as the instructor in a special education, self-contained NI classroom.

2. The evaluations of McEwan's performance as a special education teacher are satisfactory. Copies of each evaluation are attached together hereto as Exhibit A.

3. On May 4, 1998, Dr. Roger Tesi, Superintendent of Schools, informed McEwan that he would be recommending to the Board that McEwan be awarded a teaching contract for the 1998-99 school year and be granted tenure. See May 4, 1998 Letter of Dr. Tesi, attached hereto as Exhibit B.

4. The Board did not adopt the Superintendent's recommendation. On May 11, 1998, the Board voted not to grant McEwan tenure.

5. On June 2, 1998, the Board sent McEwan a list of reasons for her tenure denial. See Board correspondence dated June 2, 1998, attached hereto as Exhibit C.

6. On June 29, 1998, the Board heard a presentation by McEwan pursuant to the *Donaldson* ruling.

7. Only six of the nine Board members were able to attend the June 29, 1998 meeting. As a result, the Board re-scheduled a vote on McEwan's *Donaldson* request for its next regularly scheduled meeting on July 20, 1998. McEwan's representative agreed to this postponement of the vote.

8. On July 20, 1998, the Board voted not to grant tenure to McEwan. On that date there were nine Board members. The vote consisted of five votes against tenure, two in favor of tenure and two abstentions.

The evaluations attached to the Stipulation of Facts provide for ratings of "Satisfactory" or "Needs Improvement" and comments. All of petitioner's ratings are "Satisfactory," and all of the comments are positive. There is no indication of any problem.

The list of reasons for denial of tenure stated as follows:

> The Bloomingdale Board of Education believes that Ms. McEwan is not an exceptional enough teacher and role model to warrant obtaining tenure in Bloomingdale. Board members have heard over the past three years from numerous citizens and parents, and other teachers, that Ms. McEwan is a person who acts uncivilly, who intimidates others and who can be difficult to deal with. Board members do not wish to breach the confidentially of their sources, but their sources include respected members of the community, teachers, neighbors and parents, some of whom will not allow their children to be taught by Ms. McEwan.

SUMMARY OF EVIDENCE

A. Petitioner's Testimony

Petitioner testified as her sole witness in her case in chief. Her testimony covered three main areas. First, petitioner addressed the absence of any problems concerning her work at school. Second, petitioner described a dispute with a neighbor. Petitioner believes that this dispute is the real reason that she was denied tenure. Third, petitioner discussed her alleged involvement in various incidents.

With respect to her work at school, petitioner testified that no representative of respondent told her during her three years of employment as a teacher that a colleague ever complained about her. Further, she was never counseled by a supervisor or given a warning about inappropriate behavior in the work place. Petitioner was never disciplined in any way, and respondent never withheld her salary increment. During her three years of employment, petitioner was never told that a parent did not want his child in her class.

Petitioner stated that she was involved in a dispute with a neighbor who lived directly across the street for eighteen years and happened to be a member of the board of education. The neighbor was George Burik, and his wife was Rose Burik. Mr. Burik was on the board of education during a period from 1996 to 1998. Petitioner initiated two municipal court proceedings against George Burik, and there was civil litigation against George and Rose Burik. In the first incident, Mr. Burik became angry and pushed his way into petitioner's home. Petitioner called the police and pressed charges against Mr. Burik. Later, petitioner dropped the charges. Petitioner could not recall when this incident occurred other than that it was a long time ago.

The second incident occurred approximately six years ago. According to petitioner, Mr. Burik would verbally abuse her and her children and threaten family members with physical violence. Petitioner filed a complaint in municipal court with the result that she obtained a restraining order against Mr. Burik.

The third legal proceeding stemmed from an incident involving one of petitioner's children and one of the Burik's. Because the alleged incident involved juveniles, the details of petitioner's testimony concerning the Burik's child will not be repeated herein. It is also noteworthy that the allegations are unproven and that petitioner did not have firsthand knowledge as to the incident. In regard to petitioner's handling of the situation, petitioner became aware in December 1995 of an incident which allegedly occurred in August 1995. In December 1995, petitioner went to the prosecutor and reported the incident. However, the prosecutor declined to prosecute the Burik's child and said that the matter would be referred to the Division of Youth and Family Services (DYFS). Dissatisfied with this response, petitioner sent a letter to the Attorney General of New Jersey in an effort to have the Burik child prosecuted. However, petitioner was advised that the matter was within the discretion of the prosecutor.

After being rebuffed by the prosecutor, petitioner went to the Bloomingdale Police Department and presented the same information to Police Chief William Alexander. There was

no argument or altercation with the Chief of Police, and the situation was handled in a very professional manner.

Still dissatisfied and concerned about the safety of her child, petitioner consulted an attorney to try to find a way to make certain that the Buriks would watch their child. As a result, petitioner filed a lawsuit against the Buriks in Passaic County Superior Court in 1996 or 1997 alleging "parent neglect." The Buriks countersued for libel and slander.

At one of the court appearances in regard to the lawsuit between petitioner and the Buriks, the judge denied the Burik's request for a gag order. In frustration, Mrs. Burik yelled out, "She got me at my job; I'm going to get her at her job."

Eventually, both parties agreed to drop their lawsuits. Petitioner was unclear as to the specific legal mechanism by which the parties terminated their lawsuits.

Petitioner stated that the Buriks were out to get her. Mr. Burik and the board members who voted against her were in the same political party. Petitioner assumed that they had political contact even though she did not know if they were personal friends.

Petitioner was allegedly involved in various incidents with neighbors, the police and a board member. Petitioner tended to be uncertain as to dates. The following summary reorganizes petitioner's testimony into roughly chronological sequence.

On one occasion, Dr. Tesi advised petitioner that board member Gerald Witty had received a telephone call from a community member who reported that petitioner was at home during the middle of the school day. Petitioner explained to Dr. Tesi that she travels between schools and that she stopped at home to get her asthma medication. Petitioner was never disciplined as a result of this situation.

Petitioner decided to attend a board meeting in an effort to learn more about the situation and to ask Mr. Witty to give her the name of the caller. The situation was not discussed at the meeting, which occurred in December or January of petitioner's first year of employment. Petitioner approached Mr. Witty in the parking lot after the meeting between 1:00 a.m. and 2:00 a.m. According to petitioner, she did not know which car belonged to him. Petitioner introduced herself and without raising her voice asked Mr. Witty to tell her who made the call. Mr. Witty said that the matter had been investigated and there was nothing to it. Further, Mr. Witty said that he would not reveal his sources other than it was not the Buriks. Petitioner denied that she persisted in asking Mr. Witty to identify the caller and that the conversation did not end until Mr. Witty got frustrated and began to walk back to the school building.

In late December 1995, petitioner went to the home of a neighbor, Barbara Regan, on two occasions. When petitioner went to Mrs. Regan's home a second time, Mrs. Regan closed the door in petitioner's face. Mrs. Regan went around the neighborhood telling people that petitioner and her husband were liars, and she also called the employer of petitioner's son to get him fired.

On April 16, 1996, petitioner was standing in line to vote at a school board election and saw Mrs. Regan. Petitioner denied seeing Mrs. Burik speaking with Mrs. Regan. The fact that petitioner's husband wrote a letter dated April 16, 1996, to Mrs. Regan had nothing to do with the encounter on election day. In reference to a conversation mentioned in the letter, petitioner acknowledged that she had spoken with Mrs. Regan in December 1995, but petitioner's husband was also present.

In regard to the Bloomingdale Police Department, petitioner stated that she never had angry words with Police Chief Alexander, but she acknowledged that she had encounters with members of his staff. On one occasion, Detective Steven Caputo came to her house to inquire about the letter that her husband wrote to Mrs. Regan. That was petitioner's first meeting with Detective Caputo. When Detective Caputo entered petitioner's home, he was angry about the letter. Detective Caputo's conduct took away petitioner's belief that the police were honest and trustworthy and seek justice.

Petitioner also had an encounter with Detective Caputo at a court appearance concerning her husband. On that occasion, petitioner did not call Detective Caputo "a piece of s---," and anyone who said that she did would be lying.

Petitioner encountered Detective Caputo at a second court appearance. At that time, Detective Caputo made inappropriate comments to the Police Chief Alexander to the effect that petitioner and her husband had been lying for so long that they believed their own lies. It was also unprofessional for Detective Caputo and Police Chief Alexander to laugh about the situation. This encounter was petitioner's only other contact with the Police Chief Alexander. Petitioner does not know the children of the Police Chief Alexander, and she has never had any of them in her class.

Subsequently, petitioner encountered Detective Caputo, who had his children with him, in a grocery store. Petitioner said to Detective Caputo that he had beautiful children and that she hoped that they would never have to go through what her child went through. Detective Caputo started screaming at petitioner, who said that if he felt that she was harassing or threatening him, he should understand how she felt the night that he entered her house.

Petitioner first felt uncomfortable with the police, when Detective Caputo came to her home in April 1996. The fault lies with Detective Caputo and Chief Alexander rather than with petitioner and her husband.

On another occasion, the police came to the house to report that petitioner's son had been involved in a car accident. Petitioner denied slamming the door in the police officer's face.

There came a time when petitioner became aware that respondent had arranaged to have a police officer in the high school. Petitioner denied that she demanded that the police officer be removed from the school. However, petitioner acknowledged that she had a problem with Detective Caputo and that she did not want him to have anything to do with her children.

Petitioner acknowledged that she and her husband approached Mrs. Regan's husband and started yelling at him because they were upset that Mrs. Regan had turned over to the police information which they regarded as a private letter. Petitioner stated that when she raises her voice, it is never with a lack of class. Petitioner acknowledged that her husband pulled her away but only because he wanted to handle the situation himself. Petitioner denied that she ever gave Mrs. Regan the finger.

B. Respondent's Witnesses

Respondent's witnesses included four members of the Board of Education, the Bloomingdale Chief of Police and one of petitioner's neighbors.

1. Gerald Witty

After retiring from employment in 1984, Gerald Witty filled an unexpired term on the Board of Education in 1994, and he later became its president. Prior to becoming a member of the Board of Education, Mr. Witty did not know Mr. Burik. Mr. Burik was on the Board of Education for one and a half or two years, before he moved out of town and left the position. Mr. Witty has met Mrs. Burik on occasion through her work at the Borough Hall. In regard to his political affiliation, Mr. Witty stated that he was the borough leader of the Republican Party at one point but that he has been known as a renegade Republican since approximately 1980. Mr. Witty was only an acquaintance of the Buriks, and he never socialized with them. Mr. Witty was aware of a dispute between petitioner and the Buriks, but he never discussed it with any of them and had no firsthand knowledge. Neither the Buriks nor anyone associated with them contacted Mr. Witty in regard to the tenure vote concerning petitioner in the spring of 1998. The dispute between petitioner and the Buriks was not a factor in Mr. Witty's mind, when he voted to deny petitioner tenure.

Mr. Witty voted against tenure for petitioner for several reasons. One factor involved a personal encounter that he had with petitioner. During a board meeting in 1995, Mr. Witty noticed that a woman in the audience was staring at him continuously. The meeting ran late, and at approximately 1:30 a.m., Mr. Witty walked to his car in the parking lot. As Mr. Witty walked through the parking lot, he saw the woman who had been staring at him standing next to his car. When he reached the car, petitioner identified herself.

Previously, Mr. Witty had received a telephone call from one of petitioner's neighbors questioning how she could spend so much time at home during the school day. Mr. Witty contacted petitioner's principal and asked her to investigate the situation. The principal later advised Mr. Witty that petitioner had to travel from one school to another and that she sometimes stopped at home. The principal did not see anything improper with this practice. Mr. Witty was satisfied with the explanation, and in his mind, he had already dropped the matter.

In the parking lot, petitioner stood next to Mr. Witty's car such that he could not open the door and said that she wanted to know the identity of the person who told Mr. Witty that she was at home during the school day. Mr. Witty said to petitioner that he investigates all complaints and that after speaking with petitioner's supervisor, he was ready to drop the matter. Petitioner said that she would not drop the matter until Mr. Witty identified the caller, and petitioner specifically wanted to know whether Mrs. Burik was the individual. Mr. Witty said that he was tired and the he wanted to go home. Petitioner became very insistent and said that he better tell her or they would be there all night. Mr. Witty said that the information did not come from the Buriks, but he would not otherwise identify the caller. Petitioner began to raise her voice, and Mr. Witty started back to the board room, because there were still some people in the building. Petitioner then backed off, and Mr. Witty was able to drive away. Mr. Witty was so upset by the incident that he was unable to sleep that night. Mr. Witty was seventy-six years of age at the time of this incident.

Mr. Witty was also influenced by comments from several individuals who spoke to him about petitioner. Police Chief Alexander had two children in the school district including one

who was in special education and would likely have petitioner for a teacher at some point. Police Chief Alexander said that he did not think petitioner should be a teacher in the school district in essence because of her behavior in the community. Further, two teachers spoke to Mr. Witty and said that it was difficult to get along with petitioner. One said that petitioner had a high-handed manner and that the other teachers were afraid of her. These comments made an impression on Mr. Witty, because teachers usually do not speak against one another. Mr. Witty was also impressed by the fact that no teachers spoke to him in favor of petitioner. A parent, Mrs. Briggs, who is a special education teacher in another district, said that petitioner is a very poor teacher.

Mr. Witty also spoke with petitioner's neighbors, Mr. and Mr. Wanklin. Mr. Wanklin made an unflattering remark about petitioner, and Mrs. Wanklin said that petitioner continually gave the finger to her and to another neighbor, Mrs. Regan. Mr. Witty also spoke to Mrs. Regan, who said that petitioner gave her the finger. Another neighbor, Mrs. Posumus, also said that petitioner gave her the finger and that petitioner was high-handed and arrogant.

In regard to Dr. Tesi's evaluation of petitioner, Mr. Witty said that Dr. Tesi is very lenient with teachers. However, Dr. Tesi reported that he received information that petitioner was giving the finger to a neighbor. Mr. Witty acknowledged that the evaluations are actually prepared by the principals and not by Dr. Tesi. Mr. Witty never observed any of petitioner's classes.

Mr. Witty stated that one of his main objectives on the board of education is to have a decent, good teaching staff. He tries to be selective about the teachers who are on the staff. Based on the information that he received from a trusted employee of the school district and from the Chief of Police concerning petitioner's behavior in the community along with Mr. Witty's own encounter with her, his decision to vote against tenure for petitioner was not a close one. His decision was not influenced in any way by the Buriks or any type of political consideration.

2. Barbara Regan

Barbara Regan is married and has an eight-year-old daughter. Mrs. Regan moved to Bloomingdale in 1993 and lives in the same neighborhood as petitioner. Since moving to this neighborhood, Mrs. Regan has had a problem with harassment by petitioner.

Mrs. Regan first met petitioner on Thanksgiving Day in 1994. Petitioner's daughter was running up and down the street with no shoes and crying for her mother. Because there was nobody at home in petitioner's house, Mrs. Regan had the daughter in her home for approximately two hours. A neighbor put a note on petitioner's door, and petitioner later picked up her daughter.

Mrs. Regan's next meeting with petitioner occurred on December 27, 1995, when petitioner and her husband came to Mrs. Regan's door. Petitioner said that she was there to warn Mrs. Regan about the Burik's child. Petitioner made certain allegations against the Burik child, but petitioner could not give specific answers to questions from Mrs. Regan. Petitioner identified a child other than her own as the victim. Petitioner promised to give Mrs. Regan the telephone number of DYFS. At the time, Mrs. Regan did not know whether to believe petitioner.

Petitioner came to Mrs. Regan's door the following day to give her the telephone number. By that time, Mrs. Regan had reached the conclusion that petitioner was lying and closed the door in her face.

On April 16, 1996, Mrs. Regan went to vote in a school board election. While standing in line, Mrs. Regan saw Mrs. Burik and went over to speak with her. Mrs. Regan then saw petitioner about three people behind her. Mrs. Regan got nervous and started to laugh.

On April 19, 1996, Mrs. Regan received a letter dated April 16, 1996, from petitioner's husband. The first few sentences of the letter refer to the conversation at Mrs. Regan's house on December 27, 1995, and use the word, "I." On that occasion, petitioner did all of the talking,

while Mr. McEwan stood back and listened. Despite the fact that the letter had Mr. McEwan's name at the bottom, Mrs. Regan thought that the word "I" referred to petitioner. After discussing the letter with another neighbor, Mrs. Regan decided to call the police. Mrs. Regan believes that it was petitioner who wrote the letter.

Mrs. Regan next saw petitioner in front of Mrs. Regan's house during the summer yelling at Mrs. Regan's husband, who was in a car. Petitioner's husband was trying to pull petitioner away. Petitioner was asking why the Regans were doing things to her. Thereafter, when petitioner drove by in her car, she would give Mrs. Regan the finger. Mrs. Regan is afraid of petitioner, because she does not know what petitioner might do or what kind of lies she might tell next. Mrs. Regan went to the police because petitioner was giving her the finger, and the police told her that there was nothing that she could do about it. In April 1998, Mrs. Regan reported to the Superintendent of Schools that petitioner was giving her the finger. Petitioner was doing the same thing to two neighbors, Mrs. Posumus and Mrs. Wanklin. Mrs. Regan stated that she never placed a telephone call to threaten the job of petitioner's son.

Mrs. Regan did not speak with Mr. Witty prior to the vote on tenure for petitioner about petitioner giving her the finger. However, Mrs. Regan advised Dr. Tesi of the situation prior to the vote.

3. William Alexander

William Alexander has been a police officer for twenty-six years, and he is now the Chief of Police of the Borough of Bloomingdale. Police Chief Alexander interacts with people in the community on a daily basis. As part of his duties over the years including fourteen in the detective bureau, Police Chief Alexander has interviewed people who have been involved in crimes and other misconduct including victims, suspects and witnesses and made judgments about various individuals. Police Chief Alexander is not an educator, and his comments about petitioner were made as a parent and as a police officer.

Police Chief Alexander first met petitioner in December 1995, when she and her husband came to the police station to report an incident involving her child. Petitioner and her husband had already taken the matter to the prosecutor, who refused to investigate or indict the alleged perpetrator. The McEwans came to the police station to create a record of the alleged incident. Pursuant to Police Chief Alexander's instructions, two detectives went to petitioner's home, interviewed her and wrote a report. A copy of the report was given to petitioner and her husband.

The next interaction between petitioner and the Bloomingdale Police occurred in April 1996, when petitioner's neighbor, Barbara Regan, reported that she had received a letter dated April 16, 1996, from "William McEwan" with an attached photocopy of an Investigation Report by the Bloomingdale Police Department. Police Chief Alexander gave Detective Steven R. Caputo the assignment to investigate the disclosure of juvenile information. On April 22 and 23, 1996, Detective Caputo interviewed Mrs. Regan and petitioner in person and spoke to Mr. McEwan over the telephone. According to Detective Caputo's report, Mr. McEwan acknowledged sending the letter but said that it was not threatening even though the undertone was "why don't you shut your mouth." Detective Caputo accompanied petitioner to the computer, and a copy of the letter retrieved, printed and retained as evidence.

The next incident involving a neighbor occurred on October 7, 1997, when Peggy Wanklin complained of harassment by petitioner. Mrs. Wanklin was with her daughter, when petitioner pulled up next to her in a vehicle and asked how Mrs. Wanklin could hurt her daughter and how she could sleep at night. Mrs. Wanklin wanted to make a written record of the incident, but she did not wish to sign a complaint.

On October 11, 1997, Michael Wanklin came to police headquarters to report an incident of harassment by petitioner. Mr. Wanklin had previously advised petitioner to leave his family alone. On October 11, 1997, petitioner stepped in front of Mr. Wanklin's five-year-old son in a field and said something to him. On October 24, 1997, petitioner took a similar action at the Walter T. Bergen School involving Mr. Wanklin's son and also his daughter. Mr. Wanklin wanted to have a written record of these incidents.

The next incident involving petitioner occurred on January 3, 1998, when Mrs. Burik complained of harassment by petitioner. Mrs. Burik reported to the police that while walking on the street, her daughter was approached by petitioner, who attempted to start a conversation with her. At the time, petitioner was a passenger in a car. Mrs. Burik reported to the police that there was a court order for petitioner not to have contact with the Burik family. According to Police Chief Alexander, it was actually part of a Consent Order from the lawsuit that they were not supposed to have any contact with each other rather than an actual restraining order.

On January 4, 1998, Michael Wanklin complained to the police about harassment by petitioner concerning the same incident. His three children were with the Burik's daughter, when petitioner approached them. Mr. Wanklin wanted to have a record of the incident, because he had told petitioner not to have any contact with any member of his family. Mr. Wanklin decided not to file a complaint.

Police Chief Alexander stated that Michael Wanklin was the Fire Chief in Bloomingdale at the time. Mr. Wanklin spoke to Police Chief Alexander many times about petitioner, because he was concerned for his family.

In addition to neighbors, police officers also complained to Police Chief Alexander about petitioner. The letter dated April 16, 1996, led to the arrest of Mr. McEwan for improperly disclosing juvenile information and a subsequent court appearance to which he was accompanied by petitioner. Detective Caputo appeared in court on behalf of the Bloomingdale Police Department. On the following day, Detective Caputo told Police Chief Alexander that he would not go back to the court by himself with the McEwans. The McEwans and in particular petitioner stared him down and made various comments to him. Petitioner called him "a piece of s---" more than once.

Police Chief Alexander accompanied Detective Caputo to the next court appearance. On that occasion, Detective Caputo was stared at occasionally, but nothing really happened. There

was no interaction with the McEwans, and Police Chief Alexander and Detective Caputo made no inappropriate comments about them. The charge against Mr. McEwan was subsequently dismissed in May 1999.

There was another incident involving Detective Caputo and petitioner. Detective Caputo reported that he was in a supermarket with his children, where he encountered petitioner with her children. Petitioner got down and started talking to Detective Caputo's children like she knew them for years. Detective Caputo asked petitioner several times to get away from his children, but petitioner persisted in talking to them.

On another occasion, Police Chief Alexander was in the principal's office discussing a program which involved the assignment of a police officer to the high school. While Police Chief Alexander was present, petitioner telephoned the principal and demanded that the police officers be taken out of the high school and that none of the police officers have any contact with her children. Police Chief Alexander heard only half of the conversation, but the principal told him what petitioner had said over the telephone. No other parents complained, and the police officers were not removed from the high school.

During the spring or summer of 1999, petitioner's son was involved in a car accident in which one occupant of the vehicle sustained a serious injury. A police officer brought petitioner's son home. The police officer later expressed his consternation at the way he was treated by the McEwans. This new police officer had no previous contact with the McEwans and was not aware of the prior incidents. The officer said that he had never had anyone look at him with such disgust and hate.

Police Chief Alexander described petitioner as vindictive and out of control. She holds a grudge and treats people whom she does not like without respect. Based upon petitioner's interactions with her neighbors and police officers, Police Chief Alexander became concerned with the way that she would treat children in her class. Police Chief Alexander was particularly concerned about the manner in which petitioner tried to have the Burik's child prosecuted and

thought that as a teacher, she would display more understanding. Police Chief Alexander was also concerned, because his younger child was a special education student and likely would eventually have petitioner for a teacher.

Police Chief Alexander made a point to find out when petitioner was up for tenure because of his concern for his child and other children. Police Chief Alexander spoke with two aides in petitioner's classes. Both aides did not approve of the way that she treated the pupils. In addition, the aides felt like they were doing petitioner's work. Petitioner was mean to both the children and the aides.

Police Chief Alexander discussed his concerns privately with two board members, Jerry Witty and Joe Gomez, who was his partner for many years in the police department. In addition, Police Chief Alexander spoke at a public session of the board of education on July 20, 1998, expressing his concerns about petitioner's conduct in the community and her character. Police Chief Alexander's only reason for speaking out against petitioner was his concern for his child and for other children in the school district.

4. Santora M. Molinari

Santora M. Molinari was in his third year as a member of the Bloomingdale Board of Education. Mr. Molinari knew Mr. Burik as a member of the board of education, but he never socialized with the Buriks. Neither the Buriks nor anyone on their behalf ever discussed their dispute with petitioner with Mr. Molinari. The dispute between the Buriks and petitioner was not a factor in Mr. Molinari's decision to vote against tenure for petitioner.

Mr. Molinari was strongly influenced by Police Chief Alexander's comments concerning petitioner. Mr. Molinari has known Police Chief Alexander for many years and considers him to be an excellent chief of police. Mr. Molinari's decision to vote against tenure for petitioner was not a close one. Mr. Molinari reviewed petitioner's evaluations briefly, but the main factor in regard to his decision was her behavior in the community.

5. Joseph G. Gomez

Joseph G. Gomez worked as a police officer, a builder and a construction official, and he is now partially retired from employment. Mr. Gomez joined the Bloomingdale Board of Education in 1996, and his term has since expired. Mr. Gomez has met Mr. and Mrs. Burik, but he did not socialize with them. Mr. Gomez was aware of the dispute between the Buriks and petitioner, but the Buriks never discussed it with him. Neither the Buriks nor anyone acting on their behalf contacted Mr. Gomez in regard to the vote on tenure for petitioner. The dispute between the Buriks and petitioner was not a factor in regard to his vote on tenure for petitioner.

Mr. Gomez, who was president of the board of education at the time of the vote on tenure for petitioner, was influenced by the fact that no one who works with petitioner spoke publicly on her behalf. Teachers typically receive support from their colleagues. In addition, no teacher spoke to Mr. Gomez privately on behalf of petitioner. One teacher told Mr. Gomez privately that petitioner was arrogant and that people were afraid of her. Mr. Gomez gave a great deal of weight to the statement of Police Chief Alexander concerning petitioner's behavior in the community. Mr. Gomez did not think that the behavior described by Police Chief Alexander was appropriate for a teacher. Mr. Gomez also took a dim view of petitioner's encounter with Mr. Witty in the parking lot. Mr. Gomez would want a more stable person as a teacher. Mr. Gomez's decision in regard to tenure for petitioner was not a difficult one. Mr. Gomez did not want to take a chance with the pupils by giving tenure to petitioner.

6. George E. Brewster, Jr.

George E. Brewster, Jr. is a chiropractor who joined the Bloomingdale Board of Education in 1994. Dr. Brewster had met the Buriks, and he considered them to be acquaintances. Dr. Brewster was aware of the dispute between the Buriks and petitioner, and on one occasion, Mrs. Burik told Dr. Brewster that she felt harassed by petitioner. However, neither the Buriks nor anyone acting on their behalf contacted Dr. Brewster in regard to the vote on

tenure for petitioner. According to Dr. Brewster, the dispute gave him an insight that petitioner could be a volatile person, but it was not a major factor in his decision to vote against tenure.

Dr. Brewster knows the McEwan family much better than the Buriks. Dr. Brewster and the McEwans each have a daughter in the same grade. Petitioner's daughter has been to Dr. Brewster's home on numerous occasions, and Dr. Brewster's daughter has gone to petitioner's home frequently. Petitioner was the Girl Scout or Brownie leader for Dr. Brewster's daughter, and petitioner's two sons played on a soccer team coached by Dr. Brewster. Dr. Brewster met the McEwans on various occasions.

One well-respected teacher spoke to Dr. Brewster privately prior to the vote on tenure for petitioner. The teacher said that she and other teachers were afraid of petitioner. Petitioner could be a volatile person, and in the event of a disagreement, she could be very disruptive. The other teachers were not comfortable with her. Dr. Brewster took this expression of concern seriously. No Bloomingdale staff member spoke to Dr. Brewster on behalf of petitioner privately or at the public meeting of the Board of Education.

The Bloomingdale Chief of Police spoke against petitioner at the public meeting. Dr. Brewster thought that his testimony was extremely significant.

In his meetings with petitioner, Dr. Brewster found her to be a very nice person. However, he also heard things that showed another aspect of her personality, which Dr. Brewster found to be quite disturbing. Dr. Brewster described petitioner as having a Dr. Jekyll and Mr. Hyde sort of personality. Dr. Brewster saw a potential for problems with petitioner at the Walter T. Bergen School, which is a small school with approximately twenty staff members. Dr. Brewster acknowledged that petitioner had an excellent teaching record. However, petitioner's conduct in the community and relationships with other staff members are also factors to consider with respect to a teacher. When these factors are considered, petitioner is not an exceptional teacher. Dr. Brewster's decision to vote against tenure for petitioner was not a close one.

Subsequent to the vote, Dr. Brewster was in a school for career day and encountered petitioner in the hall. Petitioner gave Dr. Brewster a very strong hate stare and said, "How could you call yourself a Christian? How could you do this?" In Dr. Brewster's view, petitioner's conduct was not appropriate.

C. Petitioner's Rebuttal

Petitioner testified on her own behalf, and she also called three other rebuttal witnesses.

1. Janice Ruth Olsommer

Janice Ruth Olsommer has lived in Bloomingdale for twenty-three years, and she is a neighbor and friend of petitioner. Ms. Olsommer first met petitioner through the Scouts and later was petitioner's aide in a special education class. Ms. Olsommer had a cordial working relationship with petitioner, and she was not aware of any problem between petitioner and the parents of any of her pupils. Ms. Olsommer never complained to the principal about petitioner.

When petitioner was up for tenure, Ms. Olsommer was not contacted by the Board of Education or the superintendent. Ms. Olsommer never had a conversation with the Chief of Police or any other police officer concerning petitioner, and she never told any resident of Bloomingdale that petitioner was heavy handed in the classroom. Ms. Olsommer acknowledged that petitioner had two other aides.

2. Cindy Briggs

Cindy Briggs has lived in Bloomingdale for twenty-four years, and she knows petitioner through Scouting. Ms. Briggs has two children, but they never had petitioner for a teacher. Ms. Briggs saw petitioner and her husband only occasionally, but they did not have any problem getting along with others in Scouting. Ms. Briggs knew that petitioner was a teacher, but she was not aware when petitioner came up for tenure. Ms. Briggs never made any public comments

concerning tenure for petitioner, and she never discussed the subject privately with any board member.

Ms. Briggs has had many discussions with Mr. Witty. On one occasion, Ms. Briggs and Mr. Witty were discussing the Boy Scouts at a picnic. Ms. Briggs expressed her surprise that the McEwans did nothing when their son got an Eagle Scout award. Ms. Briggs said something to the effect that there was a lack of parental involvement, and someone else commented, "If petitioner was not involved with her own children, how can she take care of her pupils?" Ms. Briggs never had any other discussion with Mr. Witty or any other board member concerning petitioner. Ms. Briggs never made any comments concerning petitioner's classroom style.

3. Carol Corcoran

Carol Corcoran has lived in Bloomingdale for thirty-four years, and she has two children in the Bloomingdale school system. Her children never had petitioner for a teacher. Ms. Corcoran served on the Board of Education from April 1999, until she resigned in April 2001. This period was after the vote on tenure for petitioner.

Ms. Corcoran had a friendly relationship with petitioner and was not aware of any complaints about her. Ms. Corcoran was not aware of the vote on tenure for petitioner until after the denial. Ms. Corcoran called the superintendent and asked about the denial of tenure. The Superintendent said that he gave petitioner a favorable recommendation, but the Board of Education voted to deny tenure anyway. Ms. Corcoran wrote a letter to petitioner describing her as a dedicated teacher who cares about her students and looks at her position as more than a job. Ms. Corcoran also stated that she spoke with Mr. Witty, who said that he had a source who had a problem with having his child in petitioner's class.

4. Mary McEwan

Petitioners gave additional testimony concerning the various incidents mentioned by respondent's witnesses. According to petitioner, Mr. Witty's account of the incident in parking lot was not accurate. Petitioner stated that she introduced herself and told him how deeply concerned she was about her job. She asked Mr. Witty to identify the person who called him, and Mr. Witty said that it was confidential. Petitioner was not aware that Mr. Witty ever reported the incident to the police or the Superintendent.

In regard to the testimony of Mrs. Regan to the effect that petitioner's daughter was left alone, petitioner stated that she took her teenage sons on a ski trip. Her fourteen-year-old daughter was babysitting, but her three-year-old daughter slipped out. Mrs. Regan brought the daughter home.

In December 1995, petitioner's husband received a police report concerning the Burik's child. No one ever told petitioner that the report was confidential. Nonetheless, petitioner never gave the report to anyone. Petitioner denied that she ever gave Mrs. Regan the finger.

Officer Caputo came to petitioner's home in regard to the letter sent to Mrs. Regan in April 1996. Officer Caputo asked the other family members to leave the room and showed the letter to petitioner. Officer Caputo was very angry at the time. Petitioner's husband wrote the letter, and petitioner was not aware that he had sent it to Mrs. Regan. Petitioner denied any involvement with the letter.

With respect to the court appearances, Officer Caputo attended one alone and another with Police Chief Alexander. On the occasion when Officer Caputo was alone, petitioner had no communication with him. Petitioner specifically denied that she called Officer Caputo "a piece of s---." There was no exchange with Officer Caputo and Police Chief Alexander at the second court appearance.

In regard to the complaints by the Buriks to the police, petitioner testified that the Buriks were not supposed to contact her. However, there was no restraining order against petitioner. Petitioner denied that she ever gave the finger to anyone in the Wanklin family. Petitioner acknowledged that the Wanklins sided with the Buriks.

In regard to the situation where a police officer brought petitioner's son home after a car accident, petitioner said that she awoke and found the officer in the kitchen. Petitioner was not upset, and she did not raise her voice at the police officer.

With respect to the situation where a police officer was assigned to the high school for security purposes, petitioner stated that she was concerned only because it was Officer Caputo. It was actually petitioner's husband who called the principal.

In regard to the Eagle Scout pin, petitioner's son completed all the requirements in 1999, and petitioner had prepared a guest list and invitations for a celebration. However, the award was not presented at that time, and the celebration did not take place. The pin was subsequently awarded in 2000.

Petitioner acknowledged that she did not believe that the board members who voted to deny tenure were discriminating against her because of gender, race or ethnicity. Petitioner is not a union leader.

LAW AND ANALYSIS

A board of education has broad discretionary authority in regard to the granting of tenure. *Donaldson v. Bd. of Ed. of No. Wildwood*, 65 *N.J.* 236, 240-241 (1974). A board's discretionary authority is not unlimited, and its action will be set aside if it was taken for arbitrary or capricious reasons. *Id.*, at 247; *N.J.S.A.* 18A:27-4.1(b). A determination not to grant tenure need not be grounded on unsatisfactory classroom or professional performance, as there are many unrelated but equally valid reasons. *Donaldson v. Bd. of Ed. of No. Wildwood*, 65 *N.J.* at 241. Thus,

evaluations of classroom performance are not necessarily the controlling factor. *Dore v. Board of Educ.*, 185 *N.J. Super.* 447, 453-454 (App. Div. 1982).

A determination within a board's discretionary authority is arbitrary, capricious or unreasonable if it is without a rational basis or is induced by improper motives. *Kopera v. West Orange Bd. of Education,* 60 *N.J. Super.* 288, 294 (App. Div. 1960). A rational basis for a determination is lacking where the board's beliefs or assertions as to the underlying facts prove to be untrue or if the facts are true, they do not warrant the board's conclusion or action. *Id.*, at 296-297. The party challenging the board's action has the burden of proving unreasonableness. *Id.*, at 297.

Petitioner maintains that respondent's determination to deny her tenure was arbitrary and capricious in two respects. First, the factual allegations concerning various incidents involving petitioner are untrue. Second, petitioner contends that respondent's action was induced by an improper motive in that the denial of tenure was a reprisal because petitioner filed a lawsuit against a former member of the board of education. In support of these contentions, petitioner argues that respondent's position is based to a large extent on unreliable hearsay.

Resolution of the questions whether the factual allegations concerning the underlying incidents are true and whether respondent's action was induced by improper motives is largely a matter of credibility of witnesses. One disputed incident involves the conversation between petitioner and Mr. Witty at 1:30 a.m. in the parking lot after a board meeting that ran late. The unusual aspects of this conversation are its time and location. The conversation as described by petitioner could readily have taken place at a more reasonable hour and location. In contrast, the time and location would have been ideal for the type of confrontation described by Mr. Witty. Observation of the respective ages and stature of petitioner and Mr. Witty gives no reason to believe that she would not confront him alone in a parking lot at 1:30 a.m. Under the circumstances, I accept Mr. Witty's version of this incident. In essence, petitioner confronted an elderly member of the board of education alone in a parking lot at 1:30 a.m. in an attempt to intimidate him into revealing confidential information.

Police Chief Alexander described several instances in which neighbors complained to the police about harassment by petitioner. In addition, several police offices complained to Police Chief Alexander about petitioner's conduct toward them. The incident at the court appearance with Officer Caputo was especially egregious in that it involved an attempt to intimidate a police officer and use of highly offensive language. Other incidents involving neighbors and one with Officer Caputo stemmed from situations in which petitioner persisted in attempting to initiate conversations with children after their parents told her to stay away from them. There were also situations where neighbors complained that petitioner gave them the finger. While Police Chief Alexander did not observe these incidents personally, his assessment of the situation and petitioner based upon his years of experience as a police officer is entitled to substantial weight.

One neighbor, Mrs. Regan, described a situation where her husband was confronted in the street by petitioner who launched a loud tirade. Mrs. Regan also stated that petitioner gave her the finger on multiple occasions. Mrs. Regan was a credible witness.

The testimony of respondent's witnesses concerning the various incidents in the community was credible, while petitioner's denials were not believable. Under the circumstances, petitioner has failed to carry the burden of proof concerning the incidents related to her behavior in the community.

There was also testimony concerning petitioner's behavior at school. A respected teacher reported to one or more board members that she and other teachers were afraid of petitioner. In view of petitioner's behavior in the community, this report is certainly believable.

There was limited testimony concerning petitioner's work in the classroom. Two aides gave Police Chief Alexander unfavorable reports concerning petitioner. According to Mr. Witty, Ms. Briggs said that petitioner is not a good teacher. However, Ms. Briggs denied that she made this statement. In view of petitioner's evaluations, the conclusion cannot be drawn on the basis

of the limited evidence presented by respondent that her teaching performance in the classroom was anything less than satisfactory.

Petitioner viewed the vote deny tenure as a reprisal because she filed a lawsuit against a former member of the board of education. However, the testimony of four members of the board of education to the effect that their respective votes were not induced by petitioner's lawsuit against a former member of the board of education was believable. They credibly testified that they were influenced primarily by Police Chief Alexander's testimony against tenure for petitioner. Under the circumstances, petitioner has failed to prove that the vote to deny her tenure was induced by an improper motivation.

In view of petitioner's failure to carry the burden of proof in this matter, the findings in favor of respondent may be stated in general terms. Based upon the evidence presented at the hearing, I **FIND** as follows:

1. Petitioner behaved in an uncivil manner toward neighbors and police officers.

2. Petitioner attempted to intimidate neighbors, a police officer and a member of the board of education.

3. Other teachers were afraid of petitioner.

4. Petitioner was not a good role model for students.

5. The members of the board of education who voted against petitioner were motivated by petitioner's conduct in the community, her relationships with other teachers and her character. They were not motivated to use the vote on tenure as a reprisal because petitioner filed a lawsuit against a former member of the board of education.

With the facts concerning petitioner's conduct and the motivation of the board members established, the next question is whether the circumstances warrant the denial of tenure. Petitioner's conduct raises serious and legitimate concerns about her future behavior as a teacher. In view of the broad discretion given to the board, it seems evident that respondent was fully justified in denying petitioner tenure. Therefore, I **FURTHER FIND** as follows:

6. Respondent had a reasonable basis for the denial of tenure.

Petitioner's final contention is that respondent relied extensively on hearsay evidence. Petitioner's argument in effect raises a question whether respondent's evidence satisfies the residuum rule. As set forth in *N.J.A.C.* 1:1-15.5(b), some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. Here, the testimony given by Mr. Witty and Mrs. Regan concerning specific incidents certainly constitutes legally competent evidence sufficient to satisfy the residuum rule. In addition, the testimony of Police Chief Alexander concerning his assessment of petitioner's character was legally competent evidence. Finally, the testimony of the board members concerning their motivation with respect to the vote to deny tenure is certainly legally competent evidence. Therefore, I **CONCLUDE** that there is a residuum of legally competent evidence to support the ultimate findings in this matter.

Based upon the above, I **CONCLUDE** that petitioner has failed to prove by a preponderance of the believable evidence that the determination by respondent to deny her tenure was arbitrary, capricious or unreasonable. It follows that the petition in this matter must be dismissed.

Accordingly, it is **ORDERED** that the petition in this matter be dismissed.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Jan. 18, 2002
DATE

RICHARD McGILL, ALJ

Receipt Acknowledged:

1/25/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 29 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

cml

APPENDIX

WITNESS LIST

For petitioner:

Mary McEwan
Janice Ruth Olsommer
Cindy Lou Briggs
Carol Corcoran

For respondent:

Gerald J. Witty
Barbara Regan
William Alexander
Santora N. Molinari
Joseph G. Gomez
George E. Brewster, Jr.

EXHIBIT LIST

P-1	Letter from Carol Corcoran to Mary McEwan	Evidence
R-1	Letter dated April 16, 1996, from "William McEwan" to Barbara	Evidence

R-2	Notes of James S. Rothschild, Jr., of the hearing on June 29, 1998, concerning Mary McEwan	Identification
R-3	Minutes of meeting of Bloomingdale Board of Education of July 20, 1998	Evidence
R-4	Letter dated June 30, 1998, from James S. Rothschild, Jr., to Norman Danzig and Ms. Linda Shortman	Evidence
R-5	Letter dated August 13, 1998, from James S. Rothschild, Jr., to Sanford R. Oxfeld, Esq., with attachments	Identification
R-6	Investigation Report dated April 23, 1996	Evidence
R-7	Investigation Report dated October 7, 1997	Evidence
R-8	Investigation Report dated October 27, 1997	Evidence
R-9	Investigation Report dated January 3, 1998	Evidence
R-10	Investigation Report dated January 4, 1998	Evidence
R-11	Investigation Report dated August 15, 1998	Evidence
J-1	Stipulation of Facts	Evidence

OAL DKT. NO. EDU 7075-98
AGENCY DKT. NO. 203-6/98

MARY MC EWAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BLOOMINGDALE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, including transcripts of the hearings conducted at the OAL on February 23 and February 24, 2001, the Commissioner concurs with the Administrative Law Judge (ALJ) that the within petition is properly dismissed. Petitioner failed to demonstrate that the Board denied renewal of an employment contract for the 1998-99 school year for arbitrary and capricious reasons, notwithstanding a recommendation from the superintendent, in violation of *N.J.S.A.* 18A:27-4.1(b). Neither has petitioner met the limited standard entitling nontenured, nonrenewed teachers to relief, as established by the Appellate Division in *Dore, supra,* and recognized by the State Board of Education in *John Kufel, Jr. v. Board of Edcuation of the Union County Vocational-Technical School District, Union County,* decided by the State Board February 7, 1996, and *Randy Pratt v. Board of Education of the Borough of Butler, Morris County*, decided by the State Board January 6, 1999.

Accordingly, the Initial Decision is affirmed, and the within petition is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/11/02

Date of Mailing: 3/13/02

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

91-02

NANCY BAUCH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
_____	:	

January 31, 2002

OAL DKT. NO. EDU 3930-98
AGENCY DKT. NO. 106-4/98

NANCY BAUCH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

Maria Mucciello

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 1/31/02

Date of Mailing: 3/13/02

92-02

92-02

NEW BRUNSWICK EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 31, 2002

OAL DKT. NO. EDU 0585-01
AGENCY DKT. NO. 16-1/01

NEW BRUNSWICK EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 1/31/02

Date of Mailing: 3/13/02

93-02

NANETTE ROTONDA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 31, 2002

OAL DKT. NO. EDU 1086-00
AGENCY DKT. NO. 340-11/99

NANETTE ROTUNDA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

Maria Rucatello

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 1/31/02

Date of Mailing: 3/13/02

94-02

PINELAND LEARNING CENTER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,	:	DECISION
RESPONDENT.	:	

January 31, 2002

OAL DKT. NO. EDU 10454-01
AGENCY DKT. NO. 411-11/00

PINELAND LEARNING CENTER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 1/31/02

Date of Mailing: 3/13/02

135-02

135-02

BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 1, 2002

OAL DKT. NO. EDU 9917-00
AGENCY DKT. NO. 225-6/00

BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 4/1/02

Date of Mailing: 4/2/02

134-02

BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL AND TECHNICAL SCHOOL DISTRICT, BERGEN COUNTY,

PETITIONER,

V.

BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY, *ET AL.*,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

April 1, 2002

OAL DKT. NO. EDU 3264-01
AGENCY DKT. NO. 93-4/01

BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL AND TECHNICAL SCHOOL DISTRICT, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY, *ET AL.*,	:	DECISION
RESPONDENTS.	:	

The record and notice of withdrawal, with prejudice, transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal, with prejudice. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 4/1/02

Date of Mailing: 4/1/02

133-02

R.J.N., on behalf of minor child, T.P.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 1, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8105-01
AGENCY DKT. NO. 370-9/01

R.J.N. ON BEHALF OF T.P.L.,

Petitioner,

v.

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

Respondent.

Robert A. Elkinson, Esq., for petitioner

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

Record Closed: February 5, 2002 Decided: February 6, 2002

BEFORE **MARGARET M. MONACO,** ALJ:

This matter involves an appeal by petitioner R.J.N. on behalf of T.P.L. from a residency determination by respondent Board of Education of the South Orange and Maplewood School District. On or about October 29, 2001, respondent filed an Answer and Counterclaim. The Department of Education, Bureau of Controversies and Disputes, subsequently transmitted the matter to the Office of Administrative Law (OAL) where, on November 16, 2001, it was filed for a hearing and determination as a contested case. A hearing was scheduled for March 18, 2002. Prior to the scheduled hearing, the undersigned was advised that the matter had been resolved and counsel for respondent thereafter submitted the attached Stipulation of Settlement and Mutual Dismissal indicating the terms of agreement which the undersigned received on February 5, 2002. Having reviewed the record and the settlement terms, I **FIND:**

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

February 6, 2002
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Receipt Acknowledged:

2/13/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 14 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

pb

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
FEB 5 12 07 PM '02

SCHENCK, PRICE, SMITH & KING
10 Washington Street P. O. Box 905
Morristown, New Jersey 07963-0905
(201) 539-1000
Attorneys for South Orange and Maplewood Board of Education

OFFICE OF ADMIN LAW
FILED
2002 FEB -4 A 10: 05

R.J.N., ON BEHALF OF THE MINOR CHILD, T.P.L.,

Petitioner,

v.

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT

Respondent/Counterclaimant.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

Agency Ref. No. 370-9/01
OAL DKT NO. EDUOS

STIPULATION OF SETTLEMENT AND MUTUAL DISMISSAL

Petitioner Remy Jean Noel and Respondent/Counterclaimant Board of Education of the School District of South Orange and Maplewood, herein stipulate and agree as follows:

1. This settlement is being made without any admission of liability or wrongdoing on the part of any party and is for the purpose of amicably resolving this dispute. The parties specifically deny any wrongdoing or liability relating to any other party's claim.

2. The parties waive any and all claims which were or could be asserted in the within action or any other action, including attorneys fees and damages pursuant to any federal or State educational, constitutional or civil rights claims, including 42 U.S.C. 1983, and specifically release the other party from any claims arising out of or related to these claims.

3. T.P.L. will be permitted to continue to attend District schools for so long as Petitioner remains domiciled in the District and retains custody of the pupil through a court order.

4. As a result of the foregoing, Petitioner Remy Jean Noel withdraws his Petition filed pursuant to N.J.S.A. 18A:38-1, with prejudice, and Respondent/Counterclaimant Board hereby withdraws its Counterclaim pursuant to N.J.S.A. 18A:38-1, with prejudice.

1/18/02
REMY JEAN NOEL Date

1/24/02
SOUTH ORANGE/ MAPLEWOOD BOARD OF EDUCATION Date

OAL DKT. NO. EDU 8105-01
AGENCY DKT. NO. 370-9/01

R.J.N., on behalf of minor child, T.P.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Stipulation of Settlement and Mutual Dismissal, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/1/02

Date of Mailing: 4/1/02

132-02

FRANK B. DOMINIANNI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the State Board of Examiner's denial of a supervisor's certificate to him. The certificate was denied because petitioner obtained a master's degree from American State University (ASU), a university that was not approved or accredited for purposes of certification.

Because the university was neither approved by the state of Hawaii, where it is located, nor properly accredited, the ALJ determined that the degree did not meet the requirements of the Department's regulations for awarding certification. The ALJ rejected the assertion that the university was self-accredited and that such accreditation meets the requirements of the regulations.

The Commissioner agreed that ASU was not properly approved or accredited and affirmed the Initial Decision. The matter was dismissed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1851-01
AGENCY DKT. NO. 34-2/01

FRANK B. DOMINIANNI,
Petitioner,
v.
STATE BOARD OF EXAMINERS,
Respondent.

Vincent N. Marino, Esq., appearing for petitioner

Allison C. Eck, Deputy Attorney General, appearing for respondent
(David Samson, Attorney General of New Jersey, attorney)

Record Closed: December 27, 2001 Decided: February 8, 2002

BEFORE **MARGARET M. HAYDEN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appealed the denial by the respondent Board of Examiners (Examiners) of his application for a supervisor's certificate. On December 2, 2000, the respondent denied petitioner's request for a supervisor's certification. Petitioner

filed a timely appeal on or about February 13, 2001. The Department of Education transmitted the matter to the Office of Administrative Law (OAL) on March 15, 2001. The undersigned held a prehearing conference with the parties on June 28, 2001. The matter was scheduled for hearing on December 7, 2001.

On October 25, 2001, the Examiners filed a motion for summary decision and supporting papers. On November 16, 2001, petitioner filed a reply and cross motion for summary decision. On December 7, 2001, oral argument on the motion was held. The record was held open until December 7, 2001, for provision of information discussed at the hearing.

FACTS

The following facts, which are undisputed, I **FIND** to be **FACTS** in this case.

Petitioner, a tenured teacher, applied to the Department of Education for a supervisor's certification to pursue a career opportunity as an Athletic Director. One requirement to obtain the certification is a Masters Degree from an accredited or approved institution.

On April 8, 1998, the American State University (ASU) in Hawaii awarded petitioner a Masters of Science in Education. On March 2, 1999, the Office of Licensing and Credentials of the Department of Education denied the petitioner's application based in part on its determination that the ASU was not approved or accredited for purposes of certification. Petitioner appealed this determination. By letter dated April 7, 1999, petitioner's faculty advisor from the ASU wrote the Department of Education explaining that the University had chosen to operate under its own internal accrediting standards rather than pursue the costly method of accreditation.

The Hawaii State Department of Education (Hawaii DOE) has advised the Examiners that the Hawaii DOE had not granted approval to ASU for any purpose. The Hawaii DOE does not have any jurisdiction on the accreditation of college degree programs. The Hawaii DOE does not accept course work from the ASU towards meeting teacher licensing requirement because the University does not have regional accreditation acceptable to the department. Additionally, the University has not been approved by the department as having state approved teachers education programs.

American education institutions can very widely in the character and quality of their program. As a result to ensure basic levels of quality, the practice of accreditation rose "as a means of conducting non-government, peer evaluations of educational institutions and programs." The Office of Post Secondary Education (http://www.ed.gov/offices/OPE/accreditation/accredus.html). Through accreditation by private educational associations of regional or national scope with sound educational criteria evaluation of institutions can be made to determine if they are operating at basic levels of quality. *Id.*

LEGAL DISCUSSION AND CONCLUSION

In determining whether a degree from an institution of higher education will be recognized for certification purposes, *N.J.A.C.* 6:11-9.2(a)2i provides that "except where indicated below degrees will be recognized for purposes of administrative and supervisory certification in New Jersey from colleges and/or programs accredited or approved by the state in which the college exists." The term "accredited" as defined in *Blacks Law Dictionary* means "to give official authorization or status to; or (2) to recognize (a school) as having sufficient academic standards to qualify graduates for higher education or for professional practice." *Blacks Law Dictionary* (7th Ed. 1999).

In the New Jersey higher education licensure rules, accreditation has been defined as a "status attained by an institution through voluntarily meeting standards

set by a non-government entity recognized by the U.S. Department of Education or the Council for Higher Education Accreditation. *N.J.A.C.* 9A:1-1.2. For states without a licensing requirement a duly authorized institution of higher education is "one which is regionally accredited or accredited by the appropriate accrediting body recognized by that U.S. Department of Education or the Council for Higher Education Accreditation . . . . *N.J.A.C.* 9A:1-8.1.

The Examiners argued that under *N.J.A.C.* 6:9.2(a)3 the state must approve or accredit the institution of higher education. The petitioner argued that either approval must be by the State or by accreditation as the words are separated by the word "or." In light of the undisputed evidence that accreditation in the United States is by private institutions, not by states, it is clear that accreditation must not be done by the state.

However, this interpretation of the regulation does not help petitioner as petitioner has admitted that ASU has neither State approval nor independent accreditation. Petitioner nonetheless argued that the ASU's self-accreditation is sufficient to meet the requirement that the institution granting the degree be accredited. This argument ignores the definition of accreditation which requires the institution to meet the standards set by a non-government entity recognized by the U.S. Department of Education or the Council for Higher Education Accreditation. *N.J.A.C.* 9A:1-1.2; *N.J.A.C.* 9A:1-8.1. Clearly, the ASU's self-accreditation does not meet this requirement.

Petitioner also argued that a comparison of his course of study with the standards for accreditation of teacher education in *N.J.A.C.* 6:11-7.1 show that he is qualified. This argument completely misses the point as *N.J.A.C.* 6:11-7.1 does not set forth standards for approving institutions for higher education but rather goes to a curriculum of teacher preparation. The basis for the denial was not failure to have the correct courses but the absence of a Masters Degree from an accredited or approved institution.

Petitioner has presented ample evidence that he has had extensive experience in his field and is highly recommended by present and former employers. While admirable, this alone cannot qualify him for a supervisor's certification without a Masters Degree from an approved or accredited institution. I **CONCLUDE** that ASU is not an approved or accredited institution under *N.J.A.C.* 6:9.2. Therefore, I must **CONCLUDE** that he is not qualified for a supervisor's certification.

ORDER

Based on the foregoing, it is **ORDERED** that the Board of Examiners' determination that petitioner does not have a degree for a supervisor's certification is hereby **AFFIRMED**. It is further **ORDERED** that petitioner's appeal is hereby **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Feb 8, 2002
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

2/13/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 14 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

jb

OAL DKT. NO. EDU 1851-01
AGENCY DKT. NO. 34-2/01

FRANK B. DOMINIANNI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

The record and Initial Decision issued by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review of the record, the Commissioner agrees with the findings and conclusions of the Administrative Law Judge (ALJ) that American State University is not an approved or accredited institution under *N.J.A.C.* 6:11-9.2; thus, petitioner is not qualified for administrative certification with a supervisor's endorsement. Consequently, the Commissioner concurs with the ALJ's recommendation to dismiss the Petition of Appeal and adopts the Initial Decision, for the reasons set forth therein, as the final decision in this matter.

Accordingly, the matter is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/1/02

Date of Mailing: 4/1/02

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

128-02

128-02

SHARON MILLER, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY, : DECISION

RESPONDENT. :

SYNOPSIS

Petitioner, a tenured teacher in the district, alleged that the Board violated her tenure rights when it failed to reinstate her upon the expiration of her child-care leave. The ALJ granted petitioner partial summary decision, holding that petitioner's tenure rights were not waived pursuant to the contractual agreement between the board and petitioner's collective bargaining unit - wherein it was agreed that employees that failed to provide notice of intent to return from child-care leave as set forth in the agreement could be terminated - because termination of a tenured employee is governed by statute, and the statutory requirements for termination of a tenured employee could not properly be usurped by the contractual agreement between the Board and petitioner's bargaining unit.

Prior to hearing on the issue of the amount back pay and emoluments owed petitioner, the parties agreed to a settlement, which agreement was made contingent on the ALJ's partial summary decision order being affirmed upon review by the Commissioner.

The Commissioner affirmed the ALJ's order granting partial summary decision for the reasons set forth therein, and approved the settlement agreement.

Matter was dismissed.

March 25, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8087-99

AGENCY DKT. NO. 248-8/99

SHARON MILLER,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,

Respondent.

Kathleen A. Naprstek, Esq., for the petitioner (Zazzali, Zazzali, Fagella and Nowak, attorneys)

Michael J. Rogers, Esq., for the respondent (McDonald, Rogers & Rizzolo, attorneys)

Record Closed: February 5, 2002 Decided: February 5, 2002

BEFORE **STEVEN C. REBACK**, ALJ:

This matter concerns the allegation of the petitioner, Sharon Miller, that the respondent, the Board of Education of the Borough of Somerville, Somerset County, violated her tenure rights when denying her return to work from child care leave. The petitioner requested a hearing and the matter was transmitted to the Office of Administrative Law (OAL) on September 13, 1999, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties conferred and agreed to a settlement. The attached stipulation sets forth the terms of the settlement, and is incorporated herein.

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

2/05/02
DATE

Steven Reback/gzo
STEVEN C. REBACK, ALJ

Receipt Acknowledged:

2/7/02
DATE

Debbie Antonaitis (fa)
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 7 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

None

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN, P.C.
One Riverfront Plaza
Newark, New Jersey 07102
(973) 623-1822
Attorneys for Petitioner

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2002 FEB -5 A 9:53

SHARON A. MILLER, Petitioner, v. BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 248-8/99 OAL DKT. NO. EDU 08087-99 STIPULATION OF SETTLEMENT AS TO DAMAGES AND MITIGATION

The parties, by and through their attorneys, Kathleen A. Naprstek, Es (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, P.C.) for petitioner Sharon A. Miller, and Michael J. Rogers, Esq. (McDonald, Rogers & Rizzolo, Esqs.) for Respondent, hereby stipulate and agree as to the following:[1]

1. On September 14, 2000, the Hon. Steven C. Reback, A.L.J. issued an interlocutory letter ruling and order granting Petitioner's motion for partial summary decision and denying Respondent's motion for summary decision. That ruling and order concluded that Respondent had violated Petitioner's tenure rights as a result of its failure to retain her in, or reinstate her to, her tenured position of employment during the 1999-2000 school year and thereafter.

2. The issue of mitigation of damages, back pay and other emoluments

[1] This settlement was placed on the record on July 30, 2001.

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

attendant to Petitioner's claims was not decided and a plenary hearing was scheduled for July 30, 2001.

3. On that date, the parties appeared for the plenary hearing and reached a settlement as to the issue of mitigation, back pay and other emoluments.

4. The terms of that settlement are as follows:

A. During the 1999-2000 school year (September 1, 1999 through June 30, 2000), Petitioner would have been on step 13 (MA + 30) of the teacher's salary guide and would have earned an annual salary of $58,641.00. Although Petitioner is entitled to a back pay award of $58,641.00 for this period of time, she also had a duty to mitigate her damages. Taking such duty into consideration, the parties have agreed that Respondent shall therefore pay to Petitioner the gross amount of $21,990.00, subject to standard and ordinary deductions.

B. During that same school year, Petitioner would have received Board paid health insurance coverage for herself and her family. Respondent shall therefore pay to Petitioner the sum of $1,280.00 as reimbursement for health insurance premiums paid for alternative health insurance coverage obtained through her husband's employer.

C. The parties agree that Petitioner shall pay the employee's share of any pension contributions to the Teachers' Pension & Annuity Fund for the period of September 1, 1999 through June 30, 2000 based upon the Petitioner's back pay award of $58,641.00 before the reduction for mitigation of damages, that

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

the employer shall not be liable for the employee's share thereof, that tl employee shall not be liable for the employer's share thereof, that the State will contribute the employer's share of pension contributions if it agrees to do so, and that if the State does not contribute the employer's share of pension contributions, the Board shall contribute the employer's share of such contributions. This contribution is expressly conditioned upon approval of same by the Teachers' Pension and Annuity Fund.

5. This settlement is expressly conditioned upon adoption and approval by the Commissioner of Education of the Letter Ruling and Order entered by the Hon. Steven C. Reback, A.L.J., and any further appellate proceeding before the State Board of Education. Respondent expressly reserves the right to seek review of the Letter Ruling and Order. In other words, the terms of this Stipulation and Settlement are only valid if the underlying decision is subsequently upheld by the Commissioner of Education and/or State Board of Education.

Kathleen A. Naprstek, Esq.
ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
For Petitioner

Michael J. Rogers, Esq.
McDONALD, ROGERS & RIZZOLO
For Respondent

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
P.O. Box 049
Trenton, New Jersey 08625
(609) 588-6525
Fax - (609)588-6536

STEVEN C. REBACK
ADMINISTRATIVE LAW JUDGE

LETTER RULING AND ORDER GRANTING PETITIONER'S MOTION FOR PARTIAL SUMMARY DECISION AND DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

Kathleen A. Naprstek, Esq.
Zazzali, Zazzali, Fagella and Nowak
One Riverfront Plaza
Newark, New Jersey 07102

Michael J. Rogers, Esq.
McDonald, Rogers & Rizzolo
181 West High Street
Somerville, New Jersey 08876

Re: Sharon Miller v. BOE of the Borough of Somerville, Somerset County
OAL Dkt. No. EDU 8087-99

Dear Counsel:

The following is a Ruling and Order issued in response to your cross-motions for summary decision. For the following reasons the motion of respondent (Somerville) is **DENIED** and the motion of the petitioner (Sharon Miller) is **GRANTED**. Since the issue of back pay remains to be disposed of, this matter cannot be resolved through the issuance of an initial decision which must be fully dispositive. Consequently, the form I have taken to render this decision is by way of letter ruling. A plenary hearing, should it prove necessary, will be scheduled as soon as possible to determine issues of back pay and other emoluments denied to the petitioner by respondent as a result of its failure to retain her, or reinstate her, to her tenured position of employment during the 1999-2000 school year and thereafter.

I

Petitioner, Sharon A. Miller, holds an Instructional Certificate issued by the New Jersey State Board of Examiners in November of 1983. This Certificate contains a comprehensive science endorsement.

NEW JERSEY IS AN EQUAL OPPORTUNITY EMPLOYER

Ms. Miller commenced employment with Respondent, Board of Education of the Borough of Somerville, Somerset County, on or about September 1, 1986 as a full time science teacher. Respondent has employed her in that position through the 1998-99 school year. As a result, Ms. Miller acquired tenure with the Somerville Board pursuant to *N.J.S.A.* 18A:28-5.

Furthermore, at the time of the dispute, Ms. Miller was a member of the Somerville Education Association, an employee organization designed to represent its members for the purpose of collectively negotiating with the Somerville Board of Education pursuant to *N.J.S.A.* 34:13A-5.3. During the course of the Association's representation a Collective Bargaining Agreement was reached between the Board and the Association, effective July 1, 1997 and continuing until June 30, 2000.

On or about December 1, 1997, Ms. Miller requested a paid child adoption leave of absence for the period January 26, 1998 through June 30, 1998, and indicated her intent to return to work on September 1, 1998. This request was in writing and was approved by the Somerville Board at a meeting held on December 16, 1997.

On or about April 29, 1998, Ms. Miller further requested in writing a one-year unpaid leave of absence, also for the purpose of child care, and indicated her intention to return to her teaching position effective September 1, 1999. The Board again approved the request at a meeting held on May 12, 1998. At the same meeting the Board approved a transfer of Ms. Miller from a full-time teacher of science position at the high school to a full-time teacher of science position at the middle school, effective September 1, 1998.

On or about May 24, 1999, Ms. Miller received documentation from the Board regarding her right to apply for continued medical coverage under COBRA. The correspondence further indicated that Ms. Miller's benefits would cease effective June 30, 1999.

Subsequently, Ms. Miller requested information on her teaching assignment for the 1999-2000 school year by letter dated July 27, 1999, addressed to Tim O'Hallorhan, Principal of Somerville High School. Ms. Miller then received a letter dated August 2, 1999 from Superintendent Carolyn F. O'Leary. This letter notified Ms. Miller that she was no longer employed by the Somerville Public Schools for "failure to adhere to the contract as noted on the attached enclosure."

Ms. Miller then filed a Petition of Appeal with the Commissioner of Education on August 12, 1999. The Board filed an answer to the Petition on September 2, 1999, and the matter was transferred to the Office of Administrative law as a contested case on September 30, 1999.

NEW JERSEY IS AN EQUAL OPPORTUNITY EMPLOYER

The parties have agreed to a joint stipulation of facts, leaving "no genuine issue as to any material fact," *N.J.A.C.* 1:1-12.5(b), rendering the case ripe for summary judgment.

Thereafter a briefing schedule was devised and the final brief was submitted to my office on August 6. 2000, the date on which the record in these proceedings closed.

II

ANALYSIS

1. Jurisdiction

In the letter brief in support of respondent's motion for summary decision, the Somerville Board of Education pursues the affirmative defense that the "Commissioner of Education lacks subject matter jurisdiction." *Respondent's Brief*, at 6. In doing so, the Board frames the issue involved as purely "a matter of contract interpretation," stating that "[l]eaves of absence and procedures upon return are obviously negotiable terms and conditions of employment."[1] *Id.*, at 6-7.

However, the contested provision relied upon by the Somerville Board provides for the termination of tenured employees without the legislative safeguards secured by the school laws. As such, the Board's characterization of the issue is really a mischaracterization that ignores the preeminence of the school laws with regard to matters relating to tenure and the implication of those laws with regard to the contract provision at issue in this case. In light of the broad jurisdiction granted to the Commissioner over matters concerning the school laws and the case law interpreting the boundaries of his jurisdiction, the Board's argument simply cannot stand.

This controversy requires an examination of the rights of a tenured teacher and the scope of those rights with regard to negotiated contractual provisions. The determination of this issue therefore falls squarely within the subject matter jurisdiction of the Commissioner of Education, as it is clear that the Commissioner "shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes *arising under* the school laws[.]" *N.J.S.A.* 18A:6-9 (emphasis added).

[1] The characterization of the relevant language as providing for conditions upon which the Somerville Board will recognize the resignation of a tenured employee assumes that a negotiated agreement can define what constitutes the valid resignation of a tenured employee. Respondent provides a citation to *Hall v. Board of Educ. of the Township of Jefferson*, 125 *N.J.* 299 (1991), in support of this premise. However, the negotiability of defining what constitutes a valid resignation was not an issue in that case. Rather, *Hall* was concerned with the right of a school board to deny the request of a tenured employee to extend the effective date of a resignation. Implied in the holding is the understanding that the granting of *incentives* upon retirement may be negotiated, but nowhere in the opinion is it even suggested that a negotiated agreement can alter the requirements necessary to effectuate a resignation or the waiver of tenure rights. *See*, footnote 2, *infra* (discussing what constitutes an effective resignation or waiver of rights of a tenured employee).

"The Supreme Court [of New Jersey] has repeatedly 'reaffirmed the great breadth of the Commissioner's powers,' recognizing that he has 'fundamental and indispensable jurisdiction over all disputes and controversies arising under the school laws.'" *Board of Educ., City of Newark, Essex County. v. Levitt*, 197 *N.J. Super.* 239, 246 (App. Div. 1984). While this grant of jurisdiction does not attach merely because school personnel is involved, *Pennetta & Sons, Inc. v. Board. of Educ. of North Bergen,* OAL DKT. EDU 3648-82, (Apr. 22, 1983) *adopted,* Comm'r of Education, (May 27, 1983)(*citing, East Brunswick B. of Educ. v. Township Council of East Brunswick*, 48 *N.J.* 94, 102 (1966); *Board of Trustees of Teachers' Pension v. La Tronica*, 81 *N.J. Super.* 461 (App. Div. 1963), *cert. denied*, 41 *N.J.* 587 (1964); *Baham v. Hoboken Bd. of Educ.,* No. A-283-80 (App. Div. June 29, 1981), and it is settled that "a controversy over the interpretation or enforcement of an employment contract does not come within the orbit of [*N.J.S.A.* 18A:6-9]," *Id.,* at 4 (*quoting, Larsen v. Piscataway Bd. of Educ.,* OAL DKT. EDU 1445-81 (Jan. 7, 1982), *adopted,* Comm'r of Education (Feb. 18, 1982), *rev'd,* State Bd. (Oct. 6, 1982)), it is equally clear that "[the Commissioner's] jurisdiction over school litigation encompasses questions regarding tenure rights, *N.J.S.A.* 18A:25-5." *Levitt, supra,* 197 *N.J. Super.,* at 246.

The court in *South Orange-Maplewood Educ. Ass'n. v. Board. of Educ. of S. Orange, 146 N.J. Super.* 457 (App. Div. 1977), stated that:

> [t]he Commissioner has jurisdiction over certain disputes in the absence of an agreement or if the subject matter is not susceptible to binding agreement because it concerns major educational policy or because the issues are controlled by the school laws. *Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n.* 64 *N.J.* 17, 31 (1973); *Union County Regional High School Bd. of Educ. v. Union County Reg'l High Sch. Teachers Ass'n.*, 145 *N.J. Super.* 435 (App. Div. 1976). *C.f., Red Bank Bd. of Educ. v. Warrington*, 138 *N.J. Super.* 564, 571-573 (App. Div. 1976).
>
> [*Id.*, at 462.]

Furthermore, the Supreme Court of New Jersey has consistently held that "[t]he Tenure Act, *N.J.S.A.* 18A:28-1 to -18, specifically defines the conditions under which teachers are entitled to the security of tenure. *The statute makes tenure a mandatory term and condition of employment.* It therefore supercedes contractual terms." *Spiewak v. Board of Ed. of Rutherford*, 90 *N.J.* 63, 72-73 (1982)(*citing, In the Matter of Local 195, IFPTE, AFL-CIO V. State*, 88 *N.J.* 393, 403-04 (1982); *State v. State Supervisory Employees Ass'n*, 78 *N.J.* 54, 82 n. 7 (1978); *Red Bank Reg. High Sch. Bd. of Educ.,* 78 *N.J.* 122, 141 (1978); Zimmerman v. Newark Bd. of Educ., 38 *N.J.* 65, 70-72 (1962))(emphasis added).

Where, as here, the subject matter of the contract shares "sufficient contacts with statutory and decisional education law," *Love v. Trenton Bd. of Educ.,* OAL DKT. EDU 647-83, at 9-10 (June 6, 1984) *adopted,* Comm'r of Educ. (July 23, 1984), the Commissioner may exercise the jurisdictional power to resolve the dispute. *C.f., Page v. Trenton Bd. of Educ.,* 1980 *S.L.D.* 1193; *Kyler v. Voorhees Township Bd. of Educ.,* 1979 *S.L.D.* 169; *Wagner v. Bridgewater-Raritan Reg'l Sch. Dist. Bd. of Educ.*, 1978 *S.L.D.* 827; *McLean v. Glen Ridge Bd. of Educ.,* 1977 *S.L.D.* 311; *David v. Cliffside Park Bd. of Educ.,* 1967 S.L.D. 192. Therefore, the Somerville Board of Education's argument to the contrary should be dismissed.

2. Validity of the Contractual Provision

In its brief, Respondent states several indistinct bases for the validity of the contractual provision at issue. None of the arguments posited is clearly on point, as the core issue in this case is the validity of the contract provision itself in light of the statutory scheme regulating tenured employees. However, the arguments will be addressed in turn below.

The critical language of Article 12C(5) of the Collective Bargaining Agreement between the Board of Education of the Borough of Somerville and the Somerville Education Association states:

> A teacher granted a child care leave shall indicate to the Board in writing his/her intent to return to teaching by March 1st, if returning in September, or by October 1st, if returning in the second semester. All other employees shall so indicate at least sixty (60) days prior to the end of the leave. *Failure to do so will be construed as a decision not to return, and employment will be declared at an end on that date.* (emphasis added).

In contrast, *N.J.S.A.* 18A:28-5 states, in relevant part:

> The services of all teaching staff members employed in the positions of teacher ... shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then *only in the manner prescribed by subarticle B of article 2 of chapter 6 of this Title*[.] (emphasis added).

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> The last sentence of Article 12C(5), in effect, authorizes the dismissal of a tenured employee without implicating the dismissal provisions of *N.J.S.A.* 18A:28-5[2]. As the contractual language effectuates the dismissal of a tenured employee without the statutory safeguards of a hearing, the employee's tenure rights have been abrogated, and the dismissal pursuant to the negotiated contract cannot stand.

The Supreme Court of New Jersey has acknowledged that "[a]mong the powers expressly vested by the Legislature in the local school boards was the power to employ, promote, transfer and *dismiss* and to adopt appropriate rules in connection therewith, all subject of course to *specific statutory provisions*." *Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n*, 64 *N.J.* 17, 23 (1973)(*citing, 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) (emphasis added).

However, "the mere existence of a statute or regulation relating to a given term or condition of employment does not automatically preclude negotiat[ed alternatives]", *Wright v. Board of Educ. of the City of East Orange, Essex County*, 99 *N.J.* 112, 119 (1985)(*citing, Local 195, supra,* 88 *N.J.,* at 403), but rather "'[n]egotiation is preempted only if the "statutory or regulatory provisions ... speak in the imperative and leave nothing to the discretion of the public employer."'" *Ibid.* (*quoting Supervisory Employees Ass'n, supra*, 78 *N.J.,* at 80 (1978)).

More specific to the issue at hand, however, is that the express purpose of the tenure statutes is to "prevent[] school boards from abusing their superior bargaining power over teachers in contract negotiations, *Trenton Bd. of Educ. v. State Bd. of Educ.*, 125 *N.J.L.* 611, 614 (S.Ct. 1941). It protects teachers from dismissal for 'unfounded, flimsy or political reasons.' *Zimmerman, supra*, 38 *N.J.*, at 71." *Spiewak, supra*, 90 *N.J.*, at 72. And, "[a]s was stated in *Nancy Weller v. Board of Educ. of the Borough of Verona*, 1973 *S.L.D.* 513, 521:

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[2] In its brief, Respondent suggests that this provision does not effectuate a dismissal, but rather should be interpreted to mean that non-compliance with the provisions of Article 12C(5) actually constitutes a waiver of one's tenure rights; i.e., non-compliance amounts to a valid tender of resignation. Such an interpretation has no merit on these facts or in accord with the law.

To begin, Petitioner was on an authorized leave of absence. It is clear that a leave of absence, taken by a tenured employee, in no way suggests that the employee wishes to resign or waive any rights. *See, Murray v. Northern Highlands Reg'l High Sch. Bd. of Educ.*, 92 *N.J.A.R.*2d (EDU) 335, at 339 (recognizing that a position held by an employee on a leave of absence does not create a vacancy, but rather the position becomes "only temporarily unoccupied by its incumbent, whose return to duty [is] contemplated.").

Furthermore, New Jersey case law has long held that the resignation or waiver of tenure rights by a tenured employee must be "voluntary" and "intentional" to be effective. *Evaul v. Board of Educ. of City of Camden*, 35 *N.J.* 244 (1961)(holding that tenured employee's written resignation does not divest the employee of tenure rights where the resignation was submitted under "emotionally charged" and "unusual circumstances"); *O'Toole v. Forestal*, 211 *N.J. Super.* 394, 402-403 (App. Div. 1986)(holding that where petitioner has been "charged with knowledge of the legal effect of the rejection, the refusal of reemployment result[s] in an effective waiver of petitioner's tenure and reemployment rights."); *In the Matter of the Tenure Hearing of Robert C. Bates*, OAL DKT. EDU 3490-84 State Bd. of Educ. Decision, at 6 (Dec. 5, 1986) *aff'd,* No. A-2700-86 (App. Div. Nov. 6, 1987)(holding tenured employee's prolonged absence without medical leave did not constitute actual abandonment);. *C.f., Vexler v. Board of Educ. of the Borough of Red Bank, Monmouth County*, 1 *N.J.A.R.* 196 (1980)(holding that a tenured employee, whose full-time position was legally abolished, does not waive tenure rights by refusing to accept a position of lesser rank). It is clear that Ms. Miller evidenced absolutely no intention to voluntarily relinquish her tenure security in this case.

> ...In the Commissioner's view, the statutes in *N.J.S.A.* 18A are so *explicit* with respect to their delegation of authority, that they take preference over the more general provision of the New Jersey Employer-Employee Relations Act....
>
> [*Philbin v. Board of Educ. of the Borough of Pitman, Cloucester County*, 1981 *S.L.D.* 595 (emphasis added).]

The result of the above is the recognition of the "Legislative concept" regarding the school laws in general and the tenure laws in particular. A hierarchy has been established with regard to the interplay between the school laws, the labor laws and the discretion of local school boards. Statutes that explicitly confer rights and duties upon the parties cannot be circumvented, altered or negotiated within their mandate. All subjects not expressly covered are open to negotiation or discretion, insofar as they conform to the overall "legislative concept." Therefore, "[s]uch statutes and rules of the State Board affecting the [b]oard[s of education] and [their] employees and the agreements negotiated under *N.J.S.A* 34 must exist as harmonious provisions." *Id.*, at 605.

With regard to the case *sub judice*, where *N.J.S.A.* 18A:28-5 specifically provides that no tenured employee may be dismissed absent "inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause" and then *only* where the board adheres to the procedures "prescribed by subarticle B of article 2 of chapter 6" of Title 18, no party may circumvent these procedures or contract out of these procedures.

The language of Article 12C(5) clearly attempts to provide a back-door provision whereby unwary tenured employees run the risk of dismissal in a fashion contrary to the statutory protection of *N.J.S.A.* 18A:28-5. Despite Respondent's arguments[3], this case is functionally equivalent to the facts of *Philbin, supra*, and the similarity should govern the result as well.

The *Philbin* court was faced with a contract provision governing leave of absences. The relevant language in that contract stated that "[t]he granting of such leave of absences does not bind the Board to reemploy the person nor return him to his previous position except when stated otherwise by law." *Id.*, at 599. Upon Petitioner Philbin's return from an approved leave of absence, the Board informed him that he would not be reemployed. In effect, the language of the contract was interpreted by the Board as altering the nature of a leave of absence, characterizing the return of an employee from a leave of absence as an application for reemployment.

In holding the disputed language null and void, the A.L.J. found that this language was "inconsistent with the protection conferred on tenured teachers by the Legislature and the State Board of Education in the tenure statutes and in *N.J.A.C.* 6:3-1.10[,]" *Id.* , at 605, and ordered reinstatement of Petitioner Philbin and renegotiation of the contested terms.

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[3] Respondent provides a rather circular argument with regard to the similarity of *Philbin*. Respondent states: "In *Philbin*, the teacher fully complied with the terms and conditions of his leave of absence. Regrettably, Ms. Miller did not." *Respondent's Brief*, at 4. This line of thinking has little merit, primarily because it does not address the issue of the validity of the terms and conditions of the contracts. To suggest that had Ms. Miller complied with the terms and conditions of Article 12C(5) is determinative misses the point. Rather, whether or not the terms and conditions of Article 12C(5) run contrary to the express safeguards of *N.J.S.A.* 18A:28-5 is the determinative question to be addressed here.

In the present case, Respondent argues that "the contractual language in *Philbin* is procedurally and substantively different from Article 12C(5) of [the] Somerville collective bargaining agreement." *Respondent's Brief*, at 3. To suggest that the *Philbin* contract is different because discretion to rehire was given to the school board in that case, whereas the present contract works automatically misses the point and suggests that the court recognize form over function. Rather, rudimentary analysis of the two provisions reveals the similarity in their effect: to provide a mechanism for the school boards to dismiss tenured employees without the legislatively mandated procedural protections required under *N.J.S.A.* 18A:28-5.

As a result, the decision in the present case should be no different than the decision reached in *Philbin.* Article 12C(5) of the Collective Bargaining Agreement between the Somerville Board of Education and the Somerville Education Association is in direct conflict with the Tenure provisions as established by the New Jersey State Legislature. Respondent Somerville Board of Education's motion for summary decision should be denied, and the motion of the Petitioner, requesting reinstatement and such other relief as the Commissioner deems just and appropriate, should be granted.

Accordingly, and based upon the foregoing, I **CONCLUDE** that the petitioner has demonstrated that there are no genuine issues as to any material of fact and that she is entitled to prevail as a matter of law. Accordingly the petitioner's motion for partial summary decision in respect to her tenure rights be and is hereby **GRANTED**. It is further **ORDERED** that a plenary hearing, should one prove necessary, shall be scheduled to address the issue of back pay and other emoluments and mitigation which relate to Ms. Miller's reinstatement to her tenured position for the 1999-2000 school year and subsequently. It is further **ORDERED** that respondent's motion for summary decision be and is hereby **DENIED**.

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

9/14/00
DATE

STEVEN C. REBACK, ALJ

es

c: Clerk's Office – Trenton OAL

NEW JERSEY IS AN EQUAL OPPORTUNITY EMPLOYER

OAL DKT. NO. EDU 8087-99
AGENCY DKT. NO. 248-8/99

SHARON MILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review of the record, the Commissioner notes that the settlement presented for approval concerns damages and mitigation of monies owing in the matter due to an order of the Administrative Law Judge (ALJ), issued on September 14, 2000, which granted partial summary decision to petitioner based on the ALJ's conclusion that the Board had violated petitioner's tenure rights when it failed to retain her in, or reinstate her to, a teaching position upon completion of a child rearing leave in 1999.[1] It is further noted that the settlement is expressly conditioned upon the Commissioner's adoption and approval of that ruling and order of the ALJ (Settlement Term 5)

Upon review of the record in its entirety, the Commissioner concurs with the ALJ's ruling and order granting partial summary decision to petitioner and approves the

[1] The Board did not seek interlocutory review of the ALJ's September 14, 2000 ruling at the time it was issued; thus, pursuant to *N.J.A.C.* 1:1-12.5(e), it is being reviewed by the Commissioner at the conclusion of the proceedings in the matter.

settlement terms. Consequently, the ALJ's order of September 14, 2000 and the terms of the settlement presented herein are adopted by the Commissioner as the final decision in this matter.

Accordingly, the matter is no longer deemed to be a controversy before the Commissioner and is hereby dismissed, subject to the parties' compliance with the terms of the settlement.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 3/25/02

Date of Mailing: 3/27/02

[2] The decision which grants partial summary judgment to petitioner may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

123-02

123-02E

F.P.T., on behalf of minor child, N.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SALEM COUNTY VOCATIONAL SCHOOL DISTRICT, SALEM COUNTY, BOARD OF EDUCATION OF WOODSTOWN-PILESGROVE REGIONAL SCHOOL DISTRICT, SALEM COUNTY, AND GLOUCESTER COUNTY VOCATIONAL SCHOOL DISTRICT, GLOUCESTER COUNTY,	:	DECISION ON MOTION
RESPONDENTS.	:	

March 25, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
DISMISSING REQUEST FOR
EMERGENT RELIEF
OAL DKT. NO. EDU 485-02
AGENCY DKT. NO. 23-1/02

F.P.T. ON BEHALF OF MINOR CHILD
NT

Petitioner,

v.

BOARD OF EDUCATION OF THE SALEM COUNTY VOCATIONAL SCHOOL DISTRICT. SALEM COUNTY AND WOODSTOWN-PILESGROVE REGIONAL HIGH SCHOOL, SALEM COUNTY, AND GLOUCESTER COUNTY VOCATIONAL SCHOOL, GLOUCESTER COUNTY

Respondent.

F.P.T., petitioner, *pro se*

Alan R. Schmoll, Esq., appearing on behalf of respondents Board of Education of the Salem County Vocational School District, Salem County, and Woodstown-Pilesgrove Regional High School, Salem County (Capehart and Scatchard, attorneys)

No appearance on behalf of respondent Gloucester County Vocational School, Gloucester County

BEFORE **JOHN R. FUTEY,** ALJ:

On February 5, 2002, petitioner F.P.T., on behalf of minor child, N.T., filed an Emergent Relief application with the Department of Education, which was received by it on February 7, 2002, in which he challenged the decision to deny N.T. admission to the Gloucester County

Institute of Technology and in which he sought Emergent Relief to allow his daughter to audition for the 2002/2003 school year at that institution. This order results from that Emergent Relief application.

The matter was transmitted to the Office of Administrative Law (hereafter "OAL") and was received at the OAL on February 8, 2002. An Emergent Relief hearing was set to be heard on February 13, 2002, at the OAL, Trenton, New Jersey, but no one appeared on that date as a result of the Department of Education having failed to provide addresses for counsel to which notice could be sent. The matter was thereafter rescheduled to be heard on February 25, 2002, at the OAL, Trenton, New Jersey. As indicated hereinabove, on that date, petitioner F.P.T. appeared along with Alan Schmoll on behalf of two of the respondent districts. When this tribunal observed there was no appearance on behalf of the respondent Gloucester County Institute of Technology, respondents counsel Alan Schmoll was directed to immediately contact Gloucester County's purported counsel, Robert J. Smith, II, Esq., in order to verify the status of his participation in the matter. After waiting one half hour from the commencement of the hearing time, the matter proceeded to be heard without any input from the Gloucester County School or any attorney on its behalf whatsoever.

At the Emergent Relief hearing, Mr. Schmoll verbally raised an affirmative defense, which had been previously supplied as part of his answer to the petition and application for Emergent Relief which had been filed in the matter, *to wit*, in relevant part, that petitioner had failed to comply with the requirements of *N.J.A.C.* 6A:3-1.6(b) regarding applications for Emergent Relief in that no memorandum or brief was filed in support of such application. As a result, Mr. Schmoll argued that he was unable to fully address the parameters of the matter then pending before me for purposes of Emergent Relief.

At that point, I inquired whether or not petitioner intended to file any memorandum or brief, as required in the above-cited regulations, to which he replied "no." Additionally, he was asked whether or not he intended to consult with an attorney or have a brief or memorandum supplied later that day, to which he also replied "no." He was also invited to have the matter continued in order to provide him with an opportunity to comply, but he declined that offer. After considering additional argument by both sides regarding that threshold matter, I once again

instructed petitioner that, absent the submission of an appropriate memorandum or brief to support his bare assertions, I was unable to consider his application for Emergent Relief as having been satisfied in accordance with *N.J.A.C.* 6A:3-1.6(b).

Specifically, "when a motion for a stay or Emergent Relief is filed, it shall (emphasis added) be accompanied by a letter memorandum or brief which shall (emphasis added) address the following standards to be met for granting such relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982):

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim;
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the request to relief is not granted.

Based upon all the foregoing, and after having given petitioner a full opportunity to address the concerns raised by respondents in this matter, I **FIND** and **CONCLUDE** that, absent the presentation of any supporting letter memorandum or brief, I am unable to find any legal right underlying petitioner's claim to have been settled, as well as being unable to determine whether or not he has the likelihood of prevailing on the merits of the underlying claim, among other concerns raised by me at the Emergent Relief hearing.

Accordingly, it is **ORDERED** that the motion for Emergent Relief is **dismissed without prejudice**. If petitioner seeks to file an appropriate letter memorandum or brief which shall address all the concerns raised hereinabove under the *Crowe* decision, then the matter shall be rescheduled for an Emergent Relief hearing, at his preference. Unless and until that occurs, however, the Emergent Relief application is **dismissed without prejudice**.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of Emergent Relief in accordance with *N.J.S.A.* 52:14B-10.

March 1, 2002
DATE

JOHN R. FUTEY, ALJ

mamf

OAL DKT. NO. EDU 485-02
AGENCY DKT. NO. 23-1/02

F.P.T., on behalf of minor child, N.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SALEM COUNTY VOCATIONAL SCHOOL DISTRICT, SALEM COUNTY, BOARD OF EDUCATION OF WOODSTOWN-PILESGROVE REGIONAL SCHOOL DISTRICT, SALEM COUNTY, AND GLOUCESTER COUNTY VOCATIONAL SCHOOL DISTRICT, GLOUCESTER COUNTY,	:	DECISION ON MOTION
RESPONDENTS.	:	

The record of this emergent relief matter, which includes the audiotape of the proceeding conducted at the Office of Administrative Law (OAL), and the Order of the Administrative Law Judge (ALJ), have been reviewed.

Upon such review, the Commissioner affirms the Order denying emergent relief because the record establishes that petitioner has not satisfied the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). In so holding, however, the Commissioner is not in agreement with the ALJ that petitioner failed to comply with *N.J.A.C.* 6A:3-1.6(b) because the application for emergent relief did not have a letter brief or memorandum of law addressing the *Crowe v. DeGioia* standards for the grant of injunctive relief. Given petitioner's *Pro Se* status, the Commissioner finds that petitioner's papers, although sparse in legal argument, meet the intent and purpose of the aforementioned

regulation. Moreover, although petitioner's written submission may have been rudimentary insofar as specifically addressing the *Crowe* standards, the ALJ provided petitioner a thorough explanation of the *Crowe* standards during the proceeding before the OAL and ample opportunity for petitioner to express his position as to why emergent relief should be granted in this matter.

Notwithstanding this determination, the Commissioner concludes that, even granting petitioner every deference, the arguments petitioner presents in support of his request for emergent relief, contained in the papers he filed with his petition and as presented by him during the proceeding before the ALJ, fall substantially short of meeting the *Crowe* standards.

Accordingly, the within application for emergent relief is hereby denied. This matter is being returned to the OAL for such further proceedings as may be necessary to bring it to conclusion.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/25/02

Date of Mailing: 3/26/02

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:2-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

124-02

IN THE MATTER OF THE TENURE	:	
HEARING OF COLLEEN RIEGER,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF GREEN, SUSSEX COUNTY.	:	DECISION
	:	

March 25, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

DECISION

SETTLEMENT

OAL DKT. NO. EDU 9042-01

AGENCY DKT. NO. 334-8/01

IN THE MATTER OF THE TENURE HEARING OF COLLEEN RIEGER, BOARD OF EDUCATION OF THE TOWNSHIP OF GREEN, SUSSEX COUNTY

Robert J. Merryman, Esq., for petitioner (Appruzzese, McDermott, Mastro & Murphy, attorneys)

Mary J. Hammer, Esq., for respondent (Bucceri and Pincus, attorneys)

Record Closed: January 24, 2002 Decided: February 4, 2002

BEFORE **ROBERT J. GIORDANO**, ALJ:

On October 4, 2001, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. Telephone pre-hearing conferences were held on October 19 and 23, 2001. The hearings scheduled for January 3, 4, 9 and 10, 2002, were adjourned and rescheduled to January 14, 15, 18 and 22, 2002, at the Office of Administrative Law in Newark, New Jersey. The hearing commenced on January 14, 2002. During the hearing, the undersigned was advised that respondent would be tendering her resignation

from her tenured teaching position with petitioner, Green Township Board of Education. The matter was adjourned to January 24, 2002, at which time the parties submitted an executed Settlement Agreement and Extract providing the terms and conditions of the proposed settlement.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the terms of the Settlement Agreement marked Exhibit J-1 as evidenced by the signatures of the parties or their representatives.

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

3. The Settlement Agreement was duly approved by the Green Township Board of Education as evidenced by the Extract marked Exhibit J-2 in evidence.

4. The Settlement Agreement conforms with the *Cardonick* standards and with the concerns of the Commissioner of Education as set forth in his decision. *In re Cardonick*, decided by Commissioner, April 7, 1982, *affirmed*, State Bd. of Ed., 1990 *S.L.D.* 842, 846 (April 6, 1983).

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

2/4/02
DATE

ROBERT J. GIORDANO, ALJ

Receipt Acknowledged:

2/8/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 11 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

md

Settlement Agreement

Petitioner, Green Township Board of Education (hereinafter "Board") and Respondent, Colleen Rieger (hereinafter "Respondent"), hereby stipulate and agree as follows:

1. The instant matter, OAL Docket No. EDU-09042-01, involves three separate charges certified by the Board against Respondent who is a tenured teaching staff member, holding the position of Speech and Language Specialist.

2. The tenure charges, which are attached hereto, allege Conduct Unbecoming a Teaching Staff member and Insubordination on the part of Respondent.

3. Respondent has expressed her intention to resign from the Green Township School District effective on the date that the Commissioner of Education finally approves this settlement agreement and to apply for a disability retirement from the Teachers Pension and Annuity Fund (TPAF).

4. The parties have determined that the settlement of this matter is in the public interest based on the following facts and circumstances:

It is the intention of Respondent to resign her position effective on the date that the Commissioner of Education finally approves this settlement agreement and apply for a disability retirement pension based on her contention that she is disabled from continuing service as a speech language specialist. Continuing with the tenure hearing and post hearing procedures will entail a substantial cost both monetarily and in terms of time expended by School District employees and administrators. Further, the absence of school officials and employees from the District to participate in the tenure hearing will cause disruption to the Green Township School District. Finally, resolving this matter based on the terms set forth herein will provide certainty

J-1 Evid

that speech services for students in the District will continue in an uninterrupted manner without the risk of a another change in personnel depending on the results of this proceeding.

5. The terms of the agreement are as follows:

a. Respondent will, with the execution of this agreement, submit her written resignation from the Green Township School District to be effective upon the date that the Commissioner of Education finally approves this Settlement Agreement.

b. Respondent agrees to waive any and all claims for compensation and benefits after the date of her resignation and agrees to waive any and all claims for salary and benefits during the 120-day period of her unpaid suspension from the Board. Notwithstanding this waiver, respondent will continue to receive salary and benefits from the Board until final approval of this Settlement Agreement by the Commissioner of Education.

c. Respondent agrees to execute the General Release and Waiver that is attached to this agreement. Notwithstanding the signing of the annexed Release and Waiver, respondent does not waive any rights she may have for indemnification from the Board pursuant to N.J.S.A. 18A:16-6 and 6.1.

d. Upon approval of this Settlement Agreement by the Commissioner of Education the tenure charges will be deemed withdrawn with prejudice.

6. Respondent acknowledges that she has consulted with her own retained attorneys before agreeing to these terms and signing this Agreement; that she has been represented by counsel during the entire course of negotiations over the terms of this Agreement; that she has carefully read and fully understands all of the provisions of this Agreement; that she has had adequate time to review the release contained herein. Respondent understands that she is waiving the right to proceed to hearing on the adjudication of the charges against her; that she is voluntarily entering into this Agreement; and that she fully understands the consequences of her entering into this agreement.

7. Respondent understands that this matter will be referred by the Commissioner of Education to the State Board of Examiners for possible suspension and/or loss of her certificate.

8. Nothing in this settlement Agreement or the Releases set forth Herein shall preclude either party from bringing an action to enforce performance of any term of this Agreement should there be a default in performance.

9. As of the date the Commissioner of Education approves this Agreement respondent shall, consistent with her rights under the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA), be able to purchase, at her own cost and expense, the insurance coverage that she is presently receiving from the Board.

10. The instant agreement has been approved by the Green Township Board of Education at its meeting on January 17, 2002.

Green Township Board of Education

By: Thomas Yarzab, Board President

Dated:

Colleen Rieger

Dated: 1-24-02

111199

GENERAL RELEASE AND WAIVER

I, COLLEEN RIEGER, having agreed to settle all outstanding matters and claims with the GREEN TOWNSHIP BOARD OF EDUCATION ("Board"), hereby provide the following General Release and Waiver ("Release"). The terms of the Release are as follows:

1. I acknowledge and agree that specific consideration for this Release is provided to me by the Board of the benefits set forth in the attached Settlement Agreement, which is hereby incorporated with and is an integral part of this Release.

2. I specifically release all claims against the Releasees, as that term is defined relating to or arising out of any aspect of my employment with the Board, including, but not limited to, all claims under The Age Discrimination in Employment Act, 20 U.S.C. § 621, et seq., and specifically § 626, Title VII of the Civil Rights Act, The Civil Rights Act of 1991 and the laws amended thereby, The Americans with Disabilities Act, The Family and Medical Leave Act of 1993, The New Jersey Law Against Discrimination, The New Jersey Conscientious Employee Protection Act, The New Jersey Family Leave Act, any contract of employment, express or implied, any provision of the Constitutions of the United States or the State of New Jersey, and any other law, common or statutory, of the United States, the State of New Jersey or any other state. "Releasees", as that term is used herein, means that Board and its past and present officers, employees members, agents and servants, and the successors and assigns thereof. Notwithstanding the signing of this General Release and Waiver, respondent does not waive any right she may have for indemnification from the Board pursuant to N.J.S.A. 18A:16-6 and 6.1.

3. I hereby execute this Release without being under any duress. I agree that I am not being coerced to sign this Release, and that the decision to provide this Release is being made of my

own free will, with full understanding of the consequences thereof, and after seeking the advice of counsel, who has fully answered all my questions.

ACKNOWLEDGEMENT

I HAVE CAREFULLY READ AND FULLY UNDERSTAND THE TERMS AND CONDITIONS OF THIS RELEASE. BY MY SIGNATURE BELOW I DEMONSTRATE MY ACKNOWLEDGEMENT OF AND AGREEMENT TO EACH AND EVERY TERM OF THIS RELEASE. I ACKNOWLEDGE THAT I WAS ACCORDED AN OPPORTUNITY TO TAKE 21 DAYS TO CONSIDER WHETHER TO EXECUTE THIS RELEASE, BUT I HAVE SPECIFICALLY AND KNOWINGLY WAIVED THIS OPPORTUNITY. I ACKNOWLEDGE THAT I HAD THE OPPORTUNITY TO REVIEW THIS RELEASE WITH LEGAL COUNSEL AND/OR ANYONE ELSE OF MY CHOOSING, AND TO DISCUSS WITH EACH SUCH PERSON THE TERMS AND CONDITIONS OF THIS RELEASE AND MY RIGHTS UPON EXECUTION. NO REPRESENTATIONS CONCERNING THE TERMS OR EFFECT OF THIS RELEASE AND NO PROMISES, INDUCEMENTS, AGREEMENTS OR UNDERSTANDINGS OF ANY KIND WERE MADE TO ME OR WITH ME BY THE BOARD OR ITS ATTORNEYS TO CAUSE ME TO AGREE TO THE TERMS OF THIS RELEASE OTHER THAN AS SET FORTH IN THE DOCUMENT. I HAVE VOLUNTARILY SIGNED THIS RELEASE AS MY OWN FREE ACT WITH FULL KNOWLEDGE OF ITS TERMS AND CONDITIONS, WHICH ARE FINAL AND BINDING UPON ME. I UNDERSTAND THAT, FOR A PERIOD OF 7 DAYS FOLLOWING MY EXECUTION OF THIS RELEASE, I MAY REVOKE THIS RELEASE, AND THAT THIS RELEASE WILL NOT BE EFFECTIVE OR ENFORCEABLE UNTIL THE REVOCATION PERIOD HAS EXPIRED.

Signature

Colleen M. Rieger

Name (please print)

Dated: 1-24-02

STATE OF NEW JERSEY :
:SS:
COUNTY OF SUSSEX :

I CERTIFY that on January 24, 2002, COLLEEN RIEGER personally came before me and acknowledged under oath to my satisfaction that she is named in and personally signed this document.

Mary J. Hammer

~~A Notary Public of the State of New Jersey~~ MARY J. HAMMER
AN ATTORNEY AT LAW
OF THE STATE OF
NEW JERSEY

111200

EXTRACT

FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF GREEN, SUSSEX COUNTY, NEW JERSEY, AS RECORDED IN THE OFFICIAL SET OF MINUTES

The Board of Education of the Township of Green, in the County of Sussex, New Jersey, convened in a Workshop meeting on January 17, 2002 at 7:30 p.m. in the library of the school located at 69 Mackerley Road, Greendell, New Jersey.

The following members of the Board of Education were present: Mr. Aull, Ms. Cooke, Mr. Graham, Ms. Kucharski, Mr. Lally, Mr. Swisher, Ms. Miller and Mr. Yarzab.

Members absent: Mr. McDermott.

Ms. Kucharski introduced and moved the adoption of the following resolution and Ms. Miller seconded the motion:

RESOLUTION APPROVING SETTLEMENT AGREEMENT
GREEN TOWNSHIP BOARD OF EDUCATION

WHEREAS, there is now pending before the Commissioner of Education tenure charges filed by the Green Township Board of Education against a tenured teaching staff member; and

WHEREAS, a settlement agreement has been reached by the parties which will provide for the resignation of the staff member and the referral of the matter to the State Board of of Examiners for its determination; and

WHEREAS, the terms of the settlement agreement are reasonable and in the best interests of the Green Township School District;

NOW, THEREFORE BE IT RESOLVED that the Green Township Board of Education hereby approves the Settlement Agreement attached hereto and that the Board President, Superintendent of Schools and the Board Secretary are hereby authorized to execute any and all documents necessary to effectuate the Settlement Agreement in the name and on behalf of this Board.

MOTION UNANIMOUSLY APPROVED BY ROLL CALL VOTE (8-Yes-0-No-0-Abstentions) (Ayes: Mr. Aull, Ms. Cooke, Mr. Graham, Ms. Kucharski, Mr. Lally, Mr. Swisher, Ms. Miller and Mr. Yarzab; Nayes: None; Abstentions: None).

State of New Jersey)
County of Sussex) SS

I, Alan B. Parmelee, Secretary of the Board of Education of the Township of Green, in the County of Sussex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on January

J-2 Evid.

17, 2002 has been compared by me with the original minutes as officially recorded in my office in the minute book of said Green Township Board of Education, and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 17th day of January 2002.

Alan Parmelee

Alan B. Parmelee – Board Secretary

(AFFIX SEAL)

OAL DKT. NO EDU 9042-01
AGENCY DKT. NO. 334-8/01

IN THE MATTER OF THE TENURE	:	
HEARING OF COLLEEN RIEGER,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF GREEN, SUSSEX COUNTY.	:	DECISION
	:	

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

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/25/02

Date of Mailing: 3/26/02

125-02

IN THE MATTER OF THE TENURE	:	
HEARING OF GIOVINA REINDL,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF CAMDEN	:	DECISION
COUNTY TECHNICAL SCHOOLS,	:	
CAMDEN COUNTY.	:	

March 25, 2002

AGENCY DKT. NO. 16-1/02

IN THE MATTER OF THE TENURE	:	
HEARING OF GIOVINA REINDL,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF CAMDEN	:	DECISION
COUNTY TECHNICAL SCHOOLS,	:	
CAMDEN COUNTY.	:	

For the Board, Gary G. Bennett, Ed.D., Board Secretary

For Respondent, Jeffrey F. Dragon, Esq.

This matter having been opened before the Commissioner of Education on January 23, 2002, through certification of tenure charges of inefficiency, incapacity, unbecoming conduct and excessive absenteeism against Giovina Reindl, a tenured teacher, by the School District of Camden County Technical Schools, Camden County; and

The Commissioner having directed respondent, by notice dated January 23, 2002, via both certified and regular mail, the certified copy of which was signed for on February 9, 2002, to file an Answer to the tenure charges against her; and

Such communication clearly having provided respondent notice that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, individuals against whom tenure charges are certified shall have *15 days from the date such charges are filed with the Commissioner* to file a written response to the charges, and that failure to answer within the prescribed period, where no extension has been applied for and granted, or where there has been no submission by the charged employee of a

responsive filing indicating that s/he does not contest the charges, will result in the charges being deemed admitted by the charged employee; and

By letter dated February 19, 2002, Jeffrey F. Dragon, Esq., having advised that he had recently been retained to represent respondent, and having explained that:

> [respondent has not answered the charges against her] because she is continuing to experience emotional problems that negatively affect her ability to investigate and comprehend the import of the proceedings, among other activities. Ms. Reindl's emotional problems impacted her job performance, and resulted in tenure charges. These same problems prevented Ms. Reindl from taking ameliorative action to correct inefficiency in her performance when such opportunities were presented repeatedly, and until very recently, also prevented her from responding appropriately to the tenure charges. (Letter from Jeffrey F. Dragon to Deborah N. Antanaitis, dated February 19, 2002); and

Mr. Dragon having further requested that this matter be kept open for an additional twenty (20) days to allow the parties to negotiate a settlement agreement for the Commissioner's review and approval; and

By letter dated February 28, 2002, Gary G. Bennett, Ed.D., Board Secretary, Camden County Technical Schools, having advised that the Board had accepted respondent's resignation, which had been tendered by her counsel, Mr. Dragon, at its February 20, 2002 meeting, and further having advised that there had been and would be no settlement agreement between the parties; and

In that respondent has unilaterally resigned her tenured position, the instant charges cannot be adjudicated but may be referred to the State Board of Examiners, pursuant to *N.J.A.C.* 6A:3-5.6(d); and

Tenure charges certified against respondent and the statement of evidence in support of those charges indicate that respondent was charged with: 1) inefficiency for her

failure to remediate extensive and continuing instructional deficiencies; 2) incapacity for her failure to improve her teaching performance despite intensive assistance by her supervisors; and 3) unbecoming conduct (insubordination) toward school authorities for her refusal to meet with her supervisors, refusal to submit to physical and mental examinations as directed by her supervisors and the Board of Education, and for her excessive absences without good cause; and

Such charges are hereby DISMISSED as moot; and, further

This matter shall be transmitted to the State Board of Examiners for action as that body deems appropriate.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/25/02

Date of Mailing: 3/26/02

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

126-02

CATHERINE COLACINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

March 25, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
WITHDRAWAL
OAL DKT. NO. EDU 11043-99
Agency Dkt. No. 251-8/99

CATHERINE COLACINO,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT
CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

Alan S. Porwich, Esq., for petitioner

Charlotte Kitler, General Counsel
(State Operated School District of Jersey City)

Record Closed: January 9, 2002 Decided: February 4, 2002

BEFORE **MUMTAZ BARI BROWN**, ALJ:

STATEMENT OF THE CASE

These cases were transmitted to the Office of Administrative Law (OAL) on September 29, 1999 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13.

The parties entered into an agreement and have prepared a letter of withdrawal which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to a settlement of this matter.

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

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1(d) and should be approved. I approve the stipulation of settlement and therefore **ORDER** that the parties comply with the agreement.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

January 4, 2002
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

2/8/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 11 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NO. EDU. 11043-99
AGENCY DKT. NO. 251-8/99

CATHERINE COLACINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed.

It is noted that, by letter dated January 9, 2002, counsel for petitioner advised the Administrative Law Judge that petitioner was withdrawing her Petition of Appeal. The Commissioner approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/25/02

Date of Mailing: 3/27/02

121-02

121-02

B. HAGGENMILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 21, 2002

OAL DKT. NO. EDU 10348-00
AGENCY DKT. NO. 285-9/99

B. HAGGENMILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 3/21/02

Date of Mailing: 3/21/02

150-02

BRAD SORRENTINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF TOWN OF BRICK, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 5, 2002

OAL DKT. NO. EDU 8826-01
AGENCY DKT. NO. 497-12/01

BRAD SORRENTINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF TOWN OF BRICK, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 4/5/02

Date of Mailing: 4/5/02

149-02

BARBARA DUVERNAY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 5, 2002

OAL DKT. NO. EDU 10328-00
AGENCY DKT. NO. 285-9/99

BARBARA DUVERNAY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 4/5/02

Date of Mailing: 4/5/02

148-02

B.Y.L., on behalf of minor child, R.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 4, 2002

OAL DKT. NO. EDU 1228-01
AGENCY DKT. NO. 432-12/00

B.Y.L., on behalf of minor child, R.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 4/4/02

Date of Mailing: 4/4/02

147-02

CHRISTINA STONEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 4, 2002

OAL DKT. NO. EDU 3808-99
AGENCY DKT NO. 399-9/98

CHRISTINA STONEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 4/4/02

Date of Mailing: 4/4/02

146-02

EDITH FIELDS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 4, 2002

OAL DKT. NO. EDU 12130-99
AGENCY DKT. NO. 360-12/99

EDITH FIELDS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 4/4/02

Date of Mailing: 4/4/02

145-02

145-02

BRIAN ZAIKOWSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEFIELD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 4, 2002

OAL DKT. NO. EDU 5047-01
AGENCY DKT. NO. 152-5/01

BRIAN ZAIKOWSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEFIELD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 4/4/02

Date of Mailing: 4/4/02

144-02

DR. J. THOMAS MORTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ALLENDALE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 3, 2002

OAL DKT. NO. EDU 7251-01
AGENCY DKT. NO. 235-7/01

DR. J. THOMAS MORTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ALLENDALE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 4/3/02

Date of Mailing: 4/3/02

143-02

143-02

DONNA MIRABELLI, MARY ANN CINQUE, WILLIAM KENNEDY AND FRANCESCO SABETTA,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF WEST NEW YORK, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 3, 2002

OAL DKT. NO. EDU 9196-00
AGENCY DKT. NO. 304-9/00

DONNA MIRABELLI, MARY ANN CINQUE, WILLIAM KENNEDY AND FRANCESCO SABETTA,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF WEST NEW YORK, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 4/3/02

Date of Mailing: 4/3/02

142-02

142-02

EDWARD MERTZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF KINNELON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 3, 2002

OAL DKT. NO. EDU 7406-00
AGENCY DKT. NO. 208-6/00

EDWARD MERTZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF KINNELON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 4/3/02

Date of Mailing: 4/3/02

141-02

S.L., on behalf of minor child, J.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 3, 2002

OAL DKT. NOS. EDU 7892-01 and EDU 9033-01
AGENCY DKT. NO. 374-9/01

S.L., on behalf of minor child, J.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 4/3/02

Date of Mailing: 4/3/02

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN HOWARD, JR.	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
CITY OF EAST ORANGE, ESSEX	:	DECISION
COUNTY.	:	
	:	

SYNOPSIS

Board filed 12 tenure charges against respondent, Superintendent of Schools, alleging conduct unbecoming a chief school administrator for a multitude of acts, including use of school employees to perform work at his home and for his family, improper use of an annuity, relocating his office at a significant cost without Board approval and ordering the hiring of a friend as a special education teacher and improperly providing him a reduced work schedule to enable him to perform non-teaching functions. Respondent contested all charges.

The matter was transmitted to OAL and, after 14 days of hearing, the ALJ sustained seven of the 12 tenure charges, holding, *inter alia*, that petitioner improperly had school employees perform work at his house, engaged in deceptive acts with regard to his annuity, and failed to properly communicate with the Board. The ALJ recommended termination as the appropriate penalty.

The Commissioner initially affirmed the credibility determinations of the ALJ, noting that such determinations are entitled to deference, and that respondent failed to provide a valid basis to disturb the same. In addition, the Commissioner affirmed the Initial Decision on the specific tenure charges with modification, holding that, in addition to the charges the ALJ determined were proven by it, the Board had presented sufficient evidence to sustain charges V. However, the Commissioner found that the Board had not sustained its burden with respect to Charge XI.

The Commissioner concluded that termination was the proper penalty based on the charges proven by the Board and so ordered.

April 1, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1528-01
AGENCY DKT. NO. 17-1/01

IN THE MATTER OF THE TENURE HEARING OF JOHN HOWARD, JR., BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY.

Stephen Edelstein, Esq., appearing for Petitioner Board of Education of the City of East Orange (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Andrew Babiak, Esq., appearing for Respondent Dr. John Howard

Record Closed: November 16, 2001 Decided: February 6, 2002

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, East Orange Board of Education, certified charges against Respondent, Dr. John Howard, Jr., Superintendent of Schools and suspended him. The Department of Education transmitted the matter to the Office of Administrative Law (OAL) on February 7, 2001, for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

A prehearing conference was held and a schedule for discovery, including depositions, to which both parties agreed, was set. The matter was set down for the hearing to commence on July 23, 2001 and continue until August 7, 2001. Ultimately, additional hearing dates were required and days were added. When time for submitting written summations at the close of the hearing is taken into consideration, the record closed on November 16, 2001. The Initial Decision, therefore, was due on December 31, 2001. Upon reviewing the evidence and preparing the file for transmittal, I discovered that certain items which had been admitted into evidence were missing from the file. I sought and received an extension of time in which to issue the Initial Decision in order to give the attorneys an opportunity to submit copies of the missing exhibits.

Because of the time constraints imposed by statute and regulations on tenure hearings such as this one, the parties were instructed that I would not consider any dispositive applications prior to hearing. Notwithstanding that instruction, Respondent submitted an application for summary disposition which I declined to consider by letter order dated May 25, 2001; Respondent then sought review of my decision; the Commissioner refused interlocutory review of my determination.

During the course of the hearing, Petitioner made an application *in limine* to bar all testimony, exhibits, and comment by counsel related to the contention that the charges were filed in retaliation for Respondent's disclosure of inappropriate conduct by a Board member and for asserting his rights to a five year employment contract in a separate petition which bore OAL Docket No. EDU 7553-00.[1] Respondent vigorously opposed the application which was granted; however, Respondent's right to test the credibility of witnesses by presenting evidence of improper motive was specifically preserved.

Petitioner also made an application to consolidate this case with another case filed just as this one was being heard. Although the parties are the same, the second

[1] This matter was decided by summary decision in which I determined that the issues contained therein were contractual in nature and for that reason, I had no jurisdiction to make a determination. The Commissioner of Education reversed my decision and the State Board upheld the Commissioner's determination. A notice of appeal has been filed with the Appellate Division.

case is predicated on charges which are separate and distinct from those at issue here. Moreover, since the hearing in this case had already commenced and there was no time for Respondent to conduct any discovery, the application to consolidate was denied.

During the course of the hearing, I issued two protective orders. The first, issued on August 17, 2001, was to protect the integrity of a manuscript; the second, issued on September 12, 2001, was to protect the confidentiality of Dr. Howard's financial information as it appeared on his federal tax return.

Respondent also made an application to dismiss certain charges at the close of Petitioner's case for failure to make a *prima facie*. Based on the standard which must be employed in determining such an application, specifically, that all inferences must be resolved in favor of the non-moving party, the application for dismissal was denied in its entirety.

FINDINGS OF FACT

A. Stipulated Facts

The parties have stipulated to certain facts which are incorporated herein as findings of fact.[2]

1) Respondent John Howard, Jr., (Dr. Howard), first became employed as Superintendent of Schools by Petitioner, Board of Education of the City of East Orange (Board or District), under an employment contract which ran from July 1, 1992 to June 30, 1996.

2) The Board is a Type I District whose members are appointed by the Mayor of the City of East Orange. The Board consists of seven members.

[2] The executed stipulations are attached hereto as part of the Appendix.

3) On or about January 1, 1998, Robert L. Bowser took office as the Mayor of the City of East Orange.

4) As of January 1, 1998, the Board was comprised of the following persons:

Diane Cooper	Annie V. Moore
Daniel Desrivieres	Sheila Y. Oliver
Ernestine Harris	Mary Ann Cool
George W. Ballard, Sr.	

5) Mayor Bowser's appointments to the Board in or about April 1999 were as follows:

Carolyn Scott Nelson
Everett Jennings
Sidney S. Williams, Jr.

These individuals replaced Ernestine Harris, Annie V. Moore and George W. Ballard, Sr.

6) Mayor Bowser's appointments to the Board in or about April 2000 were as follows:

Jaimar T. James
Robert L. Jefferson
Jeweline Grimes

These individuals replaced Diane Cooper, Daniel Desrivieres and Shelia Y. Oliver.

7) As of July 1, 2000, the Board was composed of six of seven members appointed by Mayor Bowser.

8) Wallace White (Mr. White) first became employed by the Board on June 20, 1994. Mr. White's employment contracts since June 1994 indicate that his position is a "maintenance mechanic." Mr. White's performance evaluations, with the exception of his first evaluation, state that his position is either electrician or HVAC electrician.

9) The Board does not have a job description for Mr. White's position.

10) Sometime prior to November 30, 1997, James Scott (Mr. Scott) became Mr. White's supervisor.

11) From the period from July 1, 1997 through June 20, 1999, Mr. White was president of the East Orange Service Building Employees' Association.

12) Mr. White never filed a written grievance pursuant to his collective bargaining agreement in connection with the allegations made in his affidavit.

13) Mr. White never filed a written grievance pursuant to his collective bargaining agreement in connection with any work assignments he was required to perform at Mr. Scott's direction.

14) Mr. White did not contact the police with regard to the alleged theft from the School Services Building.

15) At all relevant times hereto, a security code was required to be entered by the first person entering the School Service Building in the morning. The alarm security system also includes motion detection which is not on during the work day.

16) At all times relevant hereto, approximately thirty-five to forty individuals worked out of School Services Building.

17) By memorandum dated March 13, 2000 from Dr. Howard to Mr. White, Mr. White was told the following: "Effective immediately, your services will no longer be needed to operate the sound system at Robeson Stadium. All future overtime associated with this activity also cease effective immediately."

18) On or about July 12 and 13, 2000, Mr. White was instructed by Mr. Scott to cut grass at different Board locations.

19) Since the 1990-91 school year, the Board has faced a shortage of teachers of the handicapped/special education teachers.

20) For the 1996-97 school year, four out of seventeen special education teachers hired by the Board were employed under emergency certification.

21) For the 1997-98 school year, ten out of twenty special education teachers hired by the Board were employed under emergency certification.

22) Peter Andrews' (Mr. Andrews) resume was faxed to Mr. Scott, HVAC Supervisor, at his Board office on or about September 17, 1998.

23) On October 6, 1998, the Board approved the hiring of Mr. Andrews as a Teacher of the Handicapped, upon the recommendation of Respondent.

24) For the 1998-99 school year, six out of eleven special education teachers, including Mr. Andrews, who were hired by the Board, were employed under emergency certification.

25) None of the special education teachers hired by the Board using emergency certification procedures had a college degree in elementary, secondary or special education.

26) On or about June 29, 1999, the Board approved the submission of the script entitled "DragonFly" for copyright.

27) During the 1998-99 school year, as a result of a dispute between himself and Mr. Andrews, the Respondent instructed Deloris Trimble (Ms. Trimble), the Director of Special Services, to get rid of Mr. Andrews.

28) Mr. Andrews received three performance evaluations during the course of his employment with the Board. The first two evaluations were performed

by Sharon Alsbrook, Assistant Principal. The third evaluation was performed by Ms. Trimble.

29) The Board never took action to non-renew Mr. Andrews' employment contract.

30) Ms. Trimble received negative written comments from Dr. Howard on or about July 26, 2000.

31) On or about October 1, 1995, Respondent executed a document entitled, "Legacy II Variable Annuity Application." The effective date of the Annuity was December 8, 1995, and an Annuity Contract was issued by The Lincoln National Life Insurance Company.

32) Prior to the filing of the Sworn Charges, the Board contributed $9500 annually to the variable annuity. The contributions were not made through deductions in Dr. Howard's salary.

33) On or about August 5, 1996, 4 Ivy Court, East Hanover, New Jersey was Respondent's home address.

34) On or about May 6, 1998, Respondent signed a request for a partial withdrawal of $50,000 from the Annuity account. On the request, he listed himself as the Contract Owner.

35) In response to Respondent's request for a partial withdrawal of $50,000, a check was issued, on or about May 9, 1998, by The Lincoln National Life Insurance Company in the amount of $50,000, payable to: "East Orange Board of Education, Attn: John Howard, Jr.; 4 Ivy Court, East Hanover, New Jersey 07936-2900." The check was sent to 4 Ivy Court, East Hanover, New Jersey. Upon receipt of the check, Respondent endorsed it by signing his own name and thereafter deposited the check into his personal account.

36) In or about May 1998, 4 Ivy Court, East Hanover, New Jersey was Respondent's home address.

37) On or about September 25, 2000, Respondent signed a request for a partial withdrawal of $32,000 from the Annuity account. On the request, he listed himself as the Contract Owner, "c/o East Orange Board."

38) In response to Respondent's request for a partial withdrawal of $32,000, a check was issued, on or about October 6 or 8, 2000, by The Lincoln National Life Insurance Company in the amount of $32,000, payable to: "East Orange Board of Education, Attn: John Howard, Jr.; 4 Ivy Court, East Hanover, New Jersey 07936-2900.

39) Upon receipt of the said $32,000 check, Respondent endorsed it by signing his own name and, thereafter, he deposited same into his personal account at Summit Bank.

40) The Board Treasurer, Board Secretary and Board President signed the checks for the annuity contributions. All such payments were approved by the Board.

41) Paul Woodard (Mr. Woodard) first became employed by the Board on or about March 1, 1996. Mr. Woodard is employed as a custodian.

42) The Board operates and maintains a sports stadium know as Paul Robeson Stadium. Mr. Woodard has worked at Robeson Stadium from 1997 through 2000.

43) Mr. Woodard received overtime payments as a Board employee for years other than 1997-98 and 1998-99. Mr. Woodard received overtime in the 2000-01 school year, and received overtime subsequent to Dr. Howard's suspension by the Board.

44) The Board uses time-clock cards and overtime reports for custodial/maintenance employees to track employee overtime.

45) Supervisors are responsible for signing-off on employee overtime payments.

46) Prior to June 19, 2000, the office of the Superintendent of Schools had been located, together with other central administrative and support staff offices of the Board, at 715 Park Avenue, East Orange, New Jersey. On or about June 19, 2000, Respondent caused the office of the Superintendent of Schools to be relocated to a different building (the Mary Dantzler Building).

47) The office that Dr. Howard moved the Office of the Superintendent of Schools to in the Mary Dantzler Building is currently used as a student and parent counseling center.

48) The Board does not approve purchase orders. All payments to vendors are to be submitted to the Board for approval.

49) Ebony Nicole Howard (Ms. Howard) is Dr. Howard's daughter.

50) Ms. Howard is a student at The College of New Jersey located in Ewing, New Jersey.

51) The copies of photographs produced by Respondent are authentic photos depicting areas in the basement of Respondent's former residence at 4 Ivy Court, East Hanover, New Jersey. The copies of the photographs marked JHJ277 through JHJ290 were taken on or about September 26, 2000. The copies of the photographs marked JHJ292 through JHJ305 were taken on or about October 26, 2000.

52) On or about March 30, 1999, the Board approved and adopted the 1999-2000 budget. On or about February 22, 1999, the Board met to review the 1999-2000 budget.

53) At all times relevant hereto, Jamie L. Williams (Mr. Williams) was the Board's authorized purchasing agent.

54) Mr. Woodard has not been disciplined by the Board in connection with the allegations made by Mr. White in his affidavit.

55) Respondent was suspended by the Board on September 5, 2000.

56) Mr. Scott was suspended by the Board on September 5, 2000 and his employment was terminated by the Board on or about December 20, 2000.

B. Undisputed Facts

1) Board employees, specifically Wallace White and James Scott, did electrical work for Dr. Howard at his home.

2) White installed the conduit line from the garage to the basement, light switches, stairway lights, connections for pre-wiring the sub-panel, and the electrical sub-panel.

3) White moved Dr. Howard's daughter out of her college dormitory on one occasion; he was not paid for his time and effort.

4) Paul Woodard cleaned Dr. Howard's home on several occasions.

5) Peter Andrews was assigned two classes at the outset of his employment as a special education teacher; his program was later increased to five classes.

6) Peter Andrews volunteered to work on the "DragonFly" project.

7) Dr. Howard directed the Director of Special Services to fire Andrews for reasons not connected with his teaching responsibilities.

8) The annuity established by the Board for Dr. Howard's benefit was owned by the Board.

9) In addition to the change stipulated above, Dr. Howard changed the address of the annuity contract owner to "East Orange Board of Education, Attn. John Howard, Jr.; 4 Ivy Court, East Hanover, New Jersey 07936.

10) Dr. Howard discussed moving his office with the duly constituted Board in the Fall of 1999; there was no other discussion of the move until June, 2000.

11) At the time of the removal of the Superintendent's office from 715 Park Avenue to the Mary Dantzler Building, the Board was a different legal entity than it had been when Dr. Howard had the discussion regarding the office move, since three new members had been appointed.

DISCUSSION AND CONCLUSIONS

The gravamen of each of the charges in this case is conduct unbecoming a chief school administrator (CSA); the Board must prove, by a preponderance of the credible evidence that Dr. Howard has engaged in such conduct to the extent that he should be dismissed from his position as Superintendent. A Superintendent shall not be dismissed or reduced in compensation except for inefficiency, incapacity or conduct unbecoming . . . or other just cause. *N.J.S.A.* 18A:17-20.2; *In re Polk License Revocation,* 90 *N.J.* 55, 560 (1982); *I/M/O Tenure Hearing of Marrero,* 97 *N.J.A.R.* 2d (EDU) 104.

It has been established that the touchstone of unbecoming conduct is the teaching staff member's fitness to discharge the duties and functions of his office or

position. *Laba v. Newark Bd. of Ed.,* 23 *N.J.* 364, 384 (1957). A finding of unbecoming conduct does not require a violation of any specific rule of regulation; it may be based primarily on an implicit standard of good behavior. *In re Emmons,* 63 *N.J.Super.* 136, 140 (App. Div. 1960). Moreover, if teachers are held to a stringent standard of behavior, the standard for high administrative personnel must be even more stringent. *I/M/O Tenure Hearing of Frank Napoli,* 1988 *S.L.D.* 284. Accordingly, since the Superintendent is the highest administrative officer in the District, he must be held to the most stringent standard of behavior.

The first charge is based on the alleged use of an electrician employed by the Board to install lighting fixtures in the private residence of the Superintendent of schools. It is undisputed that Wallace White worked on at least one weekend, all day on Saturday and a half day on Sunday, at Dr. Howard's residence. White, however, testified that he worked at the residence on a daily basis for a two-week period of time during regular work hours. He reported at his regularly scheduled time and his supervisor, James Scott, Dr. Howard's purported friend and intermediary, drove him to Dr. Howard's residence where he would work for the day and return in time to sign out at his usual quitting time. Scott, on the other hand, denies that he drove White to the residence; in fact, he testified that White worked at Dr. Howard's home only the one Saturday and Sunday and that he, Scott, did the remainder of the work White claims to have done in the evening and on weekends.

Clearly, each of these two witness' testimony is diametrically opposed to the other; accordingly, I must make a determination with regard to the credibility of these two witnesses. On the one hand, Mr. Scott admitted to having "forgotten about" the several reprimands he had received; he admitted that he falsely claimed to have an associate degree in order to get a job and he had claimed to have a red seal license, when in fact he did not, because to have such a license would improve his chances of getting another position for which he was applying. In short, this witness has demonstrated, by his own admissions, that he will deliberately misstate the truth when it suits his purpose. Consequently, I accord his testimony no weight.

In addition, although Dr. Howard's son, John Howard, III, (JH, III) testified that he was home by 1:00 or so every school afternoon during his senior year (the 1998–99 school year), he testified at one point that he would usually hang out in the living room watching television; later on in his testimony he says that he would lift weights in the basement. Notwithstanding the fact that JH, III testified that he did not have money to go out for lunch and that he had to eat three regular meals a day because he is diabetic, it strains credulity to believe that a senior in high school would consistently come home and remain there during the afternoons when he had an early release program. He also said he never saw Mr. Scott, who claimed to have worked in the Howard home on more than 30 occasions.

A trier of fact may be justified in disbelieving the testimony of a witness who may have an interest in the outcome of a case. See, *State. v. Salimone*, 19 *N.J. Super.* 600, 608 (App. Div. 1952). As Dr. Howard's son, JH, III certainly has an interest in the outcome of this case; he admitted as much on the record. Accordingly, based on the foregoing discussion, I ascribe no weight to JH, III's testimony.

Dr. Howard also denied that White had worked at his home during Board time. Dr. Howard has as much or more interest in the outcome of this case as his son. In addition, Dr. Howard has admitted that he lied while under oath during his deposition in another case. Although he later recanted the false statements, it was only after the charges at issue in this case had been certified, the case had been transmitted to OAL for hearing and the discovery process had begun, that he corrected his testimony. Moreover, Dr. Howard's answers to questions, particularly on cross examination, were generally evasive. For these reasons, I **FIND** Dr. Howard's testimony to be unreliable and accord it no weight.

Applying the definition of credibility found in *Clark v. Trenton Housing Authority,* OAL Dkt. No. CSV 8248-97 (1998), *i.e.,* that a determination of credibility contemplates an overall assessment of the story of a witness in light of its context in – its rationality and internal consistency as well as the manner in which it hangs together with other evidence to the testimony of Wallace White, I **FIND** that, although there are some

inconsistencies, they do not affect the overall credibility with respect to the ultimate fact at issue here: whether White performed work for Howard on board time.

The foregoing determination is based on several factors. First, I had the opportunity to observe Mr. White. His demeanor was that of someone to whom words, either written or spoken, do not come easily. I detected an effort on his part to be cautious in his choice of words to convey what he wanted to convey. Second, although I must discount the testimony of Petitioner's expert, whose opinion was based on a personal standard, there is no dispute that White installed the 100 foot conduit line from the garage to the basement, light switches, stairway lights, connections for the pre-wiring of the sub-panel and the electrical sub-panel. I agree with Petitioner's assessment that, considering the amount of undisputed work which was completed by White, even to a lay person, it would take more than a long day and one half to complete.

Accordingly, based on all of the foregoing, I **FIND** that Petitioner has demonstrated that it is more likely than not that White performed work at Dr. Howard's residence during Board time.

The testimony with regard to the second charge, conduct unbecoming based on the theft of electrical supplies from the Services Building for installation in the Howard residence, is also diametrically opposed. In this instance, however, it is not enough to say, without even a scintilla of evidence, that Dr. Howard had to be aware of the source of the materials. The determination I must make here is not whether the materials were stolen and used in Howard's residence. It is whether there is sufficient evidence that Dr. Howard knew that they had been pilfered and allowed the materials to be used in his home. There is simply not enough in the record to imbue Dr. Howard with the knowledge that the materials were stolen and used in his home. Accordingly, I **FIND** that Petitioner has not sustained its burden of proving that Dr. Howard was aware of the theft and countenanced it.

The third charge is also for conduct unbecoming based on Dr. Howard having used his position of authority to obtain unwarranted privileges and advantages for himself and/or his family. In this case, the allegation is that Dr. Howard, on more than one occasion, directed Wallace White to move Howard's daughter in and out of her dormitory at the College of New Jersey, located in Trenton, New Jersey. In this instance, Dr. Howard's daughter, Ebony, testified that, indeed, White did move her from her dormitory on one occasion. She was steadfast in her testimony that it was no more than one occasion; she was equally steadfast in details she supplied, such the fact that the move occurred in the evening, after the normal workday for White and that he used his own vehicle. On the day in question, she checked out of the dormitory at approximately 8:00 p.m.

With respect to this charge, although I am aware the stress Ms. Howard was under the day of the move with which White did help her, as well as her natural interest in the outcome of the case, I **FIND** her to be a credible witness. In addition, there is documentary support for the time she checked out on the day that she admits White helped her move. Accordingly, for that day, May 8, 1998, I **FIND** that the Board has failed to sustain it burden of proof.

With respect to the other occasions, White's testimony is somewhat vague. Details are sparse and at odds with Ms. Howard's recollection of who helped her move. A trier of fact may choose to believe or disbelieve all or part of a witness' testimony. With respect to his testimony about helping Ms. Howard move in and out of dormitories on other occasions than May 8, 1998, I **FIND** that White's testimony lacks sufficient detail to give it credibility. Accordingly, I **FIND** that Petitioner has failed to sustain its burden of proving this conduct.

In Charge IV, Petitioner asserts that a Board employee, Paul Woodard, cleaned Respondent's private residence and, in return for the services performed at Dr. Howard's home, Woodard was rewarded with excessive overtime payments. Moreover, according to the charges, Dr. Howard orchestrated, directed, intimidated and permitted such conduct, which constitutes a pattern of theft, complicity, collusion, intimidation and

abuse amounting to conduct unbecoming a teaching staff member. Woodard's job entailed complete caretaking of Robeson Stadium, an athletic field and staduim in the District. He was in charge of cleaning the entire premises, care and setting up of equipment as well as the breaking down and storing of equipment before and after a game.

It is undisputed that Woodard cleaned Dr. Howard's home. Woodard also testified that he was paid $50 or $70 to clean the bar downstairs, shampoo the carpet and clean the kitchen floor. The testimony regarding Dr. Howard paying Woodard for his services in cleaning the Howard home is unrefuted. In addition, although Petitioner attempted to show that there were excessive claims for overtime at the stadium, Woodard was able to give a plausible explanation for the time in question on each of several dates he was queried about by Petitioner. In one case, for example, the fact that Woodard was at the stadium at 9:00 a.m. when the game did not start until 1:00 p.m. was explained by the unrefuted testimony that the team had breakfast at the stadium that day.

I **FIND** Woodard's testimony to be credible; he was straightforward in his answers; he was completely knowledgeable about all the aspects of his job and his answers, during direct and cross-examination, were consistent.

Based on the record before me, I **FIND** that Petitioner has not established a connection between Woodard's cleaning Dr. Howard's home and the overtime he was paid for his duties at the stadium. Moreover, I **FIND** the testimony in the record that he was give such overtime because he was among the lowest paid of the custodial staff to be credible and persuasive. I **CONCLUDE,** therefore, that Petitioner has not sustained its burden with respect to this charge.

In September 1998, the East Orange School District was faced with a shortage of special education teachers and availed itself of emergency certification procedures. Among the hires was Peter Andrews, who was an acquaintance of James Scott and who had experience and contacts in the entertainment industry. The fifth charge of

conduct unbecoming centers on the hiring and firing of Peter Andrews as a special education teacher under emergency certification. The issue to be resolved with respect to this charge is whether Dr. Howard abused his position in ordering the hiring and, subsequently, the firing of Andrews as well as whether Dr. Howard wanted Andrews hired either to write the screenplay or as a production consultant, a term Andrews uses to describe his role as late as April 14, 1999.

The evidence presented to prove this charge consisted of testimony from Deloris Trimble, Dr. Morgan, Ms. Cool, Marvin Cormick, the Board Attorney, and Dr. King as well as certain documents. Trimble testified that she was told that Andrews was an old friend of Dr. Howard's and was instructed to hire him before she had met Andrews or had had an opportunity to review his qualifications. She also testified that Dr. Howard instructed her to give Andrews a reduced schedule. This testimony was bolstered by Dr. Morgan's indicating that he, too, as the principal under whom Andrews would be working, had been informed that Andrews should be given a reduced schedule. The reason given to both Trimble and Morgan for these instructions was that Andrews would be involved in the writing of a screenplay, *DragonFly*.

Respondent asserts that Andrews was a friend of Mr. Scott, not Dr. Howard. Trimble's testimony, however, was that she had been told that Andrews was an old friend of Dr. Howard. I note that these two assertions are not mutually exclusive. There is no question that Andrews had superior qualifications and that his evaluations were good. The issue, however, is not whether he should or should not have been hired; rather, as stated above, it is whether he was hired primarily to teach in the special education environment or to work on the screenplay and its production. If so, then the ultimate issue to be determined with respect to this charge is whether Dr. Howard dealt with the Board in a forthright manner.

It is clear from the testimony not only of Trimble and Morgan that Andrews had been given a reduced schedule, but from that of Andrews and Holmes-Douglas as well. She testified that Andrews shadowed her schedule in order to observe her teaching techniques. There is quite a difference between teaching a class and observing

someone else. A teacher actively engages the class and interacts with the students as a group and individually. The role of the observer is, by definition, to observe, *i.e.,* to watch and, perhaps, to learn.

There is also testimony and documentary evidence that, at some point in time, Andrews' schedule was eventually increased to 5 teaching periods, which is a full teaching schedule. Specifically, the documentary evidence indicates that Andrews was given a full schedule at the beginning of the third term of the school year (R-193).

Respondent asserts that the testimony of Trimble should be discounted because she was upset over a reprimand which Dr. Howard had given her. In addition, according to Respondent, Morgan's testimony should be discounted because he never saw Andrews working on the screenplay during school time. Morgan's testimony, however, tends to corroborate Trimble's. Respondent also contends that there is no evidence that Andrews worked on the screenplay during the school day. This is true, and I do so **FIND;** however, whether work on the screenplay was done during the school day or not is not dispositive of the issue of determining the true purpose for hiring Andrews.

Viewing the evidence on this point in context and as a whole, I am not persuaded by either side; *i.e.,* although there is some evidence that Andrews may have been hired for a purpose other than to teach special education students, there is also evidence that he was hired because there was a shortage of teachers of special education and he had expressed an interest. The parties are in equipoise. Accordingly, I **FIND** that Petitioner has not sustained its burden of proving that Howard engaged in subterfuge and was less than candid with the Board regarding his reasons for hiring Andrews.

Charges VI, VII, and VIII are based on Dr. Howard's actions, which are undisputed, with respect to the annuity established for him by the Board, pursuant to his contract. Charge VI is predicated on Dr. Howard's actions with regard to changing the address of the contract owner without notifying the Board. Petitioner contends that by so changing the information on the annuity, Dr. Howard provided false and misleading

information concerning the annuity and, as a result, according to a warning included as an addendum with the annuity contract, is subject to criminal and civil penalties.

The stipulated facts are that the Board established a annuity and contributed to it. The undisputed testimony of Mark Kramer and Dante Liberti is that the Board was the stated contract owner. It is further stipulated that Dr. Howard twice changed the address of the contract owner. The first time, in July 1996, he changed the address from that of the Board, 715 Park Avenue, East Orange, to his own home address. The second time, in August, 1999, he changed the address of the contract owner to "East Orange Board of Education, *Attn: John Howard, Jr.;* 4 Ivy Court, East Hanover, New Jersey.[3] In neither instance did Respondent notify Petitioner of the change he had made.

Respondent argues that the annuity as constructed is contrary to law and that under the applicable statute, Dr. Howard should have been the named owner. This may be so; I make no determination with respect to whether the annuity is properly set up. The issue here is whether Dr. Howard's behavior, under these circumstances was willfully misleading and deceptive. If the annuity was improperly set up the appropriate way to remedy the error was to bring it to the attention of the Board and request a change. There is no evidence anywhere in the record that Dr. Howard made any attempt at all to communicate the purported impropriety to the Board.

Dr. Howard is not a member of the East Orange Board of Education; at the time in question he was the District's CSA, a contractual employee of the Board. There is no way that he can be construed as being the contract owner, yet his changes of the address on the annuity would lead an observer to believe he was, at minimum a member of the entity owning the contract. It is simply not credible that someone of Dr. Howard's education and experience did not realize that he was misstating a fact when he made the changes.

[3] The change in July 1996 was to the 4 Ivy Ct. address; the change in August, 1999 was to add "Attn. John Howard, Jr."

Accordingly, I **FIND** that Dr. Howard did engage in deceptive behavior when he changed the address of the contract owner twice on the annuity. I further **FIND,** therefore, that Petitioner sustained its burden of proving the conduct on which this charge is founded.

Charges VII and VIII are based on Dr. Howard's actions in twice unilaterally requesting withdrawals from the annuity, in May 1998 and in September 2000. On both requests he listed himself as the contract owner. For the same reasons as stated above, I **FIND** that Petitioner has sustained the burden of proving the conduct on which these charges are predicated, *i.e.,* that Respondent engaged in a course of deceit and misrepresentation.

Charges VII and XI deal with the undisputed fact that Dr. Howard endorsed and deposited both checks in his personal account notwithstanding the fact that they were made payable to Petitioner who asserts that by so doing, Dr. Howard engaged in forgery and theft by deception.

Dr. Howard argues that he cannot be guilty of forgery, since he only signed his own name to the check, which he then deposited. Moreover, he asserts that he cannot be guilty of theft by deception because, in reality, the funds belonged to him. Once again, if Dr. Howard was aware that the annuity may have been improperly set up, he should have brought it to someone's attention. If he were not aware of an impropriety, his behavior, at minimum, was deceitful. A determination of whether the annuity was properly set up in not essential to the determination of whether Petitioner sustained the burden of proving the charges of willful misrepresentation and deception. For the reasons stated above, I **FIND** that Dr. Howard did engage in conduct which was deceptive and dishonest.

With respect to Charge X, which is predicated on the relocation of the Superintendent's office from 715 Park Avenue to the Mary Dantzler Building at a cost of $30,000, Petitioner asserts that the move was made unilaterally and without notice to the Board and authorization. Once again, the facts are essentially undisputed: Dr.

Howard mentioned his intention to move his office to a new location to the Board sometime in the fall of 1999. In April 2000, three new members were appointed to the Board. In June 2000, Dr. Howard moved his office without so much as a phone call to notify the Board of the change. The Board president testified that she only learned that the move was in progress on the day it was to take place.

Respondent asserts that it is within his purview and authority to move his office; he had done so in the past, in response to an emergent situation, without notifying the Board or seeking approval. It should be noted that the previous move was to offices within the same building and not, as was the case in June 2000, to a completely new address, some distance from the original location.

Once again, Respondent fails to understand the true nature of the charge he is facing. Once again, I detect a lack of candor and honesty on the part of Dr. Howard in his dealings with the Board which employs him. He may very well have the authority to move his office without seeking approval; that, however, is not the determination with which I am faced. I must determine whether, in his dealings with Petitioner, he displayed a patent disregard for the negative consequences of his act upon the proper administrative and educational operation of the school district.

There is no question that Dr. Howard did not seek, at minimum, to advise the Petitioner of his plans to move his office after the Board was reconstituted in April 2000. The move took place on a Saturday; the Board was unaware of the move of the Superintendent's office, a major matter of Board business; they only became aware of it by chance. In addition, in preparing for the move and in actually executing it, Dr. Howard expended Board funds without first having at least notified the Board that he was about to do so.

Clearly, Dr. Howard believed, based on his interpretation of the statute and prior experience that he had the authority to move his office. He does admit, however, that even if funds had been budgeted for the move, Board authority and/or a Board resolution is required for the actual expenditure. His own expert, Dr. Galinsky also

testified that he would have expected the Board to have received the cost of the move and to have had the opportunity to vote on it before the move was made. Dr. Cooperman, Petitioner's expert testified that to require Board approval of the move, a major change in the District, would not be considered micromanaging.

Respondent asserts that he followed the law; he does not seem to understand that the issue is more complex than simply adhering to the statute. On this charge, I **FIND** that Petitioner has proved, by a preponderance of evidence, that Dr. Howard exhibited a lack of forthrightness, candor and failed to communicate with the Board.

Charge XI is predicated on the assertion that Dr. Howard repeatedly stated to Mark Kramer, the District's Business Administrator, that Dr. Howard could not ". . . have [Kramer] say that [he was] not privy to my contract."

Dr. Howard made a statement such as the one set forth above, according to Kramer, on five separate occasions; three were in person and two were on the telephone. In addition, Kramer testified that he felt intimidated by the statements, since they were made at a time when Dr. Howard and the Board were engaged in litigation over his, Dr. Howard's, contract.

Dr. Howard denies ever having made the remark, even once. He testified that he had given Kramer a copy of the contract after it had been executed and approved by the Board sometime in 1996. Moreover, he testified that Kramer's contract, negotiated after his, was very similar to his since it contained provisions which were almost identical to his with regard to a so-called Evergreen provision and the amount of the annuity contribution which could be made on Kramer's behalf.[4] Kramer testified that he did not have a copy of Dr. Howard's 1995 contract until July or August 2000. Thus, until that time, he was not aware of the contents of the contract except for those for which he was responsible to administer.

[4] An Evergreen provision is one, according to Dr. Howard, that permits the automatic renewal of a contract at the end of the contract term.

It should be noted that the relevant statute contains a provision for automatic renewal of a Superintendent's contract for the same term as the previous contract. *N.J.S.A.* 18A:17-20.1. Therefore, such a provision is clearly not so unusual that Kramer could not have had independent knowledge of it or legal advice to include it in his contract. The fact that this provision is referred to as the "Evergreen" provision, *i.e.,* is given a name, so to speak, is a further indication that it is not unusual and is a provision, routinely included in certain employment contracts.

As far as the amount of the contribution to Kramer's annuity is concerned, up to $9500 a year, Dr. Howard, Dante Liberti and Kramer himself testified that Kramer helped to set up the annuity; clearly, the inference to be drawn is that Kramer knew, from his experience with Dr. Howard's annuity, the amount of the annual contribution which was made to Dr. Howard's annuity.

The determination of this charge turns on the credibility of the witnesses. In an effort to impeach Kramer, Respondent asserts that Kramer denies ever going with Dr. Howard to lease a vehicle for the Superintendent's use, while Dr. Howard recalls that he did. Review of the record, however, discloses that Kramer's testimony was less than precise on the point. Respondent further asserts that Kramer had knowledge of Dr. Howard's contract and states, in footnote # 49 that Kramer knew the contract had been approved. Kramer never said he did not have some knowledge of Dr. Howard's contract; he said he did not have a copy of it and had knowledge of only those aspects of it that he administered. Knowing that the contract was approved is far different than having actual knowledge of the contents of the contract. Based on the foregoing, I **FIND** the testimony of Mark Kramer that he was uncomfortable and felt intimidated by Dr. Howard's repeated statement is credible. I further **FIND** that it is more likely than not that Dr. Howard did make the statements and, therefore, while the behavior may not rise to the level of witness tampering, Petitioner did sustain the burden of proving that Dr. Howard abused his position and authority in a manner that warrants serious disciplinary action.

The final charge is based on the assertion that, if Dr. Howard engaged in all or part of the behavior with which he had been charged, such behavior demonstrates a pattern of conduct unbecoming a teaching staff member so as to constitute cause for dismissal. This charge brings us to the issue of the penalty to be assessed for such conduct.

It is undisputed that the Commissioner has repeatedly affirmed the importance of holding teaching staff members to a high standard of honesty. In one case, the Commissioner adopted the initial decision of an ALJ who found that the CSA's lack of candor with both the board and the public justified revoking tenure. The ALJ found that Respondent had ". . . engaged in a series of actions, . . . or inactions, which manifested a lack of appropriate judgment, a lack of communication with the Board and with the public, . . . and conduct which, if not in fact criminal, was in some instances sufficiently questionable so as to raise concern as to his capacity to perform his job within the confines of legality." *I/M/O Tenure Hearing of Horowitz*, 93 *N.J.A.R.*2d. (EDU) 232. A review of each of the charges which Petitioner has proven reveals that Dr. Howard has engaged in a series of actions which manifested, at minimum, a lack of professional judgment, a lack of communication with the Board and conduct which was sufficiently questionable as to raise concern as to his capacity to perform his duties within legal parameters.

Allowing Wallace White to perform work at his residence on Board time is tantamount to theft of time and money. White testified, and for the reasons previously stated, I believe him, that Dr. Howard did not pay him for his work. Accordingly, Dr. Howard's course of conduct with respect to this charge was not only deceitful and dishonest; it was a betrayal of the public trust in that public funds were used to pay White for the time spent at Dr. Howard's home. It is well established that those hold a position of public trust are held to a high level of integrity and honesty. I **FIND**, therefore, that this breach of trust is sufficiently egregious to warrant termination without any further discussion of the other charges.

The fact is, however, that Petitioner has proven other charges. The changes of the address of the contract owner on the annuity exhibit, at minimum, a lack of candor and communication; I have found, however, that Respondent engaged in a course of deception, which is more serious, with respect to the changes of address. As I have noted previously, if Dr. Howard was aware that he should have been listed as the contract owner, the simplest, most logical and direct way to correct the error would have been to communicate with someone – either Kramer, Liberti, or a member of the Board. He did not do this. Instead, he chose to take matters into his own hands and make unilateral changes which by their nature and for the reasons expressed above were deceptive.

The seriousness of such a lack of candor and forthrightness cannot be overstated. They represent an unwillingness or reluctance to recognize the Board's role in the District, that of his employer as well as the entity which bears final responsibility to the public not only for the educational policy of the system, but for the overall educational and fiscal practices within the municipality. I **FIND** that the breach of trust and confidence this lack of candor and forthrightness represents is so serious that it has severely disrupted the requisite cooperative relationship required to carry on the educational business of this District. I **CONCLUDE**, therefore, that termination, based on these charges alone, is also warranted.

The deceptive behavior exhibited by Dr. Howard in endorsing two checks which were made payable to the Board and depositing them in his own account, at minimum, raises the question of whether Dr. Howard can perform his responsibilities within legal parameters. As a result of this question, I **FIND** that the mutual trust and confidence between the Board and its CSA required to successfully implement an educational program has been irreparably shattered. I **CONCLUDE**, therefore, that, once again, conduct in which Dr. Howard engaged is, by itself, so serious as to warrant immediate termination.

Forthright and candid dealings with the Board, as well as clear and open lines of communication between the CSA and Board are the cornerstones of good

management, whether it is in education or business. Consequently, when one of the parties fail to deal candidly or with forthrightness and ignores the need to communicate, a failure of trust and confidence results. That is clearly what has happened in this case; there is no question that the relationship between the Board and Dr. Howard had deteriorated to the point of being detrimental to the District's ability to carry on its business when each of the last two charges, that of the relocation of the Superintendent's office without advising the Board and that of intimidating Mr. Kramer, arose in the late spring and summer of 2000.

Consequently, these last charges must be considered in the context of the entire case. I have already determined that any one of the other five sustained charges warranted termination standing alone; I further **CONCLUDE**, however, that these two charges taken together, warrant termination as well, not only because they occurred so close in time together that cumulatively they merit such action, but also because each underscores complete and utter failure of trust and confidence between the Board and Dr. Howard.

Based on the foregoing, I **CONCLUDE** that Petitioner has sustained its burden of proving that Dr. Howard engaged in behavior which demonstrates a pattern of conduct unbecoming a teaching staff member so as to constitute cause for dismissal.

ORDER

It is, therefore, hereby **ORDERED** that charges II, III, IV, and V, be and hereby are **DISMISSED WITH PREJUDICE**; it is further **ORDERED** that, based on the findings with respect to charges I, VI, VII, VIII, IX, X, XI, and XII, that Dr. Howard be and hereby is **DISMISSED** from his position as Superintendent of the East Orange Public Schools.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 6, 2002
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

2/13/02
DATE

Deborah Gottesman
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 14 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb/pb/cb

APPENDIX

Witnesses

Delores Trimble
Dr. Kenneth King
Dr. Robert Morgan
Mary Ann Cool
Dante Liberti
Wallace White
Mark S. Kramer, Sr.
Jamie Bassin
Ebony Nicole Howard
John Howard III
Annie V. Moore
Dr. Robert Penna
Patricia A. Moss
Ernestine B. Harris
Armand Lamberti
Paul Woodard
James Scott
Sheila Oliver
Eleanor Forbes
Marvin Cormick
Lawrence Miranda
Peter A. Andrews
John Howard, Jr.
Dr. Harry Galinsky
Dr. Saul Cooperman
Jamie L. Williams
Clifford Harris
Clifford Doll
Mark Boehm

Exhibits

For Petitioner:[5]

P-2	Andrews' Resume
P-3	Andrews' Application For Professional Position
P-4	Letter – Dr. Howard from Peter Andrews, September 28, 1998
P-5	Trimble Interview Data Sheet
P-6	Minutes appointing Andrews as handicapped teacher
P-7	Letter – Mr. Andrews from Dr. King, October 20, 1998
P-8	Letter – Dr. Howard from Writers Guild, May 18, 1999

[5] Exhibits were premarked by attorneys; not all were marked for Identification and/or accepted into evidence.

	P-9	Memo – President Cool from Trimble, July 20, 2000
*	P-12[6]	Dr. Howard 199500 Employment Contract
	P-13	Lincoln Financial Group Annuity Contract
	P-13a	Application for Annuity
	P-14	Confirmation of address change, July 17, 1996
	P-15	Confirmation of address change, August 5, 1996
	P-16	Annuity Quarterly Statement, October 1, 1995 to December 29, 1995
	P-17	Annuity Quarterly Statement, January 1, 1996 to March 29, 1996
	P-18	Annuity Quarterly Statement, January 1, 1997 to March 31, 1997
	P-19	Annuity Quarterly Statement, January 1, 1998 to March 31, 1998
	P-20	Annuity Quarterly Statement, January 1, 1999 to March 31, 1999
	P-21	Annuity Quarterly Statement, January 1, 2000 to March 31, 2000
	P-22	Withdrawal form for $50,000, May 6, 1998
	P-23	$50,000 check payable to East Orange BOE Attn: Dr. Howard
	P-24	Withdrawal form for $32,000, September 25, 2000
	P-25	Check and Endorsement, $32,000
	P-26	Summit Bank Deposit Slip for $32,000
	P-31	BOE Resolution re: Office Relocation, June 26, 2000
	P-34	Photographs of Dr. Howard's basement
	P-37	Robeson Stadium Extra Pay Report (FY 1999)
	P-38	Robeson Stadium Extra Pay Report (FY 2000)
*	P-39	Affidavit of Dr. Morgan, May 29, 2001
*	P-40	Letter of June 28, 2001
*	P-41	Dr. Howard's Evaluation, May 10, 1998
*	P-42	Memo from Dr. Howard re: Approval of Overtime Request, March 23, 2000
*	P-43	Memo from Dr. Howard re: Dennis Harris, September 2, 1997
*	P-44	Memo from Dr. Howard re: Reassignment of Duties, February 3, 1998
	P-45	Memo Scott from Porter, November 5, 1996 (revised date)
	P-46	Memo from King to Scott, October 30, 1996
	P-47	Memo Scott from King, February 24, 1997

[6] All exhibits not accepted into evidence, including those marked for Identification, are returned to respective attorneys.

	P-48	Memo Scott from Penna, April 8, 1999
	P-49	Memo Scott from King, April 3, 2000
	P-50	Medical Information of Scott
	P-51	Resume of James Scott
	P-52	Evaluation of Scott, February 10, 1998
*	P-53	Deposition of Scott, June 22, 2001
	P-54	Letter Scott from Andrews with attachment, February 11, 1999
	P-55	Memo from Scott, March 19, 1999
	P-56	Memo Scott from White, July 19, 2000
	P-57	Memo Dr. Howard from Andrews, April 14, 1999
	P-58	Deposition of Dr. Howard, June 13, 2001 (designated portions)
*	P-59	Interrogatories to Dr. Howard
*	P-60	Answers to Interrogatories, March 30, 2001
	P-61	Letter to Cavet from Barone re Request for Admissions, July 24, 2001
	P-62	Survey
	P-63	Letter to Edelstein from Barone, August 2, 2001 (with responses to Request for Admissions)
	P-64	Respondent's Answers to Petitioner's Request for Admissions
	P-65	Petitioner's Request for Admissions to Respondent
*	P-66	List of documents reviewed by Cooperman

For Respondent:

	R-14	Invoice from Electric Distributors, Inc., October 15, 1998
	R-16	Invoice from Capitol Lighting, October 8, 1998
	R-20	Invoice from Custom Electrical Contractor, Inc., October 25, 2000
	R-27	Memo from Dr. Howard to Mr. Andrews, April 15, 1999
	R-28	Memo from Dr. Howard to Mr. Andrews, April 15, 1999
	R-29	Memo from Dr. Howard to Mr. Andrews, April 15, 1999
	R-30	Letter from A. Chandler Warren, Jr., Esq. to Dr. Howard
	R-32	Letter from Mr. Cormick to Mr. Warren, May 20, 1999
*	R-33	Letter from Mr. Cormick to Cardwell Production, June 1, 1999
	R-34	Board caucus meeting minutes, June 1, 1999

	R-36	Memo from Mr. Cormick to Dr. Howard, June 11, 1999
	R-37	Resolution approving hiring of Gin Cohen for film Co-Op, October 6,1998
	R-38	Letter of Interest and Resume of Gin Cohen, October 6, 1998
*	R-39	Emergency Certificate for Mr. Andrews with attachments
	R-40a	Extract from minutes of meeting, June 29, 1999
	R-41	Letter from Dr. Howard to Doug Groff, December 1, 1999
	R-41c	Resolution approving updating Education Technical Plan
*	R-54	Five-year Plan and Condition Survey, October 28, 1994
*	R-55	Five-Year Plan Facility Master Plan, September 16, 1997
	R-56	Memo from Dr. Penna to Dr. Howard, September 23, 1999
	R-57	Handwritten notes from Dr. Howard and Mark Kramer, June 19, 2000
	R-59	Letter from Mel Randall to Dr. Howard, June 17, 2000
	R-60	Letter from Dr. Howard to Mr. Randall, June 19, 2000
	R-61	Memo from Janie Williams to Mr. Kramer, June 22, 2000
*	R-64	Memo from Mr. King to Dr. Howard, September 16, 1996
*	R-65	Memo from Dr. Howard to Ms. Harris, November 11, 1996
*	R-68	Correspondence from Mr. Zitomer, June 2, 2001
*	R-74	Memo from Mr. Kramer to Dr. Howard, July 10, 1996
*	R-77	Letter from Mr. Kramer to W. Dittman, July 8, 1999
	R-80	Memo from Mr. Kramer to Dr. Howard, June 22, 1995
	R-81	Memo from Mr. Kramer to Dr. Howard, January 8, 1996
	R-82	Proposed Employment Contract for Mr. Kramer for 1995-98, July 1, 1995
	R-83	Employment Contract for Dr. Howard for 1995-2000
*	R-108	Memo from Mr. Kramer to Dr. Howard, September 5, 2000
	R-158	Schedule of Ms. Howard's residence at CNJ, May 22, 2001
	R-159	Hanover Park High School billing schedule& student record
	R-165	Mr. Liberti to Dr. Howard, September 20, 2000
	R-167	Liberti to Dr. Howard, October 18, 2000
	R-168	Custodial/Maintenance overtime report, 31 pages, April 1999 to October 2000
	R-169	Schedule of games

	R-170	Memo from Dr. Howard to Mr. White, March 13, 2000
	R-172	Series of Evaluation
	R-173	Affidavit of Mr. White
	R-186	Teacher Evaluation, January 15, 1999
	R-187	Teacher Evaluation, March 16, 1999
*	R-192	Interview sheet Perkins
	R-193	Mr. Andrews' Teaching Utilization Chart
	R-202	Extra Pay Reports
	R-203	CAFRA Report
	R-204	CAFRA Report FY June 30, 1996
	R-206	Memo from Mr. Scott to Mr. James, July 2000
	R-207	Mr. James to Mr. Scott, July 19, 2000
	R-209	Memo from Mr. Kramer to Mr. Lamphey, July 7, 1999
	R-209a	Employee Absence Report, July 9, 1999
	R-210	Employee Absence Report, September 15, 1999
	R-211	Excerpt from Agenda, March 14, 2000
	R-212	Superintendent of School Job Description & Evaluation
	R-213	Recruitment, Selection & Hiring
	R-213a	Board Policy 4112.2 Certification
	R-215	Memo from Mr. Harrison to Mr. Alsbrook (undated)
*	R-216	Dr. Galinsky's Report
*	R-217	Policy 3320 Board Purchasing
*	R-218	Policy 3300 Expenditures
*	R-223	Expert report, June 23, 2001
*	R-224	Supplemental expert report, July 27, 2001

Joint:

J-1	Stipulation of Facts
J-2	Stipulation of Facts

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* Identification Only.

OAL DKT. NO. EDU 1528-01
AGENCY DKT. NO. 17-1/01

IN THE MATTER OF THE TENURE	:	
HEARING OF DR. JOHN HOWARD, JR.,	:	
BOARD OF EDUCATION OF THE SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF EAST ORANGE,	:	DECISION
ESSEX COUNTY.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Both parties filed exception and reply arguments in accordance with *N.J.A.C.* 1:1-18.4 and 1:1-18.6.[1]

RESPONDENT'S EXCEPTIONS AND PETITIONER'S REPLY

Respondent excepts to the Administrative Law Judge's (ALJ) recommendation to sustain Charges I, VI, VII, VIII, IX, X and XI.

Exceptions to Sustaining of Charge I: *In this charge, the Board alleges, in pertinent part, that respondent either "orchestrated, directed, intimated, condoned, permitted, and/or countenanced" work done at his home by Wallace White during White's regular work days as a Board employee, which was compensated with Board funds through the normal payroll process.* (Sworn Charges Against Dr. John Howard, Jr., Superintendent, Charge I at 2)

Here, respondent challenges the credibility determinations rendered by the ALJ with respect to Wallace White, Dr. Howard, John Howard III, and James Scott, and disputes some of the ALJ's "findings" on this charge,[2] as well as the ALJ's ultimate conclusion that it was

[1] Respondent submitted 42 exceptions (erroneously numbered as 40) encompassing 133 pages of text. Due to the extraordinary volume of these arguments, they are not all summarized in this decision.

[2] A number of respondent's exceptions challenge a specific "finding and/or conclusion" of the ALJ. However, the Commissioner notes that most were statements made by the ALJ in the course of her discussion and were *not* designated in her Initial Decision as "findings."

more likely than not that Wallace White worked at respondent's home during Board time. (Respondent's Exceptions at 8-42)

The Board contends that the ALJ correctly determined that Wallace White was a credible witness who performed extensive electrical installations in respondent's home, on Board time, which respondent condoned. (Board's Reply at 1) In so holding, the ALJ properly found that respondent, James Scott, and Dr. Howard's son were not credible. (*Id.* at 2-4)

Exceptions to Sustaining of Charges VI, VII, VIII and IX: *In these charges, the Board alleges that respondent's actions with respect to changing the address on the annuity, supra, constitute "a course of willful misrepresentation, deception, deceit and/or false swearing"* (Sworn Charges Against Dr. John Howard, Jr., Superintendent, Charges VI, VII, VIII and IX at 6-8); *that respondent's actions with respect to his unilateral withdrawal of $50,000 from the annuity on May 6, 1998 constitute "a course of willful misrepresentation, deception, deceit, false swearing, attempted theft and/or theft" (id.* at 7); *that respondent's actions with respect to his unilateral withdrawal of $32,000 from the annuity constitute "a course of willful misrepresentation, deception, deceit, false swearing, forgery, attempted theft and/or theft" (id.* at 8); *and that respondent's endorsement of the $32,000 check issued by The Lincoln National Life Insurance Company, although not payable to him, and his depositing of same in his personal bank account constituted "a course of willful misrepresentation, deception, deceit, false swearing, forgery, attempted theft and/or theft" (Id.* at 8).

In addition to his objections to statements made by the ALJ in support of her findings and conclusions on these charges, respondent contends that the ALJ erroneously failed to address the issue of whether the annuity was properly established and whether, as a matter of law, the Board could properly own the annuity. In this regard, respondent insists the ALJ improperly failed to consider: the provision in his employment contract for such an annuity; that the Board was informed of the status of the annuity by Business Administrator Mark Kramer; that respondent relied upon Kramer and Dante Liberti regarding the establishment of the annuity and changing the address; and that Board members testified the annuity was established for respondent's benefit. Additionally, respondent reasons he could not be found guilty of forgery

because he signed his own name to the checks and could not be found guilty of theft where the annuity legally and properly belonged to him. (Respondent's Exceptions at 47-60)

In reply, the Board argues that, even assuming, *arguendo*, the annuity was established in derogation of State and Federal law, this does not excuse respondent's conduct relative to this charge. (Board's Reply at 20) The Board continues, asserting that there was no proof offered at the hearing that it ever received notification of the first address change and respondent should not use Mr. Kramer and Mr. Lamberti "as scapegoats for his transgressions." (*Id.* at 22) Further, respondent's acknowledged $50,000 withdrawal was carried out "without so much as informing the Board of the activity." (*Id.* at 23) Finally, the Board underscores that Jamie Bassin, the risk control coordinator of Summit Bank, characterized respondent's attempt to deposit the $32,000 check in his personal account, although the check was payable to the Board, as "fraud." (*Id.* at 26)

Exceptions to Sustaining of Charge X: *The Board asserts in Charge X that respondent "unilaterally and without Board knowledge or authorization, caused his office to be relocated to a different building *** at an approximate cost of $30,000***."* (Sworn Charges Against Dr. John Howard, Jr., Superintendent, Charge X at 8) *Such conduct constituted "an unauthorized expenditure of public funds, abuse of authority, patent disregard for proper procedures and protocol, and a complete disregard for the negative consequences of his act upon the proper administrative and educational operation of the school district ***."* (*Id.* at 9)

Respondent argues that the ALJ erred, as a matter of law, when she failed to recognize his legal and contractual authority to undertake such a move, when she barred respondent from presenting evidence of prior moves undertaken by him, and when she permitted the Board's expert witness to express his opinion that respondent's actions constituted unbecoming conduct. Respondent similarly attests that the ALJ failed to consider that the Business Administrator and purchasing agent agreed that no funds had been improperly spent in connection with the move. Furthermore, respondent disputes that the within record supports the

conclusion that he expended Board funds without notice to the Board. However, if he did fail to notify the Board in June 2000, respondent claims that such inaction would, at worst, constitute inefficiency rather than unbecoming conduct. The ALJ erred, respondent maintains, in concluding that he failed to deal honestly with the Board. (Respondent's Exceptions at 60-73)

The Board points out respondent's acknowledgement that although the Board was notified of the possibility of a move in October or November 1999, *that* Board was a different legal entity from the one sitting in June 2000. (Board's Reply at 27) Indeed, Board President Ms. Cool testified "that the Board never received a written plan, proposed resolution, or proposed budget from Dr. Howard relative to the office move *** [and] she was not aware of the actual move until the day in question. ***" (*Ibid.*) As to the costs involved, even if the money is budgeted, the Board contends that only with its authority may there be an actual expenditure. (*Ibid.*) Moreover, respondent's actions in this regard should not be viewed as "inefficiency," which the Board considers an inability to perform the job. Instead, the allegations in this charge involve, "*inter alia*, issues of dishonesty, misrepresentation and abuse of public office[,which] go right to the heart of Dr. Howard's fitness to discharge the duties of Superintendent." (*Id.* at 29)

Exceptions to Sustaining of Charge XI: *In Charge XI, the Board alleges that Howard urged Mark Kramer, Business Administrator, to deny that Kramer was not familiar with respondent's contract. "By demanding urging, suggesting, cajoling and/or representing that Kramer provide false testimony, Howard, among other things, suborned perjury, solicited false swearing, [and] attempted to obstruct an ongoing Board investigation ***."* (Sworn Charges Against Dr. John Howard, Jr., Superintendent, Charge XI at 9)

Respondent challenges the ALJ's credibility determination with respect to Mark Kramer, and adds that her finding that Kramer felt intimated and uncomfortable is not supported by this record. However, even assuming the record fairly shows that Kramer felt intimidated by respondent's words, respondent contends that a staff member's subjective feeling of intimidation, absent proof of witness tampering, is insufficient to support a finding of

unbecoming conduct. Moreover, respondent argues that, in reviewing this charge, the ALJ failed to consider the testimonial and documentary evidence affirming that Mark Kramer *did* have knowledge of respondent's contract. (Respondent's Exceptions at 73-82)

In reply, the Board underscores Kramer's testimony wherein he affirmed that he understood respondent's words "to mean that Dr. Howard wanted him to say that he *was* privy to his contract, even though he knew this to be false,***" and Kramer felt intimated by this repeated statement. (emphasis in text) (Board's Reply at 31) The Board asserts that the ALJ properly credited Kramer's testimony and found that the Board sustained its burden of proving that respondent abused his position and authority in a manner which warrants serious disciplinary action. (*Id.* at 32, citing to page 23 of Initial Decision)

PETITIONER'S EXCEPTIONS AND RESPONDENT'S REPLY

The Board excepts to the ALJ's recommendation to dismiss Charges II, III and V.[3]

Exceptions to Dismissal of Charge II: *The Board alleges in Charge II that Wallace White observed numerous lighting fixtures and other lighting supplies from the School Services Building in James Scott's car, which Scott directed White to unload and bring to Howard's home for his use. This conduct, the Board avers, was either "orchestrated, directed, intimated, condoned, permitted and/or countenanced by Dr. John Howard, Jr.***"* (Sworn Charges Against Dr. John Howard, Jr., Superintendent, Charge II at 3)

The Board contends that it has established by a preponderance of the credible evidence that respondent knew the electrical supplies were stolen from the Board and used in his home. In this connection, the Board argues that Wallace White, who was determined to be a credible witness, described in detail how and what items were stolen from the Services building for use in respondent's residence. Given the number of items "and the fact that Dr. Howard

[3]The Board does not except to the ALJ's recommendation to dismiss Charge IV, wherein the Board alleged that Paul Woodard was rewarded with excessive overtime payments, using Board funds, in return for providing cleaning services to respondent at his home. (Sworn Charges Against Dr. John Howard, Jr., Superintendent, Charge IV at 4)

obviously did not pay for them," leads to one conclusion, according to the Board, that respondent was aware of the source of the supplies and countenanced the theft. (Board's Exceptions at 2) Moreover, although Dr. Howard testified that the conduit line installed in his home contains a bar code from Home Depot, rebuttal witness, Mark Boehm, a store manager from Home Depot, testified that the conduit did not contain a Home Depot bar code, but, rather a manufacturer's bar code. Home Depot, Boehm explained, did not produce its own bar codes for its inventory. (*Ibid.*)

In reply, respondent contends that the Board's exception is falsely premised on the notion that the ALJ found, in fact, that a theft had occurred. However, she did not make such a finding with respect to either Wallace White or James Scott. Neither did the ALJ determine that stolen materials were used in respondent's home. (Respondent's Reply at 3) Respondent further argues that the Board "intentionally omits" other evidence demonstrating that he paid for the items that White claims were stolen. (*Id.* at 5) As to respondent's misunderstanding about the source of the bar code on the conduit, respondent affirms that he "believed the bar code came from Home Depot because it was purchased from Home Depot and he went back to the store to confirm that the numbers matched up." (*Ibid.*) Lastly, respondent finds that the Board is attempting to shift the burden of proof on this charge. In this connection, he underscores that it is not his burden to show that the theft did not occur; rather, the Board must show that it *did* occur. However, the Board has failed to produce any purchase orders, invoices, vouchers, receipts or bill lists to verify that any of the allegedly stolen items was once in its inventory and has failed to bring forth any physical evidence of a theft. (*Id.* at 6)

Exceptions to Dismissal of Charge III: *In this charge, the Board alleges that respondent directed Wallace White, on more than one occasion, to move his daughter in and out of her dormitory at the College of New Jersey in Trenton, using a Board vehicle, on Board time and for which White was compensated with Board funds through the normal payroll process.* (Sworn Charges Against Dr. John Howard, Jr., Superintendent, Charge III at 3)

The Board asserts that Wallace White's testimony proves this charge and contends that respondent's daughter "is a biased witness whose testimony should be subject to intense scrutiny.***" (citation omitted) (Board's Exceptions at 4) Further, the Board contends that the documentary evidence which the ALJ credits establishes only that students had to be checked out of the dormitory by 8:00 p.m., but does not substantiate when Ms. Howard actually commenced check-out. The Board also argues that the ALJ failed to address whether Dr. Howard abused his discretionary authority by asking one or more Board employees to move his daughter out of her college dormitory as a personal favor to him since he testified that, in addition to Mr. White, Mr. Scott, and perhaps other Board employees, also assisted in transporting his daughter. (*Id.* at 3-5)

Respondent counters that Charge III contains no allegation that anyone other than White was improperly involved in moving his daughter from her dorm and, therefore, the Board cannot, at this point, expand the charges. (Respondent's Reply at 6) Rather, regulations require that charges be stated with specificity so that respondents are aware of the precise allegations against them. (*Id.* at 6, 7) Neither, respondent continues, is there any proof that any other Board employee helped to moved his daughter on anything but his own personal time. (*Id.* at 7) Furthermore, respondent contends that the Board's implication that staff members should not perform personal favors for one another on their own time is absurd. (*Ibid.*) To the extent Wallace White was merely performing such a personal favor, respondent claims that Charge III should not have been included, because a personal favor connotes a voluntary decision. (*Id.* at 8)

Exceptions to Dismissal of Charge V: *The Board alleges in Charge V, in pertinent part, that Dr. Howard directed Deloris Trimble, Director of Special Education Services, to hire Peter Andrews, "an 'old personal friend,'" notwithstanding that Andrews lacked any formal preparation or certification for the position, and Howard told Trimble that Andrews' primary responsibility would be to assist the writing of a screenplay entitled Dragon Fly. Howard recommended, and the Board approved, Andrews' hiring. Andrews was given a reduced teaching schedule to work on the screenplay. Later, for reasons apart from his teaching performance, Dr. Howard directed Trimble "to get rid" of Andrews.* (Sworn Charges Against Dr. John Howard, Jr., Superintendent, Charge V at 5)

The Board avers that the totality of the evidence demonstrates that respondent was dishonest with the Board when he recommended the hiring of Peter Andrews and subsequently directed that Andrews be fired for reasons unrelated to his teaching performance. Specifically, the Board argues that Trimble testified that she was directed by respondent to hire Andrews and respondent told her that Andrews' role would be largely to help with the writing of the script for *Dragon Fly*. Thus, at respondent's direction, Trimble interviewed Andrews and recommended his hiring. Trimble further testified they discussed a reduced schedule for Andrews. According to the Board, Trimble's testimony, supported by that of Principal Morgan, was credited by the ALJ who noted, "'[t]he reason given to both Trimble and Morgan for these instructions was that Andrews would be involved in the writing of *Dragon Fly*.'" (Board's Exceptions at 7, citing to Initial Decision at 17)

Furthermore, the Board reasons that Andrews could not have admitted to working on the script during the school day, since he could not, then, lawfully claim the script as his own, as he has, in fact, done. (*Id.* at 9) However, even assuming that Andrews was hired because there was a shortage of special education teachers in the District, the Board contends that the ALJ should not have disregarded the fact that respondent never informed the Board that Andrews would have a reduced teaching schedule, although he was hired as a full-time teacher. Neither,

the Board adds, did the ALJ address whether respondent's recommended firing of Andrews for reasons unrelated to his teaching performance constituted unbecoming conduct. (*Id.* at 10)

In reply, respondent maintains that he did not surreptitiously hire Andrews to write *Dragon Fly* and asserts that the Board did not produce a single witness to show that Andrews wrote his version of the play during the school day. (Respondent's Reply at 12, 13) As to his alleged order to Ms. Trimble to hire Andrews, respondent reiterates that Trimble, who interviewed Andrews, found him to be a "superior candidate." (*Id.* at 14, 15) Similarly, another district administrator, Lois Perkins, interviewed Andrews and also recommended that he be hired. (*Id.* at 16) Respondent avers that he had no role in setting a reduced schedule for Andrews. (*Id.* at 16, 17) Furthermore, respondent's reasons for wanting Andrews, a nontenured teacher, terminated were legitimate. (*Id.* at 14, 20) As to the Board's lack of knowledge of Andrews' reduced schedule, respondent contends, "it was not the Board's practice or role to get involved with the minutia of teacher's [sic] schedules or their specific duties." (*Id.* at 21)

COMMISSIONER'S DETERMINATION

Upon careful and independent review of the complete record in this matter, which included transcripts from 14 days of hearing, together with exhibits, post-hearing briefs, exception and reply arguments, the Commissioner determines to affirm the Initial Decision with modifications as set forth below.

The Commissioner initially notes that despite respondent's urging to the contrary, he finds no cause to disturb the credibility determinations of the ALJ. Rather, the Commissioner is satisfied that the ALJ's recitation of testimony is both accurate and thorough,[4] and that she

[4] To the extent respondent alleges that the ALJ failed to consider what he deems to be crucial documentary or testimonial evidence, the Commissioner determines that the ALJ's findings, as well as her articulated bases for such findings, are sufficient "to enable a reviewing court to conduct an intelligent review of the administrative decision and determine of the facts upon which the order is grounded afford a reasonable basis therefor." *State, Dept. of*

carefully measured conflicts, inconsistencies and potential biases in deciding which testimony to credit. *See In the Matter of the Tenure Hearing of Frank Roberts, School District of the City of Trenton, Mercer County*, 94 *N.J.A.R.*2d (EDU) 284, 294, *aff'd* 95 *N.J.A.R.*2d (EDU) 349, *aff'd* App. Div. 96 *N.J.A.R.*2d (EDU) 549.

Furthermore, the ALJ's credibility determination is entitled to the Commissioner's deference. "The reason for this rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses, and, consequently, is better qualified to judge their credibility. *In the Matter of Tenure Hearing of Tyler*, 236 *N.J. Super.* 478, 485 (App. Div.) *certif. denied*, 121 *N.J.* 615 (1989)." (sic) *In the Matter of the Tenure Hearing of Frank Roberts, supra,* at 550. The Appellate Division recently affirmed this principle, underscoring that "[u]nder existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor based judgments." *Whasun Lee v. Board of Education of the Township of Holmdel*, Docket No. A-5978-98T2 (App. Div. 2000), Slip Op. at 14. The Court also noted *then* pending legislation providing that "'the agency head may not reject or modify any findings of fact on the issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent and credible evidence in the record.'" (*Ibid. citing* A-1484, 209th Leg., §10(b), later enacted as *P.L.* 2001, *c.* 5, now codified at *N.J.S.A.* 52:14B-10(c))

Health v. Tegnazian, 194 *N.J. Super.* 435, 443 (App. Div. 1984) In this regard, the Commissioner has held that an initial decision satisfies the necessary requirements of section *N.J.S.A.* 52:14B-10(d) of the Administrative Procedures Act, if it presents, "a detailed and accurate summary and analysis of all *relevant*, credible testimonial and documentary evidence adduced at hearing, which amply supports the ALJ's ultimate conclusion***." (Emphasis in text) *In The Matter of the Tenure Hearing of Margaret Sidberry, School District of Township of Willingboro, Burlington County*, Commissioner Decision No. 272-00, August 18, 2000, Slip Op. at 52-53

Additionally, with the exception of the findings specifically addressed below, the Commissioner further determines that, contrary to respondent's contentions, the ALJ's factual findings are each supported by sufficient, credible evidence in the record.

Turning to the specific charges, the Commissioner concurs with the ALJ that the Board has demonstrated it is more likely than not that Wallace White performed work at respondent's home during Board time, for which he was compensated with Board funds through the normal payroll process.[5] The Commissioner further determines that the Board has sufficiently demonstrated that respondent either condoned or countenanced this conduct. Charge I, therefore, is sustained. Similarly, the Commissioner affirms the ALJ's findings and conclusions with respect to Charges VI, VII, VIII, IX and X. These charges are, therefore, sustained.

Additionally, for the reasons set forth in the Initial Decision, the Commissioner agrees that Charges II, III and IV are properly dismissed.

However, the Commissioner determines to set aside the ALJ's conclusions with respect to Charges V and XI. In so doing, the Commissioner first notes the full allegation raised by the Board in Charge V:

> In or about September of 1998, Dr. John Howard, Jr. directed Deloris Trimble, petitioner's director of special education services, to hire Peter Andrews. Howard described Andrews to Trimble as an "old personal friend." Andrews lacked any formal preparation or certification for the position in question, and in fact had been trained and educated in the field of television and theatrical production. Howard told Trimble that Andrews' primary responsibility would be to assist in the writing of a screenplay entitled, "Dragon Fly."

[5] The Commissioner acknowledges the apparent dispute in the record as to whether any of White's work was performed on the weekends, but ultimately determines that resolution of this dispute is not necessary, since the ALJ found, and the Commissioner has affirmed, that White performed work at respondent's home during Board time.

> Trimble and her assistant director interviewed Andrews and, as directed, recommended that he be hired, subject to emergency certification, as a teacher of special education. In turn, Howard recommended, and the Board approved, a resolution hiring Andrews as Teacher of the Handicapped, effective October 7, 1998, at the annual prorated salary of $34,003.
>
> In order to permit Andrews to work on the screenplay, he was given a reduced teaching load of only two classes, instead of the five normally assigned. Andrews worked in this capacity for some eight months. When his performance, apart from his teaching duties, failed to live up to Howard's expectations. Howard directed that Andrews' teaching load be increased to five daily [classes] and [later] directed Trimble "to get rid of Andrews."
>
> When Trimble expressed concern about firing Andrews instead of less senior teachers, Howard told Trimble to "get rid of the [m***** f*****]." Howard also indicated to Trimble that he did not care what effect the action might have on special education. Andrews was not renewed for the next school year.
>
> The foregoing conduct which either was orchestrated, directed, intimated, condoned, permitted and/or countenanced by Dr. John Howard, Jr. constitutes, among other things, a pattern of patent disregard for the education of special education students, misrepresentation, complicity, collusion, intimidation, and/or abuse of public office by Howard that constitutes conduct unbecoming a teaching staff member and/or just cause for dismissal. (Sworn Charges Against Dr. John Howard, Jr., Superintendent at 4-5)

As the Board notes in its exceptions, Ms. Trimble credibly testified that, at the end of September 1998, she was called to respondent's office, where he introduced Peter Andrews to her as "an old friend." (Tr. 7/23/01 at 44) Respondent told Ms. Trimble "that Mr. Andrews was interested in becoming an emergency certified teacher of the handicapped but that his role would largely be to help with the writing of the script '*Dragon Fly.*'" (*Ibid.*) Further, Ms. Trimble testified that it was her impression that respondent did not want Mr. Andrews to teach, but Trimble "indicated to Dr. Howard that to have someone hired under emergency certification, the person had to teach and then a reduced schedule was discussed." (*Id.* at 45) It

was also Trimble's impression that "the majority of [Mr. Andrews'] time would be spent in the activity of writing the script." (*Ibid.*)

There is no question that Mr. Andrews' background and experience is as described by the Board in its charges. (Exhibit P-2). Also, the Board duly notes documents on record where Andrews proposes "services as a film production consultant to the East Orange Board of Education," (Exhibit P-4, dated September 28, 1998), where Andrews refers to himself as the "production consultant" to *Dragon Fly* (Exhibit P-57, dated April 14, 1999), and where Andrews' agent affirms "that Mr. Andrews was, indeed, engaged to write a screenplay, subsequently entitled 'Dragon Fly.'" (P-8, dated May 18, 1999) (Board's Exceptions at 9)

On October 6, 1998, the Board appointed Andrews as a Teacher of the Handicapped upon the recommendation of respondent (Initial Decision at 6) and he was given a reduced teaching schedule, initially, of two classes. However, Trimble affirmed that it would not have been proper for him to have such a reduced schedule simply because he was getting acclimated to the school. (Tr. 7/23/01 at 75) Nonetheless, Andrews maintained the schedule of two classes until the second quarter, when he was assigned three classes. In the third quarter, he was assigned the full five classes. (*Id.* at 120)

There is no dispute that the District was in need of special education teachers (Initial Decision at 6) and that Mr. Andrews, even in his limited role as a teacher, performed satisfactorily (Tr. 7/23/01 at 128). However, there is also no question that Mr. Andrews was hired *as a full-time teacher*. Board President Mary Ann Cool testified that neither respondent nor anyone acting on his behalf ever apprised the Board that Andrews was to be teaching on a reduced schedule. (Tr. 7/24/01 at 22) Later, respondent directed Ms. Trimble to fire Andrews because respondent felt Andrews "was pilfering the *Dragon Fly* script ***" from the District's

version. (Tr. 8/6/01 at 47; Tr. 8/7/01 at 35) However, the Board never took action to non-renew Andrew's employment contract. (Initial Decision at 7) Andrews resigned in late May or early June of that year. (Tr. 8/6/01 at 49)

The Commissioner cannot agree, therefore, that the parties' evidence is at equipoise, but, rather, finds that the Board has proven it is more likely than not that Andrews was hired for a purpose *other than*, or in addition to, serving as a Teacher of the Handicapped, without the Board's knowledge or approval.[6] This, the Commissioner finds, is the fundamental aspect of Charge V, in that respondent's failure to fully disclose to the Board the true purpose for hiring Andrews was a misrepresentation, a breach of the Board's trust, and showed a lack of regard for the special education programs and students in the District.[7]

Turning to Charge XI, the Commissioner states, for clarity, the full text of the charge:

> In or about the Spring of 2000, the Board retained the services of special legal counsel to assist it with the investigation and, if warranted, preparation of the present charges against Dr. John Howard, Jr. Subsequently, the Board's business administrator, Mark Kramer, was approached by Howard concerning Howard's employment contract. Although Howard had always personally administered his own contract and Kramer did not maintain a copy of the document, Howard, knowing that he was being investigated, urged Kramer, if asked, to deny that Kramer was not familiar with the contract, by saying: "I can't have you say that you were not privy to my contract." By demanding, urging, suggesting, cajoling and/or requesting that Kramer provide false testimony, Howard, among other things, suborned perjury, solicited false swearing, attempted to obstruct an ongoing Board investigation and engaged in behavior that constitutes conduct unbecoming a teaching staff

[6] Indeed, even respondent's expert witness, Dr. Galinsky, affirmed that if he was hiring someone as a part-time teacher, that teacher's salary would be appropriately reduced and the Board would be approving a part-time appointment. (Tr. 8/7/01 at 114)

[7] The Commissioner draws no conclusions, on this record, about respondent's directive to terminate Andrews, rather than less senior teachers, as noted in Charge V.

member***. (Sworn Charges Against Dr. John Howard, Jr., Superintendent at 9)

The ALJ noted, and the record so reflects, that "Kramer never said he did not have some knowledge of Dr. Howard's [employment] contract; he said he did not have a copy of it and had knowledge of only those aspects of it that he administered." (Initial Decision at 23) The ALJ also found, and the record substantiates, that "the testimony of Mark Kramer that he was uncomfortable and felt intimidated by Dr. Howard's repeated statement is credible." (*Ibid.*) However, the Commissioner notes that on cross-examination, Kramer also provided the following testimony:

BY MR. BABIAK:

Q Now, the first time that Dr. Howard had the conversation with you about saying, that you were not privy to this contract, how did that come about? How did the conversation begin?

A Which John Howard?

Q Yes

A I remember – I believe I was standing in the back of his office by the window looking out when – and I do not recall why I was down there – it was not specifically for this reason. It was regular business - you know – whatever we were discussing. And, I just remember the words saying that, "Mark, I cannot have you say that you were not privy to my contract."

Q So, you're saying that out of the blue he made this statement to you?

A Yeah, yeah, I was dumbfounded, I was shocked, yes, so it came out of the blue.

Q So there was no preface to his statement to you?

A I don't recall what was said prior. We could have been talking about his contract. We might not have. We could have been talking about any type of board business, I don't recall.

Q So, it's possible that you were talking about his contact before that happened?

A Yeah – I do not recall the conversation prior or leading up to that statement. When that statement was made this far in advance now – you know – I mean, that's so long ago, I don't recall what was being discussed.

Q But you do remember that statement?

A Oh, yes. (Tr. 7/26/01 at 50-52)

Even accepting that Kramer was a credible witness and that respondent, in fact, repeatedly spoke these words to Kramer, the record provides no context whatsoever for these otherwise vague statements so as to lend to them specific meaning or import. Furthermore, Kramer admitted he was never asked or told by respondent to lie under oath. (Tr. 7/26/01 at 40) Thus, the Commissioner cannot conclude that the Board has demonstrated by a preponderance of credible evidence that *with these words alone*, respondent suborned perjury, solicited false swearing or attempted to obstruct an ongoing investigation.

Charge XII incorporates all facts set forth in the prior 11 charges, as the Board avers that "by virtue of the conduct, acts and/or omissions attributable to Dr. John Howard, Jr. as therein described, the foregoing Charges, jointly and severally, constitute a pattern of conduct unbecoming a teaching staff member, and/or other just cause for dismissal." For the reasons stated by the ALJ on pages 24-27 of the Initial Decision with respect to her sustaining of Charges I, VI, VII, VIII, IX and X, and for the reasons set forth, *supra*, with respect to Charge V, the Commissioner concurs that respondent is guilty of unbecoming conduct.[8]

> In arguing for respondent's dismissal, the Board avers that:
>
> The Commissioner has repeatedly affirmed the importance of holding school district personnel to a high standard of honesty. For instance in *I/M/O Tenure Hearing of Horowitz*, 93 N.J.A.R.2d. (EDU) 232, the Commissioner adopted an ALJ's initial decision, holding that the Superintendent's lack of forthrightness with the board and public justified revoking his tenure. There the Board certified a series of charges related to Horowitz's conduct in connection with a board-sponsored construction project.
>
> ***
>
> The ALJ emphasized that, "trust is paramount in the relationship of a school superintendent ... and the Board of Education, which

[8] In so finding, the Commissioner does not rely on the testimony of Saul Cooperman, to which respondent objected. (Tr. 8/23/01 at 33) (Respondent's Exceptions at 60)

> generally consists of lay persons serving in part-time public service capacity, persons who thus must place extreme reliance upon the ability, the efficiency, the judgment and the faithfulness of the Superintendent" and that Horowitz breached that trust. *Id.* at 265. *See also, I/M/O Tenure Hearing of Robert R. Vitacco, School District of the Borough of Lincoln Park, Morris County*, 97 N.J.A.R.2d (EDU) 449, *aff'd.* State Bd. of Ed., April 5, 2000, *aff'd.* App. Div. 2002. (The Superintendent "is one in whom the board and members of the community are required to place considerable reliance with respect to his *ability, honesty, integrity, efficiency, judgment an faithfulness in the performance of his duties.* As such, the professional conduct demanded of this individual is significant.") (emphasis supplied)*** (Board's Exceptions at 8-9)

For these reasons, as well as those articulated by the ALJ in her Initial Decision, the Commissioner finds that respondent's conduct warrants termination.

Finally, the Commissioner acknowledges that respondent advances, in addition to his numerous substantive exceptions, many objections to the way the within proceedings were conducted at the OAL. Specifically, respondent objects to: the ALJ's decision, in prehearing discovery, to bar him from videotaping the school services building, the site where Wallace White alleges a theft of lighting occurred (Respondent's Exceptions at 19); the ALJ's ruling which barred him from presenting evidence of retaliation as part of his defense (*id.* at 42-46); and the ALJ's "bias manifested in disparate treatment" of him during the course of discovery, pre-hearing matters, and the within hearing (*id.* at 83) so as to compel the Commissioner to consider her findings "in a circumspect manner." (*Id.* at 132)

Initially, the Commissioner finds no infirmity in the ALJ's Order of May 25, 2001 denying respondent's request "to inspect and videotape the District's Social Services Building," (Babiak Letter, April 24, 2001)[9] a request that was strongly opposed by the Board for valid,

[9] Respondent states that his letter of April 24, 2001 "supplemented a request for additional discovery***." (Respondent's Exceptions at 3) It is noted that the ALJ's Prehearing Order, dated March 14, 2001, specifically determined, *inter alia*, that "[a]pplication for supplemental discovery shall be made no later than April 19, 2001. ***" (Prehearing Order at 3)

OAL DKT. NO. EDU 674-01
AGENCY DKT. NO. 32-2/01

IN THE MATTER OF THE TENURE	:	
HEARING OF JANICE DE WOODY,	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF FRANKLIN, GLOUCESTER COUNTY.	:	DECISION

The record, Settlement Agreement, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed in this matter with respect to a tenured secretary in the employ of the Franklin Township Board of Education.

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983; *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to the parties' compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/8/02

Date of Mailing: 4/8/02

12. Should BOARD fail to pay DeWOODY all monies owed to her under this Settlement Agreement as said monies become due, DeWOODY shall be entitled to have any arrearages thereon reduced to a judgment against BOARD upon the filing of appropriate documents with any tribunal having jurisdiction.

13. DeWOODY hereby certifies that she has read the terms of this Settlement Agreement, that she has had an opportunity to discuss it with an attorney, and that she understands its terms and effects. DeWOODY acknowledges further that she is executing this Settlement Agreement of her own volition, with full understanding of its terms and effects, and with the intention of releasing all claims recited herein, which she acknowledges is adequate and satisfactory to her. Neither BOARD nor its agents, representatives, or attorneys have made any representations to her concerning the terms or effects of this Settlement Agreement other than those contained herein.

14. To expedite the settlement contemplated in this Settlement Agreement, the Parties agree to waive exceptions to any Initial Decision adopting its terms without modification.

15. DeWOODY and the BOARD agree that this Settlement Agreement may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

Intending to be legally bound hereby, DeWOODY and BOARD execute the foregoing Settlement Agreement this 7 day of February; 2002.

WITNESS:

Janice R. DeWoody
JANICE DeWOODY

WITNESS:

FRANKLIN TOWNSHIP BOARD OF EDUCATION

BOARD SECRETARY

BOARD PRESIDENT

hire, rehire, or re-employ her in the future. Upon notification of such approval, DeWOODY's resignation and the mutual releases set forth in this Settlement Agreement will become effective, retroactively, to February 8, 2002. DeWOODY also authorizes the Franklin Township Education Association to withdraw all pending grievances and arbitration demands brought on her behalf.

9. DeWOODY and the BOARD agree and acknowledge that their agreement described herein and the settlement and termination of any claims as set forth herein, are not and shall not be construed to be an admission. DeWOODY and the BOARD further agree and acknowledge that they have consented to the severance of her employment with BOARD through resignation effective close of business on the date that the Parties receive notification that the Commissioner has approved this Settlement Agreement without modification and to the execution of this Settlement Agreement to provide an amicable conclusion of her employment relationship with BOARD.

10. The Parties will seek the Commissioner's approval for this Settlement Agreement, and if the Commissioner approves the Settlement Agreement without modification, ask the Commissioner to allow the tenure charges against DeWOODY to be withdrawn and dismissed with prejudice;

11. Should the Commissioner fail to approve the Settlement Agreement without modification, the Parties have agreed to make every reasonable effort to reform their Settlement Agreement to meet his objections. Should such reformation be impossible, the Parties will be returned to the *status quo ante*, the grievances and arbitration demands reinstated as timely filed, and this case will proceed to hearing. In such case, the Parties agree that the BOARD will receive a dollar-for-dollar credit of all sums paid by it to date which sums will be applied to salary. In such case, neither the terms of this Settlement Agreement nor the terms of the Joint Request for Approval of Settlement, Including Withdrawal of Tenure Charges will be admissible for any purpose.

any and all payments related to this election. DeWOODY agrees to make such payments on or before the first day of each month of coverage. Should she fail to do so, the BOARD may terminate coverage.

5. It is expressly agreed and understood that BOARD does not have and will not have any obligation to provide DeWOODY at any time in the future with any payments, benefits or considerations other than those recited in Paragraph 4 above.

6. DeWOODY further agrees and covenants that neither she, nor any person, organization or other entity on her behalf, will file, charge, claim, sue or cause or permit to be filed, charged or claimed any action for legal or equitable relief (including damages, injunctive, declaratory, monetary or other relief) involving any matter occurring at any time in the past up to the date of this Settlement Agreement or involving the allegations giving rise to this Settlement Agreement or any continuing effects or any acts or practices which may have arisen or occurred prior to the date of this Settlement Agreement.

7. The BOARD agrees and covenants that neither it nor anyone on its behalf will file, charge, claim, sue or cause or permit to be filed, charged, or claimed any action for legal or equitable relief (including damages, injunctive, declaratory, monetary or other relief) involving any matter occurring at any time in the past up to the date of this Settlement Agreement or involving the allegations giving rise to this Settlement Agreement or any continuing effects or any acts or practices which may have arisen or occurred prior to the date of this Settlement Agreement.

8. DeWOODY hereby agrees and recognizes that her employment relationship with BOARD will be permanently and irrevocably severed as of the date that the Parties receive notification that the Commissioner has approved this Settlement Agreement without modification and that BOARD does not have any obligation, contractual or otherwise, to

(a) take official action to accept DeWOODY's resignation on the date that the Parties receive notification that the Commissioner has approved this Settlement Agreement without modification. Upon notification of such approval, DeWOODY's resignation and the mutual releases set forth in this Settlement Agreement will become effective, retroactively, to February 8, 2002;

(b) pay DeWOODY the aggregate sum of $20,000 in payment for her agreement to voluntarily surrender her tenure rights and her rights to employment in the following installments:

(1) Semi-monthly checks in the amount of $900.00 apiece commencing on February 15, 2002 and payable on the first and fifteenth day of each month until the date that the Parties receive notification that the Commissioner has approved this Settlement Agreement without modification and

(2) a balloon payment in the amount of $20,000.00 minus the sum of the periodic payments made by the BOARD to DeWOODY pursuant to ¶ 4(b)(1) above up to the date that the Parties receive notification that the Commissioner has approved this Settlement Agreement without modification.

The Parties recognize that these sums represent payment for DeWOODY's surrender of her tenure rights and are neither salary nor back pay. As a result, the BOARD will not make customary payroll deductions and withholdings from its payments. Instead, the BOARD will issue an IRS form 1099 to DeWOODY and she will be responsible for paying taxes, if any, due on these sums.

(c) provide DeWOODY with hospital, medical, prescription and dental benefits to which she would otherwise be entitled under the collectively negotiated agreement, federal law or state law through February 28, 2002;

(d) provide DeWOODY with notice under the Consolidated Omnibus Budget Reconciliation Act, ("COBRA") to permit her to receive continued health care coverage under the BOARD's plan from the close of business on February 28, 2002, without interruption under COBRA and agrees to cooperate with her to the extent necessary for her to be eligible to receive COBRA benefits. Should DeWOODY elect such coverage, she will be responsible for

and/or agents, its and their respective successors and assigns, heirs, executors or administrators hereafter may have by reason of any matter, cause or thing whatsoever, from the beginning of her employment with BOARD to the date of these presents, and particularly, but without limitation, of the foregoing general terms, any claims arising from or relating in any way to her employment relationship and/or the termination of her employment relationship and/or affiliation with BOARD, including but not limited to, any claims which have been asserted or could have been asserted or could be asserted now or in the future under any and all federal, state or local laws and any common law claims now or hereafter recognized, and any and all claims arising out of her employment with BOARD (including but not limited to claims for attorney's fees and costs).

3. DeWOODY agrees that she shall no longer be employed by BOARD as of close of business on the date that the Parties receive notification that the Commissioner has approved this Settlement Agreement without modification. Upon notification of such approval, DeWOODY's resignation and the mutual releases set forth in this Settlement Agreement will become effective, retroactively, to February 8, 2002. DeWOODY further agrees that her signature on this Settlement Agreement constitutes an acknowledgment that she is relinquishing all present and future rights to employment and re-employment with BOARD as of the date that the Parties receive notification that the Commissioner has approved this Settlement Agreement without modification. Upon notification of such approval, DeWOODY's resignation and the mutual releases set forth in this Settlement Agreement will become effective, retroactively, to February 8, 2002.

4. In full consideration of the mutual execution of this Settlement Agreement, and the mutual agreement to be legally bound by its terms, at the same time as the execution of this Settlement Agreement, BOARD will:

respective successors and assigns, heirs, executors and administrators, of and from any and all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, which she ever had, now has, or hereafter may have, or which her heirs, executors or administrators hereafter may have by reason of any matter, cause or thing whatsoever, from the beginning of her employment with BOARD to the date of these presents, and particularly, but without limitation, of the foregoing general terms, any claims arising from or relating in any way to her employment relationship and/or the termination of her employment relationship and/or affiliation with BOARD, including but not limited to, any claims which have been asserted or could have been asserted or could be asserted now or in the future under any and all federal, state or local laws and any common law claims now or hereafter recognized, and any and all claims arising out of her employment with BOARD (including but not limited to claims for attorney's fees and costs), with the following exceptions: claims for compensable occupational disease caused by exposure to hazardous substances and claims arising under the Teachers' Pension and Annuity Fund Act, *N.J.S.A.* 18A:66-1 *et seq.* DeWOODY represents that as of the date of the execution of this Settlement Agreement there are no such claims pending or presently contemplated. DeWOODY also specifically acknowledges that she is releasing any claims for emotional distress and any physical manifestations arising therefrom and that such claims are specifically excluded from the exception for compensable occupational disease set forth immediately above in this paragraph.

2. BOARD, for and in consideration of the undertakings of DeWOODY set forth herein, and intending to be legally bound, does hereby remise, release and forever discharge DeWOODY and her heirs, executors and administrators, of and from any and all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, which it ever had, now has, or hereafter may have, or which its officers, members, employees

SETTLEMENT AGREEMENT REGARDING ACTION PENDING BEFORE THE COMMISSIONER OF EDUCATION

This Settlement Agreement is entered into by and between the Board of Education of the Township of Franklin ("BOARD") and its tenured employee Janice DeWoody ("DeWOODY") (the BOARD and DeWOODY are sometimes jointly referred to as the "Parties").

WHEREAS, DeWOODY has been continuously employed by the BOARD as a secretary since on or about July 26, 1994 and has attained tenure; and

WHEREAS, on January 23, 2001, the BOARD certified tenure charges against DeWOODY to the Commissioner of Education under the Tenure Employees Hearing Law, which charges were captioned:

IN THE MATTER OF THE TENURE HEARING OF JANICE DEWOODY, BOARD OF EDUCATION OF THE TOWNSHIP, OF FRANKLIN, GLOUCESTER COUNTY

OAL DOCKET NO. EDUTH 00674-01S
AGENCY REF. NO. 32-2/01

WHEREAS, DeWOODY filed an answer contesting the tenure charges;

WHEREAS, the Parties have exchanged reciprocal discovery, and

WHEREAS, the Parties have agreed to the withdrawal of the charges and the relinquishment of DeWOODY's claim to tenure upon approval of this settlement without modification by the Commissioner;

NOW THEREFORE, the matters in dispute having been amicably adjusted by and between the Parties, it is hereby stipulated and agreed as follows:

1. DeWOODY, for and in consideration of the undertakings of BOARD set forth in Paragraph 4 herein, and intending to be legally bound, does hereby remise, release and forever discharge BOARD and its officers, members, employees and agents, its and their

CONCLUSION

Counsel, as well as DeWOODY and the BOARD, are satisfied with the Settlement Agreement and believe that it fulfills the public interest with respect to these matters. For the reasons outlined above, and for good cause shown, this tribunal should conclude that the Settlement Agreement meets the requirements of *N.J.A.C.* 1:1-19.1, recommend that the Settlement Agreement be adopted without modification by the Commissioner of Education, order that the Settlement Agreement be implemented on condition that it is so approved, and therefore upon such approval dismiss with prejudice the tenure charges and petition of appeal in this matter.

Respectfully submitted,

LAW OFFICES OF
B. MICHAEL BORELLI, ESQ.
Attorneys for Board of
Education of the Township of
Franklin, Gloucester County

BY: _____
B. MICHAEL BORELLI

SELIKOFF & COHEN, P.A.
Attorneys for Janice DeWoody

BY: _____
KEITH WALDMAN

The Parties have further agreed that neither the BOARD nor its agents or employees will take any actions which could be adverse to DeWOODY's future employment interests elsewhere.

THE JUSTIFICATION FOR WITHDRAWAL OF TENURE CHARGES

Having exchanged discovery and prepared for hearing and evaluated all claims and defenses, the Parties recognize that one or more of the witnesses to be called by the BOARD and DeWOODY are no longer employees of the School District making the presentation of proofs more difficult than anticipated. The Parties also recognize that if DeWOODY prevails, the tensions caused by these proceedings would make it difficult for her to return to employment with the BOARD. The Parties also deem it to be in their mutual best interests to amicably conclude their employer-employee relationship by the withdrawal of the tenure charges and the relinquishment of tenure pursuant to the terms of the Settlement Agreement attached hereto as Exhibit A

PROCEDURAL STATEMENT

This matter arises out of charges certified by the BOARD to the Commissioner of Education on February 9, 2001, against a tenured secretary on grounds of alleged misbehavior, alleged neglect and alleged other conduct. The tenure charges were transmitted to the Office of Administrative Law (OAL) as a contested case on February 28, 2001. A hearing concerning the BOARD's tenure charges has been scheduled before the Honorable Steven C. Reback, ALJ for February 5, 6, 8 and 13 and March 4, 5, 6, 8, 18, 19, 20, 21 and 26, 2002. On or about February 5, 2002, the Parties reached a tentative settlement agreement conditioned upon BOARD approval, the drafting of mutually satisfactory settlement documents to be submitted for approval by the Commissioner of Education in accordance with which the tenure charges might be withdrawn. On or about February 7, 2002, the BOARD approved the settlement.

The Parties have agreed under the terms of the Settlement Agreement attached hereto as Exhibit A that DeWOODY will relinquish her tenure, employment and re-employment rights without a hearing in exchange for certain periodic payments and a lump sum payment.

The Parties have further agreed under the terms of the Settlement Agreement attached hereto as Exhibit A that conditioned upon the Commissioner's approval of the Settlement Agreement without modification, the tenure charges against DeWOODY shall be withdrawn and dismissed. Furthermore, should the Commissioner fail to approve the Settlement Agreement attached hereto as Exhibit A without modification, the Parties have agreed to make every reasonable effort to reform their Settlement Agreement to meet his objections. Should such reformation be impossible, the Parties will be returned to the *status quo ante* and the case will proceed to hearing.

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

2002 FEB 14 A 10: 15

SELIKOFF & COHEN, P.A.
307 Fellowship Road, Suite 314
Mt. Laurel, New Jersey 08054-1233
(856) 778-6055
Counsel for Respondent,
Janice DeWoody

IN THE MATTER OF THE TENURE HEARING OF JANICE DEWOODY, BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN GLOUCESTER COUNTY.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL DOCKET NO. EDUTH 00674-01S
AGENCY REF. NO. 32-2/01

JOINT REQUEST FOR APPROVAL OF SETTLEMENT, INCLUDING WITHDRAWAL OF TENURE CHARGES

INTRODUCTION

Counsel for the Board of Education of the School District of Franklin Township ("BOARD") and counsel for its tenured employee Janice DeWoody ("DeWOODY") (the BOARD and DeWOODY are sometimes jointly referred to as the "Parties") join in moving for an order from the Office of Administrative Law declaring that the Settlement Agreement between the Parties, attached hereto as Exhibit A, meets the requirements of *N.J.A.C.* 1:1-19.1, recommending that the Settlement Agreement be approved by the Commissioner of Education, and on condition that the Commissioner approves without modification the Settlement Agreement attached hereto as Exhibit A, ordering that the Settlement Agreement be implemented, and that the tenure charges filed by the BOARD be withdrawn and this matter dismissed with prejudice.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

2/19/02
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

2/21/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 22 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cad

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

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

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

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

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 674-01

AGENCY DKT. NO. 32-2/01

IN THE MATTER OF THE TENURE HEARING OF JANICE DeWOODY, SCHOOL DISTRICT OF THE TOWNSHIP OF FRANKLIN, GLOUCESTER COUNTY

B. Michael Borelli, Esq., for the petitioner

Keith Waldman, Esq., for the respondent (Selikoff and Cohen, P.A., attorneys)

Record Closed: February 14, 2002 Decided: February 19, 2002

BEFORE **STEVEN C. REBACK**, ALJ:

This matter concerns the School District of the Township of Franklin, Gloucester County, charges against the respondent, Janice DeWoody, for conduct unbecoming and insubordination. The respondent requested a hearing, and on March 2, 2001, the matter was transmitted to the Office of Administrative Law for hearing pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.*52:14F-1 to –13.

The parties conferred and agreed to a settlement. The attached stipulation sets forth the terms of the settlement, and is incorporated herein.

153-02

IN THE MATTER OF THE TENURE	:	
HEARING OF JANICE DE WOODY,	:	
SCHOOL DISTRICT OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF FRANKLIN, GLOUCESTER COUNTY.	:	DECISION

April 8, 2002

OAL DKT. NO. EDU 5389-01
AGENCY DKT. NO. 117-5/01

MR. AND MRS. M.M., on behalf of minor, S.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and Initial Decision issued by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review of the record, the Commissioner agrees with the findings and conclusions of the Administrative Law Judge (ALJ) and adopts the Initial Decision recommended by the ALJ as the final decision in this matter for the reasons stated therein.

Accordingly, the Petition of Appeal is hereby dismissed. Petitioners are directed to pay to the Board $1,209.44 for the period of S.M.'s ineligible attendance in the Clifton School District from May 9, 2001 until June 27, 2001.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/8/02

Date of Mailing: 4/8/02

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

APPENDIX

Witnesses:

None

Exhibits:

R-1 Letter from Clifton Public Schools to Mr. & Mrs. M. denying admission into the Clifton School District dated May 8, 2001.

R-2 Application by Clifton Resident for Admission into the Clifton School District dated May 1, 2001.

R-3 Affidavit of Karen Perkins dated December 17, 2001.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

2/14/02
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

2/20/02
DATE

Debbie A. Antonelis (ta)
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 21 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sej

ORDER

It is therefore **ORDERED** that the petitioner shall remit the sum of $1,209.44 to respondent for tuition for the period of May 9, 2001 to June 27, 2001.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Gunderson v. City of Brigantine Bd. of Educ., 95 *N.J.A.R.2d* (EDU) 39, 42 (citing *Sponsor's Statement, Senate Educ. Committee Stmt. And Governor's Conditional veto Message to Senate Bill No.* 1447 of 1993, enacted as c. 380).

Respondent alleges that pursuant to *N.J.S.A.* 18A:38-1, petitioner is not eligible for free attendance in its school district. Further, it also seeks tuition reimbursement for the education S.M. received during the period of time at issue.

Pursuant to the statute, the proofs in this matter must show that 1) that applicants are domiciled within respondent's school district; 2) that the applicants are supporting S.M. gratis; 3) that S.M.'s parents are not capable of supporting or providing care for her due to family or economic hardship; and 4) that S.M. is not residing with her relatives solely for the purpose of receiving a free public education in the school district.

The first prong of the statutory requirement is satisfied. There is no allegation that Mr. and Mrs. M.M. are not domiciled within the District and I so **FIND**. I further **FIND** that S.M. was not residing in the District solely for the purpose of receiving a public education.

I **FIND** that the petitioner applicants have failed to show that they were supporting S.M. gratis. Further, there is insufficient information to find or conclude that the family was facing an economic or family hardship. Thus, I **CONCLUDE** that the petitioners have failed to satisfy the required burden of proof.

With respect to the respondent's counterclaim, I **FIND** that S.M. attended the District school, when she was not a resident of the District or otherwise entitled pursuant to *N.J.S.A.* 18A:38-1(b)1, for 35 days. I, therefore, **CONCLUDE** that the respondent is entitled to tuition, reimbursement of $1,209.44.

7. S.M. attended the District school from May 9, 2001 until June 27, 2001 at an annual tuition cost of $6,220.60. The prorata tuition for 35 days is $1,209.44. (R-3)

DISCUSSION

The statute governing this matter, commonly referred to as the "affidavit" statute, provides, in pertinent part, that public schools are "free to the following persons over five and under 20 years of age". It further provides that:

> Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, . . . and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care of the child due to a family or economic hardship and that the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district.
>
> [*N.J.S.A.* 18A:38-1(b)1]

The statute was amended in 1977 (as set forth above) to prevent children from enrolling in school districts where they or their parent did not live. The 1977 amendment authorized local boards of education to go before the Commissioner and challenge the validity of the affidavits submitted by parents and relatives or friends to determine if the exception for attending a public school provided by *N.J.S.A.* 18A:38-1 was satisfied. In 1993, the statute was further amended to ease the burden on local school districts "attempting to remove illegally enrolled students," including "those living with a person other than the parent or guardian in order to obtain the benefit of a free public education in a district other than that of their entitlement by parental domicile."

The appeal was filed with the Department of Education on May 9, 2001 an answer and counterclaim was filed on June 1, 2001. The agency transmitted the matter to the Office of Administrative Law on June 22, 2001 for hearing as a contested case. A hearing was held on December 17, 2001 and the record closed on December 19, 2001. The petitioners did not appear for the hearing.

FACTS

I **FIND** the following undisputed **FACTS**, thus they are adopted as the, **FACTS** herein.

1. Petitioners, Mr. And Mrs. M. (petitioners or applicants), are the uncle and aunt of S.M.

2. S.M. came to live with the applicants on April 28, 2001. On May 2001, the applicants filed resident applicant with the District seeking permission to have S.M. attend the District school free of charge. (R-2)

3. Prior to living with resident applicants, S.M. lived in Salem, North Carolina with her father and stepmother. (R-2)

4. S.M.'s custodial father, D.M., left S.M. in the care of the applicants because he was traveling out of the country for an extended period of time (four to 5 months).

5. The applicants and D.M. allege that S.M. does not "get along" with her stepmother, thus D.M. felt it best that S.M. live with the applicants while he was out of the country. (R-2).

6. On May 8, 2001, the respondent notified the applicants that they had not established that S.M.'s parents were incapable of supporting or providing care for her due to a family or economic hardship. (R-1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5389-01
AGENCY DKT. NO. 117-5/01

MR. AND MRS. M.M. ON BEHALF
OF MINOR CHILD, S.M.,

Petitioners,

v.

BOARD OF EDUCATION OF THE
CITY OF CLIFTON, PASSAIC COUNTY,

Respondent.

No one appeared for the petitioner

Anthony V. D'Elia, Esq., for respondent

Record Closed: December 19, 2001 Decided: February 14, 2002

BEFORE **IRENE JONES,** ALJ:

STATEMENT OF THE CASE

Petitioners, Mr. & Mrs. M.M., filed an appeal with the State Board of Education challenging the respondent's, Clifton Board of Education, determination that their niece, S.M., is not entitled to a free public education in its district because she does not satisfy the requirements of *N.J.S.A.* 18A:38-1(b(1).

152-02

MR. AND MRS. M.M., on behalf of minor, S.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners challenged the Board's determination that their application for admission of their niece into the District's schools did not satisfy the criteria of the "affidavit student" provisions of the law and, thus, that petitioners' niece was not entitled to a free education in the Board's District. The Board counterclaimed for tuition.

The ALJ determined that petitioners failed to satisfy the statutory criteria. The ALJ dismissed the petition and awarded the Board tuition.

The Commissioner affirmed the Initial Decision.

April 8, 2002

these reasons, the NJSIAA Special Committee's denial of Midland Park's application cannot be termed arbitrary, capricious or unreasonable.

Accordingly, having found that due process was granted Midland Park and that there is sufficient credible evidence in the record to support the NJSIAA's denial of its request to leave the BPSL, the instant Petition of Appeal is dismissed.

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: 4/4/02

Date of Mailing: 4/8/02

[7] This decision, as the Commissioner's final determination in this matter, may be appealed to the Superior Court pursuant to *N.J.S.A.* 18A:11-3.

Hong Jun Kim v. NJSIAA, 1987 *S.L.D.* 259. Further, the burden of proof rests with the person or entity challenging the decision. *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960).

The arbitrary, capricious or unreasonable standard of review is extremely narrow in its scope and, consequently, imposes a heavy burden on those who challenge determinations of the NJSIAA. The standard, as defined by the New Jersey Courts provides:

> In the law, "arbitrary" and "capricious" means having no rational basis. (citation omitted) ***Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached. (citations omitted) Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling. (citation omitted) (*Bayshore Sewerage Co. v. Dept. of Envt. Protection*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974)

Guided by these principles, the Commissioner has carefully considered the record, as well as the arguments of counsel, and hereby affirms the determination of the NJSIAA upholding the denial of Midland Park's withdrawal from the BPSL. The Commissioner, initially, concurs with the NJSIAA that Midland Park was afforded the full measure of due process to which it is entitled. Similarly, he finds that, as persuasively argued by the NJSIAA, its Special Committee's findings and conclusions are grounded in the record. The Commissioner further concludes that the NJSIAA has a legitimate interest, in order to prevent a "general instability" throughout all 21 New Jersey Conferences, of requiring a school wishing to withdraw from a League objecting to its departure to demonstrate a ***substantial*** need to do so. As evidenced by the record here, Midland Park has failed to make such a demonstration. For all of

alternatives available to handle its football problems. It points out that, over 16 years ago, the NJSIAA, as an amendment to its Bylaws, created the Cooperative Sports Program (Article III, Section 7, 2000-2001 *NJSIAA Handbook*, pp. 40-41), which allows a small school experiencing difficulty in fielding sports programs to join with similarly situated schools to create joint athletic programs. (*Id.* at 18) The Cooperative Sports Program provides an opportunity for student athletes to compete even though they are attending schools whose enrollment figures would not ordinarily justify a full athletic team. Indeed, in its report, the Special Committee, in its Conclusion No. 4, urged Midland Park to consider a wider use of this alternative. The NJSIAA submits that, although Midland Park is involved in a Cooperative Wrestling Program with Waldwick, it steadfastly "insists on having its own football team on its own terms." (*Ibid.*)

In conclusion, the NJSIAA reemphasizes that the realignment process was never intended to guaranty competitive success for a single member school in a particular sport, especially when there are existing remedies in place which could resolve this school's perceived difficulties.

COMMISSIONER'S DETERMINATION

It is well-established that the Commissioner's scope of review in NJSIAA determinations is appellate in nature. *N.J.S.A.* 18A:11-3, *N.J.A.C.* 6A:3-7.4; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188 (1992). That is, the Commissioner may not overturn an action by the NJSIAA in applying its rules absent a finding that the NJSIAA applied the rules in a patently arbitrary, capricious or unreasonable manner. Nor may the Commissioner substitute his judgment for that of the NJSIAA, *even if he were to decide differently in a de novo hearing*, where due process has been provided and where there is adequate basis for the decision reached by the NJSIAA Committees. *Dam Jin Koh and*

as he explained that the BPSL had adopted a rule barring the League's three small schools, which includes Midland Park, from playing the League's two largest schools (Passaic County Technical Institute and Garfield) in football. As such, the NJSIAA contends, Midland Park cannot credibly claim that they are required to compete against much larger schools in football. (*Id.* at 15) The NJSIAA claims that this information was also particularly meaningful

> because Midland Park is alleging that the average enrollment in the BPSL is 467 students, as compared to 347 students in the League it is seeking to enter, the BCSL. ***In fact, as it relates to football, with the elimination of the two largest schools in the BPSL, Passaic Tech and Garfield, the average enrollment of competing football schools in the BPSL is 388 students, or only 41 students larger than the BCSL. In addition, with the inclusion of Hawthorne Christian, Midland Park will no longer be the smallest school in the BPSL.
> (NJSIAA's Brief at 16)

The NJSIAA proposes that the written materials which had been presented to the Special Committee, along with the testimony of the BPSL representative, persuaded the Committee that, although Midland Park is a relatively small school, this situation was not adversely affecting its competitiveness in sports other than wrestling and football. (*Ibid.*) It further professes that the Special Committee additionally relied on testimony that Midland Park's departure from the League would have an adverse impact on other small League schools, for example, Waldwick, with an enrollment of 279 students, which Midland Park defeated in football this past season. It reasons that were Midland Park permitted to withdraw from the League, it would be extremely difficult to explain to Waldwick and other small League schools, who might be struggling in one or more sports, why they also should not leave the BPSL. (*Id.* at17)

Finally, the NJSIAA argues that Midland Park should not be allowed to leave the BPSL, thereby disrupting this otherwise stable and well-functioning League, when there are

> ...The ability of member schools to have a winning season, or to obtain state or national prominence in its particular sport, is simply not a concern of the Association. (NJSIAA's Brief at 13-14)

The NJSIAA observes that, contrary to Midland Park's assertion, the within record establishes that its decision is supported by sufficient credible evidence. Specifically, Midland Park challenges the decision with respect to the finding that it was competitive in programs other than football and wrestling, that its departure from the BPSL would be disruptive to that Conference and that its application failed to satisfy criteria No. 4 of the Leagues and Conferences realignment standards because it would have an adverse impact on the BPSL should Midland Park be permitted to leave. The NJSIAA counters that the evidence in the record to support these findings and conclusions was "formidable." (NJSIAA's Brief at 14) First, the record, and even Midland Park's application itself, demonstrates that Midland Park has had significant competitive success within its current League. The NJSIAA points out that Midland Park's boys baseball team had a record of 22 and 7 for the past year and were co-champions within the BPSL's Carpenter Division; their freshman boy's basketball team was undefeated; their girl's vollyball team was 15 and 6 last year and the champions within the Carpenter Division; the girl's softball team ended last season with a 15 and 9 record, and the girl's tennis team, in the last three years, had a 25-16 one loss record and were division champions in 1998-1999. Finally, Midland Park's football team, although playing an independent schedule outside of the BPSL last season, still competed against another small school in the BPSL, which it defeated 38 to 7.[6] (NJSIAA's Brief at 14-15)

The NJSIAA further submits that the Special Committee found the testimony of David Moyle, who represented the BPSL at the November 19 hearing, particularly informative,

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[6] *See* Midland Park's Brief, Attachment 1, Appendix 9, pp. 2-3; Transcript of NJSIAA Special Committee Hearing, November 19, 2001, p. 53, lines 19-21; p. 43, lines 19-24.

With this underlying policy with regard to realignment outlined, the NJSIAA submits that there can be no question here that Midland Park was provided a full measure of due process in consideration of its application. It avers that, pursuant to the League and Conference Statement (*NJSIAA Handbook*, 1999-2000 at 133-135), the Executive Committee's role in reviewing a decision of a league or conference is "limited to determine [sic] whether the actions of the conferences were arbitrary or capricious or in violation of the NJSIAA Constitution and Bylaws. The NJSIAA and its Executive Committee will not substitute its judgment concerning such issues for that of the conference." (*Id.* at 135) (NJSIAA's Brief at 12) In this matter, the NJSIAA provided Midland Park two hearings to consider the school's transfer application, where Midland Park was represented by counsel, had an opportunity to present witnesses, was able to cross examine witnesses from the BPSL and the BCSL, was permitted to make opening and closing statements and was allowed to submit documentary evidence. Further, the proceedings were stenographically recorded and the Special Committee issued a comprehensive decision within three weeks. The same procedures were accorded before the NJSIAA Executive Committee. Committee members, additionally, posed questions to representatives of Midland Park, the Special Committee and the BPSL, and subsequently voted overwhelmingly to adopt the Special Committee's report. (*Id.* at 12-13)

The NJSIAA next submits that in reviewing a League transfer decision, consideration must be given to the fact that the realignment process was instituted solely to provide adequate scheduling for interscholastic competitions. It argues that here:

> There was never any contention ***that Midland Park was denied that scheduling, only that the school was non-competitive in football (and perhaps some other sports). Yet the standard that is to be applied is that of the 1983 Statement of Leagues and Conferences which states as follows:

NJSIAA'S POSITION

The NJSIAA's submission initially presents an overview of the history of League and Conference realignment begun in 1982, noting that the realignment process was in response to a prior expressed concern of the Commissioner of Education "that a number of inner city and parochial schools were not being allowed to have a full schedule of contests because they were denied membership in local Leagues and Conferences." (NJSIAA's Brief at 3) It emphasizes that the underlying intent of realignment of Leagues and Conferences, from its inception through today, has been to "afford full scheduling for minority and parochial schools who had been deprived of those opportunities prior to 1982." (*Id.* at 4) Of significant import in this regard, it proffers, is that assuring that a school's athletic program is victorious is not now, nor has it ever been, a concern of either the Commissioner or the NJSIAA. The NJSIAA advances that subsequent to the third statewide realignment in 1987, accomplished with the objective of assuring that the Commissioner' directive was, indeed, effectuated,

> [a] number of schools have voluntarily transferred from one League to another as population among New Jersey schools fluctuated. Where either League objected, then the NJSIAA would consider *ad hoc* applications, rather than general statewide realignments. However, in doing so, the NJSIAA maintained its principal goal. If a school was denied of any membership, then it would be admitted to an appropriate League or Conference. If it was presently in a League or Conference and wished to transfer to another conference over the objection of its existing Conference, then it would have to demonstrate some substantial need to do so. Otherwise, general instability would be created throughout the 21 Conferences in New Jersey. Accordingly, in considering a request for admissions or transfers, the NJSIAA consistently applied the standards of the 1983 Leagues and Conferences Position Statement that it had to "be shown that there has been a violation of the order of the Commissioner of Education, that there be an opportunity for a full schedule of interscholastic sports." (2001-2002 *NJSIAA Handbook*, p. 142.) (NJSIAA's Brief at 5-6)

Midland Park "being compelled to remain in the League and to resume playing a league, rather than an independent schedule, as of September 2002 (and without the addition of a new school***), there will once again be thirteen (13) football schools in the BPSL,***which creates an imbalance requiring the scheduling of byes each week." (*Ibid.*) This being the case, Midland Park urges that it stands to reason that if it were permitted to withdraw from the BPSL, the League's imbalance would be *cured*, to the benefit, rather than to the detriment, of the BPSL. (*Ibid.*) It, additionally, suggests that rather than denying Midland Park's application out-of-hand, the NJSIAA Special Committee could have, alternatively, permitted Midland Park to continue to play an independent football schedule, an option, which at least on a short-term basis, would serve to alleviate the difficulties it is currently experiencing. (*Id.* at 18)

Finally, Midland Park contends that in concluding that its declining enrollment has not affected the school's ability to be competitive in sports other than wrestling and football, the NJSIAA Special Committee relied on erroneous statistics. Specifically, "while the Special Committee concluded that the boys' soccer team was 8-2 this past year (Decision at page 5), in fact, the actual record was 1-16-1 overall, with a 0-10 record in the Carpenter (smaller school) Division of the BPSL." (Midland Park's Brief at 20) Therefore, it alleges that the NJSIAA Special Committee's determination was based, at least in part, on "inaccurate information." (*Id.* at 20)

Midland Park tenders that, because the record fails to demonstrate any sufficient or substantial evidence that the BPSL would suffer adverse impact should Midland Park be allowed to withdraw from that League, the NJSIAA's findings of such adverse impact are arbitrary, capricious and unreasonable, necessitating reversal.

Midland Park submits that Mr. Moyle's declaration is "at best, merely speculative and conjecture." (Midland Park's Brief at 9) It proffers that the record is devoid of any evidence, testimony, or even any explicit suggestion by this or any other witness, "that any of the smaller schools in the BPSL had indicated to the League an intention to seek to be released from the League in the event that Midland Park is released, or that any of the smaller schools in the League have taken any action in the last decade, by formal application or otherwise, to be released from the League." (*Id.* at 10)[4] [5]

Moreover, the record further evidences that the notion that Midland Park's departure would cause a "domino effect" with the smaller schools is negated by an analysis of the vote actually taken by the BPSL on Midland Park's application:

> a number of the smaller districts in the BPSL (including Immaculate Conception, Eastern Christian and Don Bosco Tech) all voted *against* allowing Midland Park to leave. Were there to be any legitimacy to the concern that Midland Park's leaving would have a domino effect o[n] other small schools ***, it is far more logical to assume that *all* of the smaller schools in the league would have voted to *permit*, rather than to not allow, Midland Park to leave. (emphasis in text) (*Id.* at 11-12)

Next, Midland Park proposes that the record lacks any factual or evidentiary basis for the NJSIAA Special Committee to have concluded that its departure from the BPSL would "create an imbalance" within that League. (Midland Park's Brief at 16) To the contrary, the record rather establishes, at least insofar as football is involved, that as a consequence of

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[4] To the contrary, the testimony and evidence adduced in this matter, petitioner avers, confirms that a number of the League's *larger* schools have sought, and been granted, permission to leave the League.

[5] Midland Park also vigorously objects to Mr. Moyle's representation, made for the first time before the NJSIAA Executive Committee, whose consideration of this matter, pursuant to the NJSIAA's own rules and procedures, is to be confined to the record established before the NJSIAA Special Committee, that two other small schools had indicated a desire to leave the BPSL and, indeed, voted for Midland Park's release for this reason. This impermissible supplementation of the record should not have been allowed and "must be viewed as having prejudiced the position of Midland Park before [this Committee] to the extent that such 'evidence' was considered by [them]." (Midland Park's Brief at 13-14)

January 9, 2002, where the Executive Committee subsequently voted 24-5 to adopt the report of the NJSIAA Special Committee denying Midland Park's request to change leagues. (January 9, 2002 Letter from Boyd A. Sands to Robert M. Jacobs, Esq.)

MIDLAND PARK'S POSITION

Midland Park charges that the decisions of the NJSIAA Special Committee, and the NJSIAA Executive Committee, denying its request to leave the BPSL because its departure would result in an adverse impact on, or create an imbalance within, the BPSI, are conclusions totally devoid of credible evidentiary support in the record before these bodies. As such, Midland Park contends the decisions of both Committees deprived it of due process and constituted an arbitrary, capricious and unreasonable application of rules by the NJSIAA, so that pursuant to the standard of review set forth in *N.J.A.C.* 6A:3-7.4, the NJSIAA's decision must be set aside. (Midland Park's Brief at 7, Point I)

In finding detrimental negative impact on the BPSL, Midland Park advances, the NJSIAA Special Committee relied, to a large extent, on statements of a BPSL representative to the effect that if Midland were to be permitted to leave that League, a "domino effect" would result, whereby other small schools in the League would also seek to be released. (*Id.* at 9) Specifically, Dave Moyle, Athletic Director of Pompton Lakes High School, testifying on behalf of the BPSL, stated:

> Our concern is if Midland Park leaves us it's going to have a major impact on our other smaller schools. What is to stop the next school to coming down here and appealing to you and then the next school, the next smallest school, and that's what happens. That's our concern. (Transcript at 49-50) (Midland Park's Brief at 9)

program is [sic] attributable to a large degree to the school's small size, that size has not affected the school's ability to be competitive in programs other than football and wrestling.

9. The Committee finds that the BPSL has attempted to assist Midland Park High School and further finds that the departure of that school from the League will be disruptive to this Conference. (*Id.* at 5-6)

The NJSIAA Special Committee's Report next made the following "Conclusions":

1. The application by Midland Park satisfies six of the seven criteria for realignment, as set forth in February 1996 NJSIAA Leagues and Conferences Procedures (*e.g.*, size, geography, scope of programs, administrative personnel, financial burden and any negative impact on diversity goals). However, the Committee believes that the application does not survive criteria (sic) No. 4, dealing with the adverse impact on the present League.

2. The Committee is quite sympathetic to the problems encountered by Midland Park, but has concluded on balance that the departure of this school to the BCSL will create an imbalance within the BPSL, which should not be allowed at this time.

3. In recognition of the fact that Midland Park and other Group 1 schools in BPSL and the BCSL are encountering competitiveness problems in football, it is urged that some consideration be given to combining these Conferences for football scheduling alone. Such an arrangement was recently initiated by the Olympic and Burlington County Scholastic League, which was encountering similar problems in football scheduling.

4. In addition, Midland Park may well consider expanding its cooperative sports program to include football and other activities where it is encountering genuine competitive problems. Indeed, the cooperative sports program was designed to deal with schools such as Midland Park, which have been experiencing a substantial decline in enrollment. The BPSL has demonstrated in the past that it would cooperate in any such endeavors.
(*Id.* at 6)

- Midland Park filed exceptions to the Special Committee's Report with the Executive Committee of the NJSIAA. Such exceptions were considered at a hearing conducted on

- In so concluding, the NJSIAA Special Committee's Report found the following to be "Findings of Fact":

> 1. The Midland Park High School has an enrollment, grades 10-12 of 181 students. It is the smallest school within the Bergen-Passaic Scholastic League ("BPSL").
>
> 2. In June 2001, this Committee mandated that the BPSL include Hawthorne Christian Academy, with an enrollment of only 152 students to receive first priority scheduling and ultimately to become a member as of September 2004.[3]
>
> 3. As a result of the departure of the ascending (sic) district of Ho-Ho-Kus, and the loss of some students in the Secondary Hearing Impaired Program ("SHIP"), Midland Park student enrollment has dropped significantly over the past five years.
>
> 4. In football seasons of 1997 and 1998, Midland Park posted a 0 and 18 record, which that school maintains is attributable to its small size and the fact that it had to play larger schools within the BPSL.
>
> 5. Midland Park has also dropped its boys tennis team as of the 1999-2000 school year, even though that program was highly competitive the previous year. It has also entered into a cooperative sports program in wrestling within Waldwick High School, a BCSL member, this past year.
>
> 6. The BPSL has taken proactive steps to assist Midland Park in coping with its problems in football and wrestling. It allowed the school to maintain an independent football schedule for the past three years, resulting in an 8-2 record this past year in that sport. It also cooperated in allowing Midland Park to maintain a cooperative sports program in wrestling with Waldwick High School.
>
> 7. The BCSL, National and American Divisions, has voted to allow Midland Park to join as a member, stating that the expansion of that League will allow it greater scheduling opportunities.
>
> 8. While the Committee does not doubt that the difficulties Midland Park has experienced in mounting a competitive football

[3] The body of the NJSIAA Special Committee's Report indicates that if and when Hawthorne Christian Academy enters the BPSL, it, rather than Midland Park, would be the smallest member. (NJSIAA Special Committee Report at 4)

made application for admission into the BCSL in accordance with the Constitution and Bylaws of that League. (*Id.* at 4)

- The BCSL is comprised of smaller schools than the BPSL, with 14 of its 18 public school members classified as Group 1. (NJSIAA Special Committee Report at 2-3)
- On May 2, 2000, the BCSL approved Midland Park's application to join the BCSL by the requisite two-thirds majority vote. (Midland Park's Brief at 4)
- Midland Park, subsequently, informed the BPSL of its intention to join the BCSL and of its desire to withdraw from the BPSL, effective with the 2002-03 school year. On May 8, 2001, the BPSL voted 8-7 in favor of Midland's application to leave that League. However, because a two-thirds majority vote of the member schools was necessary to permit the departure, the vote failed. (*Id.* at 4-5)
- Midland Park appealed the BPSL's denial of its application to withdraw to the NJSIAA Special Committee.[2] A hearing on Midland Park's appeal was conducted by the Committee on November 19, 2001. On December 10, 2001, the NJSIAA Special Committee issued its report denying Midland Park's release from the BPSL to join the BCSL. (NJSIAA Special Committee Report)

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[2] A letter dated May 24, 2001, from Roger A. Fitzgerald, Principal, Midland Park High School to Boyd Sands, Executive Director, NJSIAA, presents Midland Park's reasons for appeal:

> One basis for this appeal is school size, the average number of students per school in the BCSL is lower and would level the playing field for our students in all sports offered. A second reason for this appeal is for the safety of our students. It should be obvious that a school with a large enrollment will have a larger pool of students to pick from for athletic teams, especially in contact sports. The third reason is to be more competitive in various sports. For example Midland Park has been released by the BPSL for Varsity Football for the past two years because we simply could not compete with the larger schools in our league. We have also been forced to begin a cooperative program in wrestling and to drop our boys tennis team because we could not get a sufficient turnout of students. (May 24, 2001 Letter from Roger A. Fitzgerald to Boyd Sands at 2)

- The enrollment in the schools comprising the BPSL ranges from a high of 1,397 students to the 181 students of Midland Park, currently the smallest school in the league. (*Id.* at 2-3)
- For approximately the last 5-6 years, Midland Park has experienced a dramatically decreasing enrollment. In addition to an overall general decline, two specific other factors have significantly exacerbated this situation. First, the Commissioner permitted the severance of a sending-receiving relationship between Midland Park and Ho-Ho-Kus. During the four-year phase-out of this relationship, Midland Park lost a total of 60-80 students. Second, for a number of years, Midland Park has served as a host district for a program known as the Secondary Hearing Impaired Program (SHIP) conducted by the Bergen County Special Services School District. Through this program, Midland Park served the educational needs of a number of deaf and hearing-impaired students. Due to recent technological and medical advances, many of these SHIP students have been able to return to a modified educational environment in their home districts. (Midland Park's Brief at 2-3)
- As a result of the significant enrollment declines, Midland Park claims that participation in sports at the school dropped substantially between the 1995-96 and the 2001-02 school years, purportedly, 18% for fall sports, 37% for spring sports, and 45% for winter sports. (*Id.* at 3)
- Midland Park asserts that based on its substantially declining enrollments, considerable decreases in the numbers of students participating in its athletic programs, and concerns about competing effectively or safely with the significantly larger schools in the BPSL, it

position and an Appendix containing the Items Comprising the Record on Appeal. A reply brief was submitted by the NJSIAA on March 5, 2002, whereupon, the record in this matter was closed.

BACKGROUND

The within record evidences the following:

- The NJSIAA is a voluntary association established pursuant to *N.J.S.A.* 18A:11-3, which organizes, oversees and governs high school athletics in the State of New Jersey.
- Midland Park is a public school district in Bergen County, is a member of the NJSIAA and has adopted the Rules and Regulations of that body.
- Midland Park is a member of the BPSL and has been a member of this league for approximately 25 years. (Midland Park's Brief at 2)
- The BPSL and the other 20 Leagues and Conferences throughout the state serve as local organizations to provide athletic schedules for member schools and to award local championships in various sports.
- The BPSL currently consists of a total of 15 schools, one Group 4 school, one Group 3 school, 5 Group 2 schools, a Parochial A school, with the remaining schools being Group 1 or Parochial B schools,[1] and is divided into two Divisions, the "King Division," consisting of the League's larger schools, and the "Carpenter Division," comprising Midland Park and other smaller schools in the League. (NJSIAA Special Committee Report at 1-2)

[1] The NJSIAA classifies public schools for competition purposes by enrollment, with Group 1 schools having the smallest enrollments and Group IV the largest. NJSIAA parochial school groupings, also classified by enrollment, are Group A for large schools, Group B for small schools.

AGENCY DKT. NO. 25-2/02

BOARD OF EDUCATION OF THE BOROUGH OF MIDLAND PARK, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

For Petitioner, Robert M. Jacobs, Esq. (Winne, Banta, Rizzi, Hetherington & Basralian)

For Respondent, New Jersey State Interscholastic Athletic Association (NJSIAA), Michael J. Herbert, Esq. (Herbert, Van Ness, Cayci & Goodell)

PROCEDURAL HISTORY

This matter has come before the Commissioner of Education by way of a Petition of Appeal filed on February 1, 2001 by the Board of Education of the Borough of Midland Park ("Midland Park"), seeking a reversal of the decision of the New Jersey State Interscholastic Athletic Association Executive Committee ("NJSIAA Executive Committee"), dated January 9, 2002, which affirmed the determinations of the Bergen-Passaic Scholastic League ("BPSL") and the NJSIAA Special Committee on Leagues and Conferences ("NJSIAA Special Committee") denying Midland Park's request to leave the BPSL and join the Bergen County Scholastic League ("BCSL").

On February 11, 2002, respondent NJSIAA filed its Answer to the Petition of Appeal along with a Statement of Items Comprising the Record on Appeal pursuant to *N.J.A.C.* 6A:3-7.2. On February 20, 2002, Midland Park submitted a brief in support of its

151-02

BOARD OF EDUCATION OF THE BOROUGH OF MIDLAND PARK, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Board sought a reversal of the NJSIAA Executive Committee's decision denying petitioner's request to leave the Bergen-Passaic Scholastic League (BPSL) and join the Bergen County Scholastic League (BCSL), effective with the 2002-03 school year. Petitioner is the smallest school in BPSL and as a result of significant enrollment declines, was concerned about competing effectively with the significantly larger schools in the BPSL. The BCSL approved petitioner's application to join the BCLS by the requisite two-thirds majority vote, but the BPSL did not vote by two-thirds majority to permit the departure.

The NJSIAA contended that petitioner was afforded the full measure of due process to which it was entitled, and that denial of petitioner's application to withdraw was not arbitrary, capricious or unreasonable. The NJSIAA contended that, in order to prevent a "general instability" throughout all 21 New Jersey Conferences, the NJSIAA requires a school wishing to withdraw from a League objecting to its departure to demonstrate a substantial need to do so, and petitioner failed to make such a demonstration. NJSIAA emphasized that the realignment process was never intended to guaranty competitive success for a single member in a particular sport, especially when there are existing remedies in place, like the Cooperative Sports Program, which could resolve this school's perceived difficulties.

The Commissioner found that due process was granted petitioner and that there was sufficient credible evidence in the record to support the NJSIAA's denial of petitioner's request to leave the BPSL. The petition was dismissed.

April 4, 2002

OAL DKT. NO. 05372-01
AGENCY DKT. NO. EDU 112-5/01

T.W.-J., on behalf of minor child, D.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, this matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

The Board's counterclaim, therefore, is deemed admitted and petitioner is hereby ordered to pay tuition for the period of D.J.'s ineligible attendance in the Board's schools on the basis of 1/180 of the total annual per pupil cost multiplied by the number of days of ineligible attendance.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 4/2/02

Date of Mailing: 4/2/02

138-02

138-02

T.W.-J., on behalf of minor child, D.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

April 2, 2002

OAL DKT. NO. EDU 5903-99
AGENCY DKT. NO. 60-3/99

JOSEPH LAUMBACH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF WEST MILFORD, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 4/2/02

Date of Mailing: 4/2/02

139-02

JOSEPH LAUMBACH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF WEST MILFORD, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 2, 2002

> *Educ.*, 23 *N.J.* 364, 382 (1957). While the manner of conducting a hearing may vary, "[a]s long as principles of basic fairness are observed and adequate procedural protections are afforded, the requirements of administrative due process have been met." *Kelly v. Sterr*, 62 *N.J.* at 107. *** *In re Kallen*, 92 *N.J.* 14, 25-26 (1983)

The issue, then, is whether respondent "received a hearing conforming to principles of fundamental fairness." (*Id.* at 26) A complete review of this record persuades the Commissioner that he has.

Accordingly, the Initial Decision is affirmed with modification as set forth herein, and respondent is dismissed from his tenured position as Superintendent of the East Orange School District as of the date of this decision.[12] A copy of this decision shall be forwarded to the State Board of Examiners for action against respondent's certificate as it deems appropriate.

IT IS SO ORDERED.[13]

COMMISSIONER OF EDUCATION

Date of Decision: 4/1/02

Date of Mailing: 4/2/02

Synopsis Faxed 4/2/02

[12] In accordance with *N.J.A.C.* 1:1-14.10(j), the ALJ's Interlocutory Orders are affirmed.

[13] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

substantive reasons.[10] Additionally, the Board notes that respondent's counsel "glosses over the fact that he was permitted, and did in fact go to the Services Building to inspect the facility for approximately two (2) hours before the hearing." (Board's Reply at 15)

Neither does the Commissioner find that the ALJ's ruling with respect to respondent's retaliation defense was improper, under the circumstances of this case. As the Initial Decision indicates, respondent *was* provided the "right to test the credibility of witnesses by presenting evidence of improper motive." (Initial Decision at 2)[11]

As to respondent's claims of disparate treatment during proceedings at the OAL, which would render the ALJ's findings and conclusions suspect, the Commissioner is disinclined to credit such claims when the record as a whole fully supports the ALJ's findings and conclusions as affirmed herein, and where the ALJ ultimately recommended dismissing four of the twelve charges filed by the Board. In this connection, the Commissioner underscores that the proceedings before him are quasi-judicial, *City of Hackensack* 82 *NJ* 1, 28-29 (1980), and the ALJ has great latitude in presiding over the course of a hearing. *N.J.A.C.* 1:1-14.6, *N.J.S.A.* 52:14B-10. Further,

> [a]dministrative hearings in contested cases must "operate fairly and conform with due process principles." *Laba v. Newark Bd. of*

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[10] The Board argued, "[f]irst, there is nothing in the administrative rules which permits a party to videotape the land or building of an adversary. Second, it is entirely unclear [what] this viewing and inspection would accomplish. Whatever security measures may be in place at the location today is simply not relevant to whatever security measures may have been in place several years ago. Third, and most importantly, there are very serious security risks involved in allowing respondent to view and videotape [the site from which there are allegations that respondent has already stolen board-owned property.]" (Board's Letter Brief in Partial Opposition to Respondent's Motion for Supplemental Discovery and to Compel Discovery at 5)

[11] Indeed, the record shows that the ALJ determined "that testimony – or evidence of retaliation may be put in to show motive or bias *of a witness*." (emphasis added) (Tr. 7/24/01 at 55) In this connection, the ALJ distinguished between claims of retaliation against specific individuals versus claims against the board as an entity. Differentiating the latter as "institutional bias," which she did not see view as "an issue for retaliation," (*id.* at 56) the ALJ nevertheless cautioned, "[w]hat I'm saying is, we're gonna take it painstakingly step by step. But I'm going to limit, and I am going to want a proffer on every single one of these issues that comes up. ***" (*Id.* at 56)

154-02

IN THE MATTER OF THE TENURE	:	
HEARING OF CLARE MILLER,	:	COMMISSIONER OF EDUCATION
UNION COUNTY EDUCATIONAL	:	DECISION
SERVICES COMMISSION,	:	
UNION COUNTY.	:	
	:	

SYNOPSIS

Petitioning Educational Services Commission filed tenure charges against respondent, a teacher in the district, asserting unbecoming conduct based on two separate incidents of alleged violence against students in her classroom. Both incidents were alleged to involve kicking students who refused to comply with directives and return to their seats.

The ALJ determined that the charge with regard to the alleged kicking of pupil K.Z. was proven by the Commission, but held that, because respondent had already been penalized for this action by the Commission when it withheld a salary increment from her, this charge could not serve as a basis for penalty in a tenure matter. The charge with respect to student K.W. was determined by the ALJ not to have been proven by the Commission. The ALJ recommended dismissal of the charges against respondent.

The Commissioner affirmed the ALJ's determination that the charge with respect to pupil K.W. was not proven by the Commission and must, therefore, be dismissed. The Commissioner also affirmed the ALJ's determination that respondent kicked K.Z. However, the Commissioner disagreed that this charge should be dismissed because it had already been resolved by agreement between the parties as to respondent's increment withholding. Therefore, the Commissioner modified the ALJ's decision to hold that the tenure charge involving K.Z. was sustained, but that, in the absence of any further proven incidents of unbecoming conduct and under all of the circumstances of this matter, an increment withholding was the appropriate penalty for the isolated incident of which respondent was found guilty as charged.

April 8, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5812-01
AGENCY DKT. NO. 240-7/01/99

I/M/O THE TENURE HEARING OF CLARE MILLER EDUCATIONAL COMMISSION, UNION COUNTY SERVICES.

William S. Jeremiah, Esq., for Educational Services Commission, Union County, petitioner

Nancy I. Oxfeld, Esq., for Clare Miller, respondent (Oxfeld Cohen, attorneys)

Record Closed: November 14, 2001 Decided: December 27, 2001

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Educational Services Commission, Union County ("District"), certified tenure charges of conduct unbecoming a teacher and unprofessional conduct against respondent, Clare Miller. The District submits that Miller's conduct warrants dismissal from employment. Respondent denies any charges of wrongdoing.

On July 19, 2001, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to

N.J.S.A. 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. On August 7, 2001, a prehearing conference was held pursuant to *N.J.A.C.* 1:1-13.1. Hearings were held on October 17 and 18, 2000. The parties filed post-hearing briefs and the record closed on November 14, 2001.

THE CHARGE

The charges are stated as follows:

1. On May 3, 2001, Clare Miller in response to a misbehaving student, kicked the student. Immediately thereafter, Clare Miller was confronted by the Principal and the Superintendent of the Commission suggesting to her that such behavior was totally inappropriate and based on such behavior the Commission did withhold her increment.

2. Not withstanding the statement to Ms. Miller that such behavior was totally inappropriate and conduct unbecoming a teacher, on June 5, she again kicked a student who was misbehaving.

[Certification of Charges June 20, 2001]

ISSUE

If the tenure charges are sustained, is dismissal or a lesser penalty warranted?

SUMMARY OF EVIDENCE

Background

The Union County Educational Services Commission includes four special educational schools, one alternative high school, and special educational services for some non-public and all public schools in Union County.[1] The incidents in this proceeding occurred at Centennial High School (Centennial), a school for severely emotional disturbed students. Many of the students have behavioral problems and have been involved in the juvenile justice system. Centennial employs approximately

[1] State and federal laws require local public schools district to identify, classify and provide a free and appropriate education to children with disabilities. 20 *U.S.C.A.* §1412. *N.J.S.A.* 18A:46-8, 9.

ten teaching staff members and several paraprofessionals. Approximately forty-five students are enrolled in grades nine to twelve with an average of ten pupils per class.

The K. Z. and K.W. Incidents

On May 3, 2001, K.Z. age 16 was a student in Miller's history class. He entered the classroom and refused to take his seat. Instead, he walked around the room in a disruptive manner. K.Z. conceded he disobeyed Miller's directives to take a seat. Instead, he continued standing and talking to a classmate who was seated at his desk. K.Z. further testified that Miller told him to "sit the f_ _ _k down". Pointing to "his lower back, right above the waist" K.Z. maintained that Miller "kicked me in my back". Thereafter, he left the room and told Mr. O'Malley, the school principal, what Miller had done to him.

On June 5, 2001, K.W., a 15-year-old student was enrolled in Miller's history class. He entered the classroom and refused to take a seat. Instead, he walked around the room and mischievously "snatched" the pen from Miller's hand. K.W. conceded that he should not have been "playing around." K.W. further testified, "She told me to give her the pen or get out of class." K.W. deliberately dropped the pen because he did not want to go to in-school suspension (ISS), the "time-out" room. Indeed, he told Miller "to pick it up herself...because she got on my nerves." K.W. further testified, "When she reached for the pen I dropped it and then she kicked me in the knee". Under cross-examination, K.W. could not remember whether Miller kicked him before or after he dropped the pen. K.W. further claimed that on prior occasions, Milled called him names such as "dirty", "fat bitch" and "old". K.W. also claimed to have reported these incidents to Mr. O'Malley and Mr. Bellamy, the school security guard.

Steven O'Malley, Principal of Centennial, investigated each incident. On May 3, 2001 he observed K.Z. who was agitated and pacing the hall. K.Z. told O'Malley that Miller had kicked him. O'Malley took K.Z. into his office and questioned him further about the incident. K.Z. told O'Malley that he entered the classroom, refused to take his seat and stood over the desk of another student. O'Malley further testified that K.Z. told

him that "Miller came over to him and put a foot on his side and kicked him". O'Malley also observed a smudge on K.Z.'s shirt, "but it didn't look like anything particular, for example like a footprint, but there was a mark there". O'Malley had K.Z. pull up his shirt and viewed his body. There was no evidence of redness or soreness. O'Malley then called the parent.

Under cross-examination, O'Malley conceded K.Z. initially said Miller had kicked him. Later, K.Z. described Miller's contact as a "shove". Indeed, O'Malley specifically asked K.Z. "was it a kick or was it a shove and that was when he told me it was more like a shove."

O'Malley "confronted" Miller about K.Z.'s allegation. According to O'Malley, Miller responded, "I had it with him" and "had taken her foot and placed it on his side and shoved" K.Z. O'Malley informed Miller that he would pursue the matter further. Miller replied, "You do what you have to do. I'll do what I have to do." O'Malley reported the matter to the Superintendent of the District and notified the Division of Youth and Family Services (DYFS). DYFS concluded that Miller's conduct "did not constitute institutional abuse but rather ...it was corporal punishment" and should be handled by the school. Consequently, the Commission sanctioned Miller with a denial of salary and adjustment increment. Further, the Commission agreed that the "incident...will not be used in the future against Mrs. Miller." R-22.

With regard to the K.W. incident, on June 6, 2001, O'Malley observed K.W. in the hall with Winfred Bellamy, the staff monitor. K.W. appeared agitated and emotional as he yelled, "She kicked me." O'Malley directed Bellamy to escort K.W. to the "time-out room" where O'Malley questioned K.W. about the incident. K.W. pointed "to the lower part of his right shin" where Miller "had kicked him".

O'Malley spoke to Miller about the allegation and asked her if she had kicked K.W. According to O'Malley, Miller replied, "he kicked me first." Thereafter, O'Malley called Miller and K.W. into his office. K.W. maintained that Miller kicked him when he refused to return her pen and dropped it on the floor. Miller maintained that after she

directed K.W. to return the pen, he threw the pen at her and kicked her. K.W. became enraged and called Miller a liar. O'Malley ended the meeting.

Thereafter, O'Malley spoke with five other students whom he believed "would be able to give [him] an accounting of what had happened." Four students saw K.W. take the pen from Miller, two students saw K.W. drop the pen. O'Malley further testified that,

> I believe one of those students said that he saw her raise her foot but never saw any contact...Two of the other students indicated that they saw the same commotion, that they saw the pen being taken and Miller directing him to give it back and eventually leaving the room. They saw him drop the pen and as he went down, they saw her kick him.

O'Malley further recalled that one student did not see anything.

Additionally, O'Malley spoke with Ms. Robino, the teacher aide who was busy with another student and did not observe anything between Miller and K.Z. O'Malley concluded that Miller kicked K.Z. and that her conduct was inappropriate. He reported the incident to Edward Hartnett, Superintendent.

Hartnett testified that he questioned Miller about K.Z. Miller responded that she "just had it". Hartnett determined the behavior was inappropriate, warned her it should not happen again and sanctioned Miller with a denial of an annual salary increment. Several weeks later, O'Malley informed Hartnett that another student, K.W. alleged Miller had kicked him. Hartnett recommended tenure proceedings.

Miller testified about her experience as a teacher and the incidents involving K.Z. and K.W. Since 1990 she has taught students with disabilities and has worked at Centennial High School for six years. She further testified that on May 3, 2001, K.Z. and another student entered the classroom and refused to take their seats. They were "lighting matches, throwing books, and screaming out the window". K.Z. ran around the room, running and screaming." Miller explained that usually the students did not readily settle down upon entering the classroom. Thus, she would spend the first few minutes of class time calming the students. However, after a few minutes K.Z.'s behavior was "escalating to a physical dangerous situation." Miller walked to the door and looked for

assistance. She found no help and returned to the room. K.Z. was sitting at a table and disturbing other students by "grabbing pencils...taking the paper that the kids were using...trying to agitate." Although Miller denied kicking K.Z., she conceded that she "gave him a little shove with my foot." Miller claimed that her foot reached no higher than K.Z.'s foot. "K.Z. jumped screaming that Miller had kicked him and his mother would sue her." Miller denied kicking K.Z. and using profanity when speaking to him.

Regarding K.W., Miller denied kicking him. Miller testified that K.W. entered the room ten minutes late and refused to settle-down and take a seat. Miller asked to see his pass. K.W. became belligerent, grabbing a pen from Miller's hand, running around the room and disturbing the class. Miller attempted to send K.W. to ISS, but he refused to leave the room. Miller stood in the doorway and looked in the hall for help but found none. K.W. passed her, dropped the pen and kicked her. Miller met with O'Malley about the incident and denied making the statement that "he [K.W.] kicked me first."

Winfred Bellamy is assigned to Centennial High School as a security guard, hall monitor and bus aid. Bellamy rode on the bus that transported K.W. to school. Shortly after the incident involving K.Z., Bellamy heard K.W. on several occasions comment, "If she [Miller] touched me I'll sue that rich bitch". K.W.'s demeanor showed anger and hate. Bellamy testified, "[K.W.] said I would sue that rich bitch if she touched me. I hate her. A lot of hate "statements, a lot of anger".

Josephine DePetris, employed as a teacher aide at Centennial, observed K.W. in the hall with Bellamy. She testified,

> K.W. was shouting and yelling that I didn't believe him...I said, "Well what happened [K.W.]and he said, "Mrs. Miller kicked me," and he started to say to say the exact words were 'rich bitch.' He was calling her that several times and I said, 'Where did she kick you? Show me where she kicked you." And he got a little annoyed. He said, 'Don't you know you can't see a mark on a black person...he kept yelling that I didn't believe him and nobody believed him...this continued for a few minutes and then I walked back in the classroom with Ms. Taylor and I just let him continue with Mr. Bellamy."

DISCUSSION AND CONCLUSIONS

State law provides that no tenured teacher shall be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct or other just cause. *N.J.S.A.* 18A:6-10. Thus, tenured employees are protected "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." *In re Maratea*, 1966 *S.L.D.* 77, 106. Additional procedural safeguards, including the right to a list of charges, a sworn statement of evidence and an impartial hearing, are required under the law to protect tenured teachers from arbitrary dismissal for unfounded or flimsy reasons. *Spiewak v. Rutherford Bd. of Educ.*, 90 *N.J.* 63, 73 (1982). Moreover, charges against a tenured employee may not be examined in a vacuum, but must be considered in any events leading up to the allegations made against the employee that may help to explain the situation. *In re Romanoli*, 1975 *S.L.D.* 352.

The Commission charged Miller with unbecoming conduct and unprofessional conduct because on two occasions she is accused of kicking students who were misbehaving. "Unbecoming conduct" is broadly defined to include any conduct "which has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services." *Karins v. City of Atlantic City*, 152 *N.J.* 532, 554 (1998), quoting *In re Emmons*, 63 *N.J. Super.* 136, 140 (1960). Behavior that constitutes unbecoming conduct need not be "predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." *Hartman v. Police Dep't of Ridgewood*, 258 *N.J. Super.* 32, 40 (App. Div. 1992), quoting *Asbury Park v. Department of Civil Service,* 17 *N.J.* 419, 429 (1955). In the context of a school tenure case, "the touchstone is fitness to discharge the duties and functions of one's office or position." *In re Grossman*, 127 *N.J. Super.* 13, 29 (App. Div. 1974).

Teachers are expected to exercise self-restraint and control. Unfitness to remain a teacher may be shown by a single incident, if sufficiently flagrant, but it is best evidenced

by a series of incidents. *See Redclay v. State Bd. of Education*, 130 *N.J.L.* 369 (Sup. Ct. 1943), *aff'd*, 131 *N.J.L.* 326 (E. & A. 1944). Indeed, dismissal is invariably the penalty for egregious acts of unbecoming conduct by educators. *See, e.g., Morris School Dist. Bd. of Educ. v. Brady*, 92 *N.J.A.R.*2d (EDU) 410 (special education teacher's conduct, which included tolerance of and participation in gross sexual dialogue in classroom, constituted unbecoming conduct and warranted dismissal); *In re Cooke*, 92 *N.J.A.R.*2d (EDU) 220 (series of incidents of sexual contact and improper touching of junior high school students constituted unbecoming conduct and warranted dismissal of seventeen-year veteran teacher); *In re Smith*, 93 *N.J.A.R.*2d (EDU) 729 (1993), *adopted*, 94 *N.J.A.R.*2d (EDU) 317 (dismissal of teacher was warranted for unbecoming conduct that involved physical and mental abuse of children).

Teachers cannot use corporal punishment to discipline students or to punish students for infractions. Indeed, Corporal punishment of pupils is prohibited under *N.J.S.A.* 18A:6-1 which provides in part:

> No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution; but any such person may, within the scope of his employment, use and apply such amounts of force as is reasonable and necessary:
> (1) to quell a disturbance, threatening physical injury to others;
> (2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil;
> (3) for the purpose of self-defense; and
> (3) for the protection of persons or property;
>
> and such acts, or any of them, shall not be construed to constitute corporal punishment within the meaning and intendment of this section.

Here, Miller was warned not to kick students. Physical contact, such as hitting or kicking students, adversely affects the charge to teach students sufficient social, ethical and behavioral standards to help them become good citizens in society. A teacher who decides to take any form of action or inaction does so at her own risk. No matter what the ultimate objective sought, the individual must accept responsibility for her actions and must accept the consequences of her actions. *In re Nash*, 1971 S.*L.D.* 284, 296.

The first charge regarding the allegation that on May 3, 2001 Miller kicked K.Z. has essentially been resolved. After a full investigation by the school principal and the Superintendent, the Commission sanctioned Miller by withholding her salary. Indeed, the resolution states in part,

> WHEREAS, the Commission is satisfied that the conduct of Clare Miller justifies a denial of her salary and adjustment increment for good cause, namely that she kicked a student; and
>
> WHEREAS, the Commission has decided to withhold the adjustment increment and the employment increment which would otherwise be due Clare Miller...

Miller did not contest the disciplinary action. Moreover, concurrent with the sanction, the parties agreed, "This action resolves the matter concerning Mrs. Miller...and will not be used in the future against Mrs. Miller". (R-22). Although Miller and K.Z. dispute whether she "kicked" or "shoved" him, Miller's conduct was inappropriate for a teaching staff member". Notwithstanding the parties' agreement not to use the K.Z. incident against Miller in the future, the disciplinary action will be considered in the penalty phase should the Commission prove the charge regarding the allegation that on June 5, 2001, Miller kicked K.W.

Based upon the on June 6, 2001 disciplinary action against Miller to withhold her salary increment for one year because she kicked a student, I **FIND** and **CONCLUDE** that on May 3, 2001, Miller kicked K.Z., a student who was misbehaving. I further **FIND** and **CONCLUDE** that she was sanctioned with a denial of salary increment for school year 2000-2001. Notwithstanding the agreement between the parties that "the sanction will not be used in the future against Mrs. Miller. R-22" I further **CONCLUDE** that the appropriate penalty will include consideration of the prior disciplinary action should the Commission prove the charge that on June 5, 2001, Miller kicked K.W.

The Commission has the burden of proof to establish claims against Miller by a preponderance of the credible evidence. *In re Polk License Revocation*, 90 *N.J.* 550, 560 (1982). Preponderance is the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. *State v. Lewis,* 67 *N.J.* 47 (1975). The evidence must be such as to lead a

reasonable cautious mind to a given conclusion. *Bornstein v. Metropolitan Bottling Co.*, 26 *N.J.* 263 (1958). Where the standard is reasonable probability, that is, preponderance of the evidence, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." *Loew v Union Beach*, 56 *N.J. Super.* 93, 104 (App. Div 1959).

Proof of the charge that on June 5, 2001, Miller kicked K.W. depends in large part on the credibility of the witnesses. In an administrative proceeding, testimony may be disbelieved, but it may not be disregarded. *Middletown Township v Murdoch,* 73 *N.J. Super.* 511 (App. Div. 1962). Moreover, the trier of fact is not bound to believe the testimony of any witness and may accept or reject, in whole or in part, the testimony. *Application of Howard Savings Bank,* 143 *N.J. Super.* 1 (App. Div. 1976). One factor to consider in determining which party's version of the incident has the "reasonable probability of truth" is that the "interest, motive, biases or prejudice of a witness may affect his credibility and justify [the trier of fact], whose providence it is to pass upon the credibility of an interested witness, in disbelieving his testimony." *State v Salimone,* 19 *N.J. Super.* 600, 608 (App. Div. 1952). Further, "[a] trier of fact may reject testimony because it is inherently incredible, or because it is overborne by other testimony." *Congleton v Pura-Tex Stone Corp.*, 53 *N.J. Super.* 282, 287 (App. Div. 1958).

I have carefully considered the testimony and demeanor of K.W. and Miller, the only witnesses who observed the incident, "[T]estimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances." *Spagnuolo v. Bonnet*, 16 *N.J.* 546, 554-55 (1954). Gillchrist testified that the primary classification of the students "is emotionally disturbed and they can't negotiate or maintain themselves in a regular classroom." Although these students are classified as emotionally disturbed, as with any witness, their testimony need not be flawless to be believable. Indeed, some inconsistencies in a witness's testimony do not warrant an automatic discounting of that testimony as incredible. *United Stations of N.J. v. Getty Oil Co.*, 102 *N.J. Super.* 459 (Ch. Div. 1968). The testimony must be such that the trier of fact can reasonably conclude that the witness is

wholly unworthy of belief. Accordingly, the trier of fact must carefully weigh the evidence before rejecting testimony, even if not directly contradicted, when it is contrary to the circumstances.

K.W. maintained that Miller kicked him. Miller denied making any contact with K.W. Miller's prior conduct of using her foot to "shove" or "kick" a student cannot be used to prove that she behaved in the same manner on June 5 and kicked K.W. Indeed, Harnett testified that prior to the K.Z. incident, Miller had no prior charges of inappropriate contact with students. Thus, he determined that withholding a salary increment was the appropriate sanction for the K.Z. incident.

I have carefully observed the testimony and demeanor presented by K.W. and Miller. Although Miller is a woman of small stature her testimony and demeanor persuade me that she showed an assertive and perhaps a "no nonsense" attitude toward the students. She has worked with special education and emotionally disturbed students for more than ten years without incident. She recognized the anger and special needs of the young men in her class. The record also reflects that she might have been frustrated over their behavior. Prior evaluations note that her demeanor and manner towards the students had been "disparaging", "sarcastic" and inappropriate. On the dates of the incidents, she was unable to control K.Z. and K.W. who entered her classroom, behaved in a disruptive manner, refused to take their seats and disobeyed her directives to settle down. Miller acknowledged that she was inappropriate with K.Z. However, she maintained that she did not kick K.W. Further, she denied making the statement to O'Malley, "He [K.W.] kicked me first." I am mindful that the statement, if spoken, would be inconsistent with innocence and would indicate a consciousness of guilt. *R.* 803(b)(1). See also, *State v Moore,* 147 *N.J.* Super 47 (App Div). The testimony presented by K.W. has been undermine by prior statements, "I would sue that rich bitch if she [Miller] touched me. I hate her".

The evidence is in a state of equilibrium. Without other persuasive evidence, the question on whether Miller kicked K.W. must go against the party who has the burden of persuasion. *Johnson v. Barton, supra*, 251 *F. Supp.* at 476.

The evidence is in a state of equilibrium. Without other persuasive evidence, the question on whether Miller kicked K.W. must go against the party who has the burden of persuasion. *Johnson v. Barton, supra*, 251 *F. Supp.* at 476.

Thus, I have also considered the nature, character and scope of the testimony presented by the other witnesses, including the circumstances of the creation of the testimony and its reliability. None of the witnesses presented by the Commission observed Miller kick K.W. O'Malley concluded, however, that the incident occurred as described by K.W. O'Malley's opinion is based in large part on the interviews of one or two students who allegedly saw the kick and on the prior incident with K.Z. On one hand, the Commission argues that respondent's failure to call Phyllis Rubino, Miller's teacher aide, proves that Miller's version of the incident is false. Petitioner's Brief at 13. On the other hand, the Commission did not present the any witness whom O'Malley claimed saw Miller kick K.W. Thus, there exists none of the safeguards of in-person testimony under oath, the opportunity for respondent to cross-examine the witness and the opportunity for the trier of fact to observe the witness's demeanor.

The testimony of Lana Gillchrist and Hartnett is not persuasive that Miller kicked K.W. Lana Gillchrist, the school social worker, has worked with both students but was more familiar with K.Z. than K.W. On May 3, Gillchrist saw K.Z. right after the incident. He told her Miller had kicked him. Gillchrist tried to calm him but did not question him. The incident never came up in subsequent therapy sessions with K.Z. Nevertheless, based upon her therapeutic relationship with K.Z., she believed what K.Z. said about Miller. With regard to K.W., Gillchrist never spoke with K.W. about the incident. Consequently, her opinion that she believed K.W.'s version of the incident is of no import.

Hartnett sanctioned Miller regarding the incident with K.Z. O'Malley informed Hartnett concerning the second incident involving K.W. Hartnett considered the prior incident and Miller's evaluation forms and concluded that tenure charges were warranted.

The testimony presented by Bellamy was candid and straightforward. On June 5, Bellamy encountered K.W. running in the hall and screaming, "That rich white bitch kicked me." Bellamy closely observed K.W. who appeared to Bellamy to be upset. Bellamy believed that K.W. might have fabricated the incident to "set-up" or trap Miller. He further testified,

> I tried to calm him down in a sense but at the same time, I had reservations about if it happened or not because of previous conversations that me and [K.W.] has as far as Ms. Miller is concerned...I reached out to the vice principal and the principal to make them aware of what I thought was taking place...A possible frame-up because it wasn't like he was hurt or he spoke about the kick. It was mainly about hate and just his—just credibility to us believing him...I just felt...Miller was falling a victim of some kind of snowball effect.

Based on the whole of the record I am persuaded by the evidence that K.W.'s version of the incident was fabricated.

Therefore, I **CONCLUDE** that the Commission has failed to carry its burden of proof regarding the charge that on June 5, Clare Miller kicked K.W., a student who was misbehaving.

ORDER

It is **ORDERED** that the tenure charges against Clare Miller be **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 27, 2001
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

1/8/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 15 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

Presented by Petitioner, Union County Educational Services Commission, Union County
K.Z.
K.W.
Lana Gillchrist
Steven O'Malley
Edward Hartnett

Presented by Respondent, Clare Miller
Clare Miller
Josephine A. DePetris
Winford Bellamy
Sundae M. Taylor

Exhibits:

Submitted by Petitioner

P-1 Report, dated May 4, 2001

P-2 Incident Report, dated June 6, 2001

P-3 Job Description of Teacher of the Handicapped

P-4 Board Minutes with Addendum attached, dated June 6, 2001

P-5 Cover Letter, with charges attached, dated June 21, 2001

P-6 Board Minutes, dated June 27, 2001

P-7 Letter, dated August 17, 2001

P-8 Evaluation, dated November 4, 1994

P-9 Evaluation, dated April 4, 1996

P-10 Evaluation, dated February 6, 1996

P-11 Evaluation, dated March 21, 1997

P-12 Evaluation, dated March 3, 1998

P-13 Evaluation, dated April 15, 1999

P-14 Evaluation, dated December 19, 2000

Submitted by Respondent

R-1 Evaluation, dated October 29, 1990

R-2 Evaluation, dated February 12, 1991

R-3 Annual Summary for Clare Miller, dated March 7, 1991

R-4 Evaluation, dated November 20, 1991

R-5 Evaluation, dated January 3, 1992

R-6 Summary of Clare Miller, dated March 9, 1992

R-7 Summary of Clare Miller, dated March 3, 1993

R-8 Evaluation and Summary, dated March 22, 1993

R-9 Evaluation and Summary, dated March 16, 1994

R-10 Letter to Clare Miller from Tom Kerrigan, dated August 10, 1994

R-11 Evaluation, dated November 4, 1994

R-12 Summary of Clare Miller, dated March 22, 1995

R-13 Evaluation, dated October 11, 1995

R-14 Evaluation, dated February 6, 1996

R-15 Evaluation and Summary of Clare Miller, dated April 4, 1996

R-16 Evaluation and Summary of Clare Miller, dated March 21, 1997

R-17 Memorandum to Clare Miller, *et als.*, from Mr. Squitieri, dated January 30, 1998

R-18 Evaluation and Summary of Clare Miller, dated March 3, 1998

R-19 Evaluation and Summary of Clare Miller, dated June 6, 2000

R-20 Evaluation and Summary of Clare Miller, dated April 15, 1999

R-21 Evaluation of Clare Miller, dated December 19, 2000

R-22 Letter to Edward M. Harnett from Al Ramey, dated May 25, 2001

OAL DKT. NO. EDU 5812-01
AGENCY DKT NO. 240-7/01

IN THE MATTER OF THE TENURE	:	
HEARING OF CLARE MILLER,	:	COMMISSIONER OF EDUCATION
UNION COUNTY EDUCATIONAL	:	DECISION
SERVICES COMMISSION,	:	
UNION COUNTY.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of both respondent and the Commission, and respondent's reply exceptions, were timely filed pursuant to *N.J.A.C.* 1:1-18.4 and were fully considered by the Commissioner in reaching his determination herein.

The exceptions of both parties initially charge that the Administrative Law Judge (ALJ) erred in failing to make factual findings with respect to either of the charges against respondent, as specifically required by The Administrative Procedure Act, *N.J.S.A.* 52:14B-1 *et seq.* and well established case law. In this regard, the Commission points to *State of New Jersey, Dept. of Health v. Tegnazian*, 194 *N.J. Super.* 435, 442-43 (App. Div. 1984) wherein the court stated

> [T]he ultimate determination of the agency and the ALJ's recommendations must be accompanied by basic findings of fact sufficient to support them. The requirement of such findings is not a technicality but it is a matter of substance. Its purpose is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor.

Here, the Commission maintains, the ALJ merely provided a summary of evidence "composed of selective testimony and evidence presented, but she did not make findings of fact upon which to base her conclusions of law." (Commission's Exceptions at 4) Both parties, therefore, urge that this matter be remanded for the development of comprehensive factual findings.

In their exception and reply submissions, the parties present detailed recitations of their respective versions of the facts, which are largely duplicative of those advanced to the ALJ in post hearing briefs, with both presenting selected portions of testimony to support their particular versions of events and suggesting weight and credibility assessments to be ascribed to the evidence. Each party claims that its version of the facts is the "appropriate" one, while that of the other is fraught with inconsistencies.

Respondent's exceptions contend that the Board did not meet its burden of proof on either of the charges against her. She asserts that only two eyewitnesses testified to each of the incidents at issue, herself and the respective student involved. As such, this entire matter centers on credibility determinations and respondent advances that the record amply establishes that neither K.Z. nor K.W. was credible in recounting events. With respect to the May 3, 2001 incident involving K.Z., respondent submits that, rather than make findings of fact as to whether she actually kicked K.Z., the ALJ, instead, relied on the fact that respondent's increment had been withheld for this incident to establish her guilt on this charge. Respondent urges that it must be found that she did not kick K.Z. but, rather, merely shoved him with her foot, after he had disregarded all of her prior directives, "solely to prevent injury to other students or damage to property," (Respondent's Exceptions at 24) so that, under these circumstances, her conduct was proper pursuant to *N.J.S.A.* 18A:6-1. As to the incident on June 5, 2001 involving K.W., respondent agrees with the ALJ's dismissal of this charge, but vehemently objects to her finding

that "[t]he evidence is in a state of equilibrium, ALJ. P. 11," arguing that such a finding is inconsistent with the ALJ's conclusion, on page 13 of the Initial Decision, that K.W.'s version of the incident was fabricated. (Respondent's Exceptions at 2-3) Rather, respondent professes that appropriate findings of fact must be made to establish that respondent did not kick K.W.

The Commission's exceptions contend that the ALJ erroneously concluded that the charge involving K.Z., although found to be true, should be set aside as grounds for respondent's dismissal or other punishment and should only be considered in determining penalty should the K.W. charge be proven, because respondent's increment had already been withheld as a consequence of this event. Such mistaken opinion, it concludes, was apparently derived from Exhibit R-22 - a letter from a union representative to the Superintendent of Schools - detailing the parties' "agreement" with respect to this charge. As the Commission explains,

> [t]he purported agreement between petitioner and respondent was that the Commission would withhold respondent's salary increment for the 2001-2002 school year and respondent would subsequently "be restored to her step." According to the letter, the Commission would not use the matter "in the future against Mrs. Miller." (Commission's Exceptions at 7)

The Commission contends that there was no testimony or evidence presented in this matter as to the meaning of the term "not be used in the future against Mrs. Miller," and it hypothesizes that such language might well refer to her "subsequent restoration to her step." (*Ibid.*) Moreover, the Commission tenders, the record contains no testimony that the Commission, itself, agreed to this stipulation nor is such a limitation contained in the Commission's resolution dealing with respondent's increment withholding. The Commission cites *In re Tenure Hearing of Ward Campbell*, 95 *N.J.A.R.* 2d (EDU) 211 (App. Div.), *certif. denied*, 142 *N.J.* 518 (1995) for the proposition that nothing prohibits the withholding of a salary increment concurrent with tenure

charges for the same offense. (Commission's Exceptions at 6-7) For these reasons, and considering that respondent offered no testimony or affirmative defense claiming that a salary increment withholding for the K.Z. incident precluded a subsequent tenure charge on this incident, the Commission proposes that the ALJ erred in confining the K.Z. charge to consideration only in the penalty phase of the instant hearing.

The Commission further urges that the kicking of K.Z., which the ALJ correctly found to have occurred, even standing alone, is sufficient to justify respondent's termination. It maintains that kicking or shoving a student constitutes corporal punishment prohibited by *N.J.S.A.* 18A:6-1 unless reasonable and necessary:

> (1) to quell a disturbance, threatening physical injury to others;
> (2) to obtain possession of weapons or other dangerous objects upon the person or within control of a pupil;
> (3) for the purpose of self-defense; and
> (4) for the protection of persons or property***
> (Commission's Exceptions at 9)

The Commission further notes that none of these conditions existed at the time respondent kicked K.Z. The Commission proposes that it was wholly unnecessary for respondent to resort to kicking K.Z., as hearing testimony clearly revealed that the district has procedures in place to assist teachers experiencing difficulty with an unruly student. When also considered in conjunction with respondent's evaluations, any number of which contained "reference to her being too negative in her interaction with staff and students," (*id.* at 13) pursuant to *In re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967) and prior cases of the Commissioner and the State Board, this one incident of corporal punishment, it argues, is sufficient to require respondent's dismissal.

With respect to the June 5, 2001 incident involving K.W., the Commission advances that the ALJ was incorrect in her conclusion that it did not meet its burden of proof for

sustaining this charge. It claims that, in so determining, the ALJ failed to properly credit significant testimony and evidence proffered and made erroneous credibility assessments.

Upon careful and independent review of the record in this matter, which included the transcripts from the hearing at the OAL conducted on October 17 and 18, 2001, for the reasons detailed below, the Commissioner determines to modify the recommended decision of the ALJ.

Initially, the Commissioner rejects the parties' suggestion that the Initial Decision does not comport with the requirements of the Administrative Procedure Act at *N.J.S.A.* 52:14B-10, as these requirements were interpreted by the court in *State of New Jersey, Dept of Health v. Tegnazian, supra.* Rather, the Commissioner finds that the ALJ's decision contains a sufficient summary of the underlying testimonial evidence culminating in findings of fact on each of the charges (Initial Decision at 9, 13), which are amply supported by the testimony, both as presented in the decision and as appearing in full in the transcripts. Quite contrary to the circumstances which were present in *Tegnazian,* where the ALJ's decision recommending dismissal of all but a single charge against a nursing home administrator was found to be "highly conclusory" in its form, and consisting of "judgments rather than statements of fact," *Tegnazian, supra,* 194 *N.J. Super.* at 446, the Commissioner finds that the instant Initial Decision clearly apprises "***the interested parties and any reviewing tribunal of the basis on which the final decision was reached so that it may be readily determined whether the result is sufficiently and soundly grounded or derives from arbitrary, capricious or extra-legal considerations." *Id.* at 443, citing *Application of Howard Savings Institution of Newark,* 32 *N.J.* 29, 52 (1960)

Turning to the charges advanced against respondent, the Commissioner first concurs with the ALJ that the Commission has failed to sustain its burden of proof with respect

to the June 5, 2001 incident involving K.W., and that such charge, therefore, is properly dismissed. In so concluding, the Commissioner is cognizant of the well-established standard that, in tenure matters, the charging entity bears the burden of proving, by a preponderance of the credible evidence, respondent's guilt on the charges. It is, likewise, clear that this burden is not satisfied where the evidence is in equipoise or is such as to raise legitimate doubt as to the existence of essential facts.[1] A review of all of the evidence advanced indicates that resolution of the charge involving K.W. turns almost exclusively on credibility determinations with regard to the witnesses' testimony and the weighing of proffered evidence. Notwithstanding the parties' assertions on exception, the Commissioner finds no basis, either in the transcripts or in the record as a whole, to challenge the credibility determinations of the ALJ, who also had the benefit of observing the witnesses first hand. To the contrary, the ALJ, on pp. 10-13 of the Initial Decision, carefully details the rationale underlying her credibility determinations as they pertain to this charge. It is fully evident from her decision that the ALJ carefully measured conflicts, inconsistencies, and plausibility of content in deciding which testimony to credit, and her determinations are fully supported by the record. As such, they may not be disturbed by the Commissioner. *N.J.S.A.* 52:14B-10(c).

In his consideration of the May 3, 2001 incident involving K.Z., the Commissioner agrees with the ALJ's finding that this charge has been sustained. Respondent's contention that the ALJ based her finding of guilt here solely on the fact that respondent's increment was withheld is meritless. Rather, hearing transcripts confirm that respondent, at a number of points in her testimony, *admitted* either kicking or shoving K.Z. (*See* October 17, 2001, Transcript, p. 137, lines 12-23; p. 140, lines 15-18; p. 148, lines 16-25)

[1] Similarly, such a circumstance would also preclude a declaration of absolute vindication of the charge for respondent.

Whether respondent "kicked" or "shoved" K.Z. is a distinction without a difference under the circumstances. Clearly, respondent's conduct went beyond professional boundaries, apparently as an impulsive attempt to control a student who refused to listen to her instructions. The Commissioner finds and concludes that it is of no import that K.Z. is portrayed as a student who was prone to misbehavior and at times was difficult to control, since there can be no excuse, under circumstances of the type herein, for an offensive touching of a pupil by a teacher.[2] As noted in *In the Matter of the Tenure Hearing of Thomas Appleby, School District of Vineland, Cumberland County*, 1969 *S.L.D.* 159, 172-173, aff'd State Board, 1970 *S.L.D.* 448, aff'd N.J. Superior Court 1972 *S.L.D.* 662 (App. Div. 1972):

> [w]hile 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. The Commissioner finds in the century-old statute prohibiting corporal punishment (*N.J.S.A.* 18A:6-1) *an underlying philosophy that an individual has a right not only to freedom from bodily harm but also to freedom from offensive bodily touching even though there be no actual physical harm.****(emphasis added) (citations omitted)

Further,

> ***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.*** 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.
> *In the Matter of the Tenure Hearing of David Fulcomer*, 1962 *S.L.D.* 160, 162

[2] Specifically rejected here is respondent's claim that her behavior was justified because of the exigency of the situation.

Thus, the Commissioner fully concurs with the ALJ's finding of respondent's guilt on this charge. However, Commissioner does not accept the ALJ's concomitant conclusion that the charge should be dismissed, and considered solely in conjunction with fashioning a penalty should the K.W. charge be sustained, because it was essentially resolved by an "agreement" between the parties to the effect that respondent would not contest an increment withholding and the Commission would not use this incident against her in the future. Instead, the Commissioner determines that the charge should be *sustained*, but that no *further* penalty is warranted because, in the absence of any additional proven incident of unbecoming conduct, and under all of the circumstances of this matter, an increment withholding is the appropriate penalty for the isolated incident of which respondent has been found guilty as charged.[3] [4]

Accordingly, the Initial Decision of the OAL is modified as set forth herein. It is hereby directed that, as a result of the charge sustained against her, respondent be assessed no

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[3]The Commissioner notes that, as correctly argued by the Commission, the record is devoid of evidence or testimony either to clarify the meaning of the letter purporting to set forth an agreement between the Superintendent and respondent's union representative, or to show that the Commission ever had knowledge of or consented to be bound by any such "agreement." (*See Donald C. Backer v. Board of Education of the Township of Roxbury, Morris* County, decided by State Board September 9, 1994)

[4] The Commissioner is mindful that removal of a teacher from a tenured position may not be undertaken casually. Full evaluation must be given to respondent's prior record in the District, the nature and gravity of her offense under all the circumstances involved, any evidence as to provocation, extenuation or aggravation, and any harm or injurious effect which her conduct may have had in the maintenance of discipline and the proper administration of the school system. *In re Fulcomer* 93 *N.J. Super.* 404, 424-22 (App. Div. 1967). In contrast, it is equally true that, if sufficiently flagrant, "the need to remove a teacher may be demonstrated by a single incident." *Id.* at 421. On balance, giving full consideration to all of the circumstances, and in light of the testimony, the Commissioner cannot concur with the Commission that respondent should be removed from her position for this one incident.

penalty in addition to the one-year increment withholding already imposed by the Commission for the conduct underlying the charge.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 4/8/02

Date of Mailing: 4/8/02

[5] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

155-02

R.T., on behalf of minor children, A.T. and S.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the Board's determination that she was not domiciled in the District and, thus, that her children were not entitled to a free education in the Board's District.

The ALJ determined that petitioner is not domiciled in the District, that her children were not entitled to a free education therein, and that petitioner owed the Board $17,935.90, plus $47.44 per child per day from December 11, 2001 onward, for tuition for her children.

The Commissioner affirmed the ALJ's decision, including the amount of tuition owed.

April 8, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3420-01
AGENCY DKT. NO. 66-3/01

R.T., ON BEHALF OF MINOR CHILDREN, A.T. AND S.T.,

Petitioners,

v.

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

Respondent.

R.T., *pro se*

Alan J. Schnirman, Esq., for respondent

Record Closed: January 11, 2002 Decided: February 20, 2002

BEFORE **ELINOR R. REINER**, ALJ:

Procedural History

On March 12, 2001, petitioner R.T. filed an appeal with the Commissioner of Education, alleging that her children are eligible for a free education in the Linden School District pursuant to *N.J.S.A.* 18A:38-1(a). More particularly, petitioner asserted

that her two children, A.T. and S.T., reside with her at D. Avenue in Linden. On April 2, 2001, respondent filed an answer claiming that the evidence presented did not support the validity of petitioner's claim that A.T. and S.T. were domiciled within the Linden School District and that it had properly ordered the removal of A.T. and S.T. from its district. Respondent further requested tuition reimbursement.

On April 24, 2001, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was assigned to the undersigned judge on May 4, 2001, and a telephone prehearing conference was held on June 25, 2001. At that time, the issues were isolated, and a hearing was scheduled for December 10, 2001, at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey. The case was heard on that date. Witnesses who testified and documents marked into evidence at the time of the hearing are listed in the attached appendix. The record closed after the parties filed proposed findings of fact and conclusions of law.

Issue

At issue is whether A.T. and S.T. are entitled to a free public education because they are domiciled in respondent's school district. More particularly at issue is whether A.T. and S.T. reside in the city of Linden with petitioner or whether petitioner and her children actually reside with petitioner's husband, the children's father, at R. Street in Roselle. Further, if A.T. and S.T. are not entitled to a free public education in Linden, the amount of tuition owed by petitioner must be determined.

Testimony

Donald VanHandel is employed by respondent as director of guidance and assessment. He assumed this position in September 2001, having served for the prior

three years as supervisor of assessment and attendance. In this capacity, he supervises attendance officers, whose role is to check on residency and to follow up on absentee students. He did not know petitioner prior to this residency investigation.

Referring to his notes, he indicated that on November 1, 2000, he spoke with petitioner at the administration office. Petitioner was upset that an attendance officer had contacted her. VanHandel asked petitioner for documentation in support of her claim that she lives in Linden. Petitioner revealed that her driver's license, which indicated the Roselle address, would have to be changed. Petitioner informed VanHandel that her children sometimes stay at the Roselle address and are taken to school by a grandmother, a sister or the babysitter, L.H. She recalled that L.H. lives on M. Street in Linden, but could not recall the exact address. Petitioner stated that she would be in Georgia from November 2 through 5, 2000, and VanHandel explained to her the reason why the District must know when the children would not be residing in Linden.

VanHandel requested that his attendance officers conduct surveillances, because of the lack of documentation that petitioner lived in Linden. Since petitioner was going to Georgia, VanHandel let sufficient time elapse before commencing the surveillance and also informed his investigator, William Bruce Tango, not to conduct it on Mondays or Fridays. Surveillances were conducted on November 17, 2000, November 29, 2000, December 6, 2000, March 19, 2001, March 22, 2001, November 20, 2001, November 27, 2001, and December 4, 2001. VanHandel explained the manner in which a dual surveillance was conducted. Lalah Motley, chief attendance officer, was stationed at D. Avenue in Linden at 6:00 a.m., while Bruce Tango was stationed at the out-of-district address (R. Street in Roselle) at the same time. During the dual surveillance on November 17, 2000, R.T. and her children exited the Roselle address and no one exited the Linden address. Petitioner drove her children to two different schools. The same surveillance procedure was utilized on November 29, 2000, and December 6, 2000, and yielded the same results. During informal

surveillances of the R. Street address in Roselle on weekend and evening hours, Tango observed petitioner's car parked in front of the house.

VanHandel testified that a dual surveillance was conducted on March 19, 2001, by the same two attendance officers. On that occasion, petitioner exited the house in Roselle by herself at 8:10 a.m. and went to 807 M. Street. She picked up her younger child and took her to school. There was no information about the older child.

During the surveillance on March 22, 2001, Tango observed petitioner leave the Roselle address alone. Since no one exited the house at D. Avenue in Linden from 7:45 to 8:20, Motley went to 807 M. Street, where she observed the babysitter and younger child leave the house and walk to School No. 5. There was no record of the older child being observed that morning. A further surveillance was conducted on November 20, 2001. Petitioner left the Roselle address at 7:45 a.m. and dropped her children at their respective schools. The same was observed on November 27, 2001, and December 4, 2001. Based on his review of this information, VanHandel concluded that the children are not residents of Linden. He calculated the tuition owed from the date of the first surveillance, November 17, 2000 (R-2).

William Bruce Tango, an investigator and an attendance officer with the District for three years, has handled approximately 100 residency cases. For the twenty-five years prior to this, he had been an Elizabeth police officer. Tango did not know petitioner prior to his involvement in this matter. On November 17, 2000, he was in his vehicle doing surveillance outside the R. Street address in Roselle. Motley was at the Linden address. He observed petitioner exit the R. Street address with her children and drive them to school. (Tango followed the vehicle to school.) He made the same observations on November 29, 2000, and December 6, 2000. Also, on approximately five occasions he checked the Roselle address in the early morning hours or late at night; on four occasions, two of which could have been a weekend, he observed petitioner's car outside the R. Street address.

On March 19, 2001, Tango arrived at the R. Street address in Roselle prior to 6:00 a.m. and saw petitioner's car. Petitioner exited the R. Street address at approximately 8:10 a.m. by herself. Tango was going to follow petitioner, but petitioner spotted him in his vehicle, turned her car around and parked behind Tango's car. Petitioner was on the phone for five minutes, after which the Roselle police arrived. Tango explained to the police why he was there. Tango did not follow petitioner, but called Motley over the walkie-talkie.

On March 22, 2001, at approximately 8:00 a.m., Tango observed petitioner leave the R. Street address by herself. Tango advised Motley of this. On November 20, 2001, Tango arrived at the R. Street address prior to 6:00 a.m. and saw petitioner's parked vehicle. Petitioner exited the house by herself at around 8:00 a.m. Motley told him that petitioner had thereafter picked up the children at the M. Street address and dropped them off at school. On November 27, 2001, Tango conducted another surveillance at R. Street. He observed petitioner's vehicle prior to 6:00 a.m., and saw petitioner exit the house by herself at around 8:00 a.m. On December 4, 2001, he also observed petitioner exit the R. Street address at approximately 8:00 a.m. by herself and enter her vehicle.

Tango indicated that on each of the eight surveillance dates, petitioner came out of the R. Street address in Roselle alone or with a child. Tango never saw the children or petitioner go into the house. Tango also stated that the school day begins at 8:45 a.m. at all schools in the Linden School District except for the junior high school, where the school day begins at 8:25 a.m.

R.T., testifying on her own behalf, alleged that she lives at D. Avenue, Linden, New Jersey. Although not provided at the hearing, petitioner claimed that she had provided the District with her voter registration, a letter from her employer, her 1999 and 2000 income tax records and her driver's license.

On cross-examination, petitioner could not recall having a conversation with Donald VanHandel. Noting that she had heard about the residency issue in a prior year, she contended that at that time the superintendent asked for her driver's license. She claimed that she had not personally met with any District official regarding her residency, nor did she show her driver's license to any official. She never received notice of nor did she attend a school board meeting, but she received the letter dated February 22, 2001, from superintendent Joseph E. Martino (R-1).

Petitioner has two children, A.T., fourteen years old, who attends Soehl Middle School, and S.T., eight years old, who attends School No. 1. Petitioner claimed that she has resided at D. Avenue in Linden since 1995 or 1996 in a two-family house owned by her father. She alleged that she and her children occupy the first floor and the basement with her sister, D.M., and her eleven-year-old niece, who have lived there since 1993 or 1994. The first floor has two bedrooms, a bath, a kitchen and a living room and there are two bedrooms and a bath in the basement. Two other people live on the second floor. There is a two-car garage, which she does not use.

Petitioner claimed that she lived at R. Street in Roselle from 1984 to 1995-1996. She resided on the second floor of a two-family house with her husband and children. At that time, her mother-in-law, the owner of the house, lived on the first floor. She claimed that her husband's brother now resides on the first floor, and her husband lives on the second floor.

R.T. claimed that she is presently separated from her husband, and has been separated on and off for a couple of years. She does not have a separation agreement. She claimed that prior to the separation, she and the children lived with her husband on R. Street, and that the children were not then old enough to attend school. She alleged that her husband presently utilizes one of the bedrooms on the second floor of the house, and she did not know who sleeps in the second bedroom, which has two beds. She testified that although she had been at the R. Street address with her children the night before the hearing (December 9, 2001), she contended that they did

not stay overnight. She admitted that they had slept there on other occasions, although she could not recall the exact dates.

Petitioner alleged that she had advised the District that the children would be staying on R. Street for one week when she went to Georgia. Although she initially said that she went to Georgia due to a death in her family in November 2000, she later claimed that the death was in September 2001 and that she had actually gone to Georgia to visit her father in November 2000. She testified that she told the principal of School No. 5 of this trip (apparently November 2000) because there had been a prior problem, and that she personally spoke to Superintendent Martino. Although difficult to clarify, she later claimed to have "telephoned" the superintendent. Although she contended that there was no question of residency in November 2000, she later alleged that she informed the school of her trip because of the problem in 1999.

In further testimony, petitioner admitted that she did not report the September 2001 trip to the District despite the ongoing investigation. She claimed that the children only stayed with their father for two days, and she said that the District could have contacted L.H., her babysitter, listed on her emergency card. Although she did not know the exact address, she indicated that L.H. lives on M. Street in Linden.

Petitioner indicated that she first became aware of the residency problem in November of 2000 (she later claimed it could have been the end of 1999), when she received a card from the truant officer. The man asked her if she owned the home in Linden, and she said it was her father's home. She was not asked to produce her driver's license.

Petitioner stated that her children "go over periodically" to R. Street. Although she agreed that both she and the children have a close relationship with their father, she stated that her children sleep over at his home no more than two times a month, certainly not three times in a ten-day period. She admitted that S.T. had slept at her father's house on Saturday, December 8, 2001 (petitioner spent the night at her sister's

home in Rahway), and that one of her children might have stayed over at their father's house in December. Her children sometimes decide to "go home with Daddy," since she and her husband each give their children a home. Referring to Tuesday, December 4, 2001, she claimed that it was a "lie" that she took her children from R. Street in the morning. Since S.T. had been hospitalized the Sunday before, and did not come home until Wednesday, December 5, 2001, her children could not have been seen coming from the R. Street address on December 4, 2001. She admitted that she might have gone to R. Street to do something for her husband and "come out of the address" that morning, and that A.T. went back to school on Tuesday, December 4, 2001.

Although she alleged that she last stayed over on R. Street "a while ago," she claimed it had been one and a half to two weeks prior to the hearing, and that since she and her husband have a "boyfriend/girlfriend" relationship, she did not "document" the nights she went to his home. She later claimed that she misunderstood the question and that this was not possible, because she had originally said she had been at her husband's house the day before the hearing. She then stated that she is not contending that she never spent the night at her husband's house, but said that the last time was one and a half weeks prior to the hearing. She was positive that the last time she stayed over prior to that was one to one and a half months before. She estimated that she spent ten to twelve nights at R. Street over the last two years. Although she agreed that she could have exited the R. Street address, she alleged that it was a lie that she did so one to three times in one to one and a half weeks. She claimed that since her relationship with her husband is friendly, she can go to R. Street for money, for lunch, to bring her husband something, or for any reason.

She further indicated that she does not now contribute, nor has she ever contributed, money to the R. Street house. Her husband paid rent years ago on R. Street, but petitioner was not aware of whether or not he now pays his mother rent. She alleged that the utilities are in her mother-in-law's name. She claimed that the telephone at R. Street is in her name because her husband could not get a telephone in

his name. She did not know why he does not have his own phone, but alleged that he pays the telephone bills and all his other bills. He does not have a car, but gets rides.

Petitioner testified that she does not have telephone service in her name at D. Avenue, but that she and her sister D.M. use her father's telephone. Although she alleged that the bill is sent to her father, she contended that her sister pays the bill and that she pays her sister in cash, not by check. Petitioner later stated that she actually paid the telephone bill at the check-cashing place. She contended that the total could be $40 or $50, and that in November 2001 she paid $23. She then claimed that either she or her sister paid the bill and that she paid it two months ago.

In further testimony, she revealed that her father returns to New Jersey from Georgia in June or July and stays until Labor Day. Every bill for the house is addressed to him. The oil bill is paid by check, from her father's account in New Jersey. She contended that her oldest sister, F.G., takes care of the bills. She claimed that her father does not ask for money from her or her sister D.M., but that she and her sister give F.G. the money in cash. She claimed that because the family is close, no payments are made to her father for the bills for the house. She does not send him money on a regular basis. Although she first alleged that she and D.M. pay the taxes, and that F.G. handles this because she knows the amount, she then alleged that she helps out with the taxes only if she has money and that she does not pay a specific amount. She claimed that in July or August 2001 she paid $300 towards the taxes (they are $4,500) and did not know how much her sister D.M. paid. She provided no verification of this expense, alleging that she had paid in cash.

Petitioner revealed that she has worked in a bank for twenty-two years and presently is a customer service representative. She has direct deposit and her own checking account, which she contended she uses for shopping and groceries.

Petitioner claimed that she does not receive bills on a regular basis and could not recall sending a letter to anyone in two years. She did not know if she typically puts

her return address on letters and could not recall using a return address. She then contended that she might not put a return address on letters, but if she did she would use the Linden address.

Questioned as to how she pays her insurance bill on her 1991 car, petitioner hesitated and then indicated that it is insured by her friend, J.S., who has a connection to State Farm, and that she has an insurance card from State Farm in Maplewood. Although her car was originally registered and insured in her father's name, she claimed that for the last couple of years it has been registered in her name at the Linden address. Although she could not recall the exact time, she believed "someone took over the insurance in 2000." She explained that when she was responsible for payment of the insurance she failed to make the payments, the insurance lapsed, and she could not renew it. Thus, J.S. had the car insured in his name; the insurance card says J.S., although the car is registered in her name. She claimed that State Farm is aware of this and that she deposits money in J.S.'s account or her sister-in-law gives J.S. cash to pay for this. Petitioner first claimed that she did not receive the bill (J.S. did), nor did she know the exact premium. Petitioner then indicated that State Farm deducts $123 per week from J.S.'s checking account, and that the premium could be $1,100 or $2,000. She contended that when she worked at Summit Bank she deposited $200 in J.S.'s account "maybe every three months," which could have changed when her liability went down. Petitioner claimed that in the last six weeks she gave her sister-in-law $600 cash and then $200 to give to J.S; J.S. does not ask her to pay $123 per week.

Petitioner contended that the car is registered to her at D. Avenue and has been registered in this manner since she got the car in 1994-95; she could not recall when her father transferred ownership to her. Claiming that she has had a driver's license since she was seventeen, she contended that at one point she had changed the address from D. Avenue to R. Street. She could not recall the year she changed it back to D. Avenue, but contended that it was before 2000. She contended that she had not

reported to the police on March 19, 2001, that someone was following her, nor did she personally meet with a District official in November 2000.

In rebuttal, petitioner claimed that respondent only said that the investigator observed her exit the R. Street address alone on December 4, 2001, after she informed respondent that her daughter did not exit the R. Street address on December 4, 2001. Further, she contended that she had never met with a District administrator or shown anyone her driver's license. On cross-examination, petitioner contended that she did not stay over on R. Street on December 3, 2001, but could have gone to R. Street. Thus, Tango might have seen her come out of the house on R. Street. She admitted that she may have been at the R. Street address on some of the occasions testified to by Tango.

Discussion

Petitioner claims that her children, A.T. and S.T., are entitled to a free public education in Linden because she and her children are domiciled in respondent's school district. Respondent asserts that in actuality R.T. and her children live with R.T.'s husband, the children's father, in Roselle, New Jersey.

In order for a pupil to be entitled to a free education in New Jersey, the student must be a local domiciliary of the particular school district where admission is sought. *See V.R. on behalf of A.R. v. Hamburg Bd. of Educ.*, 2 *N.J.A.R.* 283, 287 (Educ. 1980), *aff'd*, State Bd., 1981 *S.L.D.* 1533, *rev'd on other grounds*, *Rabinowitz v. New Jersey State Bd. of Educ.*, 550 *F. Supp.* 481 (D.N.J. 1982) (indicating that New Jersey requires local domicile, as opposed to mere residence, to receive a free education). As such, at issue in this matter is whether A.T. and S.T. are entitled to a free education under *N.J.S.A.* 18A:38-1 as local domiciliaries in respondent's school district. In other words, a determination of the children's domicile is necessary in order to resolve the instant dispute.

N.J.S.A. 18A:38-1(a) provides that public schools shall be free to persons over five and under twenty years of age who are "domiciled within the school district." Petitioner claims that she and her children A.T. and S.T. are domiciles of Linden, thus requiring this tribunal's determination in her favor. Respondent argues that R.T., A.T. and S.T. actually live with R.T.'s husband, the children's father, in Roselle, thereby precluding the children from receiving a free education within the Linden School District.

Generally speaking, domicile is the place of a person's abode where he or she has the present intention of remaining and to which, if absent, he or she intends to return. *Mercadante v. City of Paterson*, 111 *N.J. Super.* 35, 39 (Ch. Div. 1970), *aff'd*, 58 *N.J.* 112 (1971). A person may have multiple residences, but may have only one domicile at a time; as such, the residence may coincide with domicile, but does not alone determine domicile. *State v. Benny*, 20 *N.J.* 238, 251 (1955).

"In a strict legal sense, the domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving." *In re Unanue*, 255 *N.J. Super.* 362, 374 (Law Div. 1991) (quoting *Kurilla v. Roth*, 132 *N.J.L.* 213, 215 (Sup. Ct. 1944)); *see also Mercadante, supra*, 111 *N.J. Super.* at 39. Thus, domicile is what is regarded as an individual's true and permanent home. *In re Jaffe*, 74 *N.J.* 86, 90-91 (1977). Intent is the touchstone of domicile, and the manifestation of a person's intent converts residence from a mere place in which a person lives to a domicile. *Benny, supra*, 20 *N.J.* at 251.

The question of domicile is one of fact and must be determined on a case-by-case basis. *Lea v. Lea*, 18 *N.J.* 1, 7 (1955). Thus, "the concept of 'domicile' may have different content and shades of meaning depending upon the context in which it is used." *In re Estate of Gillmore*, 101 *N.J. Super.* 77, 86-87 (App. Div.), *certif. denied*, 52 *N.J.* 175 (1968). Nevertheless, "[e]very person has a domicile at all times, and no person has more than one domicile at any one time." *Id.* at 87 (citation omitted). There are three possible ways by which an individual may acquire domicile: (1) through birth

or place of origin; (2) through the choice of a person legally capable of choosing his or her domicile; or (3) through operation of law in the case of a person who lacks capacity to acquire a new domicile by choice. *Ibid.*

Since the instant case involves children who lack the capacity to choose their own domicile, this tribunal must look to the operation of law. Traditionally speaking, the domicile of a child for school purposes under Title 18A is that of the natural father. *Board of Educ., Little Egg Harbor Township v. Boards of Educ. of Galloway Township*, 145 *N.J. Super.* 1, 12 (App. Div. 1975) (Morgan, J.A.D., dissenting), *rev'd per curiam, based on dissent below*, 71 *N.J.* 537 (1976) (citing *Mansfield Township Bd. of Educ. v. State Bd. of Educ.*, 101 *N.J.L.* 474 (Sup. Ct. 1925)); *V.R., supra*, 2 *N.J.A.R.* 283. Although the facts in *V.R.* are not on all fours with the instant matter, the discussion of the "traditional domicile concept" by Judge Lefelt in *V.R.*, in which he acknowledged that it was not absolute, is useful here.

> The law establishing an infant's domicile seems based on the rationale that an unemancipated person receives his or her custody, support and maintenance from the father, regardless of the child's physical location. Changing times should, therefore, affect the domicile law only when the factual situation presented undercuts this rationale.
>
> [*V.R., supra*, 2 *N.J.A.R.* at 286.]

The current dispute entails a determination as to whether or not there should be a departure from the traditional domicile rule. Petitioner alleges that she and the children's father are separated and that her children live with her in Linden. She alleges that she and the children only visit her husband, their father, in Roselle, but actually reside and make their home in Linden. Respondent contends that in actuality R.T. and her children reside in Roselle with R.T.'s husband, the children's father, and that the allegation that R.T. and her children actually live in Linden is simply not true.

In reaching a determination in this matter, I am cognizant that the question of domicile is one of fact and must be determined on a case-by-case basis. The facts of this matter must be considered in reaching a determination as to the actual domicile of R.T. and her children, A.T. and S.T. "The concept of domicile is not constant. It is designed to assure fairness to the individual or the State or both in a given setting. Its ingredients therefore will vary, depending upon what is just and useful in a given context." *Worden v. Mercer County Bd. of Elections*, 61 *N.J.* 325, 349 (1972) (Weintraub, C.J., concurring). Fairness to the individual in this case requires a determination as to whether the children are actually living with their mother, who is separated from their father, or whether the children's domicile must track their father's. The traditional rule is grounded upon the rationale that an unemancipated person receives his or her custody, support and maintenance from the father, regardless of the child's physical location. Such a blanket presumption, however, is no longer applicable in today's society. Thus, what is particularly relevant here is a determination on the facts of this case as to whether the children are actually living with their mother, R.T., in Linden or whether the family as a whole actually lives in Roselle. This case must be scrutinized carefully according to the spirit and letter of the public school law.

The burden of proof in this matter rests with petitioner. In a proceeding such as this, the parent has the burden of proof by a preponderance of the evidence to establish that the children meet the eligibility requirements. Evidence is found to "preponderate" if it establishes the reasonable probability of the fact alleged and generates a reliable belief that the tendered hypothesis, in all human likelihood, is true. *See, e.g., Loew v. Union Beach*, 56 *N.J. Super.* 93, 104 (App. Div.), *certif. denied*, 31 *N.J.* 75 (1959), *overruled on other grounds*, 36 *N.J.* 487 (1962). "Preponderance" is not necessarily dependent on which party offers the most witnesses, but refers to the greater convincing power. *See State v. Lewis*, 67 *N.J.* 47 (1975). So too, a trier of fact may reject any testimony as inherently incredible or inconsistent either with other testimony and/or common experience. *See Congleton v. Pura-Tex Stone Corp.*, 53 *N.J. Super.* 282, 287 (App. Div. 1958). In other words, to be deemed credible, testimony must not only proceed from the mouth of a credible witness, but must be

inherently credible in itself and be of such a nature as the common experience and observation of man can approve as likely or probable under particular circumstances. *See Spagnuolo v. Bonnet*, 16 *N.J.* 546 (1954); *State v. Taylor*, 38 *N.J. Super.* 6 (App. Div. 1955). Simply put, credibility is derived from an assessment of the rationality, internal consistency and manner in which testimony "hangs together" with other evidence. *See Carbo v. U.S.*, 314 *F.*2d 718 (9th Cir. 1963). In this case, in light of the disparate nature of the critical testimony, not everyone can be telling the truth.

Based, then, upon my review and consideration of the testimony and the evidence and my experience, I am compelled to conclude that petitioner's version of the situation simply cannot be believed. Petitioner's testimony was inconsistent and unreliable. She changed her testimony at various points to suit the situation. As such, it was incredible and not worthy of belief. Moreover, not only did the testimony not proceed from the mouth of a credible witness, but it was not probable or likely to be true. It is hard to believe that a wife who is not divorced or legally separated from her husband, and has a "boyfriend-girlfriend" relationship with him and sees him on a continuing basis, does not in actuality live with him with their children. This is particularly true in light of the surveillances that revealed that petitioner, with or without her children, left the Roselle address in the early morning hours, on eight different days during five different months, in two different school years. On some occasions, respondent's attendance officers saw petitioner leave the Roselle address early in the morning with her children and take them to school. On other occasions, petitioner left the Roselle address alone early in the morning. However, on none of the surveillance days did petitioner and her children actually leave the Linden address. There is no reason for the undersigned not to accept as credible the testimony of respondent's witnesses, one of whom was involved in the investigation. That being so, it appears more than likely that petitioner and her children are actually residing in Roselle.

Further support for this determination may be gleaned from the fact that petitioner's testimony offered to prove that she actually lives in Linden was simply not credible. Although she testified that she has lived at D. Avenue, Linden, New Jersey,

since 1995-96, she could not present any rent receipts, utility bills, or real estate tax bills either in her name or paid by her. Instead she asserted, but offered no other proof, that she had no bills, since the building was owned by her father and she was not responsible for paying any of the bills. She produced no evidence that she had in fact paid telephone bills at that address, alleging that any amounts she paid for telephone bills or towards the tax bills were paid in cash. This is especially not credible when one considers that petitioner has a checking account and direct deposit. The fact that petitioner has been employed at a bank for twenty-two years as a customer service representative increases the implausibility of her testimony. It is simply hard to believe that petitioner, not unsophisticated in banking, has not issued any check since 1995-96 for living expenses at the Linden address. In addition, R.T. could not even recall sending a letter to anyone in the last couple of years with a return address, nor could she adequately explain why the telephone at the R. Street address in Roselle is in her name. Further, when questioned about her car and its insurance coverage, she testified that her car was not insured by her at the D. Avenue address, but by a friend, and that the policy was in the friend's name. When questioned as to how she pays her friend for that insurance, she alleged that she pays some amount (she was not entirely sure how much) in cash either to her friend through her sister-in-law or in some other manner. Further, although petitioner attached some documentation to her proposed findings of fact and conclusions of law, these documents were not offered into evidence nor was there any testimony in regard to them. As such, they are not evidential in this matter.

Based upon the above discussion, I **FIND** that R.T. and her children A.T. and S.T. reside at R. Street, Roselle, New Jersey, and not at D. Avenue in Linden. I further **FIND** that R.T. and her children A.T. and S.T. are not domiciled within respondent's school district and therefore do not meet the requirements set forth in *N.J.S.A.* 18A:38-1(a). As a result, I **CONCLUDE** that A.T. and S.T. are not entitled to a free public education in the Linden School District. I further **CONCLUDE** that the tuition costs set forth by respondent are uncontradicted. Therefore, petitioner is assessed tuition in the total base amount of $17,935.90 for the period November 17, 2000, to

December 10, 2001, and at a *per diem* rate of $47.44 per child for the period December 11, 2001, to the date of removal from respondent's school district.

Order

It is hereby **ORDERED** that petitioner's appeal of respondent's determination is denied. It is further **ORDERED** that A.T. and S.T. are ineligible for attendance in respondent's school district. It is further **ORDERED** that petitioner be assessed tuition costs as set forth above for the period of A.T. and S.T.'s ineligible attendance in respondent's school district.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 20, 2002
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

2/22/02
DATE

Debbie Cantanucci (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 25 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

For Petitioner:

R.T.

For Respondent:

Donald VanHandel
William Bruce Tango

List of Exhibits

For Petitioner:

None

For Respondent:

R-1 Letter to R.T. from Joseph E. Martino, dated February 22, 2001 (two pages)

R-2 Calculation of tuition, dated December 10, 2001

OAL DKT. NO. EDU 3420-01
AGENCY DKT. NO. 66-3/01

R.T., on behalf of minor children, A.T. and S.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner has failed to meet her burden of proving, by a preponderance of the credible evidence, that she was a domiciliary of Linden during the period from November 17, 2000 through the present time, so as to entitle her children, A.T. and S.T., to attend the Board's schools free of charge during this time. In so finding, the Commissioner notes, as did the ALJ, the conflicting nature of the testimony brought to the record by petitioner with respect to her claim of domicile.

Accordingly, the Initial Decision of the OAL is affirmed for the reasons expressed therein. Petitioner is directed to reimburse the Board for the duration of her children's ineligible attendance in its schools, a total of $17,935.90 for the period November 17, 2000 through December 10, 2001, and a per diem amount of $47.44 per child for the period from

December 11, 2001 to the date of the children's removal from the Board's school district.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/8/02

Date of Mailing: 4/8/02

* This decision, as the Commissioner's final determination may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:2-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

156-02

BOARD OF EDUCATION OF MILLVILLE, CUMBERLAND COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

April 10, 2002

OAL DKT. NO. EDU 677-02
AGENCY DKT. NO. 41-2/02

BOARD OF EDUCATION OF MILLVILLE, CUMBERLAND COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed in this local "Abbott" district's appeal of the Department's determination of its early childhood program aid plan for the 2002-2003 school year. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

Isaac R. Byant
ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 4/10/02

Date of Mailing: 4/10/02

158-02

D.C., on behalf of minor children, K.F., R.C. AND C.C.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF EAST RUTHERFORD, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

April 11, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 5177-01

AGENCY DKT. NO. 98-3/01

D.C., ON BEHALF OF MINOR CHILDREN, K.F., R.C. AND C.C.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF EAST RUTHERFORD, BERGEN COUNTY,

Respondent.

D.C., *pro se*

Peter F. Bariso, Esq., appearing for Respondent
(Chasan, Leyner, Bariso & Lamparello, attorneys)

Record Closed: February 15, 2002 Decided: February 20, 2002

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on June 7, 2001 for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A hearing was scheduled for February 27, 2002 at the OAL, 185 Washington Street, Newark, New Jersey. The parties having agreed and stipulated, as indicated by their signatures on the attached Stipulation of Dismissal, that this matter should be dismissed.

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

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

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

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the dismissal should be approved. I approve the dismissal and, therefore, it is hereby **ORDERED** that this matter be and hereby is **DISMISSED WITH PREJUDICE**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

February 20, 2002
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

2/26/02
DATE

Deborah Antonante
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 28 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

OFFICE OF ADMIN LAW
FILED
2012 FEB 15 P 3:38

CHASAN, LEYNER, BARISO & LAMPARELLO, P.C. 00398-5405
300 Harmon Meadow Boulevard
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Attorneys For Respondent
EAST RUTHERFORD BOARD OF EDUCATION

D.C. on behalf of minors, K.F., R.C. and C.C. Petitioner(s) vs BOARD OF EDUCATION OF THE BORO OF EAST RUTHERFORD, Respondent(s).	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW TRANSMITTAL AGENCY DEPARTMENT OF EDUCATION AGENCY REF. NO.: 98-3/01 OAL DOCKET NO.: EDUOS 05177-01N STIPULATION OF DISMISSAL

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties that the above action be dismissed with prejudice without costs to either of the parties

DAWN M. CERVASIO
Petitioner

Dawn M. Cervasio
DAWN M. CERVASIO

Dated: 2/10/2012

CHASAN, LEYNER, BARISO & LAMPARELLO, P.C.
Attorneys for Respondents
EAST RUTHERFORD BOARD OF EDUCATION

PETER F. BARISO, JR.
For the Firm

OAL DKT. NO. EDU 5177-01
AGENCY DKT. NO. 98-3/01

D.C., on behalf of minor children, K.F., R.C. AND C.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF EAST RUTHERFORD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed.

Upon his full review, the Commissioner concurs with the Administrative Law Judge that dismissal of this matter is appropriate under the circumstances.

Accordingly, the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/11/02

Date of Mailing: 4/11/02

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:2-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

159-02

WILLIAM MARTIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

April 11, 2002

160-02

E.K. AND D.H., on behalf of minor child, C.K., :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY, : DECISION

RESPONDENT. :

April 12, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1772-01
AGENCY DKT. NO. 446-12/00

E.K. AND D.H., O/B/O C.K.,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY,

Respondent.

James P. Logan, Esq., for petitioners
(Logan, Logan & Lindsay, attorneys)

James L. Plosia, Jr., Esq., for respondent
(Apruzzese, McDermott, Mastro & Murphy)

Record Closed: January 10, 2002 Decided: February 25, 2002

BEFORE **DIANA C. SUKOVICH,** ALJ:

On December 15, 2000, petitioners filed an appeal with the State Department of Education (DOE) of a determination by respondent that petitioners' daughter, C.K., was not entitled to a free public education in respondent's district because of residency considerations.

Respondent filed an answer, and the DOE transmitted the matter to the Office of Administrative Law on March 7, 2001, for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1-13.

A hearing scheduled for November 7, 2001 was adjourned because a resolution of the matter had been reached by the parties. An executed stipulation of settlement and an executed promissory note, which was referenced in the stipulation, were filed on January 10, 2002, on which date the record was closed. Attached herewith are copies of the stipulation and the promissory note. Having reviewed the record and the settlement terms, I **FIND:**

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Feb 25, 2002
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

3/1/02
DATE

Jeffrie Mutanatto /ps
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR - 4 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

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RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

JAN 10 11 26 AM '02

LOGAN, LOGAN AND LINDSAY
155 North Dean Street
Englewood, New Jersey 07631
(201) 569-0700
Attorneys for Petitioners

ERIC KELLY and DANIELA HOLMES, Parents of CHRISTINA KELLY,	:	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
Petitioners	:	Docket No. EDUOS 01772-01N
vs.	:	
BOARD OF EDUCATION, BOROUGH OF TENAFLY,	:	
Respondent	:	STIPULATION OF SETTLEMENT

This matter having been brought by Logan, Logan and Lindsay, Attorneys at Law (James P. Logan, Esq. appearing) on behalf of Petitioners Eric Kelly and Daniela Holmes, Parents of Christina Kelly and Respondent Board of Education, Borough of Tenafly by Apruzzese, McDermott, Mastro and Murphy, Attorneys at Law (James L. Plosia, Jr., Esq. appearing), and the matter in difference in the above entitled action having been amicably resolved by and between the parties, whereby Petitioners agreed to pay Respondent $8,155.32 in accordance with the terms of a Promissory Note attached hereto, it is hereby stipulated and agreed that the same be and is hereby settled with prejudice and without costs against either party.

Dated: December 21, 2001

APRUZZESE, McDERMOTT, MASTRO & MURPHY

By: _____
James L. Plosia, Jr.
Attorney for Respondent

LOGAN, LOGAN and LINDSAY

By: _____
James P. Logan
Attorney for Petitioner

3a

PROMISSORY NOTE

For value received, Daniela Holmes, residing at 211 Davison Place, Englewood, New Jersey 07631 and Eric Kelly, with an address of c/o Concert Data Systems, 261 West 35th Street, Suite 301, New York, New York 10001, hereby promise to pay to the order of the Tenafly Board of Education, whose address is 500 Tenafly Road, Tenafly, New Jersey 07670, the sum of Eight Thousand One Hundred Fifty Five Dollars and 32/100 ($8,155.32). An initial payment of $2,655.32 is to be made on November 7, 2001. Equal payment of $687.50 each are to be made every month thereafter commencing on December 1, 2001, for a total of eight (8) payments, in accordance with the payment schedule set forth below:

December 1, 2001	$687.50
January 1, 2002	$687.50
February 1, 2002	$687.50
March 1, 2002	$687.50
April 1, 2002	$687.50
May 1. 2002	$687.50
June 1, 2002	$687.50
July 1, 200298	$687.50

This is a demand note and no interest is due. In the event there is a default in any payment by more than ten (10) days, then the Tenafly Board of Education is entitled to record a Judgment, a copy of which is attached hereto.

Daniela Holmes and Eric Kelly promise to pay all costs of collection, including attorney's fees, which may be incurred in the collection of this Note or any portion thereof, and in case suit is instituted for such purpose, the amount of attorney's fees shall be such as the Court shall adjudge reasonable. Daniela Holmes and Eric Kelly hereby waive trial by jury in any lawsuit.

IN WITNESS WHEREOF, Daniela Holmes and Eric Kelly executed this Note as of the date written by their names.

Dated: 11/12/01

Daniela Holmes, Debtor

Dated: 11/7/01

Eric Kelly, Debtor

STATE OF NEW JERSEY)
) SS.:
COUNTY OF Bergen)

On this 12th day of November, 2001, before me personally came the above-named, Daniela Holmes, to me personally known and known to be the individual described in and who executed the foregoing instrument, and duly acknowledged to me that she executed the same.

Robyn B. Lindsay, Esq
Attorney at Law, State of NJ

STATE OF NEW YORK)
) SS.: 0834085B9
COUNTY OF N-Y)

On this 7th Day of November, 2001, before me personally came the above named, Eric Kelly, to me personally known and known to be the individual described in and who executed the foregoing instrument, and duly acknowledged to me that he executed the same.

DEBORAH MOORER
Notary Public, State of New York
No. 4640484
Qualified in Kings County
Commission Expires April 30, 2003

3b

OAL DKT. NO. EDU 1772-01
AGENCY DKT. NO. 446-12/00

E.K. AND D.H., on behalf of minor child, C.K., :		
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/12/02

Date of Mailing: 4/12/02

* The Commissioner notes that C.K. is of an age and grade level that do not implicate the injunction imposed by the State Board on April 5, 1990, which has subsequently been upheld by the New Jersey Courts.

163-02

163-02

BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning *Abbott* district contended that Department's directive to provide its operational plan and budget for kindergarten as part of its school-based submission, rather than as part of an early childhood education operational plan including preschool and kindergarten, was in violation of statute and *Abbott* court rulings.

ALJ found that nothing in statute or *Abbott* rulings precludes the Department from requiring submission of separate operational plans and budgets for preschool and kindergarten programs, so long as the latter are, in fact, submitted and reviewed to ensure compliance with law.

Commissioner affirmed initial decision, noting that bifurcation of plan has no effect on a district's entitlement to Early Childhood Program Aid (ECPA), does not suggest that ECPA funds may be used for purposes other than those specified in statute, does not relieve a district from the requirement to provide appropriate kindergarten programs to "Abbott" students, and does not preclude a district from obtaining such additional funding as may be necessary to do so.

April 15, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00678-02
AGENCY DKT. NO. 43-2/02

BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION,
Respondent.

Richard E. Shapiro, Esq., for petitioner
Allison Colsey Eck, Deputy Attorney General, for respondent (David Samson, Attorney General of New Jersey, attorney)

Record Closed: March 13, 2002 Decided: March 22, 2002

BEFORE **JEFF S. MASIN**, ACTING CHIEF ALJ:

The "Comprehensive Educational Improvement and Financing Act ("CEIFA"), *N.J.S.A.* 18A:7F-1 *et seq.*, provides that

> Early childhood program aid shall be distributed to all school districts with high concentrations of low-income pupils, for the purpose of providing full-day kindergarten and preschool classes and other early childhood programs and services.
>
> . . . .
>
> Each district which receives early childhood program aid shall submit to the commissioner for approval an operational plan that

> shall be a subset of the district's comprehensive strategic plan, to establish preschool and full-day kindergarten for all four and five year olds by the 2001-2002 school year and to maintain them thereafter.
> *[N.J.S.A.* 18A:7F-16 (a)]

In this appeal by Pemberton Township's Board of Education ("Board" or "District"), the Board contends that the Department of Education ("DOE" or "Department") has violated the statute, as well as the directives of the *Abbott* decisions, by failing to review and fund the full-day kindergarten portion of the District's Early Childhood Program Aid Abbott School District One-Year Operational Plan ("Operational Plan") for the 2002-2003 school year. More specifically, the Board disputes the validity of the Department's instruction to it that the costs of full-day kindergarten were to be excluded from the District's Operational Plan for the 2002-2003 school year and were instead to be included in the District's individual school-based budgets.

The record indicates that on November 15, 2001, the District submitted to the DOE its Operational Plan. Attached thereto was an addendum, and a cover letter which read

> [t]he addendum is required to conform to NJAC (sic) 18A:7F that requires the submission of an operational plan for the establishment and maintenance of preschool and full day kindergarten programs. The operational plan provided by the Department of Education does not include a section for full-day kindergarten in the 2002-2003 school year. Please provide the appropriate format for the required full-day submission. The Department of Education has directed school districts to include full-day kindergarten costs in school-based budgets.

In a letter addressed to the District on November 20, 2001, the Department reported to the District on the DOE's initial review of the Operational Plan. The November 20 letter read in part:

> The Department has completed an initial review of your 2002-2003 Early Childhood Education Operational Plan submitted on November 15, 2001. You submitted an addendum listing the cost of your kindergarten program. However, the kindergarten program costs should not be included as part of the Early Childhood Education Operational Plan this year, but should be included as part of the school-based budgets. The Department has made this

> change in order to ensure a timely review and approval of the Early Childhood Operational Plan. A timely review and approval process will allow districts adequate time to implement programs. Therefore, your kindergarten costs needs to be taken out of your 2002-2003 Early Childhood Education Operational Plan and included in your school-based budgets.

On November 25 and again on December 4, 2001, the Board noted its view of the statutory requirement to submit "full day Kindergarten in the Early Childhood Plan" and inquired as to what statute had repealed or amended *N.J.A.C.* (apparently meaning *N.J.S.A.*) 18A: 7F-16.

On December 4, 2001, in a memorandum responding to the District's letter of November 25, the Department wrote

> In response to your November 25, 2001 memo, kindergarten program costs is not part of the Early Childhood Education Operational Plan this year. You were informed of this change when you attended the Professional Development Institute on October 1, 2001 and the technical assistance session on October 25, 2001. Be advised that you are required to include a full-day kindergarten program in the school-based budgets submitted to Burlington County Office on or by December 1, 2001.

On December 13, the Board once again wrote to the reviewing officer at DOE, iterating its request that if the Department was asking for the separation of kindergarten costs from the Early Childhood Plan, that the Department advise as to any amendment or repeal of the statutory requirement for inclusion of full day kindergarten in the Plan.

In addition to this correspondence, the record includes a set of printed "Instructions" issued by the DOE for the "One-Year Operational Plan School Year 2002-2003. In this instruction to districts, the DOE writes, ". . . The purpose of the plan is to provide implementation activities and related costs for *preschool* programs serving three- and four-year-olds for the 2002-2003 school year. *Please do not include kindergarten in the One-Year Early Childhood Education Operational Plan.*" (Italics in the original).

The Board contends that the wording of *N.J.S.A.* 18A:7F-16 requires that it submit its plan and budget for full-day kindergarten as part of its Operational Plan. It is not aware of either

a statutory amendment or a repeal of legislation that would change this requirement, nor have its requests of the Department for information revealed any such action by the Legislature. In addition, it points to the language of *N.J.A.C.* 6:19-3.2(d), which provides:

> A district board of education which has fully implemented preschool and full-day kindergarten shall continue the full operation of such programs for as long as it receives Early Childhood Program Aid. Beginning in the 2001-2002 school year, a district board of education shall only use Early Childhood Program Aid for preschool, full-day kindergarten and other early childhood programs and services.

The Board views this regulation as mandating that "full-day kindergarten be included in the Early Childhood Program Aid Operational Plan." The instructions received from the DOE to exclude the full-day kindergarten costs from the Operational Plan are "patently in conflict with those statutory and regulatory mandates."

In response, the DOE denies that its instruction in any way violates either the statute or the regulation. It asserts that under the CEIFA the Commissioner has broad delegated powers that include the authority to "prescribe" that school boards submit budgets with "such supporting documents" as he sees appropriate. *N.J.S.A.* 18A:7F-5. In addition, "the Commissioner may direct such budgetary reallocations and programmatic adjustments, or take such other measures as he deems necessary to ensure implementation of the required thoroughness and efficiency standards." *N.J.S.A.* 18A:7F-6. Further, it points out that the Commissioner's instruction is in accord with the recommendations of the Division of Early Childhood Education ("DECE"). These recommendations, made after the issuance of the Initial Decision and the Commissioner's Final Decision in *In re: Abbott Global Issues,* EDU 3246-01, Initial Decision, (April 20, 2001) *aff'd, modif'd, & rev'd in part,* Comm'r. (June 1, 2001) *<http://lawlibrary.rutgers.edu/oal/html/initial/edu3246-01_1.html.>*, seek to permit a more efficient review of district early childhood educational plans. More specifically, in a document entitled *Early Childhood Education: Advancing Implementation*, the DECE recommended to the Commissioner that the early childhood education plan and budget should only contain the program components for three and four-year-old programs, a modification from earlier practice that the DECE claimed would greatly reduce the review time and allow for expeditious decision-making, thus addressing a

concern that has again been emphasized by the Supreme Court even after the issuance of the "Advancing Implementation" report in the Court's opinion in *Abbott v. Burke*, _____ *N.J.* ___ (February 21, 2002) ("*Abbott VIII*"). According to the DECE, this recommendation also recognized that as the early childhood programs were district-wide, they should not be included in school-based budgets.

The respondent notes that *N.J.S.A.* 18A:7F-16 requires that early childhood program aid be distributed for the purposes of providing full-day kindergarten. The precise funding formula described in that provision is based upon factors that are unrelated to the separate issue of approval for an early childhood or kindergarten plan. The statute does not include any directive that mandates that the Commissioner review the early childhood and the full-day kindergarten programs "together," in one document, as opposed to conducting an independent review of each program. Nowhere is the Commissioner directed that he must utilize a single budget worksheet for analyzing the early childhood and the kindergarten plan. While CEIFA does mandate that ECPA be distributed for both early childhood and kindergarten programs and that each district submit an operational plan to establish preschool and full-day kindergarten, there is simply no legislative mandate that "the plan" be a single document, or that the request for ECPA funding for the two programs be incorporated within a single document. Additionally, despite the petitioner's claims, there is no basis for finding that the DOE's instruction in any way threatens or reduces either the District's obligation to provide full-day kindergarten or the Department's obligations under the law to assist this Abbott district in fulfilling this obligation. The plan, and the financial requirements for each such kindergarten program, will simply be assessed in the context of the school-based budgets. If there is then a concern on the District's part that funding provided for the kindergarten program is inadequate, the District can pursue additional funds through the available administrative process, including such resort to the courts as may prove necessary.

Discussion

CEIFA was adopted in 1996 as a response to earlier decisions of the Supreme Court in the *Abbott* line of cases regarding the Constitutional inadequacies of the State's arrangements to provide a thorough and efficient education for students in the designated urban districts. As part of CEIFA, the Legislature addressed funding for so-called "early childhood education." The aid to be provided to districts for this category of education was to be distributed under a formula described in *N.J.S.A.* 18:7F-16, now 16(a). That provision identifies that the "early childhood program aid ("ECPA") was to be used to provide "full-day kindergarten and preschool classes and other early childhood programs and services." Thus, the set of educational experiences encompassed under the "early childhood program" was defined as including both that given to five-year-olds in kindergarten and three and four-year olds in "preschool classes."

The Department of Education is required to both assure that *Abbott* Districts carry out the Legislature's mandate to provide for preschool classes and full-day kindergarten and to assist them in the financing of such programs. In regulations adopted by the Department, the provision of full-day kindergarten for students in the *Abbott* Districts is mandated by *N.J.A.C.* 6A:24-3.2, which states that the districts "shall offer a full-day kindergarten program to all five-year old children . . ." In a separate provision entitled "Early childhood education programs" the Department provides that school boards in *Abbott* districts "shall offer a half-day early childhood education program to all three- and four-year-old children." Thus, while in this case there is a controversy as to the exact content and formatting of Early Childhood Operational Plans for the 2002-2003 school year, the obligations mandated by previous case law and statutory enactments remain, and the regulations, while curiously splitting the "kindergarten" provision from the "early childhood education programs" provision, nevertheless speak in mandatory language as to the responsibilities resting on the school boards to provide both of these programs.

N.J.S.A. 18A:7F-16a defines the purpose of the "operational plan." It is to "establish preschool and full-day kindergarten . . . by the 2001-2002 school year and to maintain them thereafter." The purpose of the plan then is to explain how such programs will be established and how they will be maintained. The provision, in keeping with the clear intent of the case law and the legislative response thereto, conceives of "early childhood educational programs" for which ECPA is to be provided as including both "preschool" and "full-day kindergarten."

Obviously, the execution of these purposes requires that money be provided both for the purpose of establishing such programs and then, once they are established, for maintaining them. Indeed, that is the very purpose of the funding formula. Therefore, an "operational plan," such as is required for submission, must address both "preschool" and "full-day kindergarten," both as to how these will be established and then how they will be maintained. Perforce, the discussion of these elements must address the monetary needs. To the extent that any such "plan," document required by the DOE and supplied by the requesting school district, allows the District to fully explain its operational plan and to detail the required funds to carry out such plan, and for the Department to then properly, adequately and expeditiously review and fund such plans in a manner that assures that the full requirements of CEIFA and of *Abbott* are met, it makes little or no difference whether the "operational plan" for the three- and four-year-old programs and the "operational plan" for full-day kindergarten are contained within the parameters of one such document, denominated as the "One Year Operational Plan," or in two such documents. In the end, the crucial question is what was supplied and was it sufficient, and then, was it properly reviewed, analyzed and responded to in a manner that permits the District to carry out the *Abbott* mandate. If the Plan(s) allow for such, it seems that the question of whether the DOE asks for the information in one or in two such "plan" documents is largely irrelevant. That decision should be a matter left to the Department's sound discretion, a choice made based on such factors as the Department may find will enhance its ability to carry out its mandated responsibilities in the most efficient and legally appropriate fashion. It is generally not appropriate for those who are not themselves required to carry out the Department's difficult task of reviewing the Plan(s) and then deciding on how to deal with the funding requests to second-guess the choices made as to how to do so, unless it is apparent that the means chosen are either legally disallowed or the review of otherwise legally permissible material is itself legally deficient.

While I see nothing in the statute that prevents the DOE from requiring separate operational plans for preschool and kindergarten programs, nevertheless, there is, at least on the surface, some concern that arises out of the manner in which the Department appears to be separating these two categories of educational experience. This "separation" is manifested in small, yet not necessarily insignificant ways, and, indeed, may have led to an unfortunate misunderstanding in this case. The clear policy of CEIFA is to place both preschool and kindergarten within the broad category of "early childhood education" programs. The language

of the statute calls for "an operational plan" that addresses both of these programs. While the prior discussion allows that the Commissioner's discretionary authority is sufficient to allow for a requirement to separate the plans for purposes of review, nevertheless, there is absolutely no mandate for moving kindergarten outside of the realm of "early childhood" programs. Thus, while the current regulations, even after amendments adopted on February 4, 2002, contain the mandatory language compelling districts to provide both preschool and kindergarten, the regulations even now continue to speak of kindergarten in one regulation, 6A:24-3.2, for "Full-day kindergarten" and to speak of three- and four-year-old programs in a separate regulation, 6A:24-3.3, which bears the title "Early childhood education programs." While the titles of subsections of the Administrative Code are not part of the regulations themselves,[1] nevertheless, the structure does seem to suggest a possible mindset that kindergarten is not an "early childhood education program," this despite the clear subsuming of kindergarten under the "early childhood" label in CEIFA. Added to this regulatory construct is the recommended separation of kindergarten from the ambit of the "Early Childhood Program Aid One-Year Operational Plan," a recommendation of the DECE that has been carried forward in the Department's instructions for preparation of the Operational Plan and its subsequent treatment of Pemberton's submission for 2002-2003. Again, there is no concern if the DOE wants to see operational plans and the budgetary aspects thereof for kindergarten separate from the preschool information, but both programs are "early childhood programs," and each must by statute be the subject of an operational plan that advises how the district intends to "maintain" each program after its establishment. While the Commissioner can determine the exact information that is needed by the Department to properly review such a plan, even given the Commissioner's broad discretion, there is no warrant for doing away with the requirement for an operational plan for kindergarten.

The Department's response to Pemberton's inquiries as to why its Plan, which did include kindergarten, was unacceptable as submitted, did little to assuage such concern as the District had that it was being required to do something outside the demands of the statute. Had the Department merely advised that it wanted a separately denominated "operational plan" for the kindergarten program, perhaps this case might not have been brought, although there is no certainty that that would have been the case. Nevertheless, in the face of a statute that, as

[1] *N.J.A.C.* 1:30-1.7 provides: "Title, subtitle, chapter, subchapter, section, article, group, part and division headings contained in the Register or Code are not part of the rule, but are intrinsic parts of the publication. As such, these headings may be used in interpreting the rule."

explained above, clearly places kindergarten inside the category of early childhood education and also demands that a district submit an operational plan therefore, the DOE response that it had already told the District of the need for separation of cost information and that such had been the recommendation of the DECE report was not a very effective one. Indeed, the Instructions do not present any rationale for the direction to leave kindergarten out of the Operational Plan. The record does not reveal what conversations may have occurred between the District's personnel and/or its counsel and representatives of the Department. Perhaps a better explanation of what the Department was doing might have avoided this controversy.

As with many of the issues arising in this area, the outcome of this dispute is difficult to define. While on the surface this case seems at times to be more a matter of semantics, labels and paperwork trails than a serious controversy over educational policy and compliance with legislative and judicial mandates, nevertheless, to the limited extent that the Department's instruction to Pemberton to separate out kindergarten costs and other kindergarten-related information from the Operational Plan without a concurrent direction to submit such information in a separate "plan" addressing kindergarten as a discrete "early childhood" element, has led the District to resist what appeared to it to be a divergence from the statutory mandate for such a plan for kindergarten, the Department's process, as opposed to its intentions, may be faulted. It is imperative that the DOE now consider Pemberton's "Operational Plan" for its kindergarten program. The parties are **ORDERED** to immediately consult and determine exactly what is necessary to effectuate such review. Additionally, the Department is directed to review its procedures and regulations to assure that they do not in any way suggest that kindergarten is somehow not an integral part of the "early childhood programs" and is not subject to the same statutory "plan" process as is mandated for preschool programs. To the extent that changes in legislation may be needed to allow for different treatment that will both speed the review and approval process and at the same time assure compliance with *Abbott* mandates, these should be sought, so long as they are consistent with CEIFA's overall intent and the *Abbott* mandates.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. Pursuant to the timeline established by the Supreme Court of New Jersey in its Order of February 8, 2002, the Commissioner's decision must be made by Monday April 15, 2002. If the Commissioner of the Department of Education does not adopt, modify or reject this decision by April 15, 2002, and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

In accordance with the request of the Commissioner of Education, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." Such exceptions must be filed by March 27, 2002, and any replies must be filed by April 1, 2002. A copy of any exceptions must be sent to the judge and to the other parties.

March 22, 2002
DATE

JEFF S. MASIN, ACTING CHIEF ALJ

Receipt Acknowledged:

March 22, 2002
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETTIONER:

Budget Guidelines, Fiscal Year 2001-2002, Pursuant to the Comprehensive Educational Improvement and Financing Act of 1996

Unsigned letter from James H. Hager, Business Administrator, to Ms. Margretta Fairweather dated 11/15/01, with attached Early Childhood Plan Addendum

Letter from Tonia L. Davis to Ms. Kathryn Forman, Early Childhood Contact, dated 11/20/01

Memorandum from Kathy Forman to Tonia Davis dated 11/25/01

Memorandum from Kathy Forman to Tonia Davis dated 12/4/01

Memorandum from Tonia Davis to Kathryn Forman dated 12/4/01

Memorandum from Kathy Forman to Tonia Davis dated 12/13/01

Revised 12/11/01 Early Childhood Plan

FOR THE RESPONDENT:

Letter from Peter E. Genovese, III to Mr. Mark Cowell dated 2/5/02 with enclosed Early Childhood Budget

Letter from Ellen Frede, Ph.D., and Richard Rosenberg to Mark Cowell dated 2/22/02

Unsigned letter from Ellen Frede, Ph.D., and Richard Rosenberg to Mark Cowell dated 2/26/02

OAL DKT. NO. EDU 00678-02
AGENCY DKT. NO. 43-2/02

BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review of the record, the Commissioner concurs with the ALJ that nothing in statute or the Court's rulings in *Abbott* precludes the Department from requiring submission of separate operational plans for preschool and kindergarten programs, or from having the latter incorporated into, and reviewed as part of, an "Abbott" district's school-based plans. In so holding, the Commissioner expressly notes that such bifurcation has no effect on a district's entitlement to Early Childhood Program Aid (ECPA), does not suggest that ECPA funds may be used for purposes other than those specified in statute, does not relieve a district from the requirement to provide a suitable kindergarten program as required by law, and does not preclude a district from obtaining, through demonstration of need, such additional funding as may be necessary to implement approved program elements. Thus, there is nothing in the Department's action that would compromise provision of appropriate kindergarten programs to "Abbott" students as envisioned by the court, consistent with the spirit and intent of operative statute and rule.

Accordingly, the Initial Decision is affirmed for the reasons expressed herein, and the parties are directed to effectuate such communications and review as may be necessary to ensure that an adequate kindergarten program will be provided by the Pemberton School District for the 2002-2003 school year.[1]

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: April 15, 2002

Date of Mailing: April 16, 2002

[1] With respect to the ALJ's recommendation that the Department's procedures and rules be reviewed in order to avert future difficulties of the type giving rise to this appeal, the Commissioner notes that the Department is, in effect, already engaging in such review through the critical, comprehensive examination of "Abbott" implementation recently initiated by the State.

[2] Pursuant to *P.L.* 2001, *c.* 130, "Abbott" determinations are final agency actions appealable directly to the Appellate Division at the New Jersey Superior Court.

164-02

EDU #8085-99
C # 164-02L
SB # 21-02

PATRICIA HABERTHUR,

PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF EATONTOWN, MONMOUTH COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, April 15, 2002

For the Petitioner-Respondent, Weissman & Mintz (Steven P. Weissman, Esq., of Counsel)

For the Respondent-Appellant, Lane J. Biviano, Esq.

Patricia Haberthur (hereinafter "petitioner") filed a petition of appeal with the Commissioner of Education alleging that the Board of Education of the Borough of Eatontown (hereinafter "Board") had improperly terminated her employment as the district's school business administrator and board secretary when it abolished her position in May 1999. The Board filed a motion for summary decision, arguing that this matter was primarily contractual and, as a result, that the Commissioner did not have jurisdiction over the petitioner's claims.

On March 26, 2002, an Administrative Law Judge ("ALJ"), observing that the petitioner's claim was a combination of contract and school law dealing with a reduction

in force, concluded that the matter was within the Commissioner's jurisdiction. On April 15, 2002, the Commissioner granted the Board's request for interlocutory review of the ALJ's determination. Upon consideration of the papers filed, the Commissioner agreed with the ALJ that he had jurisdiction over this matter and that summary disposition was not appropriate.

On April 22, 2002, the Board filed a motion with the State Board of Education for leave to appeal the interlocutory decision of the Commissioner.

We grant the Board's motion for leave to appeal, and, after careful review of the papers filed on the motion, we affirm the decision of the Commissioner.

We stress in that regard that the petitioner contends, inter alia, that the Board had improperly terminated her employment in May 1999 in violation of N.J.S.A. 18A:17-1, which provides that:

> No secretary, assistant secretary, school business administrator or business manager of a board of education of any school district shall, during the term for which he was appointed, be dismissed or reduced in compensation, except for neglect, misbehavior or other offense unless it is otherwise provided in his contract of employment.

N.J.S.A. 18A:6-9 provides the Commissioner with jurisdiction to hear and determine all controversies and disputes arising under the school laws. Since the petitioner, who had been the district's school business administrator and board secretary, claims that she was improperly terminated in violation of the school laws prior to the expiration of her employment contract, we fully agree with the Commissioner that he has jurisdiction over her claim. We also concur that the Commissioner has incidental jurisdiction over the petitioner's other claims.

Accordingly, we affirm the Commissioner's decision to deny the Board's motion for summary decision.[1]

June 5, 2002

Date of mailing JUN 07 2002

[1] We note that we have accepted a brief from the Board dated May 11, 2002, which was filed in response to the petitioner's brief in opposition to the instant motion, and that we have considered that brief in reviewing this matter. See N.J.A.C. 6A:4-2.3; 6A:4-1.18.

165-02

165-02

Y.A.L.E. SCHOOL, WILLIAMSTOWN CAMPUS, INC., AND Y.A.L.E. SCHOOL, CHERRY HILL CAMPUS, INC.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners, approved private schools for disabled pupils, contested the Department's determination, pursuant to *N.J.A.C.* 6:20-4.4(a)45(i), that they could not use straight line depreciation on a stepped-up basis to calculate rental costs for tuition rate purposes because such depreciation does not constitute an actual cost.

The ALJ determined that straight line depreciation is permissible for use in the calculation at issue, because the operative rules do not preclude it and it is allowable under Federal Tax Law. Consequently, petitioners are not barred from relying on a stepped-up basis to calculate their actual allocated costs of ownership. The ALJ ordered that petitioners be permitted to include the disputed calculation of rental costs in their tuition rates.

The Commissioner adopted the findings and determination in the Initial Decision as his own.

April 15, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. EDU 6839-00 &
EDU 6840-00
AGENCY DKT. NOS. 230-6/00
& 231-6/00

Y.A.L.E. SCHOOL, WILLIAMSTON CAMPUS INC., AND Y.A.L.E. SCHOOL, CHERRY HILL CAMPUS, INC.,

Petitioners,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,

Respondent.

John R. Armstrong, Esq., for petitioners (Cooper, Perski, April, Niedelman, Wagenheim and Levenson, attorneys)

Kathleen Asher, Deputy Attorney General, for respondent (John J. Farmer, Jr., Attorney General of New Jersey, attorney)

Record Closed: November 27, 2001 Decided: January 11, 2002

BEFORE **JOSEPH LAVERY,** ALJ:

STATEMENT OF THE CASE

Petitioners and respondent bring a motion and a cross-motion for summary decision on the following question: Whether respondent, Department of Education, may determine that petitioners could not include in its tuition rate a calculation of rental costs, including an amount attributable to its lessor's Section 754 depreciation, and all other lessor charges permitted under the rule.[1]

Petitioners, Y.A.L.E. School (Williamstown Campus, Inc.) and **Y.A.L.E. School (Cherry Hill Campus, Inc.)** maintain that they are entitled to include the foregoing as reimbursable costs.

Respondent, Department of Education (DOE), replies that they may not.

Today's Initial Decision is in favor of petitioners.

PROCEDURAL HISTORY

This matter was declared a contested case by the agency head and filed in the Office of Administrative Law on September 22, 2000. It was calendared for a telephone conference on February 22, 2001, adjourned for cause, and convened on March 9, 2001, on which date a prehearing order issued. Among other things, that order consolidated the present cases. Plenary hearing was scheduled for March 30, 2001, but adjourned for cause, and was rescheduled for April 25 and 26, 2001. The case was adjourned again to permit motions for summary decision. A telephone conference convened on July 10, 2001, and the matter was scheduled for a telephone oral argument on October 24, 2001, and November 7, 2001, but adjourned in advance for cause and was rescheduled and heard on November 27, 2001. On that date, the record closed.

[1] See, prehearing order dated March 9, 2001

ANALYSIS OF THE RECORD

Background:

The parties agreed on the following facts through stipulation, last signed on April 24, 2001. They are repeated *verbatim* below, for the convenience of the record.

1. Williamstown Campus, Inc.

   a. On November 29, 1999, respondent issued a report of its fiscal review of Y.A.L.E. School, Williamstown Campus, Inc. for the period of July 1, 1998 through March 31, 1999.

   b. Based upon that report, respondent has disallowed reimbursement of tuition charges in the amount of $10,510 for the fiscal year ending June 10, 1999. In addition, respondent advised petitioner that it must restate its June 30, 1997, and June 30, 1998 financial statements to eliminate the depreciation of its building on a "stepped-up" basis from the calculation of the certified cost per pupil.

   c. The amount of $10,510 represents the calculation made by and on behalf of Y.A.L.E. School Williamstown Campus, Inc. of its payment to its lessor for depreciation of its school facility on a "stepped-up" basis pursuant to petitioner's interpretation of Section 754 of the Internal Revenue Code of 1986.

   d. Reimbursement in the amount of $10,510 was sought as part of rental costs under a lease with MED Enterprises, represented by petitioner to be a general partnership, and a "related party" to Y.A.L.E. School, Williamstown Campus, Inc., as that term is used in *N.J.A.C.* 6:20-4.4(a)45i.

2. Cherry Hill Campus

a. On January 4, 2000, respondent issued a report of its financial review of Y.A.L.E. School, Inc., Cherry Hill Campus for the period of July 1, 1998 through March 31, 1999.

b. Based upon that report, respondent has disallowed reimbursement of tuition charges in the amount of $17,474.57 for the fiscal year ending June 30, 1999. In addition, respondent advised petitioner that it must restate its June 30, 1997 and June 30, 1998 financial statements to eliminate the depreciation of its building on a "stepped-up" basis from the calculation of the certified cost per pupil.

c. The amount of $18,474.57 represents the calculation made by and on behalf of Y.A.L.E. School, Inc., Cherry Hill Campus of its payments to its lessor for depreciation of its school facility on a "stepped-up" basis pursuant to petitioner's interpretation of Section 754 of the Internal Revenue Code of 1986.

d. Reimbursement in the amount of $18,474.57 was sought as part of rental costs under a lease with Persar Associates, represented by petitioner to be a general partnership, and a "related party" to Y.A.L.E. School, Inc., Cherry Hill Campus, as that term is used in *N.J.A.C.* 6:20-4.4(a)45i.

In addition to the stipulations, the following material facts are not seriously in contention:

Both Williamstown Campus and Cherry Hill Campus are privately operated schools for disabled pupils, housed under a lease arrangement from companies with which they share a common ownership. Petitioners receive these pupils from sending public school districts.

Arguments of the Parties

Petitioners' argument:

Petitioners maintain that respondent's position is erroneous in disallowing for tuition reimbursement that portion of rent representing the lessor's depreciation of school buildings on a "stepped-up" basis under Section 754 of the Internal Revenue Code, even though it relies on a section of the New Jersey Administrative Code, *N.J.A.C.* 6AA:23-4.5(a)45i. Petitioners maintain that there are three reasons to disregard the respondent's Department's position. *First*, the rent payments here disputed have not been disallowed by the regulation. *Second*, the DOE's position is arbitrary and capricious, because of the anomalous result that a higher rent from a non-related lessor could be permitted, still using depreciation on a stepped-up basis. *Third*, the DOE's position violates constitutional standards.

1. As to the first reason, petitioners contend more specifically that the regulation relied on by respondent DOE is silent as to the treatment of the presently-disputed depreciation. The Federal Internal Revenue Code (IRC) expressly permits it. The determinant legislative history, in petitioners' view, is that, after discarding other language, the State Board of Education adopted a rule which would allow depreciation of rent to a lessor if that depreciation under Federal tax law, by definition, was an allowable cost. Here, respondent DOE wrongly interprets its own rule. DOE does not make depreciation on a stepped-up basis a non-allowable cost, notwithstanding that the State Board rejected that very reading in earlier versions of the rule.

2. Addressing the second reason that DOE acts in error, in their view, petitioners argue that the regulation itself is arbitrary and capricious, and produces an absurd result when rent paid to a related-party lessor is below fair market rates. If this construction of the rule were held appropriate, it's impact would be absurd, allowing a private school to lease facilities from a non-related party at above-rental market rates and yet, if the lease were from a related party, disallowing the very same arrangement at a lower rate. Consequently, this rule cannot be enforced. It is arbitrary and capricious.

Legislative history shows that the regulation was designed to prevent activity of "straw" corporations, used solely by private schools to disguise diversion of non-allowable cost. However, petitioners insist, DOE analysis unlawfully fails to consider that rental charges which fall well below fair market value often do not exceed actual costs, as was noted in the comment to the proposed rule. DOE did not respond to the situation of charges falling below fair market costs, petitioners stress. The result is an absurd interpretation of the rule in question. Since a related-party lessor could charge less than if the facility were rented on an open market, and still be disallowed under the rule, the State Board's rule is illogical, and summary decision should be awarded petitioners.

3. As to reason three above, petitioners argue that there has been a denial of equal protection. The State Board has devised an impermissible classification separating (a) private schools for the disabled which lease facilities from related parties, as against (b) those which lease facilities from unrelated parties. This distinction has no connection to the legitimate objective of the rule in dispute, petitioners believe. It is true, petitioners concede, that an administrative agency, such as DOE, may decide whether there has been application by the agency of a rational standard, and it is true that a distinction made by the agency is presumed valid. Nonetheless, it is possible for this tribunal and the agency head to review and evaluate the classification created by these administrative distinctions, and to determine whether they amount to discrimination violating the equal protection clause, because of the absence of a rational basis. That review, in petitioners' opinion, would show that the *averred* intent of the rule to rationalize tuition reimbursement has not been achieved.

Respondent's DOE argument:

In reply to the arguments of petitioners, DOE states first that "stepped-up" depreciation costs are not allowable under controlling rules. Relying on *N.J.A.C.* 6:20-4.4(a)45i., the respondent argues that MED Enterprises and Persar Associates are related parties as anticipated by the foregoing regulation. Petitioners, as receiving private schools for the sending school district are entitled to tuition payments from the sending districts pursuant to *N.J.A.C.* 6A:14-7.8.

Under the previously cited regulation, *N.J.A.C.* 6:20-4.4(a)45i, and throughout subsection 4, the implementing word is "costs." The words "actual cost per pupil," "actual liable cost," "direct cost," and "indirect cost" are clearly defined, respondent argues. Petitioners' use of "stepped-up" depreciation, although permitted under Section 754 of the Internal Revenue Code, is in excess of the costs permitted under the New Jersey Administrative Code. The IRC does not dictate costs for the education of disabled students in New Jersey. In contrast, the department, through its regulations, does. Conversely, the State rule in no way interferes with the use of Section 754 of the Internal Revenue Code, respondent argues.

As to petitioners' further argument that its equal protection rights have been violated, DOE replies that this claim is inaccurate. In a similar case, DOE states, *Penta Associations II and Coastal Learning Center, Inc. v. State of New Jersey, Department of Education, and the Commissioner of Education,* A-3631-89T1 July 8, 1991), the Appellate Division upheld the State Board of Education and the administrative law judge and the Commissioner of Education, disposing of that issue. The court ruled there that, where there was no actual taking of petitioners' property, limitation on the allowable reimbursement was permissible.

Here, respondent emphasizes, there is no limit to the amount of money related parties may receive in rent. The rule only limits the amount of *depreciation* to be charged to sending school districts. Petitioners are not limited in the costs of reimbursement, but solely in the amount of depreciation which they may recoup from the sending district. Thus, the regulation, neither in essence nor in application is arbitrary or irrational, respondent contends.

In reply to petitioners' brief, respondent DOE further points out that, notwithstanding petitioners' assertion, the regulation is *not* silent as to costs that should be passed on to the school district. It clearly sets these as the costs of ownership incurred by the owner of the property, plus a 2.5% return. IRC depreciation does not by law alter this rule. The legislative intent of the State rule is to protect the educational monies allocated for disabled children, a rational and legitimate purpose. The legislative history cited by petitioners, DOE declares, understandably did not specifically rule the "stepped-up" depreciation to be unacceptable. Such a hyper-specific

approach to listing all situations where costs should be allowed would be illogical and impractical. The absence of such reference cannot be reasonably read to infer approval of its use.

Further, *N.J.A.C.* 6A:23-45(a)(14) does permit fixed assets to be capitalized and to be depreciated using straight-line method during useful life consistent with current Federal tax law. However, it relates only to those assets held by the private school. Here, the relationship is lessor/lesee.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact:

The material facts are not in dispute, and this matter will go by summary decision for the reasons outlined below.

Conclusions of Law

Ripeness for Summary Decision:

Since there is no dispute of material fact, this dispute is ripe for summary decision pursuant to *N.J.A.C.* 1:1-12.5. (b). That rule states:

> The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.

> [*N.J.A.C.* 1:1-12.5; *See also, Judson v. Peoples Bank and Trust Co. of Westfield*, 17 *N.J.* 67, 73-75 (1954)]

Additionally, the facts must be considered in the light most favorable to the opposing party, *Boyer v. Anchor Disposal*, 135 *N.J.* 86 (1994).

Moreover, under the most recent guidelines delivered by our New Jersey Supreme Court, summary judgment is encouraged when the proper circumstances present themselves. *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520, 541 (1995). The court there elaborated on its intent:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby, supra*, 477 *U.S.* at 249, 106 *S.Ct.* at 2511, 91 *L.Ed.2d* at 212. Credibility determinations will continue to be made by a jury and not the judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. *Liberty Lobby, supra*, 477 *U.S.* at 250, 106 *S.Ct.* at 2511, 91 *L.Ed.2d* at 213. The import of our holding is that when the evidence " is so one-sided that one party must prevail as a matter of law," *Liberty Lobby, supra,* 477 *U.S.* at 252, 106 *S.Ct.* at 2512, 91 *L.Ed. 2d* at 214, the trial court should not hesitate to grant summary judgment.
> [*Id.* at 540]

Applying the law to the facts:

The history of the rules here in issue is instructive. In 1986, the State Board of Education (State Board) proposed on June 16 an amendment to *N.J.A.C.* 6:20-4.4, 18 *N.J.R.* 2337. This amendment was intended, the State Board said, to remedy a harm it found in the rise of

corporations commonly owned by private schools receiving handicapped students from public school districts. In its statement of purpose, the State Board said:

> The related corporations collect rentals from the private schools for use of the handicapped for the fixed assets. Such rentals can exceed the cost of ownership that would be allowable had title to the fixed assets vested in the private school. This procedure also allows the related corporation to sell the fixed assets without reimbursing the program for tuition funds expended for the fixed assets. Such transactions between related parties are entered at less than arms length.
>
> It appears that the only purpose or activity of these corporations is renting buildings and equipment to the related private schools for the handicapped. Such corporations give the appearance of being straw corporations used solely to disguise activities which would otherwise be non-allowable under *N.J.A.C.* 6:20-4.4, to divert funds intended for the education of the handicapped pupils for other uses and to circumvent the surcharge and working capital restrictions contained in *N.J.A.C.* 6:20-4.5 and 4.6. [*Ibid.*]

The regulation was adopted thereafter and that regulation stated:[2]

> N.J.A.C. 6:20-4.4(a) Non-allowable costs
>
> (a) A cost which is not allowable in the calculation of the certified actual cost per pupil includes the following:
>
> . . .
>
> 45. *Costs related to transactions between related parties* in which one party to the transaction is able to control or substantially influence the actions of the other. *Such transactions are defined by the relationship of the parties* and include, but are not limited to, those between divisions of an institution: institutions or organizations under common control through common officers, directors, or members; and an institution and a director, trustee, officer, or key employee of the institution or his or her immediate family either directly or through corporations, trusts, or similar arrangements in which they hold a controlling interest. Such costs shall include, but not be limited to:
>
> i. Rental costs for buildings and equipment *in excess* of the *actual allocated costs* of ownership (such as straight line depreciation, mortgage

[2] When first adopted this regulation was codified at *N.J.A.C.* 6:20-4.4(a)37(i), 18 *N.J.R.* 1797. It was later readopted and codified at *N.J.A.C.* 6:20-4.4(a)(39), 19 *N.J.R.* 751, 754. The regulation *N.J.A.C.* 6:20-4.4(a)(45) was adopted on December 17, 1990, 22 *N.J.R.* 3736, 3739.

> interest, real estate taxes, property insurance and maintenance costs) incurred by the related property owner including a 2.5 percent return calculated on the actual costs of ownership incurred by the property owner, prepared in the format supplied by the Commissioner, signed by the property owner and notarized.
> [Emphasis added]

To glean the agency's legislative intent, it must first be considered that, under this rule, a private school for the handicapped may not include in its tuition rate anything "in excess of the actual allocated costs." Such costs *not* in excess, and therefore acceptable, would include "straight-line depreciation" as well as "mortgage interest, real estate taxes, property insurance, and maintenance costs," all of which are listed parenthetically in subsection i, above. Also to be included as acceptable actual allocated costs are a 2.5% return calculated on the "actual costs of ownership incurred by the related party." It is noteworthy that the rule does not prohibit use of any specific type of straight-line depreciation, in particular the type employing a "stepped-up" basis.

Next, it must be remembered that the agency itself has declared that the only acceptable allocated cost is that calculated under the estimated straightline method. This may be deduced from the wording of *N.J.A.C.* 6:20-4.4(a)(15)(ii):

> N.J.A.C. 6:20-4.4(a) Non-allowable costs
> (a) A cost which is not allowable in the calculation of the certified actual cost per pupil includes the following:
> . . .
> (15) Depreciation unacceptable under N.J.A.C. 6:20-4.3(a)3 and depreciation on:
> . . .
> ii. That which is *not* based on estimated *straightline method*;
> . . .
> [Emphasis added]

With straightline the established method, and since "stepped-up" basis is not listed among those methods of straightline depreciation unacceptable under *N.J.A.C.* 6:20-4.3(a)3, it may be used by petitioners as a method of depreciation. The latter rule itself states:

6:20-4.3 Bookkeeping and accounting

(a) An approved private school for the handicapped shall maintain accounting and bookkeeping systems as prescribed in a publication issued by the Department of Education in accordance with the following standards:

. . .

(3) Fixed asset expenditures of $1,000 or more shall be capitalized and depreciated using the *straight line method* and useful life consistent with current *Federal tax law* except for real property which may be depreciated using a useful life of 15 years or the term of the original mortgage, whichever is greater.

. . .

[Emphasis added]

Finally, because of the foregoing language, it is clear that the methods of depreciation intended by these rules are those prevailing in the Internal Revenue Code. Use of the federal tax law requires adherence to federal income tax concepts. *Smith v. Dir., Div. of Taxation*, 108 *N.J.* 19, 33 (1987). This would be no less true when the reference is found in the New Jersey Administrative Code, which must be read according to the same rules of statutory construction. *Medford Convalescent and Nursing Ctr. v. Division of Medical Assistance and Health Servs.*, 218 *N.J. Super.* 1,5 (App. Div. 1985). Therefore, since the federal code allows the use of different bases, including straight-line depreciation on a "stepped-up basis," 26 *U.S.C.A.* Section 754, that concept must be honored here, and DOE may not bar petitioners from its use without specifically doing so through rule-making. *Metromedia v. Director, Division of Taxation*, 97 *N.J.* 313 (1984).

It is not in contention that there was legitimately depreciable change. The dispute is over whether a "stepped-up" basis could be relied on to define it. Since it is also agreed that this

straight-line depreciation basis will vary, so will the "cost." This critical fact effectively is at odds with DOE's apparent major argument that "cost" can only be depicted with a fixed figure.

The *per se* constitutionality or validity of rules:

Petitioners' challenge to the constitutionality *per se* of the rules will not be decided here. Determination of a New Jersey Administrative Code rule's constitutionality or, for that matter, its invalidity due to inherent arbitrariness or capriciousness, is foreclosed to an administrative law judge's recommendation or agency head's decision. While an agency or an ALJ is authorized to decide cases based on constitutional grounds, it is unlikely that they should pass on the constitutionality of regulations. *Paterson Redevelopment v. Schulman*, 78 *N.J.* 378 (1979). Regulations are subject to the same rules of construction as a statute. *Medford Convalescent and Nursing Ctr. v. Division of Medical Assistance and Health Servs, supra.* Challenges to statutes or rules' *per se* validity for constitutional or other reasons is within the exclusive jurisdiction of the Appellate Division of the New Jersey Superior Court. R. 2:2-3(a)2, when brought from an administrative agency.

The Constitutionality of rules *as applied*:

Those arguments grounded on constitutionality "as applied," need not be addressed. Administrative agencies do have power to rule on constitutional issues before them when germane to the proceedings. *Hunterdon Central High School Bd. Of ED. v. Hunterdon Central H.S. Teachers' Assoc.*, 174 *N.J. Super.* 468, 475 (App. Div. 1980). Nonetheless, the agencies should exercise that power only where relevant and necessary to the resolution of a question concededly within their jurisdiction. *Christian Bros. Inst. V. No. N.J. Interschol. League*, 86 *N.J.* 409, 416 (1981). Here, with the case resolved by direct application of DOE's own controlling rules, as reasoned above, it is unnecessary to reach the constitutional claims. However, in any event, as with the foregoing arguments directed to *per se* constitutionality of the rules, these issues and petitioners' contentions are now preserved on the record for appeal.

Summary:

The determining factor is that of the rule here in focus, *N.J.A.C.* 6:20-4.4(a)(45)i, which confirms that "straight-line" depreciation is permissible for use in the calculation of tuition, without in any way placing parameters on which of the bases available under that system could be used. Straight-line depreciation must be undertaken in a manner consistent with Federal Tax Law, which must be honored. The latter allows use of a "stepped-up" basis. Consequently, petitioners are not barred from relying on that basis to calculate their actual allocated costs. Finally, the arguments of *per se* unconstitutionality cannot be resolved here, and the contentions concerning "as-applied" constitutionality need not be.

For all these reasons, the State's position is not persuasive, and the relief sought by petitioners should be granted.

ORDER

I **ORDER,** therefore, that petitioners be permitted to include in their tuition rate a calculation of rental costs, including an amount attributable to its lessor's Section 754 depreciation, and all other lessor charges permitted under the rule.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 11, 2002
DATE

Joseph Lavery ALJ
JOSEPH LAVERY, ALJ

Receipt Acknowledged:

1/14/02
DATE

Deborah Gustanski (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 16 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NOS. EDU 6839-00 AND EDU 6840-00
AGENCY DKT. NOS. 230-6/00 AND 231-6/00

Y.A.L.E. SCHOOL, WILLIAMSTOWN CAMPUS, INC., AND Y.A.L.E. SCHOOL, CHERRY HILL CAMPUS, INC.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,	:	DECISION
RESPONDENT.	:	

The record and Initial Decision issued by the Office of Administrative Law in this consolidated matter have been reviewed. Respondent's exceptions and petitioners' reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

Respondent's first exception urges that the Initial Decision erroneously held that the legislative intent of *N.J.A.C.* 6:20-4.3(a)3[1] was to allow any type of "straight-line depreciation" not specifically excluded in the rule. As to this, respondent contends that depreciation is the method of allocating the cost of a long-lived asset over the useful life of the asset; while straight line depreciation is the allocation of the cost of the asset over its useful life in equal amounts each year. It further maintains that the basis of the asset to be depreciated using the straight line depreciation method is defined in *N.J.A.C.* 6:20-4.3(a)3, which reads:

> Fixed asset expenditures of $1,000 or more shall be capitalized and depreciated using the straight line method and useful life consistent with current Federal tax law, except for real property which may be depreciated using a useful life of 15 years or the term of the original mortgage, whichever is greater.

[1] The Commissioner notes for the record that this provision was recodified as *N.J.A.C.* 6A:23-4.4(a)3.

Moreover, respondent urges that the code specifically states that expenditure is the basis for the asset and then refers to the current Federal tax law to determine the useful life of the asset, which leads respondent to assert that:

> [w]hen the straight-line depreciation method is applied to the basis of the asset, the result is the current year's cost for the use of that asset. The amount calculated by the petitioners as straight-line depreciation was not based solely on "cost." Rather, the depreciation was calculated by petitioners using a basis allowable under Section 754 of the Internal Revenue Code [I.R.C.]. The code section allows an amount to be added to the asset being depreciated, even though no expenditure or cost has been incurred for the additional amount "stepped-up basis." (Respondent's Exceptions at 3)

Of this, respondent argues:

> The overriding purpose of the rule is to limit the tuition cost passed on to the district to that of "cost." There is nothing in the code which indicates that anything other than "cost" should be used in the determination of tuition charged to sending school districts. For these reasons, the portion of the straight-line depreciation applicable to the increased cost of ownership should be disallowed as this amount is clearly above and beyond the actual cost of ownership of the respective school buildings.
>
> Moreover, while *N.J.A.C.* 6:20-4.4(a)15 does say that depreciation "that is not based on estimated straight-line method" is unacceptable, this should not then be translated to mean that straight-line depreciation not based on actual cost of ownership is therefore permitted. (*Id.* at 3-4)

Respondent's second exception disagrees with the Administrative Law Judge's (ALJ) finding that because stepped-up depreciation is permitted pursuant to the I.R.C., it is therefore a valid cost to pass on to local school districts. With respect to this, respondent urges that, notwithstanding that the regulation requires action "not inconsistent with the Internal Revenue Code," it does not follow that straight line depreciation on a stepped-up basis is acceptable under the New Jersey Administrative Code. (*Id.* at 4) Additionally, respondent avers

that: (1) the I.R.C. does not dictate the costs of education which may be passed from private schools for the disabled to local sending districts in New Jersey and (2) approval as a private school requires that the school operate pursuant to New Jersey statute and regulations. Furthermore, according to respondent, nowhere in the administrative code is there an indication that any basis other than "cost" is permissible to determine tuition charged to the sending districts, and straight line depreciation using a stepped-up basis, as opposed to that done on a cost-basis, is not a cost of ownership of the building. (*Ibid.*)

Respondent next argues that the ALJ erred in relying on the provisions of *N.J.A.C.* 6:20-4.3(a)3, "Bookkeeping and Accounting," which refer to the method for capitalizing and depreciating fixed assets and real property, urging, *inter alia,* that:

> Whether or not petitioners or their related lessors may utilize straight-line depreciation on a stepped-up basis for Federal income tax purposes is not within the scope of this [disputed] audit or the Office of Compliance. For that reason, it cannot follow that because the I.R.C. permits a certain type of action for Federal income tax purposes that said actions are automatically applicable to the Administrative Code unless specifically otherwise excluded.
>
> Finally, while respondent has contended that there are fixed rules for what can be considered an actual cost of ownership, it has not made the contention that there is a dollar limit to the amount of costs that may be passed on to the sending district. Respondent disagrees with [the ALJ's] holding that this fact is at odds with the calculation of said straight-line depreciation on a cost basis. (*Id.* at 5-6)

Petitioners' reply exceptions aver that the ALJ was absolutely correct that the straight line depreciation of real estate on a stepped-up basis is an allowable cost and is properly included in the calculation of the certified cost per pupil and, thus, in tuition reimbursement to which they are entitled. As to respondent's first exception, petitioners argue, *inter alia,* that respondent fails to understand that under Section 754 of the I.R.C., a stepped-up basis does, in

fact, reflect the actual cost to the property owner. More specifically, petitioners contend that respondent is simply incorrect when it claims that the stepped-up basis allows an amount to be added to the asset being depreciated, even though no additional expenditure or cost has been incurred. In support of this, petitioners cite to the ALJ's finding on pages 12-13 of the Initial Decision that "[i]t is not in contention that there was a legitimately depreciable change. The dispute is over whether a 'stepped-up' basis could be relied on to define it. Since it is also agreed that this straight-line depreciation basis will vary, so will the 'cost.' This critical fact effectively is at odds with [Department of Education's] DOE's apparent major argument that 'cost' can only be depicted with a fixed figure."

Petitioners next aver that, contrary to respondent's arguments set forth in its second exception, the ALJ did not hold that depreciation on a stepped-up basis is an allowable cost because it is allowable under the I.R.C. Rather, petitioners urge, the ALJ held that (1) stepped-up depreciation is a permissible, actual cost under the DOE regulations themselves and (2) a stepped-up basis could be the basis of a straight line depreciation and is a permissible cost as a matter of comity. Of this, petitioners argue:

> [The ALJ's] reasoning begins with the very principle that Respondent suggests he failed to understand - *i.e.*, that tuition may be calculated only on the basis of actual allocated costs and may not include anything in excess thereof. These costs include, pursuant to *N.J.A.C.* 6:20-4.4 (a)45i, mortgage interest, real estate taxes, property insurance, maintenance costs, and straight-line depreciation. (see Initial Decision, p. 11.) Having said that, [the ALJ] then recognized that the only acceptable depreciation was one calculated under the straight-line method. *Ibid.* As explained above, stepped-up depreciation is, by definition, an actual allocated cost to the property owner and is therefore permissible in the tuition calculation under the Administrative Code. This is all [the ALJ] needed to conclude. (Petitioners' Reply Exceptions at 4)

Upon careful review of the record in this matter, the Commissioner finds and determines that, given the wording of the operative regulation, *N.J.A.C.* 6:20-4.4(a)(45)i, the ALJ correctly concluded that petitioners are not barred from utilizing straight line depreciation on a "stepped-up" basis as a component of rental costs for tuition rate purposes. This determination is reached because, pursuant to the wording of the aforesaid regulation, straight line depreciation is not deemed an excess cost but rather *an actual allocated cost of ownership*. (emphasis added) As set forth in the Initial Decision, *N.J.A.C.* 6:20-4.4(a)(45)i states that non-allowable costs includes costs related to transactions between related parties which include "[r]ental costs for buildings and equipment *in excess* of the *actual allocated costs* of ownership (such as straight line depreciation, mortgage interest, real estate taxes, property insurance and maintenance costs)***." (emphasis in text) (Initial Decision at 10-11)

Further, as determined by the ALJ, the operative regulation does not place limitations on which of the calculating methodologies available under straight line depreciation could be used, so long as the straight line depreciation is taken in a manner consistent with Federal Tax Law. It is undisputed that the Internal Revenue Code permits the use of a "stepped-up" basis for straight line depreciation; consequently, as determined by the ALJ, there is no prohibition in the rules as written to the use of the "stepped-up" basis in determining actual allocated costs of ownership. Therefore, the Commissioner adopts the recommendation of the ALJ to grant summary decision to petitioners for the reasons set forth in the Initial Decision.

Accordingly, it is determined that petitioners be permitted to include in their tuition rate a calculation of rental costs, including the amount attributable to its lessor's Section

754 depreciation, and all other lessor charges permitted under the rule.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 4/15/02

Date of Mailing: 4/16/02

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

166-02

166-02

LINDA J. AVELLINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 17, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4881-99
AGENCY DKT. NO. 161-6/99

LINDA J. AVELLINO,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, SOMERSET COUNTY,
Respondent.

Kathleen A. Naprstek, Esq., for petitioner (Zazzali, Fagella & Nowak, attorneys)

James F. Schwerin, Esq., for respondent (Parker, McCay & Criscuolo, attorneys)

Record Closed: February 21, 2002 Decided: February 28, 2002

BEFORE KATHLEEN **M. DUNCAN**, ALJ:

This matter commenced in the Superior Court of New Jersey, Law Division, Somerset County, in December 1998. After the Law Division transferred the case to the Commissioner of Education, the matter was transmitted to the Office of Administrative Law on July 8, 1999, for determination as a contested case, pursuant to *N.J.S.A.* 52:14F-1 to –13. Thereafter, it was held in abeyance pending resolution of a related matter, *Linda J. Avellino v. New Jersey State Board of Examiners*, OAL DKT. NO. EDU 4974-99. That case was decided by the Commissioner on October 2, 2000, and thereafter by the State Board of Education on March 7, 2001. Respondent in the within matter then filed a motion for summary decision. Petitioner filed a reply in

opposition to the motion, and oral argument was conducted by telephone conference call on July 23, 2001. Thereafter, the parties entered into settlement negotiations. They have prepared a stipulation of settlement setting forth the terms of their agreement, which is attached hereto and made a part hereof as if set forth herein at length.

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Feb 28, 2002
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

3/4/02
DATE

Debbie Antanaitis/lm
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 4 2002
DATE

Jeff S. Mazur
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

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ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN, P.C.
One Riverfront Plaza
Newark, New Jersey 07102
(973) 623-1822
Attorneys for Petitioner

LINDA J. AVELLINO, Petitioner, v. BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, SOMERSET COUNTY, Respondent	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW Agency Ref. No. 161-6/99 OAL Dkt. No. EDU 4881-99 **STIPULATION OF SETTLEMENT**

This matter having been brought before the Commissioner of Education upon the above-captioned Petition of Appeal, Petitioner and Respondent hereby agree to amicably resolve the dispute between them, now pending before this court, subject to the terms and conditions set forth below:

1. For purposes of this agreement, Respondent Board of Education of the Borough of Bound Brook shall hereinafter be referred to as the Board, and Petitioner Linda J. Avellino shall hereinafter be referred to as the Petitioner.

2. On or about May 27, 1998, the parties entered into a written contract whereby the Board engaged the Petitioner to serve as a guidance counselor at the Bound Brook High School for the 1998-99 school year at a salary of $37,015.00 per annum, payable in

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A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

semi-monthly installments during the school year, along with medical and other related benefits.

3. Petitioner had entered upon the performance of her duties in such position for the 1998-99 school year when, on or about September 25, 1998, the Board notified her that she was being immediately discharged from her position. The Board, however, subsequently retained the Petitioner on a per diem basis until November 1, 1998, at which time Petitioner's employment with the Board was terminated completely.

4. This matter was initiated on behalf of Petitioner by the filing of a complaint in the Superior Court of New Jersey, Law Division, Somerset County. By order of the Honorable Helen E. Hoens, dated April 1, 1999, this matter was transferred to the Commissioner of Education.

5. The parties have determined to settle this matter for the payment by the Board to the Petitioner of the sums she alleges are due her for the sixty (60) day period of time commencing from the notice of termination given by the Board to the Petitioner on September 25, 1998.

6. Under the terms of her contract with the Board, the Petitioner was to be paid for the 1998-99 school year in twenty (20) semi-monthly installments in the gross amount of $1,850.75.

7. For the pay period from 9/16/98 through 9/30/98, the Board deducted the sum of $555.24 from the Petitioner's paycheck for 9/28/98, 9/29/98 and 9/30/98.

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8. For the pay period from 10/1/98 through 10/15/98, the Board deducted the sum of $740.32 from the Petitioner's paycheck for 10/1/98, 10/2/98, 10/5/98 and 10/6/98.

9. For the pay period from 11/1/98 through 11/15/98, the Board deducted the

sum of $370.16 from the Petitioner's paycheck for 11/12/98 and 11/13/98.

10. The Board did not issue the Petitioner a paycheck for the period from 11/16/98 through 11/25/98. The only working day in this pay period which falls beyond the sixty (60) day termination period, or beyond 11/25/98, is 11/30/98.

11. While this litigation was pending, the Board remitted payment to the Petitioner, on or about November 15, 2001, in the gross amount of $2,035.83, for the monies which Petitioner alleges she was owed for the period from 11/1/98 through 11/25/98.

12. Based upon the foregoing figures, the Petitioner alleges she is still owed the gross amount of $1,295.56, representing the $555.24 which had been deducted from her paycheck for 9/28/98, 9/29/98 and 9/30/98 and the $740.32 which had been deducted from her paycheck for 10/1/98, 10/2/98, 10/5/98 and 10/6/98.

13. The Board thus agrees to pay the Petitioner the gross amount of $1,295.56, subject to standard and ordinary deductions, which shall be deemed to constitute back pay. This payment shall be made to the Petitioner within twenty (20) days following the execution of this agreement.

14. The parties agree that the Petitioner shall pay the employee's share of any additional contributions to the Teachers' Pension & Annuity Fund for the period of September 25, 1998 through November 25, 1998, that the Board shall not be liable for the employee's share thereof, that the Petitioner shall not be liable for the employer's share thereof, that the State will contribute the employer's share of pension contributions if it agrees to do so, and that if the State does not contribute the employer's share of pension contributions, the Board shall contribute the employer's share of such contributions.

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15. The Petitioner shall withdraw the Petition of Appeal presently pending before the Office of Administrative Law and Commissioner of Education, under the following Docket Numbers: Agency Ref. No. 161-6/99, and EDUOR 4881-99.

16. This Settlement Agreement resolves all claims between the parties arising from the Board's termination of Petitioner's employment during the 1998-99 school year.

17. This Agreement contains all the terms of the parties' agreement and cannot be modified or changed unless all parties agree to do so in writing.

Linda J. Avellino — Dated: 2-6-02

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN, P.C.
Attorneys for Petitioner, Linda J. Avellino

By: Kathleen A. Naprstek, Esq. — Dated: 2/12/02

PARKER, McCAY & CRISCUOLO, P.A.
Attorneys for Respondent,
Board of Education of the Borough of Bound Brook

By: James F. Schwerin, Esq. — Dated: 2/14/02

OAL DKT. NO. EDU 4881-99
AGENCY DKT. NO. 161-6/99

LINDA J. AVELLINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/17/02

Date of Mailing: 4/17/02

167-02

167-02SEC

IN THE MATTER OF MICHELLE RUSSO,	:	
BOARD OF EDUCATION OF THE CITY OF	:	COMMISSIONER OF EDUCATION
HOBOKEN, HUDSON COUNTY.	:	DECISION
	:	

SYNOPSIS

This matter arose from a complaint alleging that respondent, member of the Hoboken Board, violated *N.J.S.A.* 18A:12-24(b) of the School Ethics Act (Act) when, as a member of that Board, she acquired mailing labels containing student information, that were later used for the political campaign of her husband, a former mayor.

The School Ethics Commission (Commission) found the material facts of this case to be undisputed regarding the alleged conduct and concluded that petitioner did violate the Act. The Commission recommended penalty of censure.

Initially, the Commissioner emphasized that the determination of the Commission as to violation of the Act is *not reviewable by the Commissioner*. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed following a finding of violation by the Commission. Upon independent review of the record, the Commissioner found and determined that the Commission's recommended penalty of censure was appropriate.

April 18, 2002

IN THE MATTER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	:	
	:	**Docket No.: C18-01**
MICHELE RUSSO,	:	
HOBOKEN BOARD OF EDUCATION	:	**DECISION ON VIOLATION**
HUDSON COUNTY	:	

PROCEDURAL HISTORY

The above-captioned complaint was filed on May 17, 2001. It alleged that that Hoboken Board of Education member, Michele Russo, violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. when she allegedly appropriated school district mailing labels, containing student names, identification numbers and homeroom numbers in order to mail campaign literature. Complainant also alleged that Ms. Russo misused public funds and confidential student information in violation of the Act.

At its meeting of October 23, 2001, the Commission found probable cause to credit the allegation that Michele Russo violated N.J.S.A. 18A:12-24(b) of the Act when she allegedly appropriated school district mailing labels, containing student names, identification numbers and homeroom numbers in order to mail campaign literature. The Complainant did not allege a violation of any specific provision of the School Ethics Act. However the Commission considered whether the conduct alleged was in violation of N.J.S.A. 18A:12-24(b).

The Commission found the material facts of the case to be undisputed regarding the conduct on which it found probable cause and invited Ms. Russo to submit a written statement within 30 days setting forth why she should not be found in violation of N.J.S.A. 18A:12-24(b) of the Act. On December 28, 2001 Ms. Russo responded to the Commissions decision and supplemented her response in correspondence dated January 10, 2002. In her response, Ms. Russo asserted that she disagreed with the Commission's decision finding probable cause that she had violated the Act and indicated that she did not inure a benefit from her position as a board member, warranting the dismissal of the charges against her or at most the finding of a deminimus violation.

The Commission now finds that Ms. Russo violated N.J.S.A. 18A:12-24(b) of the School Ethics Act by appropriating school district mailing labels, containing student names,

identification numbers and homeroom numbers in order to mail campaign literature. The Commission recommends that the Commissioner censure Ms. Russo for this violation.

FINDING OF FACT

Based on the pleadings, the documents submitted and the testimony presented, the Commission believes that the following facts are undisputed.

At all times relevant to the allegations in this complaint, Michele Russo was a member of the Hoboken Board of Education. Also at all times relevant to the allegations in this complaint, Ms. Russo was the wife of former mayor Anthony Russo. During the week of April 23, 2001, Ms. Russo contacted the Superintendent's office and requested a mailing list with student names and addresses. Staff members and community groups routinely requested student information from the Superintendent's office. Carmella Mezzina, secretary to the Superintendent, provided Ms. Russo with a computer printout of student names and addresses. Ms. Russo subsequently contacted Ms. Mezzina and indicated that she needed mailing labels, not a list. The labels that were provided for Ms. Russo contained additional information including student identification numbers and homeroom numbers. The labels were later affixed to postcards containing campaign literature in support of former mayor Anthony Russo's reelection and mailed.

CONCLUSION OF LAW

The Commission found probable cause that Ms. Russo violated N.J.S.A. 18A:12-24(b), which provides::

> No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others.

The Commission concludes that if a Board member uses her position to acquire student information for a political campaign, she could be considered to be using her position to secure unwarranted privileges or advantages for herself or others. In the present case the facts indicate that Ms. Russo used her position to acquire the labels and the labels were used for her husband's mayoral political campaign.

The Commission finds probable cause that she used her official Board status to obtain the labels which facilitated their appropriation for political purposes. Thus, Ms. Russo was ultimately responsible for the misuse of the aforementioned student labels.

For the foregoing reasons, the Commission concludes that respondent Michele Russo used her official position to secure unwarranted privileges, advantages or employment for herself and others in violation of N.J.S.A. 18A:12-24(b), when she used her official position as a board member to acquire mailing labels containing student information, that were later used for the political campaign of her husband, former mayor Anthony Russo.

PENALTY

The Commission finds that the appropriate penalty for Ms. Russo's violation in this case is a censure. A censure is a formal public resolution read into the record of the School Ethics Commission and the school official's local board of education to rebuke a school official who has been determined by the Commission to have violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq. N.J.A.C. 6A:28-1.2. This penalty requires a public statement of her violation at his local school board, which the public can take into account in the next election.

This decision, having been adopted by the School Ethics Commission, shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction only, pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, the respondent may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Robert W. Bender

Robert W. Bender
Acting Chairperson

Resolution Adopting Decision – C18-01

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof and the testimony of the parties; and

Whereas, the Commission found probable cause to credit the allegations that Ms. Russo violated N.J.S.A. 18A:12-24(b) of the School Ethics Act; and

Whereas, the Commission reviewed the written submissions of Ms. Russo in response to the finding of probable cause; and

Whereas, the Commission now finds that respondent violated the School Ethics Act and believes that a censure would be the appropriate penalty;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter finding Michele Russo in violation of the Act and recommends that the Commissioner of Education impose a penalty of censure.

Robert W. Bender, Acting Chairman

I hereby certify that the School
Ethics Commission adopted this decision
at its public meeting on February 26, 2002.

Jacqueline Richmond
Acting Executive Director

AGENCY DKT. NO. 55-3/02

IN THE MATTER OF MICHELLE RUSSO,	:	
BOARD OF EDUCATION OF THE CITY OF	:	COMMISSIONER OF EDUCATION
HOBOKEN, HUDSON COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission ("Commission"), including the recommended penalty of censure, have been reviewed.

This matter comes before the Commissioner to impose a sanction upon Respondent Michelle Russo, member of the Hoboken Board of Education, based upon findings of fact and conclusions of law by the Commission that she violated *N.J.S.A.* 18A:12-24(b) of the School Ethics Act when she used her official position as a board member to acquire mailing labels containing student information, that were later used for the political campaign of her husband, former mayor Anthony Russo.

Upon issuance of the decision of the Commission, respondent was provided 13 days from the mailing of such decision to file written comments on the recommended penalty for the Commissioner's consideration. No comments were filed.

Initially, it must be emphasized that pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is **not reviewable by the Commissioner** herein. Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed following a finding of a violation by the Commission.

Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that censure is the appropriate penalty in this matter for the reasons expressed in the Commission's decision. In so ruling, the Commissioner notes that, in recommending the penalty of censure, the Commission had the opportunity to fully investigate the facts presented and, thus, was in the optimum position to determine whether respondent violated the School Ethics Act, and to weigh the effects of aggravating and mitigating circumstances. Therefore, the Commission's recommended penalty in this matter will not be disturbed.

Accordingly, IT IS hereby ORDERED that Michelle Russo be censored as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/18/02

Date of Mailing: 4/18/02

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

168-02

C. P. and B. P., on behalf of minor child, L. P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BLACK HORSE PIKE REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY,	:	DECISION ON MOTION
	:	
RESPONDENT.	:	

April 18, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER EMERGENT

RELIEF

OAL DKT. NO. EDU 2158-02

AGENCY DKT. NO. 90-3/02

C.P. AND B.P. ON BEHALF
OF L.P.,

Petitioner,

v.

BOARD OF EDUCATION OF THE
BLACK HORSE PIKE REGIONAL
SCHOOL DISTRICT, CAMDEN
COUNTY,

Respondent.

Richard D. Madden, Esq., for petitioner

John D. Wade, Esq., for respondent

Record Closed: April 11, 2002 Decided: April 12, 2002

BEFORE **DOUGLAS H. HURD**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On March 28, 2002, Petitioners, C.P. and B.P., on behalf of their minor child, L.P., filed an application for emergent relief with the New Jersey Department of Education. Among other

relief, the application requested that Respondent, the Board of Education of the Black Horse Pike Regional School District, be enjoined from transferring L.P. to Highland High School.

Pursuant to N.J.A.C. 6A:3-1.6(c)(3), the Commissioner of Education transmitted the application to the Office of Administrative Law (OAL) for an immediate hearing on the motion. This matter was filed with OAL on April 3, 2002. The hearing was held on April 11, 2002, with oral argument being made on behalf of the parties by their respective counsel. Limited testimony was allowed.

FACTUAL DISCUSSION

Based on the briefs, certifications, exhibits, limited testimony and arguments by counsel, I find, preliminarily, the following to be the relevant facts.

In 1998, the Black Horse Pike Regional School District consisted of two high schools; namely, Triton High School and Highland High School. In 1998, L.P.'s brother was allowed to attend Triton High School by the School Superintendent, Gerald A. Killeen. L.P.'s brother was domiciled in the geographic area where he should have attended Highland High School, but was allowed to attend Triton High School because of his course selection. Because of certain psychological problems experienced by L.P.'s brother, L.P.'s parents requested that L.P. be allowed to also attend Triton to assist her brother. Superintendent Killeen approved this request on January 12, 1999, and allowed L.P. to attend Triton even though she was domiciled in the Highland area. L.P. started attending Triton as a freshman in September 1999. L.P.'s brother was one class grade ahead of L.P. and, accordingly, was a sophomore in September 1999.

Respondent notified L.P. on January 5, 2001, that as a result of the completion of a third high school in the district she would be placed in Highland starting September 2001. This was a district wide redistricting that caused the relocation of approximately 900 students. L.P. resided in the boundaries of the Highland High School district and, accordingly, was notified by Respondent that she had to attend Highland because of the redistricting from the newly constructed high school. L.P.'s brother was allowed to remain at Triton because of his unique situation.

L.P. and her parents contested Respondent's decision to transfer her to Highland. They claimed that the January 12, 1999, decision to allow L.P. to attend Triton constituted a waiver that bound Respondent to allow L.P. to attend Triton until graduation. They also expressed concerns to Respondent that L.P.'s father's occupation as a parole officer in the Highland area would jeopardize her safety at Highland. Moreover, L.P.'s father certified that he requested a transfer of duties to the Highland area knowing that his daughter was at Triton and, therefore, he would not endanger her well being at school. Finally, they contend that L.P. needed to stay at Triton to continue to assist her brother and, also, to prevent any psychological damage to her that would be caused by a transfer to Highland. These concerns were presented to Respondent on February 13, 2000.

By letter dated February 14, 2001, Respondent notified L.P. that the request to remain at Triton was denied and that she would be transferred to Highland in September 2001. L.P.'s parents hired an attorney to contest the decision. However, no formal appeal was ever filed.

In an effort to keep L.P. at Triton, in June 2001, L.P. and her mother attempted to establish residency in the Triton sending area. They signed a lease agreement with friends of theirs that had an extra room. On July 20, 2001, Respondent approved L.P.'s attendance at Triton based on the representations that L.P. would be living in the Triton sending area. Petitioners claim that they never represented to Superintendent Killeen that they would be living at this new address full-time.

L.P. and her mother resided at the new address, 14 Crestwood Avenue, Blackwood, NJ, approximately 3 to 4 nights per week. As a result of a complaint in December 2001, Superintendent Killeen hired an investigator to look into the status of this living arrangement, *i.e.*, where did L.P. and her mother really live? The investigator presented evidence to Respondent that L.P. and her mother did not reside at the 14 Crestwood Avenue address. Based on this investigation and a lack of evidence rebutting its findings, Respondent notified L.P. by letter dated March 21, 2002, that she would be transferred to Highland on April 8, 2002. Respondent subsequently moved the transfer date to April 15, 2002.

letter dated March 21, 2002, that she would be transferred to Highland on April 8, 2002. Respondent subsequently moved the transfer date to April 15, 2002.

At the OAL hearing, Petitioner admitted through counsel that L.P. and her mother were not domiciled at 14 Crestwood Avenue because they in fact did not have an intention to stay there for an indefinite period of time.

L.P. claims that a transfer would disrupt her education, emotional state, social environment and extracurricular activities, such as cheerleading. She testified that transferring midway through the semester would disrupt her courses. Specifically, she would have to discontinue one class and at least one other class would have a change of curriculum. Superintendent Killeen testified that the school would make the transition as accommodating as possible to L.P.

LEGAL ANALYSIS

This legal analysis will consist of both a procedural and substantive analysis of this matter.

A. Procedural Analysis

Respondent submits that the Petitioners' claim regarding the waiver issue and the safety issues are out of time because they were appealed beyond the 90-day time period provided in *N.J.A.C.* 6A:3-1.3(d)(1). The Board, by letter dated February 14, 2001, denied Petitioners' claim to keep L.P. at Triton due to the waiver and safety issues. Respondent contends that since we are now beyond 90 days from that decision that these claims should be dismissed as out of time. Petitioners', relying on *N.J.A.C.* 6A:3-1.16, claim that the rule should be relaxed in the interest of fairness and justice since they did not know about the 90-day rule at that time. Petitioners were represented by different counsel at that time.

I do not find that there is good cause to justify waiving the 90-day rule. Indeed, there is no duty on Respondent to notify Petitioners of the 90-day appeal period, especially when counsel represents them. The 90-day rule is intended to provide finality to local board decisions, and I see no reason here why that rule should be disregarded in this matter.

Respondent's decision on the waiver and safety issues is the decision that is being appealed in this emergent relief petition. In light of the fact that I find they are out of time on appealing this decision, I conclude that this application should be denied on procedural grounds. (Respondent's decision on the residency issue is moot since Petitioners admit they are not domiciled in the Triton district).

B. Substantive Analysis

The Petitioners must satisfy the following four elements to be granted emergent relief in this matter:

1. L.P. will suffer irreparable harm if the relief is not granted;
2. The legal right underlying Petitioners' claim is settled;
3. The Petitioners have a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, L.P. will suffer the greater harm than the Respondent will suffer if the requested relief is not granted.

N.J.A.C. 6A:3-1.6(b); *see also Crowe v. DeGioia,* 90 *N.J.* 126 (1982).

1. Irreparable Harm. Being removed from high school midway through a semester during her junior year is a tragic event in the eyes of L.P. It is tragic to her in an academic, social and emotional sense. Although Respondent is clearly trying to accommodate this transfer, I do not find that its efforts would reduce the impact this event would have on L.P. If L.P. is transferred on April 15, 2002, I find that there would be severe disruption to L.P.'s academic and social settings that would cause irreparable harm.

2. Settled Legal Right. Petitioners are essentially contending that Respondent should be equitably estopped from changing its decision that let L.P. attend Triton because of her brother's situation. As a result of that decision, Petitioners claim that L.P. had the expectation of attending Triton for four years and that L.P.'s father took a new assignment in the Highland district as a result of that decision. Moreover, Petitioners claim that the Respondent's decision approving the lease in July 2001 was done knowing that L.P. and her mother would not be truly domiciled in the Triton district. Petitioners also contend that Respondent should be equitably estopped from reversing that decision. I find, however, that Petitioners do not meet this element

to prove emergent relief because equitable estoppel is not a settled legal right when applied against a public entity. Indeed, the law is clear that estoppel is rarely invoked against a public entity. See *O'Malley v. Department of Energy,* 109 *N.J.* 309, 317 (1987).

While admitting that L.P. and her mother were not domiciled in the Triton district, Petitioners also contend that since Respondent's redistricting plan uses the term residence, not domicile, that L.P. and her mother meet the less rigorous standard of being residents in the Triton district. I do not find, however, that it is well settled law that residence is the proper standard to apply in light of the fact that domicile is used by courts even in cases where the term residence is the operative statutory term. *See State v. Benny*, 20 *N.J.* 238 (1955).

3. *Likelihood of Prevailing on the Merits.* Petitioners have a difficult case of proving success on the merits because they must overcome the legal burdens described above and must prove that Respondent actions were arbitrary and capricious. I do not find that Petitioners have satisfied this element for purposes of emergent relief.

4. *Balancing of the Equities.* In light of the fact that I find L.P. will suffer irreparable harm if this petition is denied, I find that Petitioners have satisfied this element for purposes of emergent relief.

Based on the analysis set forth herein, Petitioners have not satisfied all four elements required in an emergent relief application. Accordingly, I conclude that Petitioners' application should be denied

ORDER

Based on both the procedural and substantive grounds set forth above, it is **ORDERED** that the Petitioners' petition for emergent relief be **DENIED**. A full hearing on this matter will be scheduled by the OAL and the parties will be notified accordingly.

This order on application for emergency relief may be adopted, modified or rejected by the Commissioner of the Department of Education, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If (title of agency head) does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

April 12, 2002
DATE

DOUGLAS H. HURD, ALJ

lam

OAL DKT. NO. EDU 2158-02
AGENCY DKT. NO. 90-3/02

C. P. and B. P., on behalf of minor child, L. P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BLACK HORSE PIKE REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter, which includes the audiotape of the hearing conducted at the Office of Administrative Law, and the Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner affirms the Order denying emergent relief. After full consideration of the hearing audiotape, where the parties' arguments were fully explicated, the Commissioner concurs with the ALJ's determination that petitioners have not satisfied the requirements necessary for the granting of such extraordinary relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the within application for emergent relief is hereby denied. This matter shall proceed to hearing on its merits.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/18/02

Date of Mailing: 4/18/02

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:2-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

169-02

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

April 18, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7434-01
AGENCY DKT. NO. 298-7/01

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE
Petitioner,
NEW JERSEY DEPARTMENT OF EDUCATION,
v.
Respondent.

Marvin L. Comick, Esq., for petitioner (Love & Randall, attorneys)

Allison Colsey Eck, Deputy Attorney General, for respondent (David Samson, Attorney General of New Jersey, attorney)

Record Closed: February 25, 2002 Decided: February 26, 2002

BEFORE **DANIEL B. MC KEOWN**, ALJ t/a:

This matter was transmitted to the Office of Administrative Law on August 27, 2001, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

February 26, 2002
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ t/a
By: Joseph Martone ALJ

Receipt Acknowledged:

3/5/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR - 7 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/lam

State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
RICHARD J. HUGHES JUSTICE COMPLEX
25 MARKET STREET
PO BOX 112
TRENTON, NJ 08625-0112
E-Mail: colseall@law.dol.lps.state.nj.us
(609) 633-8197

JAMES E. MCGREEVEY
Governor

DAVID SAMSON
Attorney General

DOUGLAS K. WOLFSON
Assistant Attorney General
Director

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

2002 FEB 27 A 9:51

February 25, 2002

Honorable Daniel McKeown, A.L. J.
Office of Administrative Law
P.O. Box 049
Trenton, NJ 08625-0049

Re: Board of Education of the City of East Orange v. New Jersey Department of Education.
OAL Dkt. No. EDUOT 07434-01N

Dear Judge McKeown:

I am in receipt of your honor's February 20, 2002 letter requesting an update of the settlement between the parties. Although Mr. Comick did forward a copy of the parties' settlement agreement to your honor on or about February 7, 2002, it appears that there may have been a mistake with the address.

I have enclosed a copy of the agreement along with Mr. Comick's letter of transmittal. Should you require anything further, please do not hesitate to contact me.

Respectfully yours,

DAVID SAMSON
ATTORNEY GENERAL OF NEW JERSEY

By: Allison Colsey Eck
Allison Colsey Eck
Deputy Attorney General

enc.
c. Marvin L. Comick, Esq.

Love & Randall
ATTORNEYS AT LAW

MELVIN C. RANDALL
MARVIN L. COMICK

JOHN C. LOVE - 1964-1989
57 WASHINGTON STREET
EAST ORANGE, NEW JERSEY 07017
(973) 674-6000
FAX: (973) 674-8813

February 7, 2002

HONORABLE DANIEL McKEOWN, A.L.J.
185 Washington Street
Newark, New Jersey 07102

RE: BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY vs NEW JERSEY STATE DEPARTMENT OF EDUCATION
OAL DOCKET NO.: EDUOT 07434-01N

Dear Judge McKeown:

Enclosed please find fully executed Stipulation of Settlement in the above referenced matter. Also enclosed is a certified copy of Board Resolution approving settlement. Pursuant to NJAC 1:1-19.1 (d), kindly issue a Final Decision returning the cause of action to the Department of Education.

If you have any questions or concerns, please do not hesitate to contact my office.

RECEIVED
2002 FEB 27 A 9:51
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Very truly yours,

LOVE & RANDALL, ESQS.

By_____
MARVIN L. COMICK

MLC:nm
Enc.
cc: Allison Colsey Eck, Deputy Attorney General
Dr. T. Josiha Haig, Interim Superintendent
Mark Kramer, Business Administrator

EXTRACT FROM THE MINUTES OF A MEETING
OF THE BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, NEW JERSEY
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the City of East Orange in the County of Essex, New Jersey convened a Regular Meeting on Tuesday, January 8, 2002 at 6:15 p.m.

The following members of the Board were present:

Mr. Everett Jennings, Mr. Norman Jeffries, Dr. Robert L. Jefferson, Mrs. Jeweline Grimes, Ms. Carolyn Nelson and Mrs. Mary Ann Cool

The following resolution was offered by Ms. Carolyn Nelson, duly seconded by Mr. Norman Jeffries, and adopted by the Board of Education:

Abbott vs Burke Aid – Stipulation of Settlement – Budget Appeal

WHEREAS, by Resolution dated July 24, 2001 the East Orange Board of Education approved the filing of a Petition of Appeal challenging the sufficiency of the State Department of Education's award of additional Abbott vs. Burke aid; and

WHEREAS, the Administration and General Counsel for the district, working with Department of Education staff and the Assistant Attorney General assigned to this cause of action, have negotiated a tentative settlement of the dispute between the parties; and

WHEREAS, the Stipulation of Settlement, attached hereto and made a part hereof, provided in part, that the District shall receive an additional $8 Million dollars in Abbott vs Burke state aid and authorization to utilize $1.7 Million Dollars in surplus fund balance for a total increase in Abbott Aid of $9.7 Million Dollars;

NOW, THEREFORE BE IT RESOLVED, that the East Orange Board of Education, hereby authorizes General Counsel to execute the aforementioned Stipulation of Settlement and pursuant to its terms and conditions, thereby resolve the litigation filed under OAL Docket No. EDUOT 07434-01N.

ROLL CALL: AYES: 6
ABSENT: 1

STATE OF NEW JERSEY}
} ss
COUNTY OF ESSEX}

I, Mark Kramer, Secretary of the Board of Education, of the East Orange Board of Education, in the County of Essex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of said district, fully called and held on Tuesday, January 8, 2002 has been compared by me with the original minutes as officially recorded in my office in the minute book of said East Orange Board of Education, original minutes so far as the same related to the subject matter referred to in said extract, in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 8th day of February 2002.

Mark Kramer, CPA, Board Secretary

jla

DAVID SAMSON
Attorney General of New Jersey
Attorney for Respondent
New Jersey Department of
Education
R.J. Hughes Justice Complex
PO Box 112
Trenton, New Jersey 08625

By: Allison Colsey Eck
Deputy Attorney General
(609)663-8197

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, Petitioner, v. NEW JERSEY DEPARTMENT OF EDUCATION, Respondent.	OAL DOCKET NO. EDUOT 07434-01N **STIPULATION OF SETTLEMENT**

WHEREAS, Petitioner, Board of Education of the City of East Orange ("Petitioner"), through its Attorney, Love & Randall (Marvin L. Comick, Esq., appearing), and Respondent, New Jersey Department of Education ("Department"), through its attorney, the Honorable David Samson, Attorney General of the State of New Jersey (Allison Colsey Eck, Deputy Attorney General, appearing), have mutually agreed to settle the above-captioned matter; and

WHEREAS, on or about June 25, 2001, Petitioner filed a Petition of Appeal ("Petition") with the Commissioner of Education seeking review of the Department's determination with respect to Petitioner's request for supplemental funding for the 2001-2002 school year under the Abbott v. Burke decisions and DOE regulations; and

WHEREAS, this Petition was subsequently transferred to the Office of Administrative Law as a contested case; and

WHEREAS, the parties thereupon entered into discussions to amicably resolve these matters in the public interest.

NOW, THEREFORE, the parties hereto agree to settle the above-captioned matter upon the following terms:

1. The Department agrees that the Petitioner has demonstrated a need for additional Abbott v. Burke state aid in the amount of $9.7 million dollars. To meet this need, Petitioner shall appropriate $1.5 million in surplus fund balance from the 2000-2001 school year for use in the 2001-2002 school year. Additionally, Petitioner shall appropriate $200,000 in additional revenue for use in the 2001-2002 school year. Thus, the total amount of additional Abbott v. Burke state aid that the Department is required to fund is $8 million dollars.

2. This settlement does not waive any of the review requirements and mandated adjustments pursuant to P.L. 2001, c.130, including reallocation of the district's undesignated general fund balance in excess of two percent. In the event that any portion of the additional Abbott v. Burke state aid awarded pursuant to this settlement is not expended during the current fiscal year ending June 30, 2002, that portion of the additional funding must be used to support approved programs and services during the 2002-2003 school year.

3. Petitioner may anticipate the award of $8 million dollars and record an account receivable in the 2001-2002 budget year.

4. The Commissioner shall seek from the Legislature an appropriation for the 2002-2003 budget year in the amount of $8 million

dollars, subject to any adjustments mandated by P.L. 2001, c. 130, and subject to appropriation in the FY 2003 Appropriations Act and the terms of this settlement agreement.

5. In the event that petitioner experiences cash flow shortages during the 2001-2002 school year, the Department shall provide expeditious assistance to Petitioner to resolve such cash flow difficulties. Such assistance may include, but not be limited to, the provision of an accelerated payment schedule of Petitioner's 2001-2002 state aid.

6. The Petitioner agrees to dismissal with prejudice of the following petition pending before the Office of Administrative Law and the Commissioner of Education: Petitioner's 2001-2002 Supplemental Funding appeal (OAL Docket No. EDUOT 07434-01N).

7. This Consent Order does not preclude Petitioner from applying for additional Abbott v. Burke state aid pursuant to N.J.A.C. 6A:24-7.1(f).

8. The parties agree that this Stipulation of Settlement fully resolves all issues between them arising from the Department's June 26, 2001 determination concerning Petitioner's request for additional Abbott v. Burke state aid for the 2001-2002 school year.

9. Resolution of this matter on the terms set forth herein shall not be construed as precedent in other pending or future litigation.

DAVID SAMSON
Attorney General of the State
of New Jersey
Attorney for New Jersey
Department of Education

ALLISON COLSEY ECK, DAG

DATED: 1/28/02

LOVE & RANDALL
Attorneys for Petitioner,
Board of Education of
City of East Orange

Marvin L. Comick, Esq.

DATED: 1/31/02

OAL DKT. NO. EDU 7434-01
AGENCY DKT. NO. 298-7/01

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and settlement transmitted by the Office of Administrative Law have been reviewed. Because this agency is a party to the present case, the settlement, pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), is deemed to be the final decision in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/18/02

Date of Mailing: 4/18/02

170-02

170-02 E

A.G.K., on behalf of minor child, D.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF PITTSGROVE TOWNSHIP, SALEM COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

April 18, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 2247-02S
AGENCY DKT. NO. 104-4/02

A.G.K. o/b/o D.K.
Petitioner,
v.
PITTSGROVE TOWNSHIP
BOARD OF EDUCATION,
Respondent.

Theodore E. Baker, Esq., appeared for Petitioner (Lummis, Krell & Baker, Attorneys)

Gary D. Wodlinger, Esq., appeared for Respondent (Lipman, Antonelli, Batt, Dunlap, Wodlinger & Gilson, P.C.)

BEFORE **ISRAEL D. DUBIN**, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On April 8, 2002, Petitioner, A.G.K., on behalf of her minor child, D.K., filed an application for emergent relief with the New Jersey Department of Education. Among other relief, the application requested the immediate return of D.K., who had been suspended administratively on March 17, 2002, to Arthur P. Schalick High School for regular classes and extracurricular activities.

This matter was transmitted to the Office of Administrative Law (OAL) on April 10, 2002, for a hearing on the requested emergent relief. The hearing was conducted on April 15, 2002, at the OAL, Quakerbridge Plaza, Building 9, Quakerbridge Road, Mercerville, New Jersey with oral argument being made on behalf of the parties by their respective counsel.

FACTUAL DISCUSSION

D.K. is a tenth grade student at the Arthur P. Schalick High School in the Township of Pittsgrove, Salem County. He is an honors student with a grade point average of 3.7 and class rank of 14. But for one disciplinary referral by a teacher other than the one involved in this incident, he has not been a disciplinary problem.

On Sunday, March 17, 2002, at approximately 1:00 a.m., D.K. and four other students threw eggs at the house of his teacher, Mrs. Darpino. One of the students, D.Z.P., spread his feces on the teacher's car and the back door of the house. The students had told their parents they were sleeping over at a friend's house when, in actuality, they were camping in the woods not far from the teacher's home.

Following an investigation of the incident by the Elmer Police Department, at approximately 9:45 p.m., the students' parents and guardians were summoned to police headquarters. When the parents and guardians arrived Officer Ray Sambor advised them that their children had vandalized a teacher's house and that Mr. Loren Thomas, the Principal of the High School, had been contacted. They were also allegedly told that the students had been or were being expelled from school.

Upon his arrival at the police station, Mr. Thomas met with and advised the students that they were immediately suspended from school pending further action of the Board of Education. Although the parties do not agree on what was said next, the students were apparently advised that possible discipline included expulsion from school.

On Wednesday, March 20, 2002, a front-page article appeared in *Today's Sunbeam*, a daily newspaper serving Salem County. In this article, which also appeared in the *Bridgeton*

News, a daily newspaper serving Cumberland County, Principal Thomas was quoted as saying, "In my opinion, it's probably one of the most despicable student behaviors I've ever seen. We simply won't tolerate this behavior directed toward a staff member. . . I am so disgusted by this incident. It's not the kind of community we want to be in."

By letter dated March 18, 2002, Mr. Thomas advised D.K.'s parents that their son had been suspended for a minimum of five days and that the matter would be reviewed during Executive Session at the Board of Education's next regularly scheduled meeting on March 21, 2002.

On the evening of March 21, 2002, A.G.K. appeared at the Board of Education meeting. At approximately 9:45 p.m., she asked the Board to accept a letter in which she made several requests. These included that (1) A.G.K. be present in any Executive Session during which her son's interests were discussed, (2) the Board make a recording of the Executive Session, (3) she be provided with a copy of the minutes of the Executive Session and (4) she be present at all meetings during which her son's case was discussed. At that point, the Board adjourned into Executive Session to discuss a number of confidential items. According to the Board's solicitor, the Board did not discuss D.K. or any of the other students by name. Rather, the Board discussed the incident in general and directed that a full Board hearing be scheduled for April 1, 2002, at 6:00 p.m.

On March 22, 2002, the Board's solicitor wrote to Petitioner's counsel addressing the concerns A.G.K. had raised in the letter she'd hand-delivered the night before. Among other things, the solicitor indicated that he would order a court reporter to attend the April 1, 2002, meeting during which a full hearing would be held in her presence. He also stated that the Board's deliberations are and would be conducted outside the presence of anyone other than the Board, administrative staff and the solicitor.

By letter dated March 23, 2002, Henry Bermann, the Assistant Superintendent for Budget/Finance, sent A.G.K. a letter advising her that a closed hearing would be conducted on April 1, 2002, at 8:00 p.m. A copy of the Pittsgrove Township Board of Education Policy regarding Student Discipline was enclosed.

The Board met on April 1, 2002, and immediately adjourned into Executive Session. Present at the meeting were the Board members, Superintendent of Schools, Solicitor, Board Secretary/Assistant Superintendent and relevant administrative staff including Mr. Thomas. The Superintendent and Solicitor came out of the Session on occasion to discuss the matter with the parents and their attorneys. After approximately three hours, the Board granted the parents' request for a continuance in order to afford them the opportunity to obtain psychological and/or psychiatric evaluations of the students. At the time, the Board and Administration were unaware of Board policy #5114.2, which requires the Board to obtain a recommendation from the school psychologist in any disciplinary matters that may result in a long-term suspension or expulsion. The Board also adopted resolutions indefinitely extending the suspensions, providing the students with ten hours per week of home instruction as soon as administratively possible and offering counseling and/or psychological services to those students who requested it.

Shortly after Petitioners filed their application for emergent relief of April 8, 2002, the Board scheduled the disciplinary hearing for April 18, 2002, three days hence. Petitioners, however, do not believe they can or will receive a fair and impartial hearing by the Board given the statements that appeared in the newspapers and the Board's handling of the matter thus far.

DISCUSSION OF THE LAW

Pursuant to *N.J.A.C.* 1:1-12.6 and *N.J.A.C.* 6A:3-1.6, emergency relief may be granted if the judge determines that:

1. The petitioner will suffer irreparable harm if the relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

It is important to note that the rule, which sets forth a four-pronged test, is written in the conjunctive and not the disjunctive. Therefore, Petitioners must satisfy and prevail on each of the four prongs in order to obtain the requested emergent relief.

Having carefully considered the parties' respective arguments, I am not convinced that D.K. will suffer irreparable harm if the emergent relief is not granted. I base this determination upon the fact that D.K. has already been on administrative suspension since March 18, 2002, and the disciplinary hearing has been scheduled for April 18, 2002, just three days hence. I further base this determination on D.K.'s statement to Dr. James S. Wulach that "[h]e is bored, but denies feelings of anxiety, depression, anger or obsessive preoccupation." D.K. may well suffer some harm every day he is out of school, being deprived of the classroom experience and socialization with his classmates and friends, as would any student. However, he is receiving his homework assignments and ten hours of in-home instruction per week. Although not ideal, it is sufficient to provide D.K. with a free and appropriate public education. *See N.J.S.A.* 18A:37-2.2 and *N.J.A.C.* 6A:14-4.9.

Additionally, I believe that D.K. would be exposed to more serious psychological harm if he were to be reinstated for three days, only to be summarily removed should the Board determine that the length of his suspension thus far is insufficient. This risk of damage to his psyche is not one I wish to take.

Based upon the foregoing, I **CONCLUDE** that Petitioners have failed to demonstrate that D.K. will suffer irreparable harm if the relief is not granted. Since Petitioner has failed to satisfy the first and perhaps primary requirement for emergent relief, I need not reach the remaining three requirements of the four-part test. On the facts presented, I therefore **CONCLUDE** that emergent relief is not warranted.

However, that is not to say that I am satisfied with the way the Board has handled this matter since its inception. Among other things, Petitioner has complained that the Board has not abided by its own policies and may not be capable of providing D.K. with a fair and impartial hearing. Petitioner has also protested that although D.K. has been on suspension for four weeks, he has not yet received ten hours of instruction per week and that what little instruction he's

received was inadequate due to the tutor's admitted unfamiliarity with the subject matter. Clearly, they must be addressed.

Initially, it is anticipated that the Board will provide D.K. with a fair and impartial hearing, and that its members will ignore the many extra-quasi judicial statements by the Principal and Chief of Police that were reported in the newspapers. Emotions have run high, but with the passage of time, calmer cooler heads should prevail. I cannot assume, as has A.G.K., that the Board has already made up its mind and is determined to mete out even more severe discipline than has already been imposed. Consequently, although asked to do so, I will not issue an order directing the Board to conduct a fair hearing in this matter; it is its moral, ethical and legal duty to do so.

It is also anticipated that the sanction that is ultimately meted out by the Board will be fair and commensurate with the offense. I fully expect that among other things, the Board will consider D.K.'s role in the incident, his remorse, any psychological and/or psychiatric reports that may be received and the length of the suspension he has already served. I am also cognizant of the fact that among their many responsibilities, Boards of Education must regularly deal with disciplinary matters. They therefore have a vast reservoir of prior determinations upon which to draw. I fully expect the Board to keep their prior disciplinary decisions in mind as they consider this matter.

Finally, although I understand A.G.K.'s concern, I do not believe there will be any further repercussions from this incident once final discipline is imposed. Clearly, should the Board decide to readmit D.K., it has the absolute right to impose such other discipline as it deems necessary and appropriate. For example, the Board could impose a series of after-school detentions or prohibit D.K. from participating in extracurricular activities. However, any such sanctions should be finite and not have indeterminate length.

DECISION AND ORDER

Based upon the foregoing, it is **ORDERED** that the petition of A.G.K. on behalf of D.K. for emergent relief is **DENIED** without prejudice. However, in order to ensure that this matter

proceeds as expeditiously as possible and that the parties' respective rights are protected, it is further **ORDERED** that

1. The Pittsgrove Township Board of Education shall conduct the plenary hearing in this matter as scheduled, on Thursday, April 18, 2002. In the event counsel is unavailable, the hearing shall be held as soon thereafter as possible.
2. The Board shall arrange for psychological and/or psychiatric evaluations of D.K. to be conducted and the experts' reports to be sent to counsel by no later than April 18, 2002.
3. A.G.K. shall cooperate with the Board and present D.K. at the psychologist and/or psychiatrist's offices for evaluation when scheduled.
4. The Board shall provide D.K. with ten hours of in-home instruction as per its initial resolution. The in-home instruction shall be coordinated with D.K.'s teacher's respective lesson plans and include such remedial work as may be necessary to restore D.K. to the status quo academically as soon as possible.

It is further **ORDERED** that this matter be returned to the Pittsgrove Township Board of Education for hearing as indicated above. This Court will not retain jurisdiction.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

4/15/02
DATE

ISRAEL D. DUBIN, ALJ

** TOTAL PAGE.08 **

OAL DKT. NO. EDU. 2247-02
AGENCY DKT. NO. 104-4/02

A.G.K., on behalf of minor child, D.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF PITTSGROVE TOWNSHIP, SALEM COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The recommended Orders of the Administrative Law Judge (ALJ) in this emergent matter have been reviewed. Upon such review, the Commissioner initially affirms the Order denying emergent relief, as he concurs with the ALJ's determination that petitioner has not satisfied the requirements necessary for the granting of such extraordinary relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). The Commissioner additionally affirms the concomitant Orders of the ALJ on page 7 of his Initial Decision.

Accordingly, the instant application for emergent relief is denied. This matter shall be returned to the Pittsgrove Board of Education for hearing and other actions as directed in the Initial Decision. The within Petition of Appeal is hereby dismissed without prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/18/02

Date of Mailing: 4/19/02

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:2-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

171-02

171-02E

W.O.L., Jr., on behalf of minor child, W.O.L. III AND M.I., on behalf of minor, J.T.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF PITTSGROVE TOWNSHIP, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	

April 18, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2285-02S
AGENCY DKT. NO. 108-4/02

W.O.L., JR. o/b/o W.O.L., III
M.I. o/b/o J.T.
Petitioners,
v.
PITTSGROVE TOWNSHIP
BOARD OF EDUCATION,
Respondent.

Samuel J. Serata, Esq., appeared for Petitioner W.O.L., Jr.

Joseph W. Veight, III, Esq., appeared for Petitioner M.I.

Gary D. Wodlinger, Esq., appeared for Respondent (Lipman, Antonelli, Batt, Dunlap, Wodlinger & Gilson, P.C.)

BEFORE **ISRAEL D. DUBIN**, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On April 8, 2002, Petitioners, W.O.L., Jr., on behalf of his minor child, W.O.L., III, (W.O.L.) and M.I., on behalf of her minor grandchild, J.T., filed an application for emergent relief with the New Jersey Department of Education. Among other relief, the application requested the immediate returns of W.O.L. and J.T., who had been suspended administratively on

March 17, 2002, to Arthur P. Schalick High School for regular classes and extracurricular activities

This matter was transmitted to the Office of Administrative Law (OAL) on April 10, 2002, for a hearing on the requested emergent relief. The hearing was scheduled for April 15, 2002, at which time Petitioners withdrew their application for emergent relief and the parties entered into a settlement that was placed on the taped record and is set forth below.

FACTUAL DISCUSSION

On Sunday, March 17, 2002, at approximately 1:00 a.m., W.O.L., J.T. and three other students threw eggs at the house in which Mrs. Darpino, the Spanish teacher at Arthur P. Schalick High School, resided. One of the students, D.Z.P., spread his feces on the teacher's car and the back door of the house. The students had told their parents they were sleeping over at a friend's house when, in actuality, they were camping in the woods not far from the teacher's home.

Following an investigation of the incident by the Elmer Police Department, at approximately 9:45 p.m., the students' parents and guardians were summoned to police headquarters. When the parents and guardians arrived Officer Ray Sambor advised them that their children had vandalized a teacher's house and that Mr. Loren Thomas, the Principal of the High School, had been contacted. They were also allegedly told that the students had been or were being expelled from school.

Upon his arrival at the police station, Mr. Thomas met with and advised the students that they were immediately suspended from school pending further action of the Board of Education. Although the parties do not agree on what was said next, the students were apparently advised that possible discipline included expulsion from school.

On Wednesday, March 20, 2002, a front-page article appeared in *Today's Sunbeam*, a daily newspaper serving Salem County. In this article, which also appeared in the *Bridgeton News*, a daily newspaper serving Cumberland County, Principal Thomas was quoted as saying,

"In my opinion, it's probably one of the most despicable student behaviors I've ever seen. We simply won't tolerate this behavior directed toward a staff member. . . I am so disgusted by this incident. It's not the kind of community we want to be in."

By letter dated March 18, 2002, Mr. Thomas advised the parents and guardians that the students had been suspended for a minimum of five days and that the matter would be reviewed during Executive Session at the Board of Education's next regularly scheduled meeting on March 21, 2002.

The Board of Education met the evening of March 21, 2002. At approximately 9:45 p.m., the Board adjourned into Executive Session to discuss a number of confidential items. According to the Board's solicitor, the Board did not discuss W.O.L., J.T., or any of the other students by name. Rather, the Board discussed the incident in general and directed that a full Board hearing be scheduled for April 1, 2002, at 6:00 p.m.

By letter dated March 23, 2002, Henry Bermann, the Assistant Superintendent for Budget/Finance, sent W.O.L., Jr. and M.I. a letter advising them that a closed hearing would be conducted on April 1, 2002, at 8:00 p.m. A copy of the Pittsgrove Township Board of Education Policy regarding Student Discipline was enclosed.

The Board met on April 1, 2002, and immediately adjourned into Executive Session. Present at the meeting were the Board members, Superintendent of Schools, Solicitor, Board Secretary/Assistant Superintendent and relevant administrative staff including Mr. Thomas. The Superintendent and Solicitor came out of the Session on occasion to discuss the matter with the parents and their attorneys. After approximately three hours, the Board granted the parents' request for a continuance in order to afford them the opportunity to obtain psychological and/or psychiatric evaluations of the students. At the time, the Board and Administration were unaware of Board policy #5114.2, which requires the Board to obtain a recommendation from the school psychologist in any disciplinary matters that may result in a long-term suspension or expulsion. The Board also adopted resolutions indefinitely extending the suspensions, providing the students with ten hours per week of home instruction as soon as administratively possible and offering counseling and/or psychological services to those students who requested it.

Shortly after Petitioners filed their application for emergent relief of April 8, 2002, the Board scheduled the disciplinary hearings for April 18, 2002, three days hence. Petitioners therefore agreed to withdraw their petitions for emergent relief as part of an overall settlement with the Board. However, they do not believe they can or will receive a fair and impartial hearing by the Board given the statements that appeared in the newspapers and the Board's handling of the matter thus far. Therefore, before accepting their settlement, I addressed their concerns on the record as follows.

Initially, it is anticipated that the Board will provide W.O.L. and J.T. with a fair and impartial hearing, and that its members will ignore the many extra-quasi judicial statements by the Principal and Chief of Police that were reported in the newspapers. Emotions have run high, but with the passage of time, calmer cooler heads should prevail. I cannot assume, as have W.O.L., Jr. and M.I., that the Board has already made up its mind and is determined to mete out even more severe discipline than has already been imposed. Consequently, although asked to do so, I will not issue an order directing the Board to conduct a fair hearing in this matter; it is its moral, ethical and legal duty to do so.

It is also anticipated that the sanction that is ultimately meted out by the Board will be fair and commensurate with the offense. I fully expect that among other things, the Board will consider the students' respective roles in the incident, their remorse, any psychological and/or psychiatric reports that may be received and the length of the suspension they have already served. I am also cognizant of the fact that among their many responsibilities, Boards of Education must regularly deal with disciplinary matters. They therefore have a vast reservoir of prior determinations upon which to draw. I fully expect the Board to keep their prior disciplinary decisions in mind as they consider this matter.

Finally, although I understand W.O.L., Jr. and M.I.'s concerns, I do not believe there will be any further repercussions from this incident once final discipline is imposed. Clearly, should the Board decide to readmit these students, it has the absolute right to impose such other discipline as it deems necessary and appropriate. For example, the Board could impose a series of

after-school detentions or prohibit the students from participating in extracurricular activities. However, any such sanctions should be finite and not have indeterminate length.

As stated above, the parties have agreed to settle this matter and have placed the following settlement terms on the record:

1. W.O.L., Jr., o/b/o W.O.L, III, and M.I. o/b/o J.T. hereby withdraw their applications for emergent relief.
2. The Pittsgrove Township Board of Education shall conduct the plenary hearing in this matter as scheduled, on Thursday, April 18, 2002. In the event counsel is unavailable, the hearing shall be held as soon thereafter as possible.
3. The Board shall arrange for psychological and/or psychiatric evaluations of W.O.L., III, and J.T., if not already done, to be conducted and the experts' reports to be sent to counsel by no later than April 18, 2002.
4. W.O.L., Jr. and M.I. shall cooperate with the Board and present the students at the psychologist and/or psychiatrist's offices for evaluation when scheduled.
5. The Board shall provide W.O.L., III and J.T. with ten hours of in-home instruction as per its initial resolution. The in-home instruction shall be coordinated with their teacher's respective lesson plans and include such remedial work as may be necessary to restore the students to the status quo academically as soon as possible.
6. The matter shall proceed at the Pittsgrove Township Board of Education and the O.A.L. shall not retain jurisdiction.

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

1. The parties have voluntarily agreed to the settlement on the record.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

CONCLUSIONS OF LAW

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

4/15/02
DATE

ISRAEL D. DUBIN, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

** TOTAL PAGE.08 **

OAL DKT. NO. EDU. 2285-02
AGENCY DKT. NO. 108-4/02

W.O.L., Jr., on behalf of minor child, W.O.L. III AND M.I., on behalf of minor, J.T.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF PITTSGROVE TOWNSHIP, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, has been reviewed.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/18/02

Date of Mailing: 4/19/02

172-02

#172-02E

C.D.M., on behalf of minor child, R.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE FLEMINGTON-RARITAN REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

April 18, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 2138-02

AGENCY DKT. NO. 29-2/02

C.D.M., O/B/O R.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE FLEMINGTON-RARITAN REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY,

Respondent.

C.D.M., petitioner, *pro se*

Joan Kane Josephson, Esq., for respondent (Parker, McCay & Criscuolo, attorneys)

BEFORE **BERNARD GOLDBERG**, ALJ:

This application for emergent relief was transmitted to the Office of Administrative Law (OAL) on April 3, 2002, by the Bureau of Controversies and Disputes, New Jersey Department of Education, pursuant to *N.J.A.C.* 1:1-12.6. The appeal was filed on February 4, 2002, by C.D.M. on behalf of her 13-year-old son, R.M.

The hearing was held on April 10, 2002, at the OAL, Mercerville, New Jersey. After oral argument concluded, the hearing record was closed.

Petitioner disputes that decisions of the Flemington-Raritan Regional School District (BOE) to impose a one-day suspension on R.M., transfer him to another language arts class and to exclude him from school activity nights.

In response to the petitioner's complaints, the BOE agrees that R.M.'s one-day suspension of February 5, 2002, will not appear on his school record. The BOE agrees that R.M. will be permitted to participate in the June 14, 2002 school activity night and the year end graduation ceremonies.

Petitioner's problem with respect to R.M.'s transfer to an alternate language arts class cannot be resolved at this time because he (R.M.) is presently at the Robert Wood Johnson Behavioral Health Center, an out of district day placement. He is expected to be released on or about April 22, 2002. Further C.D.M. requested a Child Study Team (CST) evaluation on February 1, 2002. The CST undertook its evaluation on February 21, 2002. All assessments have been completed and CST meeting will be held within the next ten days. C.D.M. will participate as a CST member.

Petitioner accepted the BOE's actions as resolution of the dispute while preserving her due process rights should she be dissatisfied with the outcome of the CST process.

As the issues precipitating this appeal were amicably resolved at the hearing, I **ORDER** that this appeal be **DISMISSED**.

This order on application for emergency relief may be adopted, modified or rejected by the Department of Education who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If (title of agency head) does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

April 11, 2002

DATE

BERNARD GOLDBERG, ALJ

/lam

OAL DKT. NO. EDU 2138-02
AGENCY DKT. NO. 29-2/02

C.D.M., on behalf of minor child, R.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE FLEMINGTON-RARITAN REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The Order of the Administrative Law Judge (ALJ) in this emergent matter has been reviewed. Upon such review, the Commissioner concurs with the ALJ that, because the issues precipitating this appeal were amicably resolved by the parties at the hearing conducted at the Office of Administrative Law on April 10, 2002, the instant Petition of Appeal is appropriately dismissed.

Accordingly, the Order of the ALJ is affirmed. This matter is hereby dismissed, without prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/18/02

Date of Mailing: 4/19/02

* This decision, as the Commissioner's final determination may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:2-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

173-02

173-02

IN THE MATTER OF THE TENURE HEARING OF STEPHEN FORD, SCHOOL DISTRICT OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY.	:	COMMISSIONER OF EDUCATION
	:	INTERLOCUTORY ORDER
AND	:	
STEPHEN H. FORD,	:	
COMPLAINANT,	:	
V.	:	
WILLINGBORO BOARD OF EDUCATION,	:	
RESPONDENT.	:	

April 18, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INTERLOCUTORY ORDER GRANTING IN PART AND DENYING IN PART SUMMARY DECISION
OAL DKT. NO. EDU 00885-01S
AGENCY DKT. NO. 45-2/01

IN THE MATTER OF THE TENURE HEARING OF STEPHEN FORD, BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,

and

STEPHEN FORD,
Complainant,
v.
WILLINGBORO BOARD OF EDUCATION,
Respondent.

OAL DKT. NO. CRT 02367-01S
AGENCY DKT. NO. EC 38WE-46177A

BEFORE **JEFF S. MASIN**, ACTING CHIEF ALJ:

It is undisputed that on June 21, 2000, Mr. Stephen Ford, a teacher in the respondent school district, defecated into a wastebasket in his classroom in the presence of a student. It is also undisputed that on June 22, 2000, the Board of Education ("Board") suspended Mr. Ford from his teaching position with pay. Thereafter, on February 26, 2001, the Board filed a tenure charge with the Commissioner of Education ("Commissioner") alleging that Mr. Ford had engaged in unbecoming conduct. More specifically, the Statement of Charge referenced a 1991 incident of alleged "abnormal behavior," a 1993 incident in which Mr. Ford allegedly urinated in

a wastebasket during class while students were in the room, and the June 21, 2000, incident noted above. The statement also recited that Mr. Ford had been referred to a unit of Thomas Jefferson University Hospital for a neurological examination and that the "physician who examined Mr. Ford once again could not give the Board assurance that these incidents would not be repeated." It is further undisputed that Mr. Ford signed a complaint with the Division on Civil Rights ("DCR") in which he charged that the Board's action suspending him with pay violated his rights under the New Jersey Law Against Discrimination ("LAD"), *N.J.S.A.* 10:5-1 *et. seq.*, specifically because it violated the prohibition against discriminating against persons who suffer from a handicap. Mr. Ford asserts, and the Board does not dispute, that he suffers from epilepsy. More significantly, there is no dispute that the medical evidence so far obtained supports the conclusion that the June 21, 2000, incident was a direct result and consequence of Mr. Ford's epilepsy.

In addition to his original complaint that the Board engaged in unlawful handicap discrimination, Ford has amended his complaint by motion, charging that the Board violated *N.J.S.A.* 10:5-12(d), engaging in unlawful reprisal against him in response to his assertion of his civil rights through the filing of the DCR complaint, specifically in that it refused to accommodate his disability and then suspended him without pay while also certifying the tenure charge to the Commissioner. The tenure charge, and the DCR complaint, have each been transferred to the Office of Administrative Law for hearing as a contested case, and the cases have been consolidated for hearing. The parties have now filed cross-motions, each seeking summary decision pursuant to *N.J.A.C* 1:12-5.

In its initial motion for summary decision, the Board claims that Mr. Ford, afflicted with a handicapping condition that has resulted in conduct that has affected his ability to perform his job in a proper fashion, has never made any request to the Board for a reasonable accommodation in his working conditions such as to allow him to continue to teach satisfactorily. The Board cites case law that it claims places the burden of seeking an accommodation upon the employee. It claims that the only request that Mr. Ford made following the June 2000 incident was for time off from work so that he could adjust his medicine regimen, but that this request was not a reasonable accommodation since there was no assurance that even were such an accommodation

made that a incident similar to the previous events would not reoccur. In the absence of a request for a reasonable accommodation, the Board claims that it is entitled to summary decision.

In his cross-motion for summary decision, Mr. Ford claims that the Board, which seeks to terminate him for conduct that was undisputedly a manifestation of his handicapping condition and which cites its concern about possible reoccurrence of incidents similar to those cited in the Statement of Charges, bears the burden of establishing that it had a reasonable objective basis for its otherwise discriminatory act. Based upon his understanding that the Board seeks to justify its action against him by relying upon the "safety defense" discussed by the New Jersey Supreme Court in *Jansen v. Food Circus Supermarkets, Inc.*, 110 *N.J.* 363 (1988), he contends that the Board neither had in its possession nor has produced any "objective factual or scientifically validated evidence" that the Court identified as the necessary foundation for the Board's successful reliance on such a justification for what would otherwise amount to discriminatory action *vis a vis* a handicapped individual. In *Jansen*, the Court held that an employer seeking to terminate a handicapped employee because that employee purportedly posed a threat to the safety of other employees had to demonstrate that it had "reasonably arrived at" the "opinion that the employee is unable to perform adequately the duties of the particular employment" "without posing a serious threat of injury to the health and safety of himself or herself or other employees." *Jansen*, at 366. The court quoted a regulation issued by the Division on Civil Rights, *N.J.A.C.* 13:13-2.8, which states that

> refusal to select a handicapped individual may be lawful where it can be demonstrated that the employment of the handicapped person in a particular position would presently be hazardous to the safety or health of such individual, other employees, clients or customers. **Such a decision must be based upon an objective standard supported by factual or scientifically validated evidence, rather than on the basis of general assumptions that a particular handicap would create a hazard to the safety or health of such individual, other employees, clients or customers.**
> [*Ibid.* at 375.] [Emphasis supplied.]

Ford also seeks summary decision because he believes that the Board clearly failed to fulfill its responsibility to engage him in an interactive, good faith discussion of accommodation

and because he believes the evidence clearly demonstrates that the Board, by first threatening to and then filing the tenure charge, retaliated against him for filing his discrimination charge and demanding accommodation.

In its reply brief dated October 31, 2001, the Board claims "Ford mistakenly assumes that the safety defense is the core of the Board's position." Instead, the Board posits that "Looking at the certification of the tenure charge, . . . the charge is clearly based on the conduct, even though there is mention of the underlying condition in relation to the prior, 1993 urination incident." The Board then argues that, despite the protection afforded to handicapped individuals by the Law Against Discrimination, case law establishes the view that employers can terminate an employee for "egregious" conduct, even despite the fact that the conduct may have been a result of the employee's disability. The Board relies upon the case of *Barbera v. I.V. DeMartino, et al.*, 305 *N.J. Super.* 617 (App. Div. 1997). In *Barbera,* the Appellate Division adopted the majority federal position that "employers subject to laws protecting the handicapped and disabled nonetheless should be able to take appropriate action on account of egregious or criminal conduct of an employee, regardless of whether or not the employee's disability contributed to the conduct. . . ." *Barbera*, at 638-639.

In response to the Board's reliance on the "conduct" based theory, Ford argues that the Appellate Division's opinion in *Barbera* must be understood in context, as a case in which the court specifically relied upon the jury's determination that the sole reason for the employer's action was the egregious nature of the employee's conduct. However, if the jury had determined that the employer acted out of a "mixed motive," that is, that the action was not solely based upon the employee's conduct, but was also based upon the fact that the employee suffered from a handicap and from the employer's unreasonable fears of a reoccurrence of the conduct, the court would not have determined the case in the same way. Therefore, Ford urges that this case presents a genuine dispute of material fact regarding the motivation for its actions and summary decision in favor of the Board cannot be granted on that issue.

Standard for Summary Decision

The standard for determining motions for summary decision has been defined by the New Jersey Supreme Court in *Robin Brill v. The Guardian Life Insurance Company of America, et al.*, 142 *N.J.* 520 (1995). In this case, the Court elaborated upon the standards first established in *Judson v. People's Bank and Trust Co. of Westfield*, 17 *N.J.* 67, 74-75 (1954). Under the *Brill* standard, as before, a motion for summary decision may only be granted where there are no "genuine disputes" of "material fact." The determination as to whether disputes of material fact exist is made after a "discriminating search" of the record, consisting as it may of affidavits, certifications, documentary exhibits and any other evidence filed by the movant and any such evidence filed in response to the motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion.

In order to defeat the motion, the opposing party must establish the existence of "genuine" disputes of material fact. The facts upon which the party opposing the motion relies to defeat the motion must be something more than "facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious, . . . ," *Judson, supra.*, at 75 (citations omitted). The *Brill* decision focuses upon the analytical procedure for determining whether a purported dispute of material fact is "genuine" or is simply of an "insubstantial nature." *Brill, supra.*, at 530. *Brill* concludes that the same analytical process used to decide motions for a directed verdict is used to resolve summary decision motions. "The essence of the inquiry in each is the same: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that a party must prevail as a matter of law.' " *Id.* at 536, quoting *Anderson v. Liberty Lobby, Inc.*, 477 *U.S.* 242, 251-52, 106 *S.Ct.* 2505, 2512, 91 *L.Ed.*2d 202, 214. In searching the proffered evidence to determine the motion, the judge must be guided by the applicable substantive evidentiary standard of proof, that is, the "burden of persuasion" which would apply at trial on the merits, whether that is the preponderance of the evidence or the clear and convincing evidence standard. If a careful review under this standard establishes that no reasonable fact finder could resolve the disputed facts in favor of the party opposing the motion, then the uncontradicted facts thus established can be examined in the light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment as a matter of law. However, where the proofs

in the record are such that "reasonable minds could differ" as to the material facts, then the motion must be denied and a full evidentiary hearing held.

Discussion

The Board's original statement in support of summary decision argued that Mr. Ford failed to make a request for a "reasonable accommodation" and therefore he cannot maintain a claim for handicap discrimination, as without establishing that his handicap could be accommodated without causing "undue hardship" to the employer, he cannot establish that he is qualified to perform the job. If an employee cannot perform the duties of his job, either without the need for accommodation or with reasonable accommodation, then the employee is not qualified and cannot establish a *prima facie* case under the LAD. In general, an employer must accommodate a handicapped employee's reasonable requests for accommodations that will allow the employee to continue to work despite his handicap. However, an employer is not expected to accommodate where the accommodation requested is either unreasonable or impossible to provide. Further, if the employer *reasonably* determines that a handicapped employee cannot perform the job even with accommodation, the employer may discharge the employee. The Board argues that since Ford did not request a "reasonable accommodation," he has therefore not shown that he can perform adequately and has not demonstrated his qualification for the job, a prerequisite for a *prima facie* case. Further, the Board argues that only after an employee requests accommodation does the employer's obligation to offer a reasonable accommodation come into play.

Analysis of the Board's brief on this issue indicates that the Board may be intermingling and perhaps confusing two distinct issues. The first of these is the accommodation requirement and the burden that may apply to one or the other party regarding the introduction of the issue of reasonable accommodation into the dialogue between employee and employer. The second issue is the "safety defense," as explicated by *Jansen*. While the Board's subsequent brief seems to de-emphasize, if not abandon it altogether, the safety defense, given the significant prior discussion of that defense in this case it seems best to address that issue nevertheless.

The Board contends that the only request for accommodation Ford made was for time off so that he could adjust his medication. Significantly, the Board then argues that since that was no guarantee that such an adjustment would assure that there would be no further repetition of the June 2000 conduct, the request for time off was a request for an unreasonable accommodation. In its brief, the Board argues that "Ford suggested nothing that could have had a chance of ensuring that he could teach without further incidents, nor could he." As there has never been any suggestion that, except for the limited number of specific incidents of manifestations of his disability cited in the Statement of Evidence, Mr. Ford is not fully capable of successfully performing his job responsibilities as a teacher, it seems clear from this quote that what the Board is really addressing is the *Jansen* "safety defense." Indeed, the Board's brief further clarifies its understanding of the issue at hand, stating "Here, *it is not really performing teaching functions that would be at issue;* under *Jansen v. Food Circus Supermarkets*, . . . , the issue is harm to the schoolchildren" (italics supplied). Thus, given that the Board is actually asserting that Mr. Ford could not guarantee that the accommodation requested would assure that no further similar incidents would reoccur, the Board is in effect arguing that it can successfully support its action based on the safety defense.

The *Jansen* Court recognizes that there are circumstances where an employee who suffers from a handicap presents a danger of harm to himself or others in the workplace sufficiently significant such that an employer is not required to continue the employment, despite the general protections offered by the LAD. The court clearly identifies the burden of proof in regard to the "safety defense" as resting upon the employer to demonstrate that it reasonably determined, based upon objective factual and/or valid scientific evidence, that the "probability" was that the dangerous conduct would reoccur. Since the burden rests with the Board to establish the "objective, reasonable basis," for its adverse action towards Ford, the issue is not whether Mr. Ford made a request for an accommodation. Instead, it is whether the Board's refusal to allow him to resume teaching with the requested accommodation is supportable. Therefore, the Board's motion for summary decision based upon its contention that Ford failed to request a reasonable accommodation is **DENIED.**

Respondent's reliance upon *Gaul v. Lucent Technologies*, 134 *F.3d* 576 (3rd Cir. 1998), is misplaced. *Gaul* involved the question of whether an employee had established a *prima facie*

case, particularly concentrating on the question of whether the employee had demonstrated that he was "qualified." The accommodation he sought in order to be able to continue to perform his job responsibilities was determined by the District Court to be an unreasonable accommodation. The Circuit Court affirmed this determination. While Mr. Gaul himself contended that he suffered from depression and he needed to be removed from stressful situations and from employees in whose presence he suffered stress, the case did not involve any claim by the employer that Mr. Gaul presented any danger of harm. Thus, the issues addressed in *Gaul* are different from those in the present case. Here, the employer does not contend that Mr. Ford cannot perform his duties as a teacher and does not really even appear to question that some period of time off for adjusting to a new medical regimen would be unreasonable by itself, but instead contends that the unreasonable nature of the request arises from the fact that the new medical regimen did not guarantee against a reoccurrence in the classroom of conduct it deems to be dangerous. The issues presented in the case at bar are quite different from those presented in *Gaul*.

It is also clear that summary decision cannot be granted on the Board's theory that, despite Mr. Ford's acknowledged handicap, his termination was lawful because it was based solely upon his allegedly "egregious conduct." The obvious reason for this is that while the tenure charge itself recites the 1991, 1993, and 2000 incidents as a basis for the termination of tenure it also specifically states that after the June 2000 incident Ford was referred for medical examination and that "the physician who examined him could not give the Board assurance that these incidents would not be repeated." On the face of the Summary of Charges it is clear that while the Board's determination to take action against Ford certainly had its impetus from Ford's conduct, the Board nevertheless did not merely file a tenure charge seeking his removal for unbecoming conduct directly after the June incident because the conduct was viewed as so egregious that his presence as a tenure employee of the district could no longer be tolerated. Instead the Board chose to actually vote upon and then file the charge some eight months after the incident, apparently only after it determined that the neurological examination did not provide it with "assurance" that similar conduct would not be repeated. Arguably, had the Board received such "assurance," it might not have filed the tenure charge. Thus, there is certainly a possibility that a full examination of all of the proofs will establish that the true motivation of the Board in filing the charge was not to remove an employee who had engaged in "egregious

conduct," but was instead to remove an employee who had engaged in disturbing conduct *which it did not feel it had any assurance would not reoccur.* If the latter was the true motivation, then the motive for the Board's action is not solely "egregious conduct" by itself, but is instead a mixed motive, a combination of revulsion at the conduct and a fear of its possible reoccurrence. It is the latter portion of this mixture that is troubling from a civil rights prospective, especially given the burden placed on the Board by *Jansen,* and *N.J.A.C.* 13:13-2.8 (all this without the possibility of a further motivation, that of reprisal as charged by Ford). While the *Barbera* decision may allow an employer to act decisively against the employee when the extreme nature of the conduct is the only motivating factor, as the jury determined it was in *Barbera,* it does not purport to allow the employer to act without regard for the civil rights of a handicapped employee when the motivating factors are more complicated. If the employer acting is at least partially out of fear that the employee represents some future threat, then the considerations addressed by the Court in *Jansen* come into play. Therefore, summary decision on the Board's "conduct" termination theory is **DENIED.**

Mr. Ford cross-moves for summary decision, arguing that the Board cannot demonstrate that, as mandated by *Jansen*, it relied on objective factual and/or scientifically validated evidence that his continued employment presented a probability of substantial harm when it suspended him without pay and later sought his removal. Therefore, the Board's purported safety defense must fail as a matter of both fact and law. Ford cites case law that holds that the employer's motives at the time of the adverse employment action are an essential element in determining whether a violation of the LAD occurred. He contends that the Board had in its possession at the time it acted the medical opinion of its own, self-selected, consulting neurologist, Dr. Sperling, associated with Thomas Jefferson University Hospital, who in a letter dated October 25, 2000, advised the Board's attorney that Mr. Ford likely had idiopathic generalized epilepsy that

> often can be brought under good control and the drug that is often most effective this is a drug known as Depakote. I have urged Mr. Ford to speak to Dr. Lipsius, his neurologist. I would suggest that the Dilantin be tapered and that Depakote be substituted.
>
> Should this not prove effective, and I would estimate an 80% chance that it would prove effective, then Topamax and/or Zarontin with either Lamictal and/or the Depakote would be other alternative choices. . . .

> With regard to his ability to work, I cannot guarantee that he will not have more of these seizures. However, they are extremely rare and the odds are overwhelmingly in favor of his not having them in a classroom again, given the 30-year history of teaching with only two episodes in that period of time. In addition, I would hope that his neurologic condition would be substantially improved over the next few weeks if this medication is changed and that therefore any remaining risk would be diminished.

Ford contends that in addition to the lack of objective factual and/or scientifically validated evidence obtained from any medical expert that reasonably supported its safety concerns, the Board also lacked any objective evidence that anyone present during this November 22, 1993, or June 2000 incident was harmed in any way. Thus, the Board had none of the necessary evidence that could support a safety defense against a discrimination claim arising from its decision to suspend and then seek termination of Mr. Ford. Under such circumstances, summary decision is not warranted.

Despite the fact that the Board had the opportunity to respond directly to Mr. Ford's allegation in his motion for summary decision that it did not have the necessary evidence demanded by *Jansen*, the Board did not address this point directly in its reply brief to the cross-motion for summary decision. Instead, as noted above, it relied upon its contention that Ford had requested no reasonable accommodation that would avoid the possibility of a reoccurrence of the incidents and claimed that it was therefore free not to allow him to teach any further. However, that response fails to address the pertinent issue, which is whether, to the extent that the Board elected during these proceedings to support its tenure action based upon a claim that Mr. Ford posed a threat of harm, it simply does not have the evidence to support such claim. Although the Board has made some claims throughout the proceedings that it would obtain a medical expert, no supporting affidavits have been presented seeking to establish that there is a genuine issue of material fact regarding the probability, versus the possibility, that Mr. Ford would again engage in conduct that might pose such a threat.

Based upon the record, the undisputed medical evidence is that with possible adjustment of the medical regime Mr. Ford is highly unlikely to again experience the kind of incident that occurred in June 2000. That medical evidence, in the form of Dr. Sperling's opinion, was the

only medical evidence available to the Board when it chose to act, apart from Dr. Lipsius' initial statement that Ford had epilepsy and that the incident was related to that condition. While certainly one can understand the Board's reaction to a rather shocking incident and to similar incidents in Mr. Ford's past history, and one can understand the Board's strong concern that students not again be subjected to such an incident, the *Jansen* case makes it quite clear that more is demanded from an employer. It cannot rely upon vague suspicions, fears, and assumptions. Instead, it must have solid, objective, validated grounds for terminating an employee who suffers from a handicapping condition. In the absence of any evidence whatsoever of any contradictory opinion to that expressed by Dr. Sperling, and where there is no evidence on the record at all documenting the reality of any harm to anyone, as opposed to bald assertions and assumptions that there is, as the Board's brief states, no "need to have evidence that such egregious conduct is harmful to the students," summary decision in favor of Mr. Ford is appropriate, to the extent that it bars the Board from further assertions that its attempt to remove his tenure can be sustained on the basis of the safety defense.

Mr. Ford also seeks summary decision on his claim that the Board retaliated against him in violation of the LAD when it voted to certify tenure charges with the Commissioner on February 21, 2001. More specifically, he claims that this decision was made in retaliation for his filing of a complaint with the DCR on August 7, 2000, and his request to the Board for accommodation which was first made on December 4, 2000. The civil rights complaint was served on the Board on October 18, 2000. The Board filed an answer to the complaint on December 15, 2000, in which it stated that it intended to certify tenure charges for unbecoming conduct to the Commissioner of Education. However, the charge was not voted upon until February 21, 2001, at which time Mr. Ford's previous suspension with pay was changed to a suspension without pay. In its response to this motion, the Board points out its contention that it had decided on July 17, 2000, to bring tenure charges. However, while July 2000 is well before the filing of Ford's discrimination charge, nevertheless, the Board did not actually vote to certify charges until the following February, after the DCR filing and the request for accommodation. Ford contends that since he asserts that the acts of retaliation occurred after he filed his complaint, the July event, whatever it actually was, is irrelevant to a determination as to whether the Board illegally retaliated against him for filing the complaint in October.

While there is certainly no question that there is a temporal relationship between the filing date of the discrimination charge, the date of the request for accommodation and the date of the Board's answer in which it asserted its intention to file a tenure charge for unbecoming conduct, and it is possible to draw a conclusion that the Board made that intention known, and later carried out its stated intention in retaliation for Ford's having filed the charge, there is another factor that must be taken into account before one can conclude at this early stage that the proofs are sufficient to support a determination on summary decision in favor of Ford on the retaliation charge. It must be remembered that the Board received Dr. Sperling's October 25 letter sometime after that date. In that letter Sperling specifically indicated that there was no guarantee that Ford would not suffer another similar epileptic seizure. While he clearly discounted the likelihood of such an event, (see quote above), nevertheless, it may be argued that the Board, which apparently was unsatisfied with the lack of such assurance, and was perhaps fearful that such an incident would again occur, determined that it had to file a tenure charge in order to attempt to remove any possibility that Ford would again suffer such a seizure in the presence of a student. While the Board may have applied an incorrect legal analysis in determining that it had a legal basis to seek Ford's removal, it cannot be definitively determined on the record as it presently stands that retaliation had anything to do with the decision to file the charge. Since motivation is generally determined after receiving testimony from persons involved and motivation is the subject of the inquiry here, and is not generally determined in a summary decision mode, I **FIND** that it would be inappropriate to resolve this issue on motion. Therefore, a hearing will be scheduled to allow testimony regarding the circumstances and motivations surrounding the Board decision to suspend Ford without pay and to certify tenure charges to the Commissioner. Mr. Ford's motion for summary decision on the retaliation claim is therefore **DENIED**. Further, in light of the above, Mr. Ford's motion to depose the former superintendent of schools is hereby **GRANTED**.

In view of the above rulings, the consolidated case must proceed. The Board of Education may attempt to demonstrate that the tenure action was motivated solely by Mr. Ford's conduct and, that given all the circumstances attendant to this case, including his disability and its relationship to the conduct, such conduct is properly characterized as unbecoming and is sufficiently serious to warrant action affecting his tenure. If successful in establishing the conduct as both unbecoming and the sole motivating factor for its complaint, the Board may then perhaps

successfully meet its burden and action against the tenure may be permissible in this case under the *Barbera* rationale, despite the relationship of the unbecoming conduct and the disability. In addition, while *Barbera* allows conduct-based action where the conduct is deemed the sole motive, the Board may attempt to demonstrate that the law nevertheless will permit a successful tenure action even where the attempt to remove tenure is determined to be the product of a mixed motivation, and even though the "safety" motivation cannot be supported and was unsupportable on the evidence available at the time of the filing of the tenure complaint. Evidence regarding the motivation for the charge will also be considered in relation to the retaliation charge, and to the extent that retaliation may be demonstrated as a motive, a determination will be made as to whether any lawful basis for removal may survive such tainted motivation. The Board may not argue the safety defense, nor may it argue that Mr. Ford did not seek a reasonable accommodation.

This order may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION AND THE DIRECTOR OF THE DIVISION ON CIVIL RIGHTS,** who by law are authorized to make a final decision in this matter. The Commissioner of Education and the Director of the Division on Civil Rights are encouraged to consult and coordinate with each other before issuing a final order. If the Commissioner of Education and the Director of the Division on Civil Rights do not adopt, modify or reject this order within forty-five (45) days and unless such time limit is otherwise extended, this recommended order shall be deemed adopted by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION AND THE DIRECTOR OF THE DIVISION ON CIVIL RIGHTS.**

December 4, 2001
DATE

JEFF S. MASIN, ACTING CHIEF ALJ

mjm

STATE OF NEW JERSEY

DEPARTMENT OF EDUCATION
OAL DOCKET NO. EDU 0885-02S
AGENCY DOCKET NO. 45-2/01

DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 02367-01S
DCR DOCKET NO. EC38WE-46177A

CONSOLIDATED CASES

IN THE MATTER OF THE TENURE HEARING OF STEPHEN FORD, SCHOOL DISTRICT OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY	ADMINISTRATIVE ACTION
STEPHEN FORD, Complainant, v. WILLINGBORO BOARD OF EDUCATION, Respondent.	INTERLOCUTORY ORDER OF THE DIRECTOR, DIVISION ON CIVIL RIGHTS DECIDED: APRIL 18, 2002

BY THE DIRECTOR:

I. INTRODUCTION

This matter is before the Director[1] of the New Jersey Division on Civil Rights (Division) pursuant to a verified complaint filed by the complainant, Stephen Ford (Complainant), alleging that the respondent, the Willingboro Board of Education (Respondent), violated the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1

[1]"Director" refers to Acting Director Jeffrey Burstein.

to -49, when it suspended him with pay because of his disability (epilepsy). Complainant subsequently amended his complaint to allege that Respondent also subjected him to unlawful reprisal in further violation of the LAD. N.J.S.A. 10:5-12-(d). Specifically, Complainant alleges that after he filed a verified complaint with the Division and sought reasonable accommodation, Respondent suspended him without pay and certified a tenure charge for his removal to the Commissioner of Education (Commissioner).

On December 4, 2001, the Honorable Jeff S. Masin, Acting Chief Administrative Law Judge (ALJ), issued an Interlocutory Order Granting In Part and Denying In Part Summary Decision (Interlocutory Decision or ID) in which he ruled that none of the issues before him were appropriate for summary decision other than granting, in part, Complainant's request for summary decision with respect to Respondent's claim that it properly sought to remove Complainant due to safety concerns. Specifically, the ALJ ruled that summary decision in this limited respect was warranted because, under the LAD, an adverse decision based on safety concerns would have been "unsupportable at the time of the decision" (ID at 13). Accordingly, the ALJ granted Complainant's motion to the extent that the record demonstrates that Respondent did not have appropriate grounds to conclude that Complainant's disability presented a reasonable probability of serious harm that could not be accommodated. Therefore, the ALJ found good cause to bar Respondent from further asserting that its attempt to remove Complainant's tenure "can be sustained on the basis of the safety defense." (ID at 11). However, the ALJ nevertheless ruled that Respondent may introduce evidence that its sole reason for seeking Complainant's removal was unrelated to considerations of his disability and concerns arising from his disability regarding the future safety of schoolchildren.

Having conducted an independent review of the record, the Director adopts the ALJ's decision as detailed herein.

II. PROCEDURAL HISTORY

This matter arose on August 7, 2000, when Complainant filed a verified complaint with the Division alleging that Respondent subjected him to unlawful employment discrimination because of his disability (epilepsy). Specifically, Complainant alleges that as a result of his neurological disability he suffered two significant seizures in front of students during his 30 years of teaching. During the first incident, which occurred in 1993,he urinated into a wastebasket during one of his classes. In the second incident, which occurred on June 21, 2000, Complainant defecated into a wastebasket while one student was present. Complainant was not conscious of his actions during these episodes.

On April 8, 2001, Complainant amended his complaint to include a charge of unlawful reprisal in violation of the LAD, N.J.S.A. 10:5-12-(d), alleging that after he filed a verified complaint and asked Respondent for reasonable accommodation, Respondent refused to accommodate his disability, suspended him without pay and certified a tenure charge to the Commissioner of Education seeking his removal. The tenure charge and the Division complaint were transferred to the Office of Administrative Law (OAL) for hearing as a contested case on March 16, 2001 and July 26, 2001, respectively. On July 26, 2001, the ALJ issued an Interlocutory Order for Consolidation and Predominant Interest recommending that the discrimination and tenure cases be consolidated for purposes of hearing and determining that the Commissioner of Education had predominant interest in resolving the consolidated matter.

On September 14, 2001, the Commissioner and the Director, following consultation, issued orders modifying the ALJ's determination of predominant interest, ruling that the Division had predominant interest and would review the ALJ's initial decision first in order to render a final determination on Complainant's LAD claims. Thereafter, the Commissioner would determine, in light of the Division's holdings, whether Respondent had proven its tenure charge and, if so, whether Respondent may lawfully terminate Complainant's employment in accordance with applicable school law.

On September 25, 2001, Respondent filed a motion for summary dismissal pursuant to N.J.A.C. 1:1-12.5(b). Complainant filed his opposition to the motion along with a cross-motion for summary decision. On December 4, 2001, the ALJ issued an Interlocutory Order Granting in Part and Denying in Part Summary Decision and ruled that the decision would become final if neither the Director nor the Commissioner acted to accept, reject or modify the ruling within 45 days.[2] Respondent filed exceptions to the ALJ's order with the Division on December 13, 2001. Complainant filed a reply to Respondent's exceptions on December 26, 2001. On January 3, 2002, Respondent submitted a reply to Complainant's response and on January 8, 2002, Complainant filed objections to Respondent's January 3, 2002 submission. The Director sought and was granted two extensions of the time for issuing his findings, determination and order in this matter, moving the deadline for issuing a final order regarding the Interlocutory Order to April 18, 2002.

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[2]Initially, the Division did not receive service of this order, which was mailed instead to the Division of Law; nor was the OAL file transmitted to the Division for review. The Division became aware that the order had been issued upon its receipt of Respondent's exceptions to the ALJ's order which Respondent filed with the Division on December 13, 2001. The Division obtained a copy of the order from the Division of Law on December 16, 2001.

III. THE ALJ'S FINDINGS AND DETERMINATION

The ALJ rejected Respondent's argument that summary decision was required based on the decision of the Appellate Division of the Superior Court of New Jersey in Barbera v. DiMartino, 305 N.J. Super. 617 (App. Div. 1997), certif. den. 153 N.J. 213 (1998). In this decision, the court ruled that an employer could lawfully terminate an employee who attacked his supervisor during a psychotic episode based on his criminal or quasi-criminal conduct even though it was caused by his disability. The court further ruled that the employer did not have to rehire the employee following psychiatric treatment. Respondent claims that, similarly, it may lawfully terminate Complainant based solely upon his alleged "egregious conduct."

The ALJ rejected this argument and concluded instead that the Barbera decision does not compel summary decision in this matter because, unlike the situation in Barbera, Respondent's motive in this case is an unresolved factual issue. The ALJ explained that the Barbera court relied on the jury's finding that the employer's sole reason for terminating the plaintiff was the fact that the severe attack occurred and that the employer did not act out of concerns related to the plaintiff's disability. By way of contrast, the ALJ held that Respondent here failed to establish that its actions were based only on Complainant's conduct rather than on his status as a person with a disability. In reaching this holding, the ALJ noted that Respondent had asserted in its initial request for summary decision that its decisions to suspend Complainant and seek his removal following the incident of June 21, 2000 were lawfully based on safety concerns. Specifically, Respondent first argued that its actions were justified as a matter of law because Complainant could not guarantee that his disability would not result in future incidents and therefore posed an

unacceptable risk to the safety of schoolchildren (ID 7). The ALJ reasoned that Respondent's arguments in support of its motion for summary decision constitute an assertion of the "safety defense" explained by the New Jersey Supreme Court in Jansen v. Food Circus Supermarkets, 110 N.J. 363 (1988). Moreover, the ALJ also found that Respondent's actions further establish a factual dispute regarding the critical question of its motives that precludes the entry of summary decision on these grounds, notwithstanding its subsequent argument in further support of its motion that its actions were based solely on Complainant's conduct. For example, the ALJ noted that Respondent did not act to formally certify tenure charges against Complainant until after it received a medical report on his condition from a neurologist it selected.

The ALJ also rejected Respondent's assertion that Complainant cannot prevail on his disability claim because he failed to request an effective reasonable accommodation that would guarantee he would not suffer another epileptic episode similar to the one he experienced on June 21, 2000. Respondent contended that absent such guarantee, Complainant cannot establish that he was qualified to perform his job or that his request for time off from work for treatment with new medication was a reasonable accommodation that would enable him to perform his job. The ALJ rejected this argument and held that:

> the issue is not whether Mr. Ford made a request for an accommodation. Instead, it is whether the Board's refusal to allow him to resume teaching with the requested accommodation is supportable.
>
> [ID at 7.]

Accordingly, the ALJ denied Respondent's request for summary dismissal based on Complainant's purported failure to request an effective reasonable accommodation.

The ALJ then granted in part Complainant's cross-motion for summary decision with respect to his proofs that at the times Respondent suspended him and certified tenure charges against him, the medical evidence upon which Respondent relied did not support the conclusion that Complainant's disability presented a reasonable probability of serious harm, as mandated by Jansen v. Food Circus Supermarkets, supra. The ALJ found instead that the undisputed medical evidence available to Respondent when it made its adverse decisions could not support a determination that Complainant's disability posed a reasonable probability of serious harm to himself or others if he continued teaching. Accordingly, the ALJ granted Complainant partial summary decision to the extent that Respondent is barred from using the Jansen "safety defense" at the forthcoming hearing to establish that it made lawful decisions under the LAD based on concerns for the safety of schoolchildren or others. However, the ALJ nevertheless ruled that Respondent may introduce evidence that its sole reason for seeking Complainant's removal was his conduct, as distinguished from considerations of Complainant's disability and related concerns for the future safety of schoolchildren.

The ALJ then denied the parties' competing motions for summary decision on Complainant's claim of unlawful reprisal under the LAD. Specifically, the ALJ found that there are genuine issues of material fact with respect to Respondent's motive to suspend Complainant without pay and to certify tenure charges to the Commissioner. For all these reasons, the ALJ ruled that the consolidated case must proceed to hearing in order to establish a record on which it can be determined whether Respondent's adverse actions toward Complainant violated the LAD's prohibitions against retaliation for asserting rights under the LAD, such as filing a complaint or requesting reasonable accommodation.

IV. PARTIES' EXCEPTIONS AND REPLIES

Respondent takes exception to the ALJ's initial decision and argues that under the Barbera decision an employer may terminate an employee for "egregious conduct" notwithstanding the existence of a disability that may have been the cause of the conduct that resulted in the employee's termination. Respondent also contends that Complainant failed to identify a reasonable accommodation which would assure that no similar incidents would reoccur, and that staying out of work to see if his new medication would work is not a reasonable accommodation.

Complainant urges the Director to adopt the ALJ's initial decision and contends that the Barbera decision is inapposite to the instant case because the court relied upon the jury's finding that the employer's adverse action was due entirely to a legitimate non-discriminatory reason, rather than on any considerations of the employee's disability.

Complainant does not take exception to the ALJ's denial of his cross-motion for summary decision on the question of reprisal under the LAD. However, Complainant asks the Director to disregard additional medical evidence that Respondent submitted to the Division in response to Complainant's exceptions. Respondent presented medical evidence (separate from Dr. Sperling's report) in support of its safety defense to demonstrate that students would be harmed from a repetition of the incident, and that there was a high degree of medical probability that Complainant would continue to have seizures. Complainant argues that such evidence should be disregarded by the Director because it constitutes extra-record evidence in violation of N.J.A.C. 1:1-18.4. In addition, Complainant asserts Respondent's "new argument" in no sense can sustain the "safety defense" stricken by the ALJ because such evidence was generated after the disputed decisions of Respondent were made.

V. THE DIRECTOR'S FINDINGS AND CONCLUSIONS

A. STANDARDS FOR GRANTING SUMMARY DECISION

The rules governing practice before the OAL provide that summary decision should be granted upon a showing that there is no genuine dispute as to any material fact and that the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b) To defeat a motion for summary decision, the opposing party must submit affidavits or other evidence that establishes the existence of a genuine dispute regarding material facts that can only be resolved by an evidentiary hearing. Ibid. The standard for summary decision in an administrative hearing is substantially the same as that applied to a summary decision in Superior Court of New Jersey pursuant to R. 4:46-2. Frank v. Ivy Club, 228 N.J. Super. 40, 62 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. denied, 498 U.S. 1073 (1991). A court must consider "whether competent evidential material presented, when viewed in the light most favorable to the non-moving party, is sufficient to permit a rational fact-finder to resolve the alleged dispute in favor of the non-moving party." Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, at 523 (1995). Applying these standards, the Director must determine whether, viewing the record in the light most favorable to the party opposing the motion, there is evidence upon which a fact-finder could reasonably conclude that Respondent engaged in conduct that violates the LAD's prohibitions of employment discrimination. Ibid.

B. DISABILITY DISCRIMINATION

1. Establishing a prima facie case

The LAD prohibits employers from denying employment opportunities to people with disabilities unless it can be clearly shown that the nature and extent of a person's disability reasonably precludes his or her performance of the particular employment. N.J.S.A. 10:5-

29.1; 10:5-4.1, 10:5-12(a), 10:5-4. Generally, a complainant may establish a prima facie case of unlawful termination or demotion based on disability with proof that: (1) the complainant is a person with a disability covered by the LAD; (2) the complainant performed his or her job at a level that met the employer's legitimate expectations; (3) the complainant is denied employment; and (4) the respondent seeks others to perform the complainant's job duties. Jansen v. Food Circus Supermarkets, 110 N.J. 363, 382-83 (1988) (citation omitted); see also Anderson v. Exxon Co., 89 N.J. 483, 499 (1982). However, where a respondent concedes or the complainant proves that the employer removed the complainant from his or her position because of the employee's disability, the burden shifts to the respondent to prove that it reasonably determined that the complainant's disability precluded his or her performance of the job. Jansen v. Food Circus Supermarkets, supra, 110 N.J. at 381, citing Andersen v. Exxon Co., supra, 89 N.J. at 500 and N.J.A.C. 13:13-2.8.

In this instance the ALJ properly noted that it is undisputed that Complainant is a person with a disability covered by the LAD and that, apart from his conduct on June 21, 2000, Complainant's performance as a teacher met Respondent's legitimate expectations. Similarly, it is undisputed that Respondent suspended Complainant and sought his removal. Finally, although the parties have not pointed to evidence that Respondent sought others to perform Complainant's job, it is undisputed that Respondent did not seek to remove Complainant due to unavailability of work or staff reductions. For these reasons, the Director concludes that the record supports a finding that Complainant has established a prima facie case of disability discrimination.

2. Respondent's motivation

Upon a complainant's proof of a prima facie case of discrimination, the respondent may avoid liability by articulating that its decision was based on a legitimate business reason and that the employee's disability was not a determinative motivating factor for its actions. In this instance, Respondent has asserted, along with other defenses, that its challenged decisions were based on the egregiousness of Complainant's conduct during his seizures and not because of his disability. Notwithstanding this argument, the ALJ correctly denied Respondent's request for summary decision regarding LAD liability because there is a material factual dispute regarding whether Respondent's motives were based, in any determinative part, on Complainant's disability.

Specifically, the Director agrees with the ALJ that the Appellate Division's decision in Barbera does not compel summary dismissal of Complainant's LAD claims. The Barbera court ruled that an employer may lawfully terminate an employee based solely on his or her criminal or quasi-criminal conduct or other similarly egregious conduct without considering reasonable accommodation, even if the conduct was caused by a disability. The Barbera court held that if an employer terminates an employee based solely on such conduct, the employer does not have to consider accommodations of disability as may otherwise be required when a disability causes unacceptable job performance. In Barbera, the employee severely beat his supervisor while threatening to kill her during a psychotic episode. Significantly, the jury in Barbera found that the employer based its decision on the belief that such conduct was clearly grounds for termination, and the court ruled that the obligation to provide reasonable accommodation did not include tolerating criminal or quasi-criminal conduct that would otherwise unquestionably lead to termination

of any employee engaging in such behavior. However, the Barbera court nevertheless reaffirmed the standards set forth in Jansen and explained that the termination, in that case, of an employee who suffered an epileptic episode while working as a meat cutter violated the LAD because the employer did not have sufficient medical evidence that the employee's disability presented a materially enhanced risk of serious harm. As the ALJ aptly noted:

> While the Babera decision may allow an employer to act decisively against the employee when the extreme nature of the conduct is the only motivating factor, as the jury determined it was in Barbera, it does not purport to allow the employer to act without regard for the civil rights of a handicapped employee when the motivating factors are more complicated.
>
> [ID at 9 (emphasis supplied).]

The Director adopts the ALJ's determination that this question cannot be addressed on a summary basis and will require further examination of whether Complainant's conduct should be regarded in the same manner as the severe beating that the plaintiff in Barbera inflicted on his supervisor and whether Respondent, like the employer in Barbera, made adverse employment decisions without regard to Complainant's disability. See Jansen, supra, 110 N.J. 374-376, 378; see also N.J.A.C. 13:13-2.8(a)(2).

3. Reasonable accommodation

The "law clearly distinguishes between" the two theories of disability discrimination, namely, pretext cases in which the employer argues that it was motivated entirely by legitimate business reasons and not because of the employee's disability, and reasonable accommodation cases in which the employer argues that it reasonably concluded that the employee's disability precluded his or her employment even with reasonable accommodation. Viscik v. Fowler Equipment Company, Inc., 2002 WL464508 (N.J. Supreme Court).

In cases in which a respondent concedes or a complainant proves that the employer removed the complainant from his or her position because of the employee's disability, the burden shifts to the respondent to prove that it reasonably determined that the complainant's disability precluded his or her performance of the job. Jansen v. Food Circus Supermarkets, supra, 110 N.J. at 381, citing Andersen v. Exxon Co., supra, 89 N.J. at 500 and N.J.A.C. 13:13-2.8; 13:13-2.5. In order to make a reasonable determination that a person's disability precludes his or her performance of particular job, an employer must also consider the possibility of making reasonable accommodations. N.J.A.C. 13:13-2.5. The LAD mandates that such decisions be based on probabilities, facts, and a willingness to provide reasonable accommodations so that people with disabilities will "enjoy equal access to employment, subject only to limits that the cannot overcome." Andersen v. Exxon, supra, 89 N.J. at 496. Therefore, in cases where it is determined that the employer is making an adverse employment decision based on disability, the mere fact that an employee does not request an accommodation does not relieve the employer from the obligation to consider and provide reasonable accommodation that will enable the employee to perform the essential functions of his or her job. [3] N.J.A.C. 13:13-2.5.

Applying these standards, the ALJ correctly concluded as follows:

> Since the burden rests with the Board to establish the "objective reasonable basis" for its adverse action towards Ford, the issue is not whether Mr. Ford made a request for an accommodation. Instead, it is whether the Board's refusal to allow him to resume teaching with the requested accommodation

---

[3] The Director also rejects Respondent's arguments regarding reasonable accommodation to the extent they are intended to assert that time off from work for medical treatment can never be a reasonable accommodation. See, e.g., Matter of Cahill, 245 N.J. Super. 397, 401 (App. Div. 1991).

is supportable. Therefore, the Board's motion for summary decision based upon its contention that Ford failed to request a reasonable accommodation is DENIED.

[ID at 7.]

Therefore, the Director adopts the ALJ's decision denying Respondent's request for summary decision based on its claim that Complainant failed to request a reasonable accommodation that would guarantee that he would not have any future epileptic episodes involving objectionable conduct.

4. The "safety defense"

In establishing that an employees's disability precludes employment, an employer may establish that the disability poses an unacceptable safety risk. To be successful, a respondent must establish that it concluded, with a reasonable degree of certainty, that the employee's condition presents a reasonable probability of substantial harm in the workplace that cannot be resolved by reasonable accommodation. Jansen v. Food Circus Supermarkets, supra, 110 N.J. at 375. Therefore, adverse employment decisions based on disability must be based on an objective standard, supported by factual or scientifically validated evidence, which demonstrates a reasonable probability that employment of the person in that particular position would cause substantial harm to the safety or health of such individual other employees, clients or customers. Id. at 374-376 (citations omitted); see also N.J.A.C. 13:13-2.8(2).

In this instance, the Director adopts the ALJ's well-reasoned and well-supported finding that Respondent did not have sufficient evidence to make a lawful determination that Complainant's disability posed an unacceptable risk of substantial harm to schoolchildren that could not be sufficiently minimized or eliminated by a reasonable

accommodation. Instead, Respondent had in its possession a medical opinion prepared by its medical expert, Dr. Thomas Sperling, a neurologist from Jefferson University Hospital, who examined Complainant and advised as follows:

> [Mr. Ford's] seizures often can be brought under good control and the drug that is often most effective is a drug known as Depakote. I have urged Mr. Ford to speak to Dr. Lipsius, his neurologist. I would suggest that the Dilantin be tapered and that Depakote be substituted. Should this not prove effective, and I would estimate an 80% chance that it would prove effective then Topamax and/or Zarontin with either Lamictal and/or would be other alternative choices.
>
> With regard to his ability to work, I cannot guarantee that he will not have more of these seizures. However, they are extremely rare and the odds are overwhelmingly in favor of his not having them in a classroom again, given the 30-year history of teaching with only two episodes in that period of time. In addition, I would hope that his neurologic condition would be substantially improved over the next few weeks if his medication is changed and that therefore any remaining risk would be diminished.

Thus, Respondent's expert believed that an adjustment in Complainant's medical regime would make it likely that he would not experience another incident similar to the one that occurred in June 2000. The ALJ noted that since Respondent presented no other medical evidence that contradicted this opinion, as a matter of law, Respondent cannot meet the Jansen standard for making a reasonable determination regarding safety. Accordingly, the Director finds good cause to adopt the ALJ's determination that, based on the evidence before Respondent at the time of its challenged decisions, it could not have made a reasonable determination that Complainant's disability presented an unacceptable risk of serious harm and therefore precluded his performance.

Based on all of the above, the Director adopts the ALJ's conclusion that the parties failed to establish grounds for summary decision with respect liability for disability discrimination. Specifically, the parties have not established the absence of material factual disputes concerning Respondent's motivation for the disputed decisions. Similarly, based on the existing record, Respondent is not entitled to summary decision as a matter of law on the basis that it reasonably determined that Complainant's disability precluded his performance of the job. Jansen v. Food Circus Supermarkets, supra, 110 N.J. at 381, citing Andersen v. Exxon Co., supra, 89 N.J. at 500 and N.J.A.C. 13:13-2.8. The Director also adopts the ALJ's ruling that Respondent may not, for the purpose of avoiding liability under the LAD, introduce evidence to establish that it reasonably concluded that Complainant's disability created a reasonable probability of serious harm.

However, the Director notes that nothing in the ALJ's determination or in this Director's order precludes Respondent from producing evidence regarding Complainant's ability to safely perform his job in connection with other issues pending before the ALJ that do not involve defense of liability under the LAD. Specifically, Respondent may introduce evidence regarding the risk of harm in connection with a determination of remedies in the event of a finding of liability, such as whether reinstatement is appropriate under all of the circumstances as a remedy for any LAD violation.

This issue may have relevance in the forthcoming hearing because as part of its reply submission to the Director in support of its exceptions, Respondent presented medical evidence (separate from Dr. Sperling's report) in support of its safety defense to demonstrate that students would be harmed from a repetition of the incident, and that there was a high degree of medical probability that Complainant would continue to have

seizures. As Complainant correctly argued in his sur-reply brief to the Director, such evidence can have no bearing on the viability of Respondent's "safety defense" under Jansen because such evidence was not considered by Respondent as part of the disputed decision-making; indeed, such reports were issued well after such decisions were made. Nevertheless, while this post-hoc evidence was not considered as part of Respondent's decision-making process, and thus cannot be a defense to liability, Respondent may present this and other evidence regarding the appropriateness of imposing certain remedies for any potential LAD violation, such as reinstatement. Although such evidence cannot be used as a defense to liability because it was not part of Respondent's decision-making process, allowing Respondent to introduce such evidence on the issue (if necessary) of remedies is consistent with the United States Supreme Court decision in McKennon v. Nashville Banner Publishing Co., 513 U.S. 352, 360-363 (1995) (even though evidence of employee's misconduct discovered by employer after the employee was fired cannot serve as a defense to liability in discrimination suit, employer could use such evidence as bar to remedies of reinstatement and front pay.)

C. REPRISAL

A complainant may establish a case of discriminatory reprisal by demonstrating that: (1) he or she engaged in a protected activity known to the employer; (2) thereafter, the complainant was subjected to an adverse employment action by his or her employer; and (3) there was a causal connection between the two. Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 193 (1988); Jamison v. Rockaway Twp. Bd. of Ed., 242 N.J. Super. 436, 445 (App. Div. 1990).

Complainant alleges that Respondent retaliated against him in violation of the LAD because he filed a complaint with the Division on August 7, 2000. Complainant argues that he submitted his request for an accommodation on December 4, 2000, and that the Division's complaint was served on October 18, 2000. Respondent filed its answer to the complaint on December 15, 2000, and stated that it intended to certify tenure charges for unbecoming conduct to the Commissioner. The record shows that the tenure charge was voted on February 21, 2001. Thus, Complainant contends that Respondent's decision to certify tenure charges with the Commissioner was an act of reprisal.

Respondent asserts that it is entitled to summary dismissal as a matter of law because Complainant cannot establish a reprisal claim since Respondent voted to bring tenure charges against Complainant on July 17, 2000, only weeks after the June 21, 2000 incident and prior to Complainant's protected activity of filing a complaint with the Division on August 7, 2000. Complainant contends that Respondent's July 17, 2000 decision is irrelevant to whether Respondent subjected him to unlawful reprisal because Respondent's decision to suspend Complainant without pay and file a formal tenure charge occurred on February 21, 2001, after Respondent was served with the Division's discrimination complaint and after Complainant requested reasonable accommodation.

Neither party filed exceptions to the ALJ's denial of summary decision on the issue of reprisal. The Director finds that there are genuine issues of material facts with respect to Respondent's motives regarding actions taken after he engaged in protected activity, and adopts the ALJ's decision to deny the parties' requests for summary decision on the issue of whether retaliation for protected activity was a determinative factor in Respondent's motivation for these decisions.

V. ORDER

Having given careful consideration to the record and the appropriate legal standards, the Acting Director adopts the ALJ's Interlocutory Order Granting In Part and Denying In Part Summary Decision.

Date: 04-18-02

JEFFREY BURSTEIN
ACTING DIRECTOR

JB:SSG:LR:

OAL DKT. NO. EDU 0885-01S
AGENCY DKT. NO. 45-2/01 and

OAL DKT. NO.CRT 02367-01S
AGENCY DKT. NO. EC38WE-46177A

IN THE MATTER OF THE TENURE HEARING OF STEPHEN FORD, SCHOOL DISTRICT OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY.	:	COMMISSIONER OF EDUCATION
AND	:	INTERLOCUTORY ORDER
STEPHEN H. FORD,	:	
COMPLAINANT,	:	
V.	:	
WILLINGBORO BOARD OF EDUCATION,	:	
RESPONDENT.	:	

The Commissioner, in consultation with the Director of the Division on Civil Rights (Director), has reviewed the interlocutory order of the Administrative Law Judge (ALJ) filed on December 4, together with the exceptions and replies filed by the parties.

Upon such review, the Commissioner notes that the issues resolved by the ALJ's Order lie squarely within the primary jurisdiction of the Director, who has rendered a final decision on the Order pursuant to the previously issued determination of consolidation and predominant interest. To the extent that the ALJ's Order pertains to the tenure charges against respondent, in light of the Director's affirmance of the ALJ's Order, the Commissioner fully

concurs with the ALJ's discussion and his recommendations for the conduct of further proceedings.

Accordingly, to the extent that the Interlocutory Order of the ALJ implicates aspects of this consolidated matter within his jurisdiction, the Commissioner adopts it as his own.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/18/02

Date of Mailing: 4/19/02

175-02

175-02

MORRIS EDUCATION ASSOCIATION AND HELEN KILGALLON,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Education Association and a resident/taxpayer alleged that the Board was utilizing instructors to teach foreign languages, who do not hold valid New Jersey certificates, and that a contract with a private vendor for such instruction was unlawful. Petitioners sought acknowledgement that to contract with a private vendor was illegal and sought an order preventing such future agreements.

The ALJ determined that the Board is not utilizing any private contractors to provide foreign language instruction to its students for the 2001-02 school year and has not contested the proposition that teachers must hold valid New Jersey certifications. The ALJ, therefore, ordered the petition dismissed without prejudice as moot. The ALJ further determined that the Association's seeking of an order to prevent future agreements was tantamount to its seeking an advisory opinion to be fortified by a written order and such an opinion does not coincide with requirement that the OAL hear contested matters.

The Commissioner adopted the findings and determination in the Initial Decision as his own.

April 19, 2002

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO: EDU 7250-01

AGENCY DKT. NO: 156-6/01

MORRIS EDUCATION ASSOCIATION AND HELEN KILGALLON,

Petitioners,

v.

BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY

Respondent.

Kathleen A. Naprstek, Esq., for petitioners
(Zazzali Fagella and Nowak, Kleinbaum & Friedman, attorneys)

John G. Geppert, Esq., for respondent
(Wiley Malehorn and Sirota, attorneys)

Record Closed: February 25, 2002 Decided: February 28, 2002

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

STATEMENT OF CASE

On or about June 1, 2001, petitioner, Morris Education Association, filed an appeal with the Commissioner of Education contending that the Board of Education of the Morris School District had engaged the services of Berlitz Jr. to teach French and Italian to students in grade five. The employees of Berlitz Jr. who were going to teach these students did not hold valid New Jersey teaching certificates. The Board filed an answer to the petition of appeal on or about July 12, 2001. The Department of Education, Bureau of Controversies and Disputes, forwarded this matter to the Office of Administrative Law (OAL) on August 16, 2001.

On January 30, 2002, the Board of Education filed a Notice of Motion to Dismiss the Petition of the Morris Education Association on the grounds that the issues in the Petition of Appeal were moot.

FACTS

The facts in this matter are not in dispute. On April 16, 2001, the Morris School District adopted a Resolution which provided for a private contractor, Berlitz Jr., to provide foreign language instructions in French and Italian to elementary school students. The contention that Berlitz's employees are not certified to teach in New Jersey at public schools is unchallenged and uncontradicted.

Despite the Resolution, the Board did not enter into any agreement with Berlitz Jr. and is presently providing foreign language instructions through certified district employees. The issue presently before this tribunal resolves itself down to the following statement taken from petitioner's brief in opposition to the Board's Motion to Dismiss:

> Respondent thus claims that the issues raised in this Petition of Appeal are now moot and that the Petition of Appeal should therefore be dismissed. Although respondent is not currently under contract with a private vendor, such as Berlitz Jr., Inc. for the provision of foreign language instructions, it will not acknowledge that such an arrangement is illegal and will not promise to refrain from entering into such improper contractual agreements with upcoming school years. Thus, unless the illegality of such a contract is resolved at this time there is a strong likelihood that respondent will again enter into such an agreement and petitioners will be compelled to repeat this litigation. Consequently, it would be improper to dismiss the Petition of Appeal in this matter on the basis that the issues raised therein are moot.

It thus appears that the Morris Education Association is requesting that this tribunal compel the Board of Education to acknowledge that it is illegal for the Board to contract with a private vendor such as Berlitz for the provision of foreign language instruction and further enter an Order preventing such agreements in the future. The education Association however, provides no support for the contention that "there is a strong likelihood that respondent will again enter into such an agreement. . . ."

The Board does not dispute that those teaching in the public schools of New Jersey must be certified. They have not, however, hired any private contractors to teach in the public schools. The Assistant Superintendent for Curriculum and Instruction of the Board of Education of the Morris School District confirms that the Board is not contracting with Berlitz, Jr. for foreign language services for 2001, 2002 and that foreign language instruction is presently being provided by District personnel. The Order that the Education Association is now seeking is really no more and no less than a declaration that the Board should follow New Jersey statutes. The Board has not contested the proposition that teachers must hold valid New Jersey certifications. Apparently, those teaching the foreign language program are certified District personnel. Thus, in essence, the Education Association seeks an advisory opinion to be fortified by a written order. An advisory opinion does not coincide with requirement that the Office of Administrative Law hear contested matters.

ORDER

It is **ORDERED** that the Petition of Appeal filed by the Morris Education Association and Helen Kilgallon against the Board of Education of the Morris School District is hereby dismissed without prejudice as moot.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

FEB 28 02
DATE

JEFFREY A. GERSON,
Administrative Law Judge

Receipt Acknowledged:

3/5/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR - 7 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/g

OAL DKT. NO. EDU 7250-01
AGENCY DKT. NO. 156-6/01

MORRIS EDUCATION ASSOCIATION AND HELEN KILGALLON,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions and the District's reply thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4.

Petitioners' exceptions recast and reiterate their arguments, advanced before the Administrative Law Judge (ALJ) below, as to why this matter should not be considered moot. Essentially, they again urge that even though the Board is not currently contracting with Berlitz for the provision of foreign language instruction, it will neither acknowledge that such an arrangement is prohibited nor provide assurance that the Board will not enter such a contractual arrangement in future school years. Therefore, petitioners propose that, absent a specific directive of the Commissioner prohibiting the Board from entering into contracts of this nature, it is highly likely that such a contractual arrangement will arise in the future, requiring petitioners to again petition the Commissioner for relief. (Petitioners' Exceptions at 2-3) As such, petitioners maintain that the ALJ erred in finding this matter moot.

Alternatively, should the Commissioner deem that this matter is no longer an active controversy, petitioners request that the Commissioner render a declaratory ruling, based upon the State Board's decision in *Guttenberg Education Association v. Board of Education of the Borough of Guttenberg, Hudson County,* decided March 3, 1999 and the Commissioner's decision in *Neptune Township Education Association v. Board of Education of the Township of Neptune, Monmouth County,* decided May 22, 2000, proscribing the Board from entering into any commitment of this nature in the future.

In response, the Board submits that it is well-established that "an issue is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. In other words, the conflict between the parties has become merely hypothetical." (citations omitted) (Board's Reply Exceptions at 2) Here, because the Board is not utilizing Berlitz to provide foreign language instruction to its students for the 2001-02 school year, the ALJ properly dismissed this matter as moot, as there was no basis upon which he could grant relief. (Board's Reply Exceptions at 3) Notwithstanding petitioners' attempt to categorize this matter as one with a strong likelihood of repetition, in actuality, petitioners do no more than "raise hypothetical arguments about potential future events***." (*Ibid.*)

The Board next urges the Commissioner to reject petitioners' attempt to secure an order prohibiting the Board from procuring services from private contractors through conversion of their petition to a petition for declaratory judgment, since petitioners have not satisfied the requirements necessary for such a ruling. It maintains that, pursuant to *N.J.S.A.* 6A:3-2.1, a petitioner may request the Commissioner to issue such a declaratory ruling with respect to rights, responsibilities, and status arising under a particular statute or regulation within the

Commissioner's jurisdictional purview. Petitioners here have advanced no statute or regulation which they claim as a foundational basis for such a ruling. Consequently, the Board avers, this request must be denied. (Board's Reply Exceptions at 4, 5)

Upon his full and independent review of the record in this matter, the Commissioner concurs with the ALJ that this matter is appropriately dismissed as moot. As to petitioners' request for declaratory relief, the Commissioner determines, pursuant to his discretionary authority under *N.J.A.C.* 6A:3-2.1, to decline to entertain such request. It is well-established that declaratory judgment "cannot be used to decide or declare rights or status of parties upon a state of facts which are future, contingent and uncertain." *Chamber of Commerce of the United States of America v. State of New Jersey*, 89 *N.J.* 131, 140 (1982). *See, also, N.J.A.C.* 6A:3-2.1(a)1. The settled policy of the law in this State is to refuse advisory opinions and refrain from functioning in the abstract in a declaratory judgment action. *See Wagner v. Ligham*, 37 *N.J. Super.* 430, 431 (App. Div. 1955), *citing New Jersey Turnpike Authority v. Parsons*, 3 *N.J.* 235, 240 (1949); *Friedland v. State*, 149 *N.J. Super.* 483, 495 (Law Div. 1977).

Accordingly, the Initial Decision of the OAL is affirmed for the reasons articulated therein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/19/02

Date of Mailing: 4/22/02

* This decision, as the Commissioner's final determination may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:2-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

176-02

176-02

RAUL SANCHEZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

April 22, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 439-01

AGENCY DKT. NO. 442-12/00

RAUL SANCHEZ,

Petitioner,

v.

BOARD OF EDUCATION

OF THE CITY OF TRENTON,

Respondent.

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

Thomas W. Sumners, Jr., Esq., for the respondent (Sumners, George & Dortch, attorneys)

Record Closed: February 26, 2002 Decided: February 28, 2002

BEFORE **KATHRYN A. CLARK**, ALJ:

This matter concerns the allegation of the petitioner, Raul Sanchez, that the respondent, the Board of Education of the City of Trenton, Mercer County, improperly reduced his salary in violation of *N.J.S.A.* 18A:6-10. The petitioner requested a hearing and the matter was transmitted to the Office of Administrative Law (OAL) on February 7, 2001, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was scheduled for a telephone prehearing conference on May 14, 2001, which was adjourned at the request of Mr. Barrett and rescheduled for June 7, 2001. After several adjournments, the matter was rescheduled for November 9, 2001. Prior to that date, the parties conferred and agreed to a settlement. The attached stipulation sets forth the terms of the settlement, and is incorporated herein.

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Feb. 28, 2002
DATE

Kathryn A. Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

3/7/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 8 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cad

SUMNERS GEORGE & DORTCH
A Professional Corporation
849 West State Street
Trenton, NJ 08618
Attorneys for Respondent, Trenton Board of Education

RAUL SANCHEZ, Petitioner, v. CITY OF TRENTON BOARD OF EDUCATION, Respondent.	: BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY : : OAL DOCKET NO.: EDUOR 00439-01S : AGENCY DOCKET NO.: 442-12/00 : : : ***SETTLEMENT AGREEMENT*** : :

This Settlement Agreement is made between the City of Trenton Board of Education ("Board") and Raul Sanchez ("Sanchez").

WHEREAS, Sanchez has filed a Verified Petition with the Commissioner of Education of the State of New Jersey alleging that the Board violated his rights pursuant to State of New Jersey tenure laws, ***N.J.S.A.*** 18A:6-10, when it refused to permit him to return to work following the expiration of his family leave in or around February, 2000; and did not place him on the proper step of the salary guide pursuant to the collective bargaining agreement between the Board and the Trenton Education Association ("TEA") upon his return from authorized family leave commencing with the 2000-2001 school year and continuing through the 20001-2002 school year; and

WHEREAS, the relief sought by Sanchez was to receive compensation covering the time period in or around February, 2000 through June 30, 2000, representing the period in which the Board refused to allow him to return from his authorized family leave, and place him on the proper step of the salary guide, together with retroactive pay for the wrong placement on the salary guide for school years 2000-2001 and 2001-2002; and

WHEREAS, the Board denies that Sanchez requested and was refused the opportunity to return from authorized family leave in or around February, 2000 through June 30, 2000; and

WHEREAS, a settlement in this matter will save both parties the cost and uncertainty of litigation;

THEREFORE, in consideration of the foregoing, the parties agree that this matter shall be resolved based upon the following terms:

1. Sanchez shall receive retroactive salary in the amount of $1,000.00 for the 2000-2001 school year due to his improper placement on the Step E (BA) guide for the 2000-2001 school year instead of the proper placement of Step D-1 (BA) on the 2000-2001 guide.

2. Sanchez shall be placed on Step D-2 (BA) of the 2001-2002 guide instead of Step D-1 (BA) 2001-2002 guide, and receive retroactive pay for the time period covering September 1, 2001 through the date that he is placed on Step D-2 (BA) 2001-2002 guide.

3. Sanchez will waive all claims for alleged lost wages during the 1999-2000 school year, as well as any other claims set forth in his Verified Petition.

4. The parties recognize that each of them had the opportunity to obtain advice of counsel and have had input into the drafting of this agreement and agree that if a dispute arises as to its terms, this agreement shall not be construed against either party based upon the identity of its drafters.

5. The parties warrant that this agreement is entered into voluntarily, without duress, or without any other promises or agreements not expressed herein, and with the understanding that neither party is compelled to do so and that by entering into this agreement, each party waives their right to a hearing before the Office of Administrative Law and disposition on the

merits of their respective allegations or defenses as articulated in their pleadings with the Commissioner or Education, State of New Jersey.

Michael T. Barrett, Esq.
Petitioner's Attorney

12-21-01
Date

Raul Sanchez
Petitioner

Melvin L. Wyns, Secretary
Trenton Board of Education
Respondent

2/19/02
Date

Joyce M. Kersey, President
Trenton Board of Education
Respondent

OAL DKT. NO. EDU 439-01
AGENCY DKT. NO. 442-12/00

RAUL SANCHEZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/22/02

Date of Mailing: 4/22/02

179-02

179-02

LINDA TURRELL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF HAZLET TOWNSHIP, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

April 22, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6249-01
AGENCY DKT. NO. 306-7/01

LINDA TURRELL,
Petitioner,
v.
BOARD OF EDUCATION OF HAZLET TOWNSHIP, MONMOUTH COUNTY,
Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Fagella & Nowak, attorneys)

Michael J. Gross, Esq., for respondent (Kenney, Gross, Kovats & Campbell, attorneys)

Record Closed: March 4, 2002 Decided: March 5, 2002

BEFORE **JOSEPH LAVERY**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 24, 2001, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 5, 2002
DATE

JOSEPH LAVERY, ALJ

Receipt Acknowledged:

3/8/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 11 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

mph

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2002 MAR -4 P 12:02

SETTLEMENT AGREEMENT

The Hazlet Township Board of Education (hereafter called the "Board"), Respondent, and Linda Turrell (hereafter called "Turrell"), Petitioner, having entered into discussions in an attempt to amicably resolve their dispute, are hereby agreed as follows:

1. Turrell shall withdraw with prejudice her Petition of Appeal, Docket No. EDUOR 0249-01S.
2. In consideration for withdrawal of the Petition, effective September 1, 2002, the Board shall assign Turrell to an Elementary School Media Specialist position in the District.
3. For the 2002-2003 school year, Turrell shall be assigned the regular Media Specialist position at the Sycamore/Cove/Middle Road Schools. The workload (including work, travel and duty free time) shall be consistent with the assignment for the Elementary School Media Specialist in the District, provided that Turrell shall not be assigned any duties which are outside of the scope of her Media Specialist endorsement for this assignment.
4. The Board agrees that it shall continue to assign Turrell to a Media Special position in the District, as long as she continues to retain tenure status in the position of Media Specialist.
5. Turrell waives any and all other claims she may have against the Board concerning the Board's 2001-2002 school year assignments for anything that has happened up to

the date that she signs this agreement. Turrell further agrees to professionally complete her current 2001-2002 school year assignment.

FOR THE BOARD:

Toni E. Caska
Feb. 20, 2002

Linda Turrell
Feb 11, 2002

FEB 11'02 9:28 No 001 P.04 ID:6093928935 2H27QI 1. 2H22PL1

OAL DKT. NO. EDU 6249-01
AGENCY DKT. NO. 306-7/01

LINDA TURRELL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF HAZLET TOWNSHIP, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/22/02

Date of Mailing: 4/23/02

180-02

180-02R

B.G., on behalf of minor child, McG.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

April 22, 2002

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

ON REMAND

OAL DKT. NO.: EDU 1601-02

AGENCY REF. NO.: 126-4/01

B.G. o/b/o minor child, McG.G.,

Petitioners,

v.

BOARD OF EDUCATION –TOWNSHIP OF UNION, UNION COUNTY,

Respondent.

John Edwards Tiffany, Esq., represented petitioners

Joseph M. Wenzel, Esq., represented respondent

Record Closed: February 28, 2002 Decided: March 7, 2002

BEFORE **THOMAS E. CLANCY**, ALJ:

PROCEDURAL BACKGROUND

Relative to the merits of this case, the Honorable Michael L. Ravin, former Administrative Law Judge, rendered an Initial Decision approving a settlement between the parties on October 21, 2001. His Initial Decision bore OAL DKT. NO. EDU 5374-01.

Thereafter, the Commissioner of Education remanded the matter to the Office of Administrative Law (OAL) because the previous case record did not reflect that the parties' settlement terms were approved by the respondent Board of Education pursuant to *N.J.A.C.* 6A:3-5.6(b).

REMAND RESULT

After transmittal to the OAL on February 5, 2002, the undersigned contacted the attorneys for the parties and invited them to submit any documentation germane to the reason for this remand. On February 27, 2002, the attorney for the Board of Education sent the attached three pages – which I have designated as Exhibit R-1. On or about February 28, 2002, the undersigned contacted the attorney for the petitioner who advised that he would not be submitting anything on behalf of his client; he also acknowledged that the undersigned would soon process the paperwork necessary to reach closure in this remand.

DISPOSITION

On the strength of the foregoing and also the contents of Exhibit R-1 **- -** which **I FIND** fully satisfies the provisions of *N.J.A.C.* 6A:3-5.6(b) **- - I ORDER** the parties to comply with the settlement terms set forth in the attached previous decision by ALJ Ravin. I also **ORDER** that these proceedings **BE** (and are hereby) **TERMINATED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

3/7/02
DATE

Thomas E. Clancy
THOMAS E. CLANCY,
Administrative Law Judge

3/8/02
DATE

Receipt Acknowledged:
Debbie Andrews/pp
DEPARTMENT OF EDUCATION

MAR 11 2002
DATE

Mailed to Parties:
OFFICE OF ADMINISTRATIVE LAW

Exhibit R-1 en tec

LUM, DANZIS, DRASCO, POSITAN & KLEINBERG, LLC

COUNSELORS AT LAW
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DOMENICK CARMAGNOLA
KEVIN F. MURPHY
MICHAEL F. NESTOR◊
JANE S. KELSEY+
LISA A. FIRKO
STEVEN F. RITARDI
KEVIN J. O'CONNOR
RICHARD A. WEST, JR.
MATTHEW J. O'DONNELL*

RICHARD LUM (1902-1995)
CHARLES H. HOENS, JR. (1922-1994)
MARTIN CLINTON CONANT (1931-1999)
PAUL R. KLEINBERG (1910-1996)

CHRISTINA SILVA LEE
COUNSEL

WILLIAM BOYCE LUM
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BERNADETTE HAMILTON*
KRISTEN L. TRONCOSO*
JOSEPH M. WENZEL
G. MICHAEL FOULON
RAMON RIVERA

WRITER'S DIRECT LINE:
(973) 228-

* ALSO ADMITTED IN NEW YORK
◊ ALSO ADMITTED IN PENNSYLVANIA
* ALSO ADMITTED IN DISTRICT OF COLUMBIA
+ CERTIFIED CIVIL TRIAL ATTORNEY

February 25, 2002

Hon. Thomas E. Clancy
Admin. Law Judge (Assignment Judge)
Office of Administrative Law
185 Washington St.,
Newark, NJ 07102

RE: Gard v. Union Board of Education
OAL Docket No. EDU 5374-01

Dear Judge Clancy:

As per your request during our telephone conference of February 22, 2002, enclosed please find a copy of the certification of the Board Secretary acknowledging that the Union Board of Education approves of the settlement reached in the above referenced action. I have an original with a raised seal if you wish to have that document. Also enclosed please find a copy of N.J.A.C. 6A:3-5.6(b) which was referenced in the Commissioner's Decision.

If any further action is required please contact the undersigned at your convenience. Thank you for you courtesies in this matter.

Very truly yours,

LUM, DANZIS, DRASCO, POSITAN
& KLEINBERG, LLC

Joseph M. Wenzel

JOSEPH M. WENZEL
For the Firm

Enc.

132864_1

3a

The committee recommends and I so move that the board approve settlement stipulation in the matter of *B.G. v. Union Board of Education*, in accordance with the information in the hands of each board member.

I CERTIFY THAT THE ABOVE RESOLUTION WAS ADOPTED BY THE TOWNSHIP OF UNION BOARD OF EDUCATION AT ITS REGULAR MEETING ON DECEMBER 18, 2001.

JAMES J. DAMATO
BOARD SECRETARY

NEW JERSEY ADMINISTRATIVE CODE
TITLE 6A. DEPARTMENT OF EDUCATION
CHAPTER 3. CONTROVERSIES AND DISPUTES
SUBCHAPTER 5. CHARGES UNDER TENURE EMPLOYEES' HEARING ACT
Current through Febuary 19, 2002; 34 N.J. Reg. No. 4.

6A:3-5.6 Withdrawal, settlement or mooting of tenure charges

(a) Once tenure charges are certified to the Commissioner, such charges may be withdrawn or settled only with the Commissioner's approval. Any proposed withdrawal or settlement, whether submitted to the Commissioner or to the ALJ, shall address the following standards established by the State Board of Education in the matter entitled In re Cardonick, State Board decision of April 6, 1983 (1990 School Law Decisions (S.L.D.) 842, 846):

1. Accompaniment by documentation as to the nature of the charges;

2. Explication of the circumstances justifying settlement or withdrawal;

3. Consent of both the charged and charging parties;

4. Indication that the charged party entered into the agreement with a full understanding of his or her rights;

5. A showing that the agreement is in the public interest; and

6. Where the charged party is a teaching staff member, a showing that he or she has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

(b) A settlement agreement shall not propose terms that would restrict access to information or records deemed public by law or result in misrepresentation of the reason for an employee's separation from service. A settlement agreement shall not be proposed to the Commissioner without an indication on the record that its terms have been approved by the district board of education.

(c) A proposed withdrawal or settlement of tenure charges shall be submitted to the Commissioner prior to transmittal of such charges to the OAL; thereafter, it shall be submitted to the ALJ in accordance with applicable rules of the OAL.

(d) Where tenure proceedings are concluded prior to adjudication because the charged party has unilaterally resigned or retired, the Commissioner may refer the matter to the State Board of Examiners for action against the charged party's certificate as it deems appropriate, when such referral is warranted under the provisions governing resignation or retirement prior to conclusion of tenure charges as set forth in N.J.A.C. 6:11-3.5.

New Rule, R.2000 d.137, effective April 3, 2000.

See: 31 N.J.R. 4173(a), 32 N.J.R. 1177(a).

<General Materials (GM) - References, Annotations, or Tables>

NJ ADC 6A:3-5.6
END OF DOCUMENT

Copr. © West 2002 No Claim to Orig. U.S. Govt. Works

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 05374-01
Agency Reference No. 126-4/01

B. G., on behalf of minor child, McG.G.,

Petitioner,

v.

BOARD OF EDUCATION of the TOWNSHIP OF UNION COUNTY,

Respondent.

John Edwards Tiffany, Esq., for petitioner
(Education Law Center, attorneys)

Joseph M. Wenzel, Esq., for respondent
(Lum, Danzis, Drasco, Positan & Kleinberg, L.L.C.)

Record Closed: October 9, 2001 Decided: October 12, 2001

BEFORE **MICHAEL L. RAVIN,** ALJ:

STATEMENT OF THE CASE

Petitioner, B. G., appeals the residency determination of McG.G. made by the Board of Education of the Township of Union, Union County, pursuant to *N.J.S.A.* 18A:38-1. The matter was transmitted to the Office of Administrative Law for hearing as a contested case on June 21, 2001, pursuant to *N.J.S.A.* 52:14B-1 –15 and *N.J.S.A.* 52:14F-1 to –13.

The matter was scheduled for a hearing on October 9, 2001. On the scheduled hearing date, the parties amicably agreed to settle the matter and have prepared the attached Settlement Stipulation setting forth the terms of settlement.

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

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

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

Therefore, I **ORDER** that the parties comply with the settlement terms and that these proceedings be and are hereby concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 12, 2001
DATE

Michael L. Ravin
MICHAEL L. RAVIN, ALJ

Receipt Acknowledged:

10-16-01
DATE

Debbie Antonaitis /gp
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 18 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

LUM, DANZIS, DRASCO, POSITAN & KLEINBERG, LLC
103 Eisenhower Parkway
Roseland, NJ 07068-1049
(973) 403-9000
(973) 403-9021 (FAX)
Attorneys for Respondent

B.G., on behalf of minor child, McG.G.

Petitioner,

-vs-

Board of Education of the Township of Union, Union County

Respondent.

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

OAL Docket No. EDU-05374-01

Agency Docket No. 126-4/01

SETTLEMENT STIPULATION,
DISMISSAL AND MUTUAL RELEASE

AGREEMENT and stipulation made this 9th day of October 2001, between Belony Gard, on behalf of minor child, McGregor Gard, Petitioner, and the Board of Education of the Township of Union, Union County, Respondent.

WHEREAS disputes and differences have arisen between the parties with respect to the residency of the minor child, McGregor Gard.

WHEREAS, Petitioner and Respondent desire to finally compromise and settle their differences by entering into this stipulation;

NOW THEREFORE, in consideration of their mutual covenants set forth herein, Petitioner and Respondent hereby agree as follows:

1. **Payment.** Belony Gard shall pay the Board of Education of the Township of Union the total cash sum of Three Thousand Dollars ($3000.00). This amount is to be paid by Belony Gard in the following manner:

$500.00 shall be due ~~simultaneously with the signing of this stipulation;~~ on November 8, 2001

$500.00 shall be due on December 8, 2001;

$500.00 shall be due on January 8, 2002;

$500.00 shall be due on February 8, 2002;

$500.00 shall be due on March 8, 2002; and

$500.00 shall be due on April 8, 2002.

This amount once paid in full ($3000.00) represents the settlement of all claims and by and for tuition due and owing for educational services provided to McGregor Gard for School Year 2000-2001. If any of the above referenced payments are late, if the monthly payment amount is less than stipulated herein, and/or if the full amount is not paid by April 8, 2002; the Board of Education of the Township of Union reserves the right to enforce this settlement agreement through a court proceeding for the full amount due plus attorney's fees and costs or in the alternative initiate an action for the full amount of tuition alleged due from the Petitioner.

2. **General Release by Belony Gard.** Belony Gard, on his own behalf and on the behalf of his heirs, personal representatives, successors and assigns, including but not limited to

McGregor Gard, hereby releases and forever discharges the Board of Education of the Township of Union and their employees, agents, officers, directors and attorneys, from any and all actions, causes of action, suits, debts, dues, sums of money, accounts, bills, invoices, covenants, contracts, controversies, agreements, promises, damages, costs, attorneys fees, interest, warranties, representations, claims and demands whatsoever, in law or equity, which Belony Gard or anyone claiming by, through or under ever had or now has against the Board of Education of the Township of Union or its employees, agents, officers, directors or attorneys by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of this instrument. The undersigned hereby agree that the effect of this general release includes, but is not limited to, the elimination of any and all further liability on the part of the Board of Education of the Township of Union, with respect to all matters claimed by Belony Gard in that certain petition filed with the State of New Jersey Department of Education, Bureau of Controversies and Disputes, Agency Docket No. 126-4/01, captioned "B.G. on behalf of minor child, McG.G., Petitioner vs. Board of Education of the Township of Union, Union County, Respondent". Belony Gard hereby represents and acknowledges that this is a legally binding instrument, that there are no representations or promises made to him which are not contained in this instrument, and that the only obligation of Belony Gard shall be to pay the Board of Education of the Township of Union the said above-mentioned sum of $3000 .00.

3. **General Release by the Board of Education of the Township of Union.** The Board of Education of the Township of Union, on their own behalf and on the behalf of their successors and assigns, hereby releases and forever discharges Belony Gard and his heirs,

personnel representatives, successors and assigns, from any and all actions, causes of action, suits, debts, dues, sums of money, accounts, bills, invoices, covenants, contracts, controversies, agreements, promises, damages, costs, attorneys fees, interest, warranties, representations, claims and demands whatsoever, in law or equity, which the Board of Education of the Township of Union or anyone claiming by, through or under ever had or now has against Belony Gard by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of this instrument. The undersigned hereby agree that the effect of this general release includes, but is not limited to, the elimination of any and all further liability on the part of Belony Gard, with respect to all matters claimed by the Board of Education of the Township of Union in that certain counterclaim filed with the State of New Jersey Department of Education, Bureau of Controversies and Disputes, Agency Docket No. 126-4/01, captioned "B.G. on behalf of minor child, McG.G., Petitioner vs. Board of Education of the Township of Union, Union County, Respondent". The Board of Education of the Township of Union hereby represents and acknowledges that this is a legally binding instrument, that there are no representations or promises made which are not contained in this instrument, and that the only obligation of Belony Gard shall be to pay the Board of Education of the Township of Union the said above-mentioned sum of $3000.00.

4. **Dismissal.** The parties hereby agree and stipulate that this case is voluntarily dismissed with prejudice and without costs. The parties hereby agree + stipulate that there is no admission of liability on the part of Belony Gard and his minor child, McGregor Gard.

IN WITNESS WHEREOF, the parties hereto have executed this stipulation as of the day and year first written above.

PETITIONER:

Delony Gard

ATTEST:

John Tiffany, Esq.
Attorney for Petitioner

RESPONDENT:
Board of Education of
Township of Union

By: Carolyn R. Martinez

Title: Recording Investigator

ATTEST:

Joseph M. Wenzel, Esq.
Attorney for Respondent

OAL DKT. NOS. EDU 1601-02 AND EDU 5374-01 (ON REMAND)
AGENCY DKT. NO. 126-4/01

B.G., on behalf of minor child, McG.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record, Stipulation of Settlement and Initial Decision on Remand issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/22/02

Date of Mailing: 4/23/02

* It is noted that the prior decision in this matter inadvertently referenced a citation for requiring Board approval for settlements of tenure matters, *N.J.A.C.* 6A:3-5.6(b), rather than the citation requiring Board approval of settlements reached in contested matters in general, *N.J.A.C.* 6A:3-1.13.

181-02

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

April 29, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NOS. EDU 6586-01
AND EDU 8707-01
CONSOLIDATED
AGENCY DKT. NOS. 299-7/01
AND 344-9/00

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Robert DeSanto, Esq., for petitioner (Gruccio, Giovinazzi, DeSanto & Farnoly, attorneys)

Todd Schwartz, Deputy Attorney General, for respondent (David Samson, Attorney General of New Jersey, attorney)

Record Closed: March 7, 2002 Decided: March 11, 2002

BEFORE **LILLARD E. LAW,** ALJ:

These matters were transmitted to the Office of Administrative Law on October 9, 2001 and November 29, 2001, respectively, for determination as contested cases, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Consent Order indicating the terms thereof, which is incorporated herein by reference and attachment.

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does ot adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

11 March 2002
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

3/13/02
DATE

Debbie Antonaitis/cp
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 14 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

FILED

MAR 7 11 28 AM '02

STATE OF NEW JERSEY
OFFICE OF
ADMINISTRATIVE LAW

DAVID SAMSON
Attorney General of New Jersey
Attorney for Respondent
New Jersey Department of
Education
R.J. Hughes Justice Complex
PO Box 112
Trenton, New Jersey 08625

By: Kimberly M. Lake
Deputy Attorney General
(609)984-6466

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY, Petitioner, v. NEW JERSEY DEPARTMENT OF EDUCATION, Respondent.	OAL DOCKET NO. EDU 8707-00 AGENCY DKT. NO. 344-9/00 **CONSENT ORDER OF SETTLEMENT**

Petitioner, Board of Education of the City of Vineland, Cumberland County ("Petitioner"), through its attorney, Gruccio, Pepper, Giovinnazzi, De Santo & Farnoly (Robert A. De Santo, appearing), and Respondent, New Jersey Department of Education ("Department"), through its attorney, the Honorable David Samson, Attorney General of the State of New Jersey (Kimberly M. Lake, Deputy Attorney General, appearing), hereby stipulate to the following terms of settlement:

1. On or about September 22, 2000, Petitioner filed a Petition of Appeal ("Petition") with the Commissioner of Education

seeking review of the Department's determination with respect to Petitioner's request for Abbott parity funding for the 1997-1998 school year.

2. This Petition was subsequently transferred to the Office of Administrative Law as a contested case.

3. In this action, Petitioner alleged a 1997-1998 parity aid account receivable of $586,533.83 from the Department.

4. Petitioner had in fiscal year 2000-2001 an undesignated general fund balance in excess of two percent ("excess surplus").

5. The parties thereupon entered into discussions to amicably resolve these matters in the public interest.

6. Based on those discussions, the Department agrees that the Petitioner may retain $586,533.83 of its excess surplus.

7. Petitioner agrees that its retention of $586,533.83 of excess surplus fully satisfies the parity aid account receivable in that amount alleged by Petitioner in this action.

8. The Petitioner agrees to dismissal with prejudice of the Petition pending before the Office of Administrative Law and the Commissioner of Education in the instant action (OAL Docket No. EDU 8707-00).

9. Resolution of this matter on the terms set forth herein shall not be construed as precedent in other pending or future litigation.

DAVID SAMSON
Attorney General of the State
of New Jersey
Attorney for New Jersey
Department of Education

Kimberly M. Lake, DAG

DATED: 3/5/02

GRUCCIO, PEPPER, GIOVINAZZI,
DE SANTO & FARNOLY
Attorneys for Petitioner
Board of Education of the City
of Vineland, Cumberland County

Robert A. De Santo, Esq.

DATED: 2-25-02

SO ORDERED THIS _____ DAY OF _____, 2002.

HONORABLE LILLARD E. LAW, A.L.J.

FILED
MAR 7 11 28 AM '02
STATE OF NEW JERSEY
OFFICE OF
ADMINISTRATIVE LAW

DAVID SAMSON
Attorney General of New Jersey
Attorney for Respondent
New Jersey Department of Education
R.J. Hughes Justice Complex
PO Box 112
Trenton, New Jersey 08625

By: Todd J. Schwartz
Deputy Attorney General
(609) 943-5949

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY, Petitioner, v. NEW JERSEY DEPARTMENT OF EDUCATION, Respondent.	OAL DOCKET NO. EDU 6586-01 AGENCY DKT. NO. 299-7/01 **CONSENT ORDER OF SETTLEMENT**

Petitioner, Board of Education of the City of Vineland, Cumberland County ("Petitioner"), through its attorney, Gruccio, Pepper, Giovinnazzi, De Santo & Farnoly (Robert A. De Santo, appearing), and Respondent, New Jersey Department of Education ("Department"), through its attorney, the Honorable David Samson, Attorney General of the State of New Jersey (Todd J. Schwartz, Deputy Attorney General, appearing), hereby stipulate to the following terms of settlement:

1. On or about July 26, 2001, Petitioner filed a Petition of Appeal ("Petition") with the Commissioner of Education

seeking review of the Department's determination with respect to Petitioner's request for supplemental funding for the 2001-2002 school year under the Abbott v. Burke decisions and DOE regulations.

2. This Petition was subsequently transferred to the Office of Administrative Law as a contested case.

3. Petitioner has an undesignated general fund balance in excess of two percent ("excess surplus").

4. The parties thereupon entered into discussions to amicably resolve these matters in the public interest.

5. Based on those discussions, as part of this settlement, the Department agrees that the Petitioner may retain $113,466.17 of its excess surplus.

6. The Department agrees that the Petitioner has demonstrated a need for additional Abbott v. Burke state aid in the amount of $700,000. To meet this need, Petitioner shall appropriate $700,000 of its excess surplus for use in the 2001-2002 school year.

7. This settlement does not waive any of the review requirements and mandated adjustments pursuant to P.L. 2001, c.130, including reallocation of the district's undesignated general fund balance in excess of two percent, except for the above-noted $700,000.

8. The Petitioner agrees to dismissal with prejudice of the Petition pending before the Office of Administrative Law and the Commissioner of Education in the instant action (OAL Docket No. EDU 6536-01).

9. This Consent Order does not preclude Petitioner from applying for additional Abbott v. Burke state aid pursuant to N.J.A.C. 6A:24-7.1(f).

10. The parties agree that this Consent Order of Settlement fully resolves all issues between them arising from the Department's June 26, 2001 determination concerning Petitioner's request for additional Abbott v. Burke state aid for the 2001-2002 school year.

11. Resolution of this matter on the terms set forth herein shall not be construed as precedent in other pending or future litigation.

DAVID SAMSON
Attorney General of the State of New Jersey
Attorney for New Jersey Department of Education

Todd J. Schwartz, DAG

DATED: 3/4/02

GRUCCIO, PEPPER, GIOVINAZZI, DE SANTO & FARNOLY
Attorneys for Petitioner Board of Education of the City of Vineland, Cumberland County

Robert A. De Santo, Esq.

DATED: 2-25-02

SO ORDERED THIS _____ DAY OF _____, 2002.

_____

HONORABLE LILLARD E. LAW, A.L.J.

OAL DKT. NOS. EDU 6586-01 AND
EDU 8707-00 (CONSOLIDATED)
AGENCY DKT. NOS. 299-7/01 AND
344-9/00

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY, PETITIONER, V. NEW JERSEY STATE DEPARTMENT OF EDUCATION, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter, Initial Decision and settlement transmitted by the Office of Administrative Law have been reviewed. Because this agency is a party to the present case, the settlement, pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), is deemed to be the final decision in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/29/02

Date of Mailing: 4/30/02

183-02

183-02

BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

April 29, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8816-98

AGENCY DKT. NO. 182-6/98

BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,

Respondent.

Richard Sacks, Esq., for petitioner

Todd Schwartz, Deputy Attorney General, for respondent
(David Samson, Attorney General of New Jersey, attorney)

Record Closed: March 7, 2002 Decided: March 11, 2002

BEFORE **LILLARD E. LAW,** ALJ:

This matter was transmitted to the Office of Administrative Law on October 14, 1998, for determination as contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is incorporated herein by reference and attachment.

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does

not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

11 March 2002
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

3/13/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 14 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

FILED

MAR 7 11 28 AM '02

STATE OF NEW JERSEY
OFFICE OF
ADMINISTRATIVE LAW

CARLUCCIO, LEONE, DIMON, DOYLE & SACKS, L.L.C.
9 Robbins Street
Toms River, New Jersey 08753
(732) 797-1600

By: Richard K. Sacks, Esq.
Attorney for Petitioner

BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, Petitioner, v. NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE, Respondent.	STATE OF NEW JERSEY BEFORE COMMISSIONER OF EDUCATION OF NEW JERSEY AGENCY DOCKET NO. 182-6/98 OAL DOCKET NO. EDU-8816-98 Civil Action **STIPULATION OF DISMISSAL WITH PREJUDICE**

The matter in difference in the above entitled action having been amicably adjusted by and between the parties; it is hereby stipulated and agreed that the same be and is hereby dismissed with prejudice.

DATED: 2/25/02

CARLUCCIO, LEONE, DIMON
DOYLE & SACKS, L.L.C.

BY: _____
RICHARD K. SACKS, ESQ.
Attorney for Plaintiffs

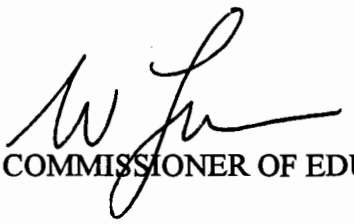
_____
TODD SCHWARTZ, DAG
Attorney for Defendant

OAL DKT. NO. EDU 8816-98
AGENCY DKT. NO. 182-6/98

BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

The record of this matter, Initial Decision and Stipulation of Dismissal transmitted by the Office of Administrative Law have been reviewed. Upon review of the file, the Commissioner accepts the Stipulation and hereby dismisses this matter.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 4/29/02

Date of Mailing: 4/30/02

182-02

#182-02SEC

IN THE MATTER OF DR. DAVID D. BLUMENTHAL, BOARD OF EDUCATION OF THE ATLANTIC COUNTY SPECIAL SERVICES SCHOOL DISTRICT.

COMMISSIONER OF EDUCATION

DECISION

April 29, 2002

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
DR. DAVID D. BLUMENTHAL,	:	
Atlantic County Special Services	:	**SEC Docket No.: T50-01**
School District	:	
Atlantic County	:	
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires new board members to attend training within one year of election or appointment to the board to gain the skills and knowledge necessary to serve as a school board member; and

WHEREAS, Dr. David Blumenthal was appointed to serve a three-year term on the Board of the Atlantic County Special Services School District and was reappointed in June 2001; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit" and notifies them when they have failed to register for or attend an orientation by the required time; and

WHEREAS, the NJSBA was never informed of Dr. Blumenthal's existence as a board member and therefore, he was not personally notified by the NJSBA of the requirement to attend training; and

WHEREAS, the NJSBA publishes that the training requirement is mandatory and lists the dates and times of the sessions in its publication, *School Board Notes*, and conducts seven training sessions each year at varying locations; and

WHEREAS, the School Ethics Commission, upon determining that Dr. Blumenthal had never been to training, directed Dr. Blumenthal to attend the next scheduled session on January 12, 2002; and

WHEREAS, when Dr. Blumenthal did not attend, the Commission issued an Order on February 4, 2002, directing him to Show Cause why he had not attended training as directed; and

WHEREAS, Dr. Blumenthal responded that he received late notice that he had to attend the January session and the session was five hours away from his home in Paramus, New

Jersey and it was held on a Saturday, which is impossible for him to attend due to his private medical practice; and

WHEREAS, Dr. Blumenthal further responded that he had registered for the October training session in Atlantic City; and

WHEREAS, the Commission finds that Dr. Blumenthal's failure to attend board member training as directed constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission rejects his offer to attend training ten months from the date that he was directed to attend as unacceptable;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Dr. Blumenthal violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education remove him from the board.

Dated: February 26, 2002

Paul C. Garbarini

Paul C. Garbarini, Chairperson

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed, the board member may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on February 26, 2002.

Jacqueline W. Richmond

Jacqueline Webster Richmond,
Acting Executive Director

T50-01.doc

AGENCY DKT. NO. 92-3/02

IN THE MATTER OF DR. DAVID D. BLUMENTHAL, BOARD OF EDUCATION OF THE ATLANTIC COUNTY SPECIAL SERVICES SCHOOL DISTRICT.	:	COMMISSIONER OF EDUCATION DECISION

Whereas, the School Ethics Commission has acted pursuant to the authority granted to it by *N.J.S.A.* 18A:12-21 *et seq.* to recommend removal of the above-named Board member from office for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-1.6; and

Whereas, the School Ethics Commission sent notice to the above-named Board member of his failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on February 4, 2002, the Commission issued an Order to Show Cause why a penalty should not be imposed for such failure; and

Whereas, the above-named Board member informed the Commission that he received late notice that he had to attend the January 2002 session, which was five hours from his home, and he could not attend due to his private medical practice;

Whereas, the Commission voted on February 26, 2002, to recommend removal of the above-named Board member for failure to attend training sessions in violation of State statute, memorializing such decision through a resolution forwarded to the Commissioner, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on March 19, 2002, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, on April 1, 2002, the Commissioner was notified that the above-named Board member had duly resigned his position on the Board; now therefore

The Commissioner of Education finds that the issue of Dr. Blumenthal's sanction for failure to attend Board member training sessions is moot; and, accordingly, IT IS ORDERED that this matter is dismissed.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/29/02

Date of Mailing: 4/30/02

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

185-02

IN THE MATTER OF THE SUSPENSION :
OF THE TEACHING CERTIFICATE OF :
KRISTIN OWENS, SCHOOL DISTRICT OF :
PITMAN, GLOUCESTER COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

April 29, 2002

AGENCY DKT. NO. 32-2/02

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF KRISTIN OWENS, SCHOOL DISTRICT OF PITMAN, GLOUCESTER COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

For the Petitioning Board, Samuel H. Bullock, Esq.

This matter having been opened by way of Motion for an Order to Show Cause before the Commissioner of Education by the Board of Education of the Borough of Pitman, seeking suspension of the instructional certificate of Kristin Owens for resigning from employment with the Pitman School District on inadequate notice; and

The Commissioner having issued, on January 8, 2002, an Order directing Kristin Owens to show cause why further order should not be entered suspending her teaching certificate for unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10; and

The Order and accompanying Certification of Robert B. Campbell, Ed.D., Superintendent, having been sent by the Board, via certified mail, to Kristin Owens, and the same having been received by her on February 5, 2002, as evidenced by her signed receipt; and

The Commissioner having directed respondent, by notice dated February 8, 2002, to submit an answer within 20 days of receipt of the Order; and

There being no Answer filed in that time, and the Commissioner having provided respondent, by notice dated March 4, 2002, an additional 10 days to file an answer, pursuant to

N.J.A.C. 6A:3-1.3(e), or else allegations raised by the Board would be deemed true and this matter would be resolved in summary fashion by the Commissioner of Education; and

As of this date, neither respondent nor any attorney on her behalf having filed an answer to the Order to Show Cause, and each allegation against the respondent having been deemed to be admitted; and

Respondent having ceased to perform her duties as a fifth grade teacher in the Pitman School District before the expiration of the term of her employment, without the Board's consent, and under the circumstances set forth in the certification of Robert B. Campbell, Ed.D., Superintendent, and, thereby engaging in unprofessional conduct, pursuant to *N.J.S.A.* 18A:26-10; now therefore

IT IS ORDERED on this 29th day of April 2002, that Kristin Owens' instructional certificate shall be suspended for a period of one year, to commence upon the date of this decision. A copy of this decision is hereby forwarded to the State Board of Examiners for the purpose of effectuating this order and taking such further action, if any, as it deems appropriate.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/29/02

Date of Mailing: 4/30/02

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

186-02

186-02E

MC CANN ACOUSTICS AND CONSTRUCTION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PARK RIDGE, BERGEN COUNTY, GRAFAS PAINTING CONTRACTORS, INC., R & J CONSTRUCTION, INC., AND STONE CREEK, INC.,	:	DECISION ON MOTION
RESPONDENTS.	:	

April 30, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDU 3289-02

AGENCY DKT. NO. 88-3/02

McCANN ACOUSTICS AND CONSTRUCTION, INC.,

Petitioner,

v.

PARK RIDGE BOARD OF EDUCATION, et als.,

Respondents.

Kevin J. Russell, Esq., for petitioner
(Lindabury McCormick & Estabrook, attorneys)

Douglas J. Kovats, Esq. for respondent, Park Ridge Board of Education
(Kenney, Gross, Kovats & Campbell, attorneys)

None by or on behalf of respondents Grafas Painting Contractors, Inc., R. J. Construction, Inc. and Stone Creek, Inc.

Record Closed: April 26, 2002 Decided: April 29, 2002

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This matter currently comes before Office of Administrative Law ("OAL") on application by petitioner McCann Acoustics and Construction, Inc. ("McCann") seeking emergency relief pursuant to *N.J.A.C.* 1:1-12.6. McCann seeks to restrain respondent Park Ridge Board of Education ("Park Ridge" or "Board") from implementing its resolution, adopted at its regularly scheduled meeting on April 15, 2002, to rescind all bids previously awarded and to re-bid work associated with Park Ridge's renovations to two elementary schools and its high school. Since Park Ridge has already advertised bids to be opened on Monday, April 29, 2002 at 2:00 p.m., McCann asks that Park Ridge be enjoined from opening those bids or awarding new contracts.

Requests for emergency relief are guided by the four-part test set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). First, the moving party must demonstrate such relief is necessary to prevent irreparable harm. Harm is generally considered irreparable if it cannot be redressed adequately by money damages. Second, emergency relief should be withheld when the legal right underlying petitioner's claim is unsettled. Third, the moving party must make a preliminary showing of a reasonable probability of ultimate success on the merits. Mere doubt as to the validity of the claim, however, is not an adequate basis for refusing to maintain the status quo. Fourth, there must be a balancing of the relative hardship to the parties in granting or denying the relief.

Both parties concur that the outcome of McCann's application turns largely on the second and third elements of this inquiry, namely whether or not McCann's legal entitlement is unsettled and whether it has a reasonable probability of success on the merits. McCann contends that a recent statutory amendment enumerates the exclusive reasons for rejecting all bids and that Park Ridge does not satisfy any of them. For the reasons that follow, the statutory provisions are nonexclusive and McCann is unlikely to prevail unless it can demonstrate that Park Ridge's actions were arbitrary, capricious and unreasonable.

Procedural History

In or about February 2002, Park Ridge solicited bids for construction work at three schools. On March 18, 2002, Park Ridge awarded the contracts under Method B of the bid invitation. Shortly thereafter, on March 25, 2002, McCann filed an order to show cause in the Superior Court of New Jersey challenging the award of contracts under Method B and demanding that the contract be awarded solely to it under Method A. By order dated March 26, 2002, Superior Court Judge Jonathan Harris transferred the matter to the Commissioner of Education ("Commissioner"). Accordingly, on March 28, 2002, McCann filed a petition, along with an application for emergency relief, with the Commissioner. Subsequently, on April 2, 2002, the Commissioner forwarded the matter to the Office of Administrative Law for ruling on an expedited basis. Administrative Law Judge Robert J. Giordano held oral argument on April 5, 2002. In a decision entered on April 9, 2002, Judge Giordano granted preliminary restraints enjoining Park Ridge from awarding the contracts under Method B. That ruling left open the possibility that Park Ridge might award the bids under Method A to McCann or, alternatively, that it might exercise its reserved right to reject all bids and submit the project for re-bidding.

Park Ridge opted to exercise this second option and advertised for new bids. McCann promptly filed its present application for emergent relief on April 22, 2002. Park Ridge filed opposing papers on April 25, 2002 and McCann filed its reply on April 26, 2002. On short notice to the parties, the OAL conducted oral argument on April 26, 2002.

Findings of Fact

Most of the background facts necessary for resolution of this application are undisputed. Initially, Park Ridge solicited bids in two separate formats. Method A sought a single overall cumulative bid for all work at three schools, East Brook Elementary School, West Ridge Elementary School and Park Ridge High School.

Method B sought separate bids for the work at each of the individual schools. Consequently, Park Ridge could either award all work under Method A to a single bidder or else break it out by school and thus have three separate contracts, depending on whichever method provided the most cost-effective means of completing the project. According to cost estimates prepared by Park Ridge's architect in advance of the bidding, the budget was $803,000 for East Brook Elementary School, $649,000 for West Ridge Elementary school and $1,531,000 for the high school or a total of $2,983,000 for all three projects.

When the bids were opened on March 15, 2002, the lowest responsible bidder under Method A was McCann, with a bid of $2,883,000. McCann's bid was $100,000 lower than the budgeted amount. Lowest bidders under Method B were Stone Creek, Inc. (who bid $813,600 for the work to be performed at the East Brook Elementary School), McCann (who bid $649,000 for the work to be performed at West Ridge Elementary School) and Graphics Painting Contractors (who bid $1,275,000 for the work to be performed at Park Ridge High School). The total bids for all three schools under Method B was $2,782,600. Hence, the total of the lowest bids submitted under Method B was $100,400 less than the lowest bid submitted under Method A. Not surprisingly, Park Ridge chose to proceed under Method B and awarded separate contracts to these lowest bidders.

Detecting what it claimed were deficiencies in one of the low bids under Method B, McCann challenged the school board's award of the contracts. In particular, McCann alleged that Grafas Painting Contractors ("Grafas") was not a responsible bidder because one of its subcontractors was not properly prequalified and also because Grafas had named an alternative subcontractor. In the event that the Grafas bid is thrown out and the next lowest responsible bidder is substituted in its place, the total of the bids under Method B would amount to $2,986,600, which exceeds McCann's bid under Method A by $103,600. Therefore, McCann contends that it is the lowest responsible bidder and should have been awarded the entire contract under Method A.

In its resolution of April 15, 2002, Park Ridge gave its reasons for choosing to re-bid the project. Recognizing that there is no guarantee that re-bidding will necessarily result in lower bids, Park Ridge found strong evidence to believe that re-bidding would achieve a significant savings for taxpayers. Paragraph 6 of the resolution recites that "[t]he difference between the lowest nominal bidder under Bid Method A and the lowest bids submitted under Bid Method B is $100,400." Park Ridge also recognized, in Paragraph 16, that the uncertainties created by the legal challenge to Grafas' bid can only be resolved by a protracted appeal process "to the Commissioner of Education, State Board of Education and thereafter the Appellate Division."[1] During oral argument, Board counsel elaborated on the implications of delay. Plans call for much of the construction work to be performed over the summer of 2002, when school is out of session. Delay would expose students to unnecessary noise and other disruption to their education, dust and related health risks, and safety hazards from use of heavy equipment.

Before deciding what action to take, the Board sought professional advice from both its school business administrator and architectural firm. Business Administrator Robert Wright informed the Board that the original amount budgeted for the project had been erroneous and that "the district would be over its budget by $14,575.000 if bid method A were used." Although the letter from Mr. Wright offers little detail, Board counsel explained that the total estimate of $2,983,000 mistakenly included monies to be transferred from the district's capital improvement account. State law strictly prohibits school boards from commingling sums raised by public referendum with those in the capital improvement account.[2] Ominously, Mr. Wright warned that the "district would be putting itself in a compromising financial position" if it were to award under Bid Method A. Comments in Paragraph 18 of the resolution reflect the Board's concern

---

[1] Because McCann was previously successful in obtaining emergent relief does not necessarily mean that it will ultimately prevail on the merits. Judge Giordano's decision refers to a lack of authoritative case law on the prequalification issue. Outcome of the issue of alternative subcontractors may turn on ambiguities in the language of the Grafas bid.

[2] *See N.J.S.A.* 18A:22-8.2 (prohibited transfers); *See also N.J.S.A.* 18A:24-51, -53 (submission to voters). Otherwise, school boards could spend more for school construction than the voters were willing to authorize at a public referendum.

that the original cost estimate "included the utilization of Capital Improvement funds not part of referendum financing." Paragraph 25 reflects the Board's awareness that an award under Method A "may result in a violation of the public bidding statutes, which may be remedied by re-bidding the project."

Rivardo, Schnitzer & Capazzi, architects retained by Park Ridge, agreed that McCann's bid under Method A would be $14,757 above the revised budget for the project. More importantly, they had no objection to re-bidding the construction work in anticipation of potential savings of approximately $100,000 projected under Method B. Their advice was not based on speculation or wishful thinking. Rather, the architects reported that "the construction market has appeared to level out and prices have been remaining constant." In accepting its architect's recommendations, the Board noted "the favorable economic climate" (Paragraph 21) and its desire "to try and lower the cost of the project." (Paragraph 19). According to Paragraph 28, "the public bidding statutes are not meant to cost the public thousands of dollars by requiring the acceptance of bids for alleged technical violations."

Conclusions of Law

Each of the four prongs of the *Crowe v. DeGoia* test for granting emergency relief will be discussed under its appropriate heading.

Irreparable Injury

While Park Ridge argues that McCann will not be harmed because it can always re-bid, the fact remains that McCann might not be the lowest responsible bidder the second time around and might lose whatever rights it had acquired under the first bid. Unless emergency relief is granted, McCann may be left without an effective remedy. Rejection of the lowest bidder for a public works contract, even if in violation of statute, does not entitle the contractor to obtain money damages. *M.A. Stephen Constr. Co., Inc. v. Borough of Rumson*, 125 *N.J. Super.* 67 (App. Div. 1973), *certif. den.* 64 *N.J.* 315 (1973). Once Park Ridge has embarked on the project and another contractor has

commenced work, McCann's claim may well become moot. *O'Shea v. Franklin Twp. Bd. of Educ.*, 127 *N.J.* 244 (1992). *See also, Disposmatic Corp. v. Mayor & Council of Kearny*, 162 *N.J. Super.* 489 (Ch. Div. 1978). Thus, McCann is able to demonstrate irreparable injury.

Settled Law in Petitioner's Favor

Significantly, McCann acknowledges that previously reported cases allowed a public entity to reject bids "if it acted in good faith and believed that the economic conditions would result in lower and a more favorable price by re-bidding." (Petitioner's brief, at 7). *See, e.g., Marvec Constr. Corp. v. Twp. of Belleville*, 254 *N.J. Super.* 282 (Law Div 1992). Nevertheless, McCann argues that recent amendments to *N.J.S.A.* 18A:18A-22, effective April 18, 2000, limit a school board's ability to reject bids to certain stated reasons and essentially overrule the body of existing case law conferring broader discretion on school districts. No cases have yet definitively construed the meaning of this new enactment. As shall be developed more fully in the next section, the effect of the new law is not nearly as clear as McCann would like. By its own admission, this case presents an issue of first impressions and, therefore, McCann cannot satisfy the requirement that the legal right underlying its claim is "settled." *Crowe*, at 133.

Likelihood of Success on the Merit

Recently, the Appellate Division summarized the status of the law regarding a public body's right to reject bids:

> A municipality has a well-recognized right to reject all bids received for a public contract. *See* Bodies by Lembo, Inc. v. County of Middlesex, 286 N.J.Super. 298, 307, 669 A.2d 254 (App.Div.1996); Cardell, Inc. v. Township of Woodbridge, 115 N.J.Super. 442, 450-51, 280 A.2d 203 (App.Div.1971), *certif. denied*, 60 N.J. 236, 287 A.2d 733 (1972); George Harms Constr. Co. v. Borough of Lincoln Park, 161 N.J.Super. 367, 379, 391 A.2d 960 (Law Div.1978); *see also* N.J.S.A. 40A:11- 24(a) (specifying that a "contracting unit shall award the contract or reject all bids within such time as may be specified in the invitation to bid"). This is especially so where, as here, the right is reserved in the bidding solicitation. Princeton Disposal Serv. v. Township of N. Brunswick, 154 N.J.Super. 488, 490, 381 A.2d 1220 (App.Div.1977), *certif. denied*, 75 N.J. 608, 384 A.2d 838 (1978); A & D Constr., Inc. v. Vineland, 175 N.J.Super. 401, 404, 418 A.2d 1319 (Law Div.1980).
>
> The right to reject promotes competitive bidding in that it "serves as a strong inducement to bidders to keep their bids as low as circumstances permit." Cardell, *supra*, 115 N.J.Super. at 450-51, 280 A.2d 203. The right is a "discretionary privilege" but one "not without limit." Bodies by Lembo, *supra*, 286 N.J.Super. at 308, 669 A.2d 254; *see also* Marvec Constr. Corp. v. Township of Belleville, 254 N.J.Super. 282, 288, 603 A.2d 184 (Law Div.1992) ("awarding authority has considerable discretion to reject all bids" but that discretion "is not unfettered").
>
> The decision to reject all bids must not be "arbitrary or capricious and it must be free from fraud, collusion and bad faith." Marvec Constr. Corp., *supra*, 254 N.J.Super. at 288, 603 A.2d 184. It is sustainable where motivated by good faith without consideration of eliminating an "unfavored bidder." Princeton Disposal Serv., *supra*, 154 N.J.Super. at 490, 381 A.2d 1220. Moreover, where all "bids have already been opened and each bidder's competitive position has been exposed, rejection of all bids should only occur for cogent or compelling reasons." Marvec Constr. Corp., 254 N.J.Super. at 288, 603 A.2d 184 (quoting Cushman & Doyle, *Construction Bidding Law* §1.7 (1990)); *see also* Bodies by Lembo, *supra*, 286 N.J.Super. at 309, 669 A.2d 254.
>
> *Penpac, Inc. v, Morris Cty. Util. Auth.*, 229 N.J. Super. 288, 295-296 (App. Div. 1997), *certif. den.* 150 N.J. 28 (1997).

McCann concedes that Park Ridge "may have acted with care and deliberation in reaching its decision to reject bids." (Petitioner's reply, at 3). Certainly McCann does not allege any bad faith or specify any circumstances suggesting favoritism. Insofar as the record reflects, Park Ridge was motivated by a genuine wish to save taxpayer dollars, by the advantages of avoiding delay, and by the belated discovery that the originally budgeted amount improperly included unavailable funds. If the language quoted above still represents good law, it would be difficult for an administrative law judge to say that the school board acted arbitrarily, capriciously or unreasonably, or that the board lacked cogent and compelling reasons for its determination. It is not the function of an administrative law judge to substitute his or her personal judgment for that of a duly elected school board. *See Palamar Constr., Inc. v. Twp. of Pennsauken*, 196 *N.J. Super.* 241, 250 (App. Div. 1983).

However, McCann contends that Park Ridge's decision is contrary to *N.J.S.A.* 18A:18A-22, which purportedly sets forth six "exclusive reasons" for rejecting a bid. As amended, *N.J.S.A.* 18A:18A-22 currently provides:

> A board of education may reject all bids for any of the following reasons:
> a. The lowest bid substantially exceeds the cost estimates for the goods or services;
> b. The lowest bid substantially exceeds the board of education's appropriation for the goods or services;
> c. The board of education decides to abandon the project for provision or performance of the goods or services;
> d. The board of education wants to substantially revise the specifications for the goods or services;
> e. The purposes or provisions or both of N.J.S.18A:18A-1 et seq. are being violated; and
> f. The board of education decides to use the State authorized contract pursuant to N.J.S.18A:18A-10 .

While the statute lists certain reasons for which a school board "may" reject all bids, nowhere does it expressly provide that such categories are intended to be exhaustive. When the Legislature clearly wants to restrict a school board's authority within defined limits, it knows how to say so. Compare, for example, *N.J.S.A.* 18A:6-10, prohibiting a board of education from dismissing or reducing the compensation of a

tenured teacher "except for" the specified reasons. Thus, the scope of *N.J.S.A.* 18A:18A-22 remains open to question. McCann's argument appears to rest on the legal maxim of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another.) That maxim, however, should not be taken too literally or be applied arbitrarily. It is not an absolute rule but merely an aid in determining intent. *Application of Lamb*, 67 *N.J. Super.* 39, 53, (App. Div. 1961), *aff'd* 34 *N.J.* 448 (1961). Nothing in the legislative history, consisting of a statement by the sponsors attached to Assembly Bill 3519, indicates any conscious intent to set aside the existing case law or to freeze development of the common law in the future.

Assuming that the examples contained in *N.J.S.A.* 18A:18A-22 are exclusive rather than illustrative, Park Ridge maintains that its decision fits within subsections (a), (b) or (e). McCann makes a persuasive point that a difference of only $14,575 in a contract worth nearly $2.9 million, or roughly one-half of one percent, cannot be considered a "substantial" cost overrun. *See Bodies by Lembo, Inc. v. Middlesex County*, 286 *N.J. Super.* 298, 309 (App. Div. 1996), where the Appellate Division characterized a difference of 1.6% between a conforming and a nonresponsive bid as "*de minimis.*"

Subsection (e), on the other hand, is a catchall category authorizing a school board to reject all bids in the event that "the purposes or provisions" of the bidding statutes are violated. The New Jersey Supreme Court has identified such purposes as securing the benefits of unfettered competition by guarding against "favoritism, improvidence, extravagance and corruption." *Meadowbrook Carting Co. v. Borough of Island Heights*, 138 N.J. 307, 313 (1994); *Twp. of Hillside v. Sternin*, 25 *N.J.* 317, 322 (1957). Here, where the Board acted to save a potential $100,000 in unnecessary expenses and to avoid a possibly illegal transfer of school funds, its decision would appear to fall within the contemplation of subsection (e) of *N.J.S.A.* 18A:18A-22.

Consequently, McCann has not made a preliminary showing of a reasonable probability of ultimate success on the merits. *Crowe*, at 133.

Balancing of Relative Hardships

Failure to grant emergency relief could cause McCann to lose whatever profit it reasonably expected and to bear the costs associated with preparing an unsuccessful bid. McCann's assertion that denial of relief would somehow discourage reputable contractors from bidding on public contracts is speculative and contrary to the economic self-interest of contractors. Issuance of restraints might prevent Park Ridge from obtaining the lowest possible price for its construction project and from using anticipated savings to benefit students or lower the financial burden on taxpayers. The attendant delay could disrupt education by postponing construction work scheduled to be performed while the students are on vacation. On balance, the public interest in keeping down costs and proceeding expeditiously with the necessary construction work strongly outweighs any monetary loss that McCann might suffer.

Order

It is **ORDERED** that McCann's application for emergency relief is denied.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If (title of agency head) does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

April 29, 2002
DATE

Ken R Springer
KEN R. SPRINGER, ALJ

** TOTAL PAGE 13 **

OAL DKT. NO. EDU 3289-02
AGENCY DKT. NO. 88-3/02

MC CANN ACOUSTICS AND CONSTRUCTION, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF PARK RIDGE, BERGEN COUNTY, GRAFAS PAINTING CONTRACTORS, INC., R & J CONSTRUCTION, INC., AND STONE CREEK, INC., RESPONDENTS.	:	COMMISSIONER OF EDUCATION DECISION ON MOTION

The Order of the Administrative Law Judge (ALJ) in this emergent matter has been reviewed. Upon such review, the Commissioner affirms the Order denying emergent relief, as he finds that petitioner has not satisfied the requirements necessary for the granting of such extraordinary relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Most notably, the Commissioner concurs with the ALJ that it is undeniable that the law in this area is unsettled.[1]

Accordingly, the within application for emergent relief is hereby denied. This matter shall proceed to hearing on its merits.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 4/30/02

Date of Mailing: 5/1/02

[1] The Commissioner finds it unnecessary at this juncture to reach the ALJ's analysis of the applicable statute here since such analysis is more appropriately reserved for a determination on the merits.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:2-1.1 *et seq.*

187-02

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

April 30, 2002

AGENCY DKT. NO. 98-4/02

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

For the District, Joseph Verga, Esq.

This matter having been opened before the Commissioner of Education on April 2, 2002 by the State-operated School District of the City of Newark through the certification of tenure charges against respondent, a tenured teacher, for excessive absenteeism, excessive tardiness, unbecoming conduct and insubordination; and

Respondent, having been served, via certified and regular mail, with a copy of the charges, the District's resolution, the Statement of Evidence and the Certificate of Determination on March 28, 2002; and

The Commissioner, having directed respondent, via both certified and regular mail on April 3, 2002, to file an Answer to the tenure charges against him; and

Whereas, there being no indication that respondent did not receive such communications, which clearly provided respondent notice that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*shall have 15 days to submit a written response to the charges to the commissioner,*" and that failure to answer within the prescribed period will, absent granting of an extension for good cause shown, result in the charges being deemed admitted; and

Whereas, no reply having been received from respondent in response to the District's charges, each count of the charges against respondent is deemed to be admitted; and

Whereas, the Commissioner's review of the tenure charges certified against respondent by the District and the statement of evidence in support of those charges having indicated respondent was suspended without pay by the State Superintendent on March 27, 2002; and

Whereas, the Commissioner's review of the tenure charges and the statement of evidence in support of those charges having indicated that respondent was absent from his

position as a teacher in the Newark School District for approximately 149.5 days from 1998 until his suspension without pay upon the certification of the within charges; and

Whereas, the supporting papers submitted by the District having documented respondent's numerous occasions of tardiness since 1998 and his failure to appear for a psychiatric and physical examination on December 18, 2001, which he was ordered to undergo pursuant to *N.J.S.A.* 18A:16-2 and District Policy 4112.4; and

Whereas, the Commissioner of Education having deemed such charges to be admitted, and having noted that respondent has not replied to the specific allegations contained therein, the Commissioner finds that respondent's actions constitute excessive absenteeism, excessive tardiness, unbecoming conduct and insubordination, as charged by the State Superintendent, which warrant dismissal from his tenured teaching position; now therefore

IT IS ORDERED this 30th day of April 2002 that summary judgment shall be granted to the District, and respondent shall be dismissed from his tenured position as a teacher in the District's employ as of the date of this order.* The matter shall be forwarded to the State Board of Examiners, pursuant to *N.J.A.C.* 6:11-3.6, for action as it deems appropriate.

COMMISSIONER OF EDUCATION

Date of Decision: 4/30/02

Date of Mailing: 5/02/02

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education, pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after date of mailing to the parties.

188-02

D.H., on behalf of minor child, J.R.H.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY, ELAINE PEELER DAVIS, EDWARD LEBIDA, RON MC GOMISH, GERALD VEGA, JACK WEBER, JANE DOE AND JACK DOE,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent alleged a variety of violations of *N.J.S.A.* 18A:36-20 and other equal protection laws when the Board determined not to place his son, J.R.H., on the Boys Junior Varsity or Varsity Soccer Teams following competitive tryouts. Respondents contended that petitioner faced the burden of proving that its policies or procedures were unreasonable under *N.J.S.A.* 18A:36-20 based on the facts of the case.

The ALJ concluded that the Commissioner lacked jurisdiction over petitioner's federal claims, and that petitioner had in any event failed to state a claim upon which relief could be granted for violations of Title IX or Title VII. While noting that the Commissioner does have jurisdiction over claims of discrimination under state law (*N.J.S.A.* 18A:36-20), the ALJ concluded that there was not a "scintilla of evidence" offered to even remotely suggest any discriminatory treatment of J.R.H. The ALJ concluded that petitioner's claims must be dismissed.

The Commissioner adopted the findings and determination in the Initial Decision as his own.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 9956-00
AGENCY DKT. NO. 329-9/00

D.H. ON BEHALF OF MINOR CHILD, J.R.H.
Petitioner,
v.
BOARD OF EDUCATION OF MONTCLAIR, ESSEX COUNTY, ELAINE PEELER DAVIS, EDWARD LEBIDA, RON McGOMISH, GERALD VEGA, JACK WEBER, JANE DOE AND JACK DOE,
Respondents.

D. H., *pro se*

Arla D. Cahill, Esq., for respondents (Schenck, Price, Smith & King, attorneys)

Record Closed: December 12, 2001 Decided: March 14, 2002

BEFORE **ROBERT J. GIORDANO**, ALJ:

Petitioner, D.H. on behalf of his minor child, J.R.H. filed a ten-count petition naming the Montclair Board of Education, Elaine Peeler Davis, Edward Labida, Ron McGomish, Gerald Vega and Jack Weber as respondents. The petition alleges violations of Title VI of the Civil Rights Act, 42 *U.S.C.A.* 2000d, Title IX of the Education Amendment Act of 1972, 20 *U.S.C.A.* 1681, and under New Jersey State Law, *N.J.S.A.*

18A:36-20. There are also several other averments, all surrounding the central theme of discrimination. The thrust of the allegations is that respondents discriminated against the minor, J.R.H. on the basis of race in implementing the process of selection of the members of the Junior Varsity soccer team for the 2000 High School soccer season.

A prehearing conference was held in the matter on July 3, 2001, during which petitioner D.H. asserted that the petition alleged a cause of action under Title VII of the Civil Rights Act. At the conclusion of the conference, a prehearing order was entered providing that the issues to be resolved included whether respondents or any of them engaged in discriminatory practices in violation of state and federal laws including the provisions of Title VII of the Civil Rights Act, Title IX of the Education Amendment Act of 1972, or New Jersey State Law, *N.J.S.A.* 18A:36-20, in the selection process for the boys soccer team for the 2000 school year. An additional issue addressed by the parties, and incorporated in the pre-hearing order was whether the Commissioner of Education has jurisdiction to consider the claims of petitioner, in whole, or in part. The issues to be resolved were therefore amended as such to include the issues as provided in the prehearing order. *N.J.A.C.* 1:1-13.2.

Additionally, pursuant to the prehearing order, the parties were to address outstanding issues regarding discovery by submissions to be made by July 11, 2001. A telephone conference was scheduled to address the discovery issues on that date. Petitioner D.H. failed to make himself available for the telephone conference scheduled in the matter, and he also failed to make himself available for the adjourned date of the telephone conference on July 17, 2001. As such, a letter was sent to petitioner directing him to respond to the application for discovery by July 23, 2001. Petitioner failed to respond to this letter as well. Thereafter, the undersigned entered an order directing petitioner to answer each of the interrogatories and to provide all documents requested by respondents. Petitioner was to comply with the order by August 31, 2001. All discovery was otherwise to be completed by September 28, 2001.

On or about October 23, 2001, respondents filed a motion for summary decision pursuant to *N.J.A.C.* 1:1-12.5. In support of this motion, respondents submitted a brief and supporting certifications. Petitioner did not submit any response to the motion,

either by brief in opposition or opposing affidavits to show that a genuine issue exists warranting an evidentiary hearing. *N.J.A.C.* 1:1-12.5(b). Despite this failure to comply with the requirements of the Administrative Code, petitioner was nonetheless provided another opportunity to resolve this deficiency. The undersigned scheduled an in-person conference for December 4, 2001 to accept any proofs that may be offered by the parties and to hear oral arguments on the matter. Recognizing that petitioner is appearing *pro se*, the undersigned afforded an additional opportunity to address the lack of response in the face of the pending motion for summary decision. At oral argument, petitioner was directed to address this lack of sufficient response. Specifically, petitioner was advised of the necessity of affidavits in support of the position that a genuine issue exists warranting an evidentiary hearing. The parties were also requested to address the issue of jurisdiction of this tribunal over petitioner's federal civil rights claims and the issue of mootness, inasmuch as the parties represented that the minor, J.R.H. had been reinstated to the soccer team. Submissions on behalf of the parties were received by December 12, 2001, at which time the record closed with respect to the motion for summary decision.

Due to the pendency of other matters, the undersigned requested an extension of time in which to file the decision on the summary decision motion. This request was granted and the date for decision extended to March 14, 2002.

RESPONDENTS' POSITION

Subject Matter Jurisdiction over Federal Claims

The issues to be resolved include claims arising under federal civil rights laws. Specifically, claims are raised under Title VI of the Civil Rights Act and Title IX of the Education Amendment Act of 1972. Petitioner also indicated that he wanted to incorporate a claim under Title VII of the Civil Rights Act, and same was incorporated in the issues to be resolved. Respondents contend that the Commissioner of Education and by extension the Office of Administrative Law lacks jurisdiction to hear petitioner's federal civil rights claims. These claims, respondents argue, do not arise under the school laws of New Jersey. In support of this premise, respondents rely on the holding

in *Cirasa v. State Operated School Dist. Of City of Paterson*, 95 *N.J.A.R.2d* 141, 147, *aff'd* Comm'r, *aff'd* State Bd. *aff'd* App. Div. Dkt. No. A-2408-93T2 (January 1, 1995) (in general, "state administrative agencies lack subject matter jurisdiction over federal civil rights actions.").

State Claims

Counts One through Six and Ten of the Petition allege violations of various provisions of the New Jersey State Statutes, specifically, *N.J.S.A.* 18A:44-23 and *N.J.S.A.* 18A:36-20. Respondent initially urges that to the extent that there is no provision of law under the citation *N.J.S.A.* 18A:44-23, that count must be dismissed for failure to state a cause of action upon which relief can be granted. Respondent next point out that to the extent that Counts Three through Six and Ten are "discernable", these counts appear to allege a violation of *N.J.S.A.* 18A:36-20. Respondents urge that these counts be dismissed for reasons stated in their brief, specifically, that petitioner has failed to answer respondents requests for discovery and also that petitioner has failed to prove that the actions of respondents were unreasonable under the provisions of *N.J.S.A.* 18A:36-20.

Actions of the Board of Education

Respondent maintains that it is petitioner's burden to prove by the preponderance of the evidence that the actions of the Board of Education were arbitrary and capricious. In support of this contention, respondents assert that it is well established that the actions of local boards of education which lie within the area of their discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives. *J.M. v. Hunterdon Central Reg. High Sch.* 96 *N.J.A.R. 2d* (EDU) 415, 419 (citing *Kopera v. West Orange Bd. of Educ.* 60 *N.J. Super.* 288 (App. Div. 1960). Respondents maintain that petitioner faces the burden of proving that the respondents' policies or procedures in connection with the decision not to place J.R.H. on the Boys Junior Varsity or Varsity Soccer Teams following competitive try-outs was unreasonable under *N.J.S.A.* 18A:36-20 based on the facts of the case.

Actions of the Individual Respondents

Various individuals were named in the petition filed by D.H. on behalf of the minor, J.R.H. Among these individuals named are Edward Labida, Ron McGomish and Gerald Vega. Respondents assert that the averments of the petition do not specifically allege a cause of action against any of these individuals and insist that as such, summary decision as to these individuals must be granted. For reasons stated in the brief, respondents maintain that allegations against Jack Weber and Elaine Peeler Davis must also be dismissed. Although these two individuals are identified in various counts of the petition, respondents maintain that there is no evidence sufficient to withstand the motion for summary decision in their favor. Additionally, as to causes of action asserting violations of federal civil rights statutes, respondents rely on the argument in support of the contention that the administrative agency here lacks jurisdiction over such claims.

Summary Decision

Respondent submits that the matter is ripe for summary decision. In support of this contention, respondent relies on the standard for granting summary judgment annunciated in the Supreme Court decision in *Brill v. The Guardian Life Insurance Co. of America*, 142 *N.J.* 520 (1995). Summary judgment is appropriate only where no genuine issue of material fact exists, such that the movant is entitled to judgment as a matter of law. *R.* 4:46-2(a); *Brill*, 142 *N.J.* at 540. Respondents assert that petitioner has failed to produce any evidence in support of his claims. In support of this assertion, respondents rely on the certification of counsel, which indicates that petitioner has failed to answer interrogatories or produce documents in accordance with the order dated August 8, 2001. Respondent further relies on the certification of Jack Weber.

Mootness of Claims

Respondents further move to dismiss the petition because the claims therein are rendered moot. Respondents characterize the petition as a claim brought on behalf of a student who was disappointed by not making the final team selection for the boys'

soccer team. Respondents point out that in this regard, petitioner J.R.H. was reinstated to the Junior Varsity soccer team on or about September 20, 2000 and he participated on the team. Respondents argue that courts do not resolve issues that have become moot due to the passage of time or intervening events. *City of Camden v. Whitman*, 325 *N.J. Super.* 236, 243 (App. Div. 1999).

Petitioner's Position

Subject Matter Jurisdiction over Federal Claims

Petitioner generally avers that the Commissioner of Education has authority to enforce the Law Against Discrimination. *Balsley v. North Hunterdon Bd. of Ed.* 117 *N.J.* 434 (1990). Petitioner points out that the courts have repeatedly affirmed that the Commissioner has the power and affirmative duty to decide controversies under the school law as it pertains to discriminatory practices. *Board of Ed. City of Newark, Essex County v. Levitt*, 197 *N.J. Super.* 239 (App. Div. 1984); *Hinfrey v. Matawan Regional Bd. of Ed.* 77 *N.J.* 514 (1978).

Petitioner also generally avers in the brief in opposition to the motion for summary decision that the district is under a desegregation order. Petitioner asserts that order was implemented to integrate the district public schools, including all programs within the district.

State Claims

Petitioner alleges in the petition filed in the instant matter that respondents have violated various provisions of the New Jersey State Statutes. Specifically among these is *N.J.S.A.* 18A:44-23 and *N.J.S.A.* 18A:36-20. With reference to the provisions referenced as *N.J.S.A.* 18A:44-23, petitioner asserts in the petition that respondent's refusal to allow petitioner to be a member of the Junior Varsity soccer team violated petitioner's right to a thorough and efficient education.

Regarding the claims arising under *N.J.S.A.* 18A:36-20, petitioner asserts that the action of respondents in refusing to allow J.R.H. on the Junior Varsity soccer team was discriminatory, and resulted in a disparate impact on African American students on the soccer team.

Actions of the Board of Education

Petitioner asserts that the actions of respondents generally in refusing to allow J.R.H. to participate on the Junior Varsity soccer team were arbitrary and capricious. Petitioner asserts further in the petition filed, that respondents generally failed to articulate ant clear policy for cutting students from the soccer team that is fair and just. Additionally, petitioner maintains that respondents generally violated state and federal laws in refusing to allow petitioner J.R.H. to participate in the Junior Varsity soccer team for year 2000.

Actions of the Individual Respondents

Specific reference is made to only respondent Jack Weber and Elaine Peeler Davis in the averments of the petition. As to respondent Jack Weber, petitioner alleges that this respondent developed criteria and guidelines for selecting students for the boy's soccer team in violation of *N.J.S.A.* 18A:36-20. Petitioner also alleges that respondent Weber has permitted the use of unauthorized personnel in the capacity of soccer coach, in violation of State law. Petitioner alleges that respondent Davis has failed to adequately monitor programs and practices under her direction. Averments as to allegations of wrongdoing by other individual named respondents are not made with particularity. Petitioner refers only to respondents generally.

Summary Decision

Petitioner has responded to the motion for summary decision by submitting a letter memorandum dated December 6, 2001. The issues addressed by petitioner in that memorandum relate to the issues of jurisdiction of the Commissioner over various claims, and the issue of whether the determination to reinstate petitioner J.R.H. to the

Junior Varsity soccer team renders the petition moot. Petitioner did not submit any affidavits in response to the motion for summary decision. Petitioner also failed to comply with the order entered August 8, 2001, directing that interrogatories be answered and documents produced by August 31, 2001.

Mootness of Claims

Petitioner continues to assert that the selection of students by respondents here violates *N.J.S.A.* 18A:36-20. Petitioner attacks generally the policy of respondents and whether such policy, if one does exist, is in compliance with state and federal laws. Petitioner requests that the Commissioner declare the policy of cutting students from the soccer team to be discriminatory and in violation of State law. Petitioner urges that the matter is not moot because there must be an articulated and accessible policy for selection of students for athletic teams.

LEGAL DISCUSSION

The Supreme Court of New Jersey, in *Desilets v. Clearview Reg. Bd. of Educ.* 137 *N.J.* 585 (1994), stated that:

> Administrative agencies have the authority to determine matters within the special province of their regulatory jurisdiction and expertise.... That proposition is particularly apt with respect to controversies under the educational laws, which should be brought before the Commissioner of Education.

See N.J.S.A. 18A:6-9 (granting Commissioner of Education jurisdiction over "all controversies and disputes arising under the school laws"); *Desilets, supra,* 137 *N.J.* at 594.

Generally speaking, administrative agencies may determine issues within their jurisdiction, "even though the resolution of those issues implicates constitutional claims." *See Christian Bros. Inst. v. N.N.J. Interscholastic League*, 86 *N.J.* 409 (1981) ("[a]dministrative agencies have power to pass on constitutional issues ... when relevant

and necessary to resolution of a question concededly within their jurisdiction"); *Hunterdon Cent. High Sch. Bd. of Educ. V. Hunterdon Cent. High School Teachers' Ass'n*, 174 *N.J. Super.* 468 (App. Div. 1980), *aff'd o.b.*, 86 *N.J.* 43 (1981) (ruling that administrative agency did not exceed its authority by passing on First Amendment issue when necessary to resolve scope of negotiations issue because "'administrative agencies are competent to pass upon constitutional issues germane to proceedings before them,' [when] ... 'such action is necessary so as to better focus the issue for judicial review, if such action is later necessary'") (citations omitted); *Paterson Redevelopment Agency v. Schulman*, 78 *N.J.* 378 (1979) (ruling that claims should be heard, "as a preliminary matter, by the [administrative] body having expertise in the area" and that "[t]his is particularly important where the ultimate decision rests upon factual determinations lying within the expertise of the agency," including those relevant to "constitutional issues"), *cert. denied*, 444 *U.S.* 900, 100 *S.Ct.* 210, 62 *L.Ed.* 2d 136 (1979).

The Supreme Court has "repeatedly acknowledged and approved the administrative handling of educational controversies that arise in the context of constitutional ... litigation." *Abbott v. Burke*, 100 *N.J.* 269 (1985). The Supreme Court has also recognized the role of the administrative agency in a matter concerning gender discrimination in school athletics, *Balsley v. North Hunterdon Bd. of Educ.*, 117 *N.J.* 434 (1990), and a matter regarding gender discrimination in employment in school districts, *Hinfrey v. Matawan Reg. Bd. of Educ.*, 77 *N.J.* 514 (1978). *Jenkins v. Morris Tp.School Dist.*, 58 *N.J.* 483 (1971).

On the other hand, there is support for the proposition that the Commissioner of Education lacks subject matter jurisdiction over federal civil rights actions. Administrative Law Judge Ken Springer stated that "[i]n general, state administrative agencies lack subject matter jurisdiction over federal civil rights actions." *Cirasa, supra.* 95 *N.J.A.R.* 2d, at 147. Judge Springer went on to state in *Cirasa*:

> Review of several leading New Jersey civil rights cases on appeal from state administrative agencies suggests that the inquiry is invariably framed in terms of state statutes. *See, e.g., Balsey v. North Hunterdon Bd. of Educ.*, 117 *N.J.* 434 (1990); *Jackson v. Concord Company*, 54 *N.J.* 113

> (1969); *Gilchrist v. Bd. of Educ.*, 155 *N.J. Super.* 358 (App. Div. 1978). Further support for this result derives from *Shepard v. Bd. of Educ.*, 207 *F.Supp.* 341 (D.N.J. 1962), where the federal district court in New Jersey referred a 1983 action to the Department of Education for exhaustion of administrative remedies available under state (not federal) law. Absent any statutory or case law authority for a state administrative agency to apply federal civil rights law, jurisdiction will not be presumed to exist.
>
> [*Ibid.*]

"To the extent a discriminatory practice made illegal under federal law may also be illegal under state law, a state administrative agency may assert jurisdiction over the claim." *Holt v. Continental Group, Inc.*, 631 *F.Supp.* 653, 657 (D. Conn. 1985), *aff'd* 788 *F.2d* 3 (2d Cir. 1986), *cert. den.* 479 *U.S.* 839 (1986). "In a variety of contexts . . . [New Jersey looks to] analogous federal law as a key source of interpretive authority." *Grigoletti v. Ortho Pharmaceutical Corp.*, 118 *N.J.* 89, 97 (1990). The State's education laws provide that the Commissioner of Education has jurisdiction to determine all controversies and disputes arising under those laws. *N.J.S.A.* 18A:6-9. The education laws further provide:

> No pupil in a public school in this State shall be discriminated against in admission to, or in obtaining any advantages, privileges or courses of study of the school by reason of race, color, creed, sex or national origin.
>
> [*N.J.S.A.* 18A:36-20.]

Clearly, the claims of public-school pupils based on unlawful discrimination in education are controversies or disputes contemplated under *N.J.S.A.* 18A:6-9.

No student in a public school may be discriminated against in admission to, or in obtaining any advantages, privileges or courses of study of the school by reason of race, color, creed, sex or national origin. It is well recognized that schools are places of public accommodation, and as such may not discriminate in the offering of its advantages, privileges or courses of study. Certainly extracurricular activities are contemplated in this context. The New Jersey Supreme Court recognizes two separate methods of proof of discrimination under the New Jersey Constitution and other state

laws. As expressed in *Peper v. Princeton University Board of Trustees*, 75 *N.J.* 55 (1978).

> "Disparate treatment" such as alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of a discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. [Citation omitted.] Undoubtedly, disparate treatment was the most obvious evil Congress had in mind when it enacted the Title VII. Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involves employment practices that are facially neutral in their treatment of different groups but that, in fact, fall more harshly on one group than another and cannot be justified by business necessity.... Proof of discriminatory motive, we have held, is not required under a disparate impact theory.
>
> [*Id* at 81-82.]

Regardless of the type discrimination alleged, the burden of proof reposes in petitioner here. Petitioner must come forward with evidence of discriminatory treatment or some statistical data supporting a claim of disparate impact. *Wards Cove Packing Co. v. Atonio*, 490 *U.S.* 642, 650 (1989). A disparate impact must be demonstrated through a comparison (usually with statistical data) between the compositions of the qualified persons and the persons actually deriving a benefit. Petitioner in the instant case does not distinguish the type discrimination alleged. However, the selection process utilized may well be analyzed under either theory, if supported by competent evidence.

> It is well established that questions that have become moot or academic prior to judicial scrutiny generally have been held to be an improper subject for judicial review; for reasons of judicial economy and restraint, courts will not decide cases in which the issue is hypothetical, a judgment cannot grant effective relief, or the parties do not have concrete adversity of interest.
>
> [*Anderson v. Sills*, 143 *N.J. Super.* 432 (Ch. 1976).]

However, there are instances which may by their very nature implicate matters of substantial public interest. Additionally, as in the instant matter, the relief requested is

framed in such a way that simply reinstating the student to the soccer team does not resolve the matter wholly. Petitioner had sought to strike down the very selection process by which his son was originally excluded. If that process is found to be tainted by the tinge of racial discrimination, the matter cannot be ignored by sweeping it under the rug. In order that a matter is determined moot, there must be a resolution obviating the adversity of interest. Administrative agencies may be vested with very broad discretion to determine through exercise of rule-making powers the appropriate means for executing policies of underlying statute and effectuating legislative intent. The Commissioner of Education is certainly vested with the power to determine whether there exists any violation of the provisions of *N.J.S.A.* 18A:36-20.

In the instant case, respondents seek disposition of the matter by way of summary decision. The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered. *N.J.A.C.* 1:1-12.5. Additionally, the facts must be considered in the light most favorable to the opposing party. *Boyer v. Anchor Disposal*, 135 *N.J.* 86 (1994). Moreover, under the most recent guidelines delivered by our New Jersey Supreme Court, summary judgment is encouraged when the proper circumstances present themselves. *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520 (1995). The court there elaborated on its intent.

Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the

matter but to determine whether there is a genuine issue for trial. *Liberty Lobby, supra*, 477 *U.S.* at 249, 106 *S.Ct.* at 2511, 91 *L.Ed.2d* at 212. Credibility determinations will continue to be made by a jury and not the judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of *Rule* 4:46-2. *Liberty Lobby, supra*, 477 *U.S.* at 250, 106 *S.Ct.* at 2511, 91 *L.Ed.2d* at 213. The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. *Liberty Lobby, supra*, 477 *U.S.* at 252, 106 *S.Ct.* at 2512, 91 *L.Ed.2d* at 214. *Id.* at 540.

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

FACTUAL DISCUSSION

For purposes of the summary decision motion before me, I am constrained to review the matter as presented. Petitioner has failed to answer interrogatories as ordered and has also failed to submit any affidavits setting forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.

The Montclair High School soccer team is coached by respondents, Jack Weber, Robert McGomish and Alan Branigan. Additionally, respondent, Gerald Vega, is a volunteer who acts as an assistant coach for the soccer team. There are three teams comprising the soccer program at Montclair High School, including the freshman team, junior varsity team and the varsity team. Students who are eligible to participate must attend try-out sessions preceding the fall soccer season. Selection for the freshman, junior varsity and varsity teams is competitive and not all students who try out are

selected for participation on these teams. The coaches exercise their discretion in determining which students are selected for these teams.

For the fall 1999 soccer season, there were sixty-three students participating in the soccer program. Of these, there were thirty-eight white students participating at all levels. There were thirteen black students at all levels. There were twelve students at all levels identified as Hispanic or "other". For the fall 2000 soccer season, there were sixty-six students participating in the soccer program. Of these, there were thirty-four white students participating at all levels. There were nineteen black students participating at all levels. There were thirteen students at all levels identified as Hispanic or "other".

For the 2000 boys soccer team try-outs, there were twenty-two freshman candidates. Of these, there were five black students, one Hispanic student and one "other". Nineteen played on the freshman team, including five blacks, one Hispanic and one "other". There were twenty-three sophomore candidates. Of these, three were black, two Hispanic and five "other". There were sixteen junior candidates. Of these, seven were black. There were fifteen senior candidates. Of these, there were four blacks, two Hispanics and one "other". Of all of these candidates, twenty-one played on the Junior Varsity team. Of these, there were three blacks, one Hispanic and five "other". Twenty-three students played on the Varsity team. Of these, there were seven blacks, two Hispanics and one "other". Overall, eleven students either left the team or did not make one of the teams. Of these, seven were white, two were black, one was Hispanic and one was "other".

Petitioner, J.R.H., a sophomore candidate, was not selected for participation on either the Junior Varsity or Varsity teams. Eventually, the high school reinstated J.R.H. and other students who originally did not make one of the soccer teams. They were invited to participate on the Junior Varsity team. Of these, only J.R.H. and one other student accepted the offer of reinstatement.

In addition to the foregoing, accepted as facts at this juncture, there were other considerations made. First, there was no evidence submitted by petitioner that J.R.H.

was treated in a discriminatory manner. There was also no statistical or empirical data offered by petitioner to support a claim of disparate treatment. A review of the data provided by respondent indicated that overall, there were three more candidates participating on the 2000 teams than had participated in 1999. The number of whites participating at all levels decreased from thirty-eight in 1999 to thirty-four in 2000. The number of blacks increased from thirteen in 1999 to nineteen in 2000. The number of Hispanic and "other" went from twelve in 1999 to thirteen in 2000.

CONCLUSIONS OF LAW

For the purposes of completion of the record, each of the various legal issues will be addressed. First is considered the issue of jurisdiction over the federal claims. Regarding the federal claims asserted here, there is no evidence of authority being vested in the Commissioner of Education. There must be a legal authority for asserting jurisdiction. Petitioner cites to no specific federal or state statute, and none is found, intended to confer jurisdiction on the Commissioner of Education to consider the federal claims. I **CONCLUDE** therefore that the Commissioner of Education lacks the jurisdiction over these federal claims. Based on the evidence adduced at this juncture of the proceeding, I further **CONCLUDE** that the petitioner has failed to state a claim upon which relief may be granted regarding these federal claims. Specifically, regarding alleged violations of Title IX, there is no assertion here of discrimination on the basis of sex, under any education program or activity receiving federal financial assistance. Inasmuch as the within claims do not implicate any employment discrimination, the provisions of Title VII do not pertain to petitioner here.

Regarding the claims of discrimination alleged pursuant to state law, clearly, the Commissioner of Education is vested with jurisdiction over such claims. *N.J.S.A.* 18A:36-20. I **CONCLUDE** that the Commissioner has jurisdiction over the claims of discrimination under state law.

As to the issue of whether the claims of petitioner are moot, I **CONCLUDE** that mootness does not act as a bar here. While the relief of reinstatement is clearly moot, petitioner seeks to have the general policies of respondents declared discriminatory.

Certainly, the Commissioner has a significant interest in assuring that no policies involving the education of students in the public schools of New Jersey are discriminatory in any manner.

In any event, respondents herein are entitled to summary decision as to all claims brought by petitioner. There is not a scintilla of evidence offered here to even remotely suggest that respondents or any of them have engaged in any discriminatory treatment of J.R.H. Additionally, there is no statistical evidence in support of a claim of disparate impact. Petitioner has simply made bare conclusory allegations of discrimination in the face of his son being cut from an athletic team. This is not to say that discrimination in any form is or will be countenanced. Discrimination on the basis of race, like discrimination of other types, is intolerable. But, in the present matter, petitioner has failed to bear his burden of proof. As such, I **CONCLUDE** that the claims of petitioner must be dismissed.

ORDER

It is hereby **ORDERED** that respondents' motion for summary decision shall be **GRANTED**. It is further **ORDERED** that the petitioner's appeal is hereby **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

3/14/02
DATE

ROBERT J. GIORDANO, ALJ

Receipt Acknowledged:

3/19/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 21 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

md

APPENDIX

Exhibits

For respondents:

Certification of Arla D. Cahill, Esq., October 22, 2001

Certification of Jack Weber, October 22, 2001

OAL DKT. NO. EDU 9956-00
AGENCY DKT. NO. 329-9/00

D.H., on behalf of minor child, J.R.H.,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY, ELAINE PEELER DAVIS, EDWARD LEBIDA, RON MC GOMISH, GERALD VEGA, JACK WEBER, JANE DOE AND JACK DOE,	:	COMMISSIONER OF EDUCATION
RESPONDENTS.	:	DECISION

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

Upon careful and independent review of this matter, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge. Accordingly, the Initial Decision is affirmed for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/3/02

Date of Mailing: 5/3/02

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

189-02

HILLSBOROUGH TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Education Association appealed the Board's failure to hold expulsion hearings pursuant to *N.J.S.A.* 18A:37-2 for students who committed "assault" against one of its members when the students posted threatening messages on a web site. The Board contended the matter was untimely and that petitioner lacked standing.

The ALJ found that there was nothing in the record indicating any sort of written complaint or assault form submitted by the affected teacher pursuant to *N.J.S.A.* 18A:37-2.1(b), which would have triggered mandatory reporting by the principal or the superintendent, who must then report allegations of assault to the Board. The ALJ found that the Board did not act in an arbitrary, capricious or unreasonable manner. The Board, through its administrators, followed up quickly and diligently upon learning of the postings. The ALJ observed that when a board acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be set aside unless there is an affirmative showing that the decision was arbitrary, capricious or unreasonable. (*Thomas v. Morris*) Petition was dismissed.

The Commissioner, noting that he did not address the issue of timeliness, adopted the findings and determination in the Initial Decision as his own.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2834-01

AGENCY DKT. NO. 99-4/01

HILLSBOROUGH TOWNSHIP
EDUCATION ASSOCIATION,

Petitioner,

v.

HILLSBOROUGH TOWNSHIP
BOARD OF EDUCATION,
SOMERSET COUNTY,

Respondent.

Stephen E. Klausner, Esq., for petitioner (Klausner, Hunter & Rosenberg, attorneys)

Andrew P. Oddo, Esq., for respondent (Fogarty & Hara, attorneys)

Record Closed: December 24, 2001 Decided: March 25, 2002*

BEFORE **BRUCE R. CAMPBELL**, ALJ:

In connection with an internet website and internet postings maintained by pupils who attend the Hillsborough Middle School, the Hillsborough Education Association (Association) filed a petition of appeal with the Commissioner of Education. The Association charges that the

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* An extension of time for issuing the decision was requested and granted pursuant to *N.J.S.A.* 52:14B-10(c).

Hillsborough Board of Education (Board) failed to act in accordance with applicable law in not conducting expulsion hearings for the involved students in response to postings on the website. The Association seeks an order from the Commissioner of Education finding that the Board violated *N.J.S.A.*18A:37-2 and –2.1 by its failure to hold expulsion hearings regarding student threats to members of the teaching staff; requiring the Board to conduct expulsion hearings for the student who threatened a member of the teaching staff; requiring the Board in future to strictly comply with the statutes, and requiring the Board to advise all school district employees, through a posting through all school bulletin boards, that the Board in the future will comply with the applicable statutes.

The Board answered, generally denying each and every allegation in the petition of appeal. The Board now moves for summary decision in its favor and dismissing the petition with prejudice. The Board argues particularly (1) that the Association lacks standing to pursue the action before the Commissioner of Education; (2) the petition is untimely; (3) the Commissioner of Education cannot grant the requested relief as the matter is moot, and (4) the contents of the website do not constitute an assault. The parties have briefed the issues.

FACTUAL BACKGROUND

On October 20, 2000, an instructional aide in the middle school brought to the attention of Vice-Principal Dennis Copland the existence of a website regarding Nicholas Deliberato, a teacher in the middle school. The vice-principal viewed the website and reported the matter to Robert DelPrete, principal of the middle school. The principal viewed the site which contained comments derogatory to Deliberato. The principal reported the matter to the Superintendent of Schools, Doctor Robert Gulick. Gulick contacted the Hillsborough Police Department which conducted an investigation.

The investigation revealed the names of the pupil who posted comments to the website under "screen names" or "user names." Hillsborough Police forwarded the results of their investigation to the Somerset County Prosecutor. The Somerset County Prosecutor decided not to take any "official" action toward any of his pupils involved and chose to refer the students to

the Hillsborough Police for "Station House Adjustment." The thirteen students involved were required to complete six hours each of community service at the direction of the Board.

On April 10, 2001, the Association filed a petition of appeal with the Commissioner alleging that the Board's failure to initiate expulsion hearings pursuant to *N.J.S.A.* 18A:37-2 and –2.1 was arbitrary, capricious, unreasonable and in violation of those statutes. The Association sought the relief he cited above.

THE BOARD'S ARGUMENTS

The Board asserts it is entitled to summary disposition in its favor based on procedural defects and as a matter of law. The standard upon which this motion must be decided, *N.J.A.C.* 1:1-12.5(b), is that summary disposition may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. *Brill v. The Guardian Life Insurance Company of America*, 142 *N.J.* 520, (1995). The motion judge must evaluate and analyze the competent materials presented and consider whether they, "when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged dispute in favor of the non-moving party." *Id.* at 540. Once the moving party has presented evidence to support its motion, the burden is on the non-moving party to set forth specific facts showing that there is a genuine issue for trial. *Id.* at 529. The present facts, viewed in the light most favorable to the Association, show that the Board is entitled to summary disposition.

The Board puts forward four arguments. First, the Association lacks standing to pursue the within action before the Commissioner. Second, the petition was filed out of time and should therefore be dismissed. Third, the Commissioner cannot grant the Association the relief it seeks because the matter is moot. Last, the contents of the website do not constitute an assault upon Deliberato or any Board employee.

An entitlement to sue requires a sufficient stake and real adverseness with respect to the subject matter of litigation and a substantial likelihood of some harm visited upon the plaintiffs

in the event of an unfavorable decision. *N.J. Chamber of Commerce v. N.J. Election Law Enforcement Commission*, 82 *N.J.* 57 (1980); *Ridgewood Education Association v. Ridgewood Board of Education*, 284 *N.J. Super.*427 (App. Div. 1995). To have standing to bring a matter before the Commissioner, the party must be considered an "interested person" defined as "a person who will be substantially, specifically and directly affected by the outcome of a controversy before the Commissioner." *N.J.A.C.* 6A:3-1.2.

The Board concedes that a union may bring a claim on behalf of the membership. However, unions are not immune from the requirement to establish a standing. The subject of the Association's petition is the Board's exercise of discretion as to the discipline of students involved in the Deliberato website and internet postings. The statutes the petition relies upon and with which the Board allegedly did not comply, *N.J.S.A.* 18A:37-2 and –2.1, do not give any tangible employment benefits to members of the Association. Rather, the Association alleges that the discipline the Board meted out to the thirteen pupils determined to be responsible for the offending website "has created much anxiety among the faculty." (Petition, ¶7). There is no evidence presently available that any member of the faculty other than Deliberato experienced any dissatisfaction with the Board's handling of the matter.

The Board asserts that the Association lacks a sufficient interest with respect to the Board's exercise of its discretion in disciplining pupils. But, regardless of the outcome of this litigation, the Association will suffer no detriment or gain no benefit from the Board subjecting certain pupils to expulsion hearings. Therefore, the Association cannot be an interested party.

The Board further argues that the petition is out of time. *N.J.A.C.* 6A:3-1.3 provides that a petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the District Board of Education that is the subject of the requested case hearing. This rule may be relaxed or dispensed by the Commissioner according to *N.J.A.C.* 6A:3-1.16, but only where restricted hearings thereto would be deemed inappropriate or unnecessary or might result in injustice.

The bellwether case is *Reilly v. Board of Education of Hunterdon Central High School*, 173 *N.J. Super.* 109, 113 (App. Div. 1980). In that case, a teacher who delayed appealing the

non-renewal of her contract for more than 90 days while waiting for an arbitrator's decision lost her cause of action before the Commissioner of Education.

The Board urges here that the critical step is to determine the date on which the Association received adequate notice of the Board's action or inaction. The Board, through its administrators, and the Association through Deliberato, knew of the website and postings on October 22, 2000. The Association asserts that the pupils' actions constituted an assault upon Deliberato. The Board denies that there was an assault. However, assuming that the pupils' actions did constitute an assault, then the pupils should have been immediately suspended on October 20, 2000 pending suspension or expulsion hearings to take place within thirty days.

Because the Board did not immediately suspend any of the pupils, the Association should have known of the Board's inaction on October 20, 2000 when those students were suspended. The Association should have been aware of the Board's inaction when no suspension or expulsion hearings regarding the website took place within the next thirty days. Thus, the Association should have filed the petition by January 18, 2001 and under no circumstances later than February 17, 2001. However, the petition was filed on April 10, 2001.

Most importantly, to hold in this case that the limitation period began to run only after Deliberato received actual notice of the Board's intention not to act further would mean that had the Board simply not disciplined the students in any way and the Association never inquired of the Board's intentions, the limitations period would never commence and the Association's claims would remain valid indefinitely. This would neither serve to encourage litigants to pursue their rights nor enable the proper and efficient administration of the Board's affairs.

The Commissioner cannot grant the five forms of relief the Association seeks because the matter is moot. The Association seeks the five forms of relief recited above. The most salient of its requests is that the Commissioner find that the Board violated *N.J.S.A.* 18A:37-2 and –2.1 and then require the Board to subject an unnamed student to an expulsion hearing. The balance of its requested reliefs are contingent upon those just mentioned because, if the Board acted consistently with the above statutes, then there would no grounds on which to grant requests C, D and E.

The issue of a board's enforcement of the discipline related statutes was addressed by the Commissioner in *Barna v. Board of Education of Irvington*, 97 *N.J.A.R.* 2nd (EDU) 345. In *Barna*, the petitioner alleged she was assaulted by a student. The student was charged with assault but found not guilty. The Irvington Board suspended the student for five days, but did not conduct an expulsion hearing. The petition charged that the Board failed to apply the procedures mandated by *N.J.S.A.* 18A:37-2.1. However, the Commissioner held that the controversy was moot in so far as the Board had already conducted disciplinary proceedings and sanctioned the student accordingly. Moreover, to subject the student to additional punishment would have violated the student's rights to procedural due process. In granting summary decision to the Board, the Commissioner concluded that there was no relief to which the petitioner was entitled.

Finally, the Board seeks dismissal of the Association's petition based upon procedural defects. In the alternative, the Board seeks dismissal as a matter of law due to the fact that the website and internet postings did not constitute an assault and, therefore, did not create a duty to act under the cited statutes from which the alleged violation could arise. The central issue in the Association's petition is whether or not the Board was obligated to act under either *N.J.S.A.* 18A:37-2 or –2.1. Both statutes deal with the suspension and/or expulsion of students in certain circumstances. A reading of the statutes shows that neither mandated that the Board act in any particular way towards the students involved with the subject website.

N.J.S.A. 18A:37-2 provides:

> **Causes for suspension or expulsion of pupils.** Any pupil who is guilty of continued and willful disobedience, or of open defiance of the authority of any teacher or person having authority over him, or of the habitual use of profanity or of obscene language, or who shall cut, deface or otherwise injury any school property, shall be liable to punishment and to suspension or expulsion from school.

The Board is clearly authorized to punish, suspend or expel pupils partaking in the described behaviors. However, the statute does not create an obligation on the Board to suspend, expel or act in any way in any specific circumstances. The law states that only a pupil, "shall be liable to punishment and to suspension or expulsion from school." In other words, the Board is not

required to punish, suspend or expel a pupil guilty of these enumerated acts, but it may, in its discretion, do so.

Even if *N.J.S.A.* 18A:37-2 could be read to require the Board to punish, suspend or expel a pupil for certain acts, the Board cannot be said to be in violation of this requirement because it did punish each of the thirteen students determined to be involved with the website. The petition does not allege that this punishment was arbitrary, capricious or unreasonable. Thus, the Board in no way violated *N.J.S.A.*18A:37-2.

Whereas *N.J.S.A.* 18A:37-2 grants the Board discretion to discipline students who commit certain acts, *N.J.S.A.*18A: 37-2.1 requires the Board to suspend a student who commits an assault as defined pursuant to *N.J.S.* 2C:12-1 upon a teacher pending suspension or expulsion proceedings. The Board then sets forth *N.J.S.* 2C:12-1. The pertinent parts are these:

(1) Simple assault. A person is guilty of simple assault if he:

a. Attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or
b. Negligently causes bodily injury to another with a deadly weapon; or
c. Attempts by physical menace to put another in fear of imminent serious bodily injury.

Simple assault is a disorderly persons offense unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty disorderly persons offense.

(2) Aggravated assault. A person is guilty of aggravated assault if he:

a. Attempts to cause serious bodily injury to another, or causes such injury purposely or knowingly under circumstances manifesting extreme indifference to the value of human life recklessly causes injury; or
b. Attempts to cause or purposely, and knowingly causes bodily injury to another with a deadly weapon; or
c. Recklessly causes bodily injury to another with a deadly weapon; or

. . .

d. Commits a simple assault as defined in subsection a.(1), (2), or (3) of this section upon:

> . . .
> (d) Any school board member of school administrator, teacher or other employee of a school board while clearly identifiable as being engaged in the performance of his duties or because of his status as a member or employee of a school board, or . . . .

Most persons would find the contents of the website postings derogatory and objectionable. However, the website postings simply do not constitute an assault as defined by the statute. In fact, to allege that an assault was committed in the absence of bodily injury or physical menace is absurd. This notion is supported by the fact that the Prosecutor declined to prosecute anyone in connection with the website. In order for the Commissioner to hold that the Board acted arbitrarily, capriciously or unreasonably with respect to *N.J.S.A.* 18A:37-2.1, it would be necessary to determine that an assault as defined by *N.J.S.* 2C:12-1 was committed. The Board asserts that, as a matter of law, the pupils' action do not constitute an assault. Because no assault occurred, the Board was not required to act pursuant to *N.J.S.A.* 18A:37-2.1.

THE ASSOCIATION'S ARGUMENTS

Concerning standing, the Association asserts that the relevant portion of the New Jersey Administrative Procedure Act permits "any interested person" to challenge the applicability of any statute or rule enforced or administered by the agency. *N.J.S.A.* 52:14B-8. This is based on the long-standing tradition of liberal application of standing criteria. In *Ridgewood Education Association v. Ridgewood Board of Education*, 284 *N.J. Super.* 427, 432 (App. Div. 1995), the court determined that "[o]nly a substantial likelihood of some harm visited upon Plaintiff in the event of an unfavorable decision is needed for the purpose of standing. Where a plaintiff association would have an obvious albeit indirect interest in the effect upon others of statutory and administrative regulations, requirements for standing are met."

The Association's interest in protecting the safety of its teachers and staff membership is one that illustrates a real stake and a concrete adverseness. The posting and publishing of comment on a website is equivalent to stating these comments publicly. The Association suggests that had these same comments been stated publicly, expulsion hearings would have taken place. The episode serves as dangerous precedent for pupils who might believe that any

future creation and maintenance of anti-teacher, violent, anti-gay, biased websites will result in no expulsion hearings. As such, this issue affects the entire Association, not just Deliberato.

The Association's membership is outraged and fearful for its safety in light of the Columbine High School massacre and the Board's decision not to conduct expulsion hearings. The discipline visited upon these pupils and the Board's refusal to carry out further disciplinary proceedings send a clear message to Hillsborough pupils: creating websites or posting violent, anti-gay, biased comments against a teacher yields nothing more than a few hours of community service. It invites violence.

The Board estimates that the Association's petition should have been filed by January 18, 2001, and under no circumstances later than February 17, 2001. The petition was filed on April 10, 2001. The Board says this is untimely and the Association disagrees. The 90-day notice requirement begins to toll only upon the Association's reasonable notice of the action or inaction of the Board. *N.J.A.C.* 6A:3-1.3(d). This occurred on or about January 15, 2001 when the petitioner was advised by the superintendent, Dr. Gulick, that the implicated, unnamed pupils had received minor discipline and would not be subject to expulsion hearings as required by statute. The Association, therefore, had 90 days from January 15, 2001 in order to timely file a petition. The petition was filed on April 10, 2001, in congruence with *N.J.A.C.* 6A:3-1.3(d).

The Association also urges that the matter is not moot. The Board argues that because the superintendent meted out discipline, no additional punishment can be imposed. The Board relies primarily on the Commissioner's decision in *Barna*, above. Assuming, *arguendo*, that the Board is correct and that the Commissioner can no longer order an expulsion hearing, the balance of the petitioner's requests for relief can be granted. Furthermore, procedural due process would not be implicated if the Commissioner were to additionally order psychological/psychiatric evaluations and/or counseling of these pupils. A potentially violent time bomb must be diagnosed and treated or the cancer may grow. There is no indication in the record that any of the students involved understand the gravity of their actions or that any of them have received counseling. The minor slap-on-the-wrist punishment may worsen rather than alleviate the problem. A child or children may think that they got away with something.

Tragically, this type of incident is clearly of the highest public importance and is likely to recur, if not in Hillsborough, somewhere else in our State's schools. Unless there is a strong message to boards of education and school administrators that such conduct will not be tolerated by the Commissioner.

The Board's last point is that the contents of the website do not constitute an assault upon Deliberato and other school employees. The Board, however, cites no case law authority for this position. *N.J.S.* 2C:12-1(a)(3) clearly recognizes that an assault includes "an attempt by *physical menacing* to put another in fear of imminent physical bodily injury." It is self-evident that "killing" is the ultimate serious bodily injury. In *State v. Jones*, 160 *N.J. Super.* 146 (App. Div. 1978) the court said:

> The gravamen of an assault is the fear of imminent bodily harm or death founded upon the apparent present ability of the perpetrator to inflect bodily harm or death. That fear is reasonably founded if a gun is unloaded without the knowledge of the victim of the assault. *State v. Drayton*, 114 *N.J. Super.* 490, 492-493 (App. Div. 1971) (affirming a conviction under *N.J.S.A.* 2A:90-3 of an assault with a revolver without proof that the revolver was unloaded.

Further, the Board ignores that fact that the Legislature in Title 18A has recognized that an assault does not require touching (compare *N.J.S.A.* 18A:37-2(d) "physical assault" with *N.J.S.A.*18A:37-2 "assault").

The Board also ignores the fact that *N.J.S.* 2C:12-3 creates a third degree crime of terroristic threats. In *Cesare v. Cesare*, 154 *N.J.* 394 (1998), the Court in the context of domestic violence discussed the elements of proof in a terroristic threat case. The Court held:

> The crime of terroristic threats, the third degree offense, is committed when a person threatens to kill another with purpose to put him in imminent fear of death under circumstances reasonably causing the victim to believe the immediatecy of the threat and the likelihood that it would be carried out. *N.J.S.A.* 2C:12-3(b).

Proof of terroristic threats must be measured by an objective standard. The pertinent requirements are whether:

(1) The defendant in fact threatened the plaintiff;
(2) The defendant intended to so threaten the plaintiff, and
(3) A reasonable person would have believed the threat.

> "[W]hether [the defendant] intended to carry out the threat or whether the fear of the victim was actually induced are immaterial to consideration. Although we agree that, under an objective standard, courts should not consider the victim's actual fear, courts must still consider the plaintiff's individual circumstances and background in determining whether a reasonable person in that situation would have believed the defendant's threat. . . . [A] threat does not even have to be communicated directly to the victim to be actionable; the legal sufficiency of the evidence . . . is controlled not by the identity of the hearer as such, but by considering the hearer's identity as part of the surrounding circumstances. [cites omitted.]

Terroristic threats is a higher degree crime then a simple assault and is codified in the same Article of the Criminal Code. Like harassment, assault is a lesser included offense. The petitioner asserts that as such, the undisputed facts of this case compel the court to find that threats to kill Deliberato and potentially other teachers can be found at discovery and hearing to be "menacing" within the definition of *N.J.S.* 2C:12-1(a)(3). The Board's arguments must be rejected.

DETERMINATION AND ORDER

The Commissioner of Education has squarely addressed the issues in this matter in *Christine Knight, Ernest Rizzitello and the Neptune Township Education Association, v. Board of Education of Neptune Township*, OAL DKT. Nos. EDU 4005-00 and EDU 4805-00 (consolidated), initial decision, May 18, 2001, rev'd, Comm'r of Ed. August 20, 2001. In that matter, the petitioners challenged the Board's handling of two separate incidents involving threats made by pupils against teaching staff members pursuant to *N.J.S.A.* 18A:37-2. The petitioners argued that a suspension or expulsion hearing should have been held before the Board of Education in each matter. In each case, the school's administration imposed penalties and did not schedule suspension or expulsion hearings before the Board. The ALJ permitted the petitioners to amend both petitions to assert claims pursuant to *N.J.S.A.* 18A:37-2.1. The judge

concluded that the superintendent would be required to place both incidents before the Board for suspension of expulsion hearings because the conduct underlying each incident constituted an assault. The ALJ recommended remand of both matters to the Board for suspension or expulsion hearings.

The Commissioner reversed the decision of the ALJ and dismissed the petitions. The Commissioner determined that the district superintendent's decision not to schedule suspension or expulsion hearings in each case was not arbitrary, capricous or unreasonable. The Commissioner opined that district administrators, at the time the incidents occurred, determined that the matters fell within the purview of *N.J.S.A.* 18A:37-2 and, therefore, a suspension or expulsion hearing was not required. In addition, the petitioners did not allege that the incidents fell within *N.J.S.A.* 18A:37-2.1 at the time the incidents occurred, nor did they make written allegations of assault as set forth in *N.J.S.A.* 18A:37-2.1(b), nor seek relief of the administrator's determinations within the thirty-day period for conducting suspension or expulsion hearings before a Board set forth in *N.J.S.A.* 18A:37-2.1. As such, the Commissioner determined that the decision to proceed in accordance with *N.J.S.A.*18A:37-2 in each case and the measured and reasoned penalties imposed therein, were not arbitrary and capricous and did not constitute an abuse of the Board's discretion and authority.

Virtually the same determination is made here.

As recent history has made painfully clear, discussions of violence cannot be ignored even if emanating from younger children. The language used in this case was not ignored. School administrators here took the matter through proper channels. They ultimately received and followed the advice of the County Prosecutor and the matter was handled via a Station House Adjustment, which, it must be pointed out, involved the school. For the reasons clearly expressed in the Commissioner of Education decision in *Knight and Rizzetello* above, the outcome is the same.

Preliminarily, I do not find that the education association has standing to bring the present complaint. In *Knight and Rizzittelo*, the teachers directly affected brought petitions; the education association was co-petitioner in each case. That circumstance does not obtain here. In

order to have standing in a matter before the Commissioner, a party must be a person who will be substantially, specifically and directly affected by the outcome of the controversy. *N.J.S.A.* 6A:3-1.2. No matter what the outcome of this case, the Hillsborough Township Education Association will realize no benefit or detriment. A tribunal should not perform an act or render an order that confers no benefit or is impossible to enforce.

Assuming without deciding that the Education Association has standing, however, the results still are not favorable to the petitioner. The petitioner does prevail on the matter of timeliness however. In the period October 20, 2000 – January 15, 2001, so far as Deliberato and the Association knew, the matter was in process. The Association asserts, and there is no reason to disbelieve, that it did not learn until on or about January 15, 2001 that the Board was taking no action against the subject pupils beyond that in the Station House Adjustment; namely, an imposition of six hours of community service on each of the pupils involved. That is the act or omission complained of. The 90-day period would run from that date and, therefore, the present petition is in time.

Given the definition of assault in *N.J.S.* 2C:12-1(a) recited above, I am hard pressed to find physical menace. Because this element cannot be established, it follows that (b) Aggravated Assault cannot be established. Even if the facts here could be contorted to fit a definition of assault, it does not follow that the Board's reaction was improper or even inadequate.

The record indicates that administrators followed up immediately upon learning of the offensive postings. Although it is not clear that district administrators determined that these matters fell under *N.J.S.A.* 18A:37-2, it is clear that the petitioners did not allege that the incidents fell within *N.J.S.A.* 18A:37-2.1 at the time the incidents occurred, nor did they make written allegations of assault as set forth in *N.J.S.A.* 18A:37-2.1(b). Neither did they seek review of the administrators' determination within the thirty-day period for conducting suspension or expulsion hearings before a board as required by *N.J.S.A.* 18A:37-2.1.

The principal reason for dismissing the petition is the traditional reluctance to second guess local school administrators and boards of education. Even reading these papers in the light most favorable to the non-moving party, I simply cannot find any demonstration that the actions

of the Board's administrators were arbitrary, capricious or unreasonable. For whatever reason, the affected teacher has not filed a petition of appeal in connection with any aspect of this matter. The administrators' actions indicate that they treated this matter as falling under *N.J.S.A.* 18A:37-2 and not *N.J.S.A.* 18A:37-2.1, which would have triggered immediate suspension and suspension or expulsion proceedings before the Board of Education. In the absence of physical menace, I **FIND** the petitioners' reliance on *Jones* above, inapposite and, if this matter were anything like *Jones*, I would have no difficulty reaching a different result. The presence of a handgun as in *Jones* – whether loaded or not – is a far reach from saying "I'm going to get a gun," or "if I had a gun . . . ."

Nothing in the record indicates any sort of written complaint or assault form was submitted by Deliberato. *N.J.A.C.* 6A:16-5.7 requires that any pupil who commits an assault on a teacher, administrator, board member or other board employee, shall be immediately suspended from school consistent with procedural due process pending suspension or expulsion hearings, which must take place before the Board of Education within thirty calendar days. *N.J.A.C.* 6A:16-5.7(c) further identifies the principal or his or her designee as the responsible party to immediately remove the student, report the removal to the chief school administrator and notify the parent of the removal action and the student's due process rights. Therefore, under *N.J.A.C.* 6A:16-5.7(c), it is the principal or his or her designee who must make an initial assessment respect to whether an assault has occurred.

The principals apparently did not and this judge cannot find that assault as defined in the criminal statute had occurred. As the Commissioner observed in his decision in *Knight and Rizzitello*, the petitioners were put on notice that the Board had determined that these incidents were not assault when: (1) the students were not immediately suspended pending a hearing before the Board, and (2) neither a suspension nor an expulsion hearing was scheduled for the students before the Board within thirty days as required by *N.J.S.A.* 18A:37-2.1(a) when an assault upon a staff member has occurred. If Deliberato believed he had been assaulted, nothing prevented him from making written allegations of alleged assaults pursuant to *N.J.S.A.* 18A:37-2.1(b), triggering mandatory reporting by the principal or the superintendent who must then report allegations of assault to the Board. The petitioner could have filed a petition for emergent relief at that point, but did not. (Commissioner decision at 12).

Examining the administrators' and the Board's reactions to these postings, I cannot **CONCLUDE** that these actions were in any way arbitrary, capricious or unreasonable. The Board, through its administrators, followed up quickly and diligently upon learning of the postings. When a board acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be set aside unless there is an affirmative showing that the decision was arbitrary, capricious and unreasonable. *Thomas v. Board of Ed of Morris Township*, 87 *N.J. Super.* 327, 332 (App. Div. 1965), aff'd 46 N.J. 581 (1966). The Board's actions here cannot be described as willful or unreasoning.

Accordingly, the Hillsborough Township Board of Education motion for summary disposition is **GRANTED** and the petition of appeal is **DISMISSED**. It is so **ORDERED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

MAR 25 2002
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

3/26/02
DATE

D. Antanaitis (ta)
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 27 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cad

EXHIBITS ADMITTED INTO EVIDENCE:

For the Petitioner:

None

For the Respondent:

None

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

Appendix

Complete copy of the contents of the website and internet postings, 5 pp.

OAL DKT. NO. EDU 2834-01
AGENCY DKT. NO. 99-4/01

HILLSBOROUGH TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record, and assuming, *arguendo*, that petitioner has standing, that the petition was timely filed[1] and that this matter is not moot, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate that the Board's actions taken in this matter pursuant to *N.J.S.A.* 18A:37-2, rather than *N.J.S.A.* 18A:37-2.1, were improper.

Accordingly, the Initial Decision is adopted for the reasons expressed therein.[2] The Petition of Appeal is dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 5/6/02

Date of Mailing: 5/6/02

[1] Although the ALJ finds that the petition was timely filed (Initial Decision at 13), because of the outcome herein, the Commissioner does not address this procedural issue.

[2] The Commissioner notes, for clarification, that the ALJ's use of the statement "The presence of a handgun as in *Jones* – whether loaded or not – is a far reach from saying 'I'm going to get a gun,' or 'if I had a gun . . .'" (Initial Decision at 14) appears to be for illustration purposes, since the record does not show that any of the students used these words.

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

190-02

BOARD OF EDUCATION OF THE PENNS GROVE-CARNEYS POINT REGIONAL HIGH SCHOOL DISTRICT, SALEM COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF LOGAN, GLOUCESTER COUNTY AND MARGARET WILLIAMS,	:	
RESPONDENTS.	:	

May 6, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION DISMISSAL

OAL DKT. NO. EDU 8083-99

AGENCY REF. NO. 195-7/99

BOARD OF EDUCATION OF THE PENNS GROVE-CARNEY POINT REGIONAL HIGH SCHOOL DISTRICT, SALEM COUNTY,

Petitioner,

v.

BOARD OF EDUCATION FO THE TOWNSHIP OF LOGAN, GLOUCESTER COUNTY AND MARGARET WILLIAMS,

Respondents.

Johnathan Garbini, Esq. for petitioner

Raymond Zane, Esq., for respondents (Zane & Lozuke, attorneys)

Margaret Williams, *pro se*

Record Closed: March 18, 2002 Decided: March 19, 2002

BEFORE **LILLARD E. LAW,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This is an appeal to the Commissioner of Education (Commissioner) by the Penns Grove –Carneys Point Regional High School District Board of Education (Penns Grove-Carneys Point Board) from a decision by the Salem County and Gloucester County Superintendents regarding the status of three minor children who have been declared "homeless," and attending the Penns Grove-Carneys Point Regional High School. The Petition of Appeal and Amended Petition of Appeal alleges that the minor children reside with their grandmother in Logan Township, Gloucester County and, therefore, the children are not homeless as defined by *N.J.A.C.* 6:3-8.2 and *N.J.S.A.* 18A:38-1.b and the Logan Township Board of Education (Logan Board) is responsible for their education.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to –13. Prehearing Telephone Conferences were scheduled for December 7, 1999; April 17, 2000; May 30, 2000; and July 10, 2000; all of which were adjourned at the request of the parties.

On or about July 10, 2000, this tribunal was advised by petitioner's attorney that the matter had been withdrawn. However, petitioner failed to withdraw the matter in writing.

On May 17, 2001, this tribunal wrote to both attorneys to advise that it had not been in receipt of a Stipulation of Settlement, a Consent Order or a Letter of Withdrawal.

CONCLUSIONS

The parties, having to failed to advise this tribunal of their withdrawal of this matter or the reasons for the withdrawal of the Petition and Amended Petition of Appeal, I **CONCLUDE** that the Penns Grove-Carneys Point Board has abandoned its appeal for a hearing.

I **CONCLUDE,** therefore, there is no justicable issue before this tribunal and the matter is dismissed for lack of prosecution.

ORDER

Accordingly, it is **ORDERED** that the herein matter is **DISMISSED WITH PREJUDICE FOR LACK OF PROSECUTION.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

18 March 2002
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

3/26/02
DATE

D. Antanaitis (CA)
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 27 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

OAL DKT. NO. EDU 8083-99
AGENCY DKT. NO. 195-7/99

BOARD OF EDUCATION OF THE PENNS GROVE-CARNEYS POINT REGIONAL HIGH SCHOOL DISTRICT, SALEM COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF LOGAN, GLOUCESTER COUNTY AND MARGARET WILLIAMS,	:	
RESPONDENTS.	:	

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

Upon review of the record, the Commissioner concurs that this matter is properly dismissed. Accordingly, the Initial Decision is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/6/02

Date of Mailing: 5/6/02

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

191-02

IN THE MATTER OF THE TENURE	:	
HEARING OF FELIX DIMANCHE,	:	COMMISSIONER OF EDUCATION
PRINCETON REGIONAL SCHOOL	:	DECISION
DISTRICT, MERCER COUNTY.	:	
	:	

May 7, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4479-01
AGENCY DKT. NO. 237-7/01

PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,
Petitioner,
v.
FELIX DIMANCHE,
Respondent.

Philip E. Stern, Esq., for petitioner (Sills Cummis Radin Tischman Epstein & Gross, attorneys)

G. Robert Wills, Esq., for respondent (Wills, O'Neill & Mellk, attorneys)

Record Closed: March 19, 2002 Decided: March 20, 2002

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

This matter commenced on July 12, 2001, when the Board of Education of Princeton Regional School District (hereinafter petitioner) filed tenure charges against tenured custodian Felix Dimanche (hereinafter respondent), alleging conduct unbecoming a board employee. An answer on behalf of respondent was filed on July 16, 2001 and on July 20, 2001, the Commissioner of Education transmitted the matter to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13. A prehearing conference was conducted on August 13, 2001, at which time the hearing was scheduled for October 15, 18, 22 and 26, 2001, at the Trenton office of the Office of

Administrative Law. The first scheduled date, October 15, 2001, was adjourned because subpoenaed witnesses had retained their own counsel who was unavailable for that first hearing date. The parties appeared on October 18, 2001, and, following a settlement conference in chambers, they arrived at a resolution of the matter subject to Board ratification. The terms of the agreement and respondent's sworn acceptance were placed on the record on October 18, 2001. By letter dated October 25, 2001, counsel for petitioner advised that the Board of Education had ratified the settlement between the parties. Counsel's letter further advised, "We will forward a settlement agreement to Your Honor forthwith." In spite of numerous calls and letters to the parties, however, a fully executed agreement was not received until March 19, 2002. That agreement is attached hereto and made a part hereof as if set forth herein at length.

I have reviewed the record and the terms of settlement and I **CONCLUDE** that in view of all of the circumstances, it would not be improper for the Commissioner of Education to approve the settlement as an appropriate, voluntary resolution of this matter entirely consistent with the law and the philosophy expressed in *Cardonick v. Board of Education of the Borough of Brooklawn*, EDU 7093-81, 7094-81 and 100-82, decided April 6, 1983, by the State Board of Education. The parties have set forth in their written agreement the circumstances which have caused petitioner to conclude that a hearing on the merits in this matter would probably not serve the public interest. Although the allegations in this matter are serious, *i.e.,* that respondent submitted false overtime reports (and as a supervisor approved false overtime reports for other custodians), recognizing that the charges must be established on the record by a preponderance of the competent and credible evidence, petitioner wishes to avoid the costs of protracted litigation and the uncertainty of outcome always associated with litigation. Resumption of salary payments to respondent pursuant to *N.J.S.A.* 18A:6-14 occurred in October 2001, and the attached stipulation of settlement provides for maximum continuation of such payments only until May 31, 2002, approximately the same time period payments would have continued pursuant to statute until issuance of the final decision. Respondent has agreed to make restitution for the monies petitioner asserts were wrongfully received ($1,196.65). Because the within matter involves a custodian and not a teaching staff member, there are no potential certification implications for the New Jersey State Board of Examiners to consider.

Under all of the circumstances, the proposed settlement agreement appears to be an appropriate resolution of this matter. I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 20, 2002
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

3/26/02
DATE

D. Antanaitis (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 27 2002
DATE

J. J. Marini
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

SILLS CUMMIS RADIN TISCHMAN
EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(973) 643-7000
Attorneys for the Princeton Regional Board of Education

In the Matter of the	BEFORE THE COMMISSIONER OF EDUCATION
Tenure Hearing of	AGENCY DOCKET NO.: 237-7/01 OAL DOCKET NO.: EDU 4479-01
FELIX DiMANCHE	
	STIPULATION OF SETTLEMENT
BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY	

This Agreement, made this _____ day of December, 2001, by and between the Princeton Regional School District Board of Education (hereinafter "Board") and Felix DiManche, a tenured teaching staff member employed by the District (hereinafter "Mr. DiManche").

WHEREAS, Tenure charges alleging unbecoming conduct against Mr. DiManche were filed with the District on May 9, 2001; and

WHEREAS, Mr. DiManche submitted an Answer to said tenure charges on May 24, 2001; and

WHEREAS, said charges were certified to the Commissioner of Education on or about June 19, 2001, at which time Mr. DiManche was suspended without pay for a period of one hundred and twenty days; and

WHEREAS, the parties agree that it is in the public interest to avoid the time, expense and uncertainty attendant to litigation; and

WHEREAS, the parties further agree that the charges at issue do not represent a danger to the public welfare; and

NOW THEREFORE, the parties hereby agree to resolve this matter on the following basis:

1. Mr. Dimanche shall submit his irrevocable resignation from all employment with the Board, effective May 31, 2002, or upon the date Mr. DiManche begins full-time employment with health benefits, whichever is earlier.

2. The Board will withdraw the tenure charges alleging unbecoming conduct against Mr. DiManche it has certified to the Commissioner of Education.

3. Mr. DiManche shall pay restitution to the Board in the amount of one thousand, one hundred ninety-six dollars and sixty-five cents ($1,196.65), to be paid through payroll deductions, or, if Mr. DiManche places in another full-time position with medical benefits, then whatever amount remains from that already paid.

4. Mr. DiManche hereby releases, waives and forever discharges the Board from any and all claims, demands, rights, actions, damages or liabilities of any description arising out of or related to the subject tenure charges.

5. Every two weeks, until May 31, 2002, or until Mr. DiManche places in a new, ful-time position with medical benefits, Mr. DiManche shall submit to the Board, via Mr. Lewis Goldstein, a list of prospective employers to which Mr. DiManche has applied. Mr. DiManche understands that his diligent efforts to obtain new employment is an integral part of this Agreement.

6. The parties agree that Mr. Lewis Goldstein shall represent the Board in providing to prospective employers any information regarding Mr. DiManche's tenure for the Board.

7. This Agreement is not and shall not be construed to be an admission of liability or wrongdoing by either party. Rather, the parties have entered into the Agreement for the sole purpose of resolving the aforementioned tenure charges.

8. This Agreement is freely and voluntarily executed by each party hereto. Both parties hav had the terms of this Agreement thoroughly explained by their respective legal counsel and understand suc terms and the legal implications arising therefrom. Mr. DiManche understands that the Commissioner Education may accept, reject or modify this Settlement.

9. This Agreement is subject to the approval of the Commissioner of Education. Should th Commissioner deny this application for approval of the parties' settlement and withdrawal of the tenu charges, this Agreement shall be null and void.

10. The Board of Education approved this settlement at its meeting on October 23, 2001.

PRINCETON REGIONAL BOARD OF EDUCATION

By: CHARLOTTE BIALEK
Board President

Dated: 2-27-02

By: PHILIP E. STERN, Esq.
Attorney for The Board

Dated: 3/19/02

G. Robert Wills, Esq.
Attorney for Felix Dimanche

Dated: 3/6/02

OAL DKT. NO. EDU 4479-01
AGENCY DKT. NO. 237-7/01

IN THE MATTER OF THE TENURE	:	
HEARING OF FELIX DIMANCHE,	:	COMMISSIONER OF EDUCATION
PRINCETON REGIONAL SCHOOL	:	
DISTRICT, MERCER COUNTY.	:	DECISION
	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/7/02

Date of Mailing: 5/7/02

192-02

ROBERT RICHARDSON,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

RESPONDENT.

AND

IN THE MATTER OF THE TENURE HEARING OF ROBERT RICHARDSON, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In consolidated matter, the Board certified tenure charges of unbecoming conduct and insubordination against Robert Richardson, Coordinator of Custodial and Grounds, and Richardson appealed his termination as coordinator, asserting violation of his tenure rights.

The ALJ determined that Richardson did not acquire tenure either under the janitor tenure statute, *N.J.S.A.* 18A:17-3 and/or the Veterans Tenure Act, *N.J.S.A.* 38:16-1, since he was appointed for fixed terms annually from 1997 through 2001 and that employment was dependent on annual review. Because the ALJ found that tenure did not exist, the tenure charges were dismissed. Accordingly, Richardson's petition asserting violation of tenure charges was also dismissed.

Upon review of the record, the Commissioner determined to set aside the Initial Decision and to remand the matter to the OAL for further factfinding and expansion of the record as may be necessary to determine whether Richardson was eligible for tenure under the janitor tenure statute, N.J.S.A. 18A:17-3 and/or the Veterans Tenure Act, N.J.S.A. 38:16-1, so as to establish his employment rights, if any.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 6181-01
AGENCY DKT. NO. 317-8/01

ROBERT RICHARDSON,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,
Respondent.
AND

IN THE MATTER OF THE TENURE CHARGES AGAINST ROBERT RICHARDSON, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY

OAL DKT. NO. EDU 870-02
AGENCY DKT. NO. 511-12/01
(CONSOLIDATED)

Robert M. Schwartz, Esq., for petitioner-respondent Robert Richardson

Thomas W. Sumners, Jr., Esq., for respondent-petitioner Board of Education (Sumners, George & Dortch, attorneys)

Record Closed: March 18, 2002

Decided: March 22, 2002

BEFORE **JOSEPH LAVERY,** ALJ:

STATEMENT OF THE CASE

Petitioner[1], **Robert Richardson**, appeals from his termination as Coordinator of Custodial and Grounds. He asserts that his discharge violated his rights of tenure accrued under *N.J.S.A.* 18A:17-3 *et seq.*, and *N.J.S.A.* 38:16-1 *et seq.* He moves now for summary decision granting reinstatement with back pay and emoluments.

Respondent, **Board of Education, City of Trenton**, contests the appeal.

Today's Initial decision (a) denies the petition of Robert Richardson, and (b) dismisses the consolidated case contesting tenure charges brought against him.

PROCEDURAL HISTORY

These proceedings were initiated as a contested case in the Office of Administrative Law (OAL) on September 18, 2001, with the filing of OAL Dkt. No. EDU 6181-01 by the agency, Department of Education. After adjournment for cause, a conference convened on November 20, 2001. Briefs were filed in support of motion and cross-motion for summary decision, the last of which was submitted on February 7, 2002. A second case, OAL Dkt. No. EDU 870-02 was filed in the OAL on March 14, 2002. Prehearing went forward on March 15, 2002. On March 18, 2002, an order of consolidation issued, and the scheduled hearing dates of March 22 and 25, 2002, were adjourned, in view of the motion for summary decision still pending. On March 18, 2002, the record closed.

[1] The use of petitioner-respondent and respondent-petitioner as terms in the order of consolidation dated March 18, 2002, is discontinued to avoid confusion. These terms are also rendered moot as a result of today's decision *In the Matter of the Tenure Charges Against Robert Richardson, School District of the City of Trenton, Mercer County*, OAL Dkt. No. EDU 870-02.

ANALYSIS OF THE RECORD

Background:

The parties do not appear to advance facts in contention, though they do dispute their legal implication:

Petitioner asserts the following in his motion for summary decision:

1. On or about November 24, 1997 the Trenton Board of Education held a regular Board meeting at which time it appointed Robert Richardson to the position of Coordinator of Custodial Buildings and Grounds with the effective appointment date December 1, 1997 at a salary of $56,090. The minutes of the regular Board meeting of November 24, 1997 only reflect the effective date of the appointment. It does not reflect an end date. (Minutes attached hereto as Exhibit A)
2. At no time after November 24, 1997 did the Trenton Board of Education reappoint by resolution the Petitioner, Robert Richardson, to the Coordinator of Buildings and Grounds and Custodian.
3. At no time after November 24, 1997 did the Trenton Board of Education adopt any resolution reappointing Mr. Richardson. The only resolution appointing Mr. Richardson was the resolution adopted by the Trenton Board of Education on or about November 24, 1997.
4. Petitioner's initial contract was made effective from December 1, 1997 to June 30, 1998.
5. On or about April 29, 1998 Petitioner agreed to a new contract for the 1998-1999 school term at an annual base salary of $63,187. (Attached hereto as Exhibit B)
6. Thereafter, Petitioner signed an "instructional staff contract" dated April 30, 1999 indicating his intention to continue with the Trenton School District for the 1999-2000 school term at a base salary of $72,431. (Attached hereto as Exhibit C)

7. On or about May 10, 2000 Petitioner signed an instructional staff contract dated April 28, 2000 for the 2000-2001 school term at a base salary of $74,204. (Attached hereto as Exhibit D)
8. Until April 2001, Petitioner received favorable evaluations listing his performance as either outstanding or satisfactory.
9. On or about May 8, 2002 Clarence Guthrie, the Assistant Superintendent for Human Resources, forwarded a memo to Petitioner advising the Petitioner that he would not be re-employed for the 2001-2001 [sic] school term.
10. On or about May 15, 2001 the Petitioner requested that the Assistant Superintendent provide him with a statement of reasons for his decision not to renew his employment with the Trenton Board of Education.
11. On or about June 6, 2001 the Assistant Superintendent corresponded with Petitioner's counsel, Lemuel Blackburn, Jr., and advised him that Petitioner's contract was not being renewed "for his failure to satisfactorily meet the requirements of the job."
12. Thereafter, after Petitioner was already advised that his employment for the 2001-2001 [sic] school term would not be renewed, petitioner received through the mail an evaluation which was dated April 26, 2001 which had not previously been discussed with him.
13. Petitioner is a veteran, having served in the Vietnam War and having been honorably discharged.

Respondent, in reply brief, presents the following facts, also not disputed:

1. On November 24, 1997, the Board hired Petitioner Robert Richardson (hereinafter "Richardson") to the position of Coordinator of Custodians, effective December 1, 1997 through June 30, 1998. *Exhibit A*
2. On April 29, 1998, Richardson executed a staff contract effective for July 1, 1998 through June 30, 1999. *Exhibit B*
3. On or about April 30, 1999, Richardson executed a staff contract effective for July 1, 1999 through June 30, 2000. *Exhibit C*

4. On May 10, 2000, Richardson executed a staff contract effective for July 1, 2000 through June 30, 2001. *Exhibit D*
5. On or about May 9, 2001, Clarence Guthrie, Assistant Superintendent for Human Resources, sent correspondence to Richardson indicating that Richardson's contract with the Board would not be renewed for the 2001-2002 school year. *Exhibit E*
6. On or about May 15, 2001, Richardson formally requested a statement of reasons for the non-renewal of his contract. Such statement was provided to Richardson and his legal counsel on June 6, 2001. *Exhibit F*
7. On July 6, 2001, Richardson executed a vacation payout agreement based on the number of vacation days accumulated through the last day of employment. Such agreement granted Richardson a payment of $20,267.00. *Exhibit G*

It is on this factual underpinning that the parties make their legal arguments.

Arguments of the Parties

Petitioner's argument:

Petitioner maintains that under the Veterans' Tenure Act, *N.J.S.A.* 38:16-1, and under the Tenure Hearing Law, *N.J.S.A.* 18A:6-10, he has attained tenure. This is so because when appointed by the district as Coordinator of Buildings, Grounds and Custodians, he was appointed for an indefinite time. Consequently, from the first day of his employment he was in a tenured position. For that reason, he can only be removed for good cause after plenary hearing on the merits of the charges.

Petitioner argues further that his title is within the general ambit of titles engaged in janitorial work, and falls within the janitor's tenure law quoted above. That being so, he cannot be removed or reduced in compensation without due process.

The fact that petitioner was compensated through annually-renewed contracts should not detract from his tenure status since these agreements were "administerial," and served only to implement the applicable resolutions of the appointing board of education, he states.

Finally, petitioner argues that tenure statutes must be liberally construed. Where, as here, the facts cited by petitioner are not disputed by the Board, as a matter of law petitioner must be appointed, since the action of the Board through resolution is the operative disposition.

Respondent Board of Education's argument:

Respondent Board denies that petitioner has been appointed to an indefinite term, triggering the tenure provisions of the Janitorial and Veterans' Tenure Statutes. The Board maintains that, because it has executed a series of one-year contracts, and because the contract is a primary document for appointment, taken together with the Board resolution, a secondary source of intent, the appointments must be interpreted to have been for a term of one year. This is so because the employment contracts by their terms were renewed annually from the 1997-98 school year through the 2000-2001 school year. The Board denies that the contracts were simply "administerial," and also denies that the title of Coordinator of Custodians, Buildings and Grounds, would come within the janitorial tenure law, in any event.

CONCLUSIONS OF LAW

Ripeness for summary decision:

This dispute is ripe for summary decision pursuant to *N.J.A.C.* 1:1-12.5. (b), since none of the material facts are in dispute. That rule states:

> The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse

> party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.
>
> [*N.J.A.C.* 1:1-12.5; *See also*, *Judson v. Peoples Bank and Trust Co. of Westfield*, 17 *N.J.* 67, 73-75 (1954)]

Additionally, the facts must be considered in the light most favorable to the opposing party, *Boyer v. Anchor Disposal*, 135 *N.J.* 86 (1994).

Moreover, under the most recent guidelines delivered by our New Jersey Supreme Court, summary judgment is encouraged when the proper circumstances present themselves. *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520, 541 (1995). The court there elaborated on its intent:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby, supra*, 477 *U.S.* at 249, 106 *S.Ct.* at 2511, 91 *L.Ed.2d* at 212. Credibility determinations will continue to be made by a jury and not the judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. *Liberty Lobby, supra*, 477 *U.S.* at 250, 106 *S.Ct.* at 2511, 91 *L.Ed.2d* at 213. The import of our holding is that when the evidence " is so one-sided that one party must prevail as a matter of law," *Liberty Lobby, supra,* 477 *U.S.* at 252, 106 *S.Ct.* at 2512, 91 *L.Ed. 2d* at 214, the trial court should not hesitate to grant summary judgment.
> [*Id.* at 540]

Applying the law to the facts:

Petitioner has not acquired tenure either under the tenure provisions for janitors, *N.J.S.A.* 18A:17-3 and *N.J.S.A.* 18A:6-10, or under the Veterans Tenure Act, *N.J.S.A.* 38:16-1, et seq. The reason he failed to attain tenure under these laws is that he was appointed for fixed terms annually from 1997 through 2001.

The rationale:

The critical question here is whether petitioner's appointment was indefinite from the outset. Both sides agree that appointment for a fixed term would not confer tenure under either of the foregoing statutes. On the basic question, then, the persuasive legal argument is that all elements of the employment understanding between petitioner and the Board must be taken into account. This would include, among other things, a review of a resolution or its absence, or mention in Board minutes, or its absence, and the contractual arrangements, or their absence. Here, none of the material facts are in dispute. From 1997 through 2001, petitioner's continuing employment was punctuated by written, formally executed contracts defining the term of employment as one year. These contracts, signed individually, in which petitioner reiterated each year his "intention to continue in the school district of Trenton," are the fundamental indices of his employment, and, more importantly, the Board's intent from the outset. They prove that his employment was dependent on annual renewal.

Respondent Board appropriately cites *Sharpe v. Wyckoff Township Board of Education*, 93 *N.J.A.R.* 2nd (EDU) 331, 332 (1993) which states, in pertinent part:

> When deciding whether or not the appointment is for a fixed term, the Commissioner and the Courts have *looked first at the individual contracts between parties,* and where that inquiry is ambiguous or inconclusive, at other indicia of the nature of the appointment, including Board minutes and resolutions, negotiated agreements, and letters...
>
> Naturally, where the contracts are unavailable or non-existent, the Commissioner has resorted to other manifestations of the employment relationship. [Emphasis added].

Petitioner maintains that the contracts were simply "administerial" in nature, as mentioned *en passant* by the Administrative Law Judge in *Burrows v. Ramapo Indian Hills Regional High School District Board of Education*, 93 *N.J.A.R* 2d (EDU) 605, 607 (1993). Notwithstanding, it is held here that contracts rise above that level. In this instance, they were formally executed, legally binding agreements between the Board and its employee, and those contracts unequivocally limited his term of employment to one year. Those fixed terms are proven by the contracts' sequential pattern of intent. The absence of limitation in the Board's minutes for its meeting on November 24, 1997, must be read together with what the Board actually did. Consequently, because of the contracts, tenure under either the Veterans Tenure Act or the janitorial tenure provisions cannot be found.

To the extent that *Burrows* may have relied on the characterization by the respondent Board describing contracts as merely "administerial," the holding is not followed. As a matter of law, the decisions relied on by petitioner cannot reasonably be construed as declaring that individual, binding contracts of employment have no meaning whenever an initial Board resolution does not specify the terms of employment as fixed term.

Since the second matter under consideration today, *In the Matter of the Tenure Charges Against Robert Richardson, School District of the City of Trenton, Mercer County*, EDU 0870-02, included here by order of consolidation dated March 18, 2002, concerns the service of tenure charges, that appeal is rendered moot. Today's initial decision holds that tenure does not exist. Therefore, the tenure charges case must be dismissed.

ORDER

I ORDER, therefore, that the petition of Robert Richardson, brought under EDU 6181-01 be, and hereby is, **DISMISSED.**

I ORDER FURTHER that the consolidated case involving certified tenure charges against Robert Richardson (EDU 870-02) be, and hereby is, **DISMISSED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 22, 2002
DATE

JOSEPH LAVERY, ALJ

Receipt Acknowledged:

3-25-02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 26 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

mph

EXHIBITS

Exhibits A through D, attached to petitioner's Motion for Summary Decision dated November 30, 2001

Exhibits A through G, attached to respondent Board of Education's Cross Motion for Summary Decision of December 21, 2001

Exhibits A through B, attached to respondent Board of Education's letter brief of January 14, 2001 [sic]

OAL DKT. NOS. EDU 6181-01 and 870-02 (CONSOLIDATED)
AGENCY DKT. NOS. 317-8/01 and 511-12/01

ROBERT RICHARDSON,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT.	:	DECISION
AND	:	
IN THE MATTER OF THE TENURE HEARING OF ROBERT RICHARDSON, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Robert Richardson (hereinafter, "Richardson") submitted exceptions and the Board replied in accordance with *N.J.A.C.* 1:1-18.4.

In his exceptions, Richardson reiterates that his termination was improper inasmuch as he had acquired tenure pursuant to *N.J.S.A.* 18A:17-3 and/or *N.J.S.A.* 38:16-1, the Veterans Tenure Act, when the Board appointed him on November 24, 1997 to the position of Coordinator of Custodial and Grounds for an indefinite term. (Richardson's Exceptions at 1, 2) In this connection, Richardson acknowledges that he signed annual "contracts," along with all tenured staff members. However, Richardson maintains that these "contracts" are not determinative where the Board did not *initially* appoint him to a fixed term.

In reply, the Board acknowledges that the initial resolution "does not mention a fixed term ***." (Board's Reply at 1) However, the Board contends that the resolution is not the sole source of information to be used in determining whether Richardson has been granted tenure. Rather, the ALJ properly considered not only the initial resolution,

> but also a series of individual contracts subsequently executed by [Richardson] in each year of employment. *** Indeed, one contract codified the resolution and was executed merely days later. This contract clearly states that the initial term of employment would be from December 1, 1997 to June 30, 1998. Subsequent contracts covered the 1998-99, 1999-2000, and 2000-2001 school years until [Richardson's] termination in June 2001. (*Id.* at 2)

Furthermore, the Board reasons that the pertinent statute does not prescribe the manner in which a local board must codify its appointments of custodians. In the absence of such prescription, the Board concludes, it was "free to employ any number of mechanisms" to confirm its appointments. (*Id.* at 3)

Upon careful and independent review of the record in this consolidated matter, the Commissioner determines to set aside the Initial Decision and to remand this matter to the OAL for the reasons set forth below.

Essential to the resolution of this matter is the threshold issue of whether the position held by Richardson, *i.e.*, that of Coordinator of Custodial and Grounds, is one wherein the individual *could lawfully acquire tenure* and, consequently, benefit from the rights and protections of such tenure. *If* Richardson were so eligible for tenure pursuant to either "the janitor tenure statute," *N.J.S.A.* 18A:17-3 or the Veterans Tenure Act, *N.J.S.A.* 38:16-1, as he claims, *then* the question of whether he was appointed by the Board to a fixed or indefinite term becomes relevant.

Initially, the Commissioner recognizes that the janitor tenure statute has been liberally construed. *See Barnes v. Bd. of Ed. of Jersey City*, 85 *N.J. Super.* 42, 46 (App. Div 1964), *cert. denied* 43 *N.J.* 450; *Brunner v. Board of Education of the City of Camden*, 1960 *S.L.D.* 155, 157; and *Lauffer v. Board of Education of the Borough of Leonia, Bergen County*, 1984 *S.L.D.* 1290, 1293. Additionally, that statute "must be read as conveying tenure status to a category or class of employment (*i.e.* janitorial) and not to a specific position." *Lauffer, supra,* at 1293. Although Richardson asserts that, indeed, his former position "falls under the general janitor category/class of employment," (Petitioner's Letter Memorandum, January 4, 2002 at 5), the Board disputes this classification. Instead, the Board argues that Richardson's duties were "predominantly administrative" and "substantively different from the hands-on responsibilities of head custodians, custodian assistants, custodian engineers and cleaners under his supervision." (Board's Letter Brief, February 7, 2002 at Exhibit C) As such, the Board reasons that "the janitorial tenure statute does *not* apply to an administrator who has not previously accrued tenure as a janitor or custodian." (*Id.* at 1) (emphasis added) In support of its position, the Board points to the job description for Richardson's former position, and argues that

> The physical abilities requirements clearly show that [Richardson] was hired for an administrative position. Between 40-60% of the employee's time is devoted to telephone, desk work and sitting, while less than 10% is devoted to lifting, bending, shoveling and groundskeeping. By contrast, the job description for an [Assistant] Custodian involves a great deal of manual labor and "hands on" cleaning.*** (*Id.* at 3)

The Commissioner recognizes that such a tenure analysis must consider "that titles given to positions in school districts are not always accurately descriptive of the work done and the controlling factor is not the name assigned to the job but the duties which are

performed." *Brunner, supra* at 158. Thus, in *Brunner*, in determining whether petitioner, as "chief janitor" was, in fact, a member of the janitorial staff, the Commissioner:

> considered the rules and regulations adopted by respondent Board in regard to its janitorial staff. The responsibilities of the chief janitor are set forth in these rules under 16 items. Generally, they assign to him responsibility for assigning, training and supervising all janitors and for inspecting the quality and adequacy of their work, supplies and equipment. A study of the list of duties of the chief janitor confirms the belief of the Commissioner that he is a "head" or "supervising janitor" with the kinds of responsibilities which such a title would logically imply. The rules of the Board support the petitioner's argument that the chief janitor is a member of the janitorial staff and, as such, is included in the provisions for tenure. *Brunner, supra*, at 158.

In the instant matter, however, the record, developed by the parties pursuant to a motion and cross-motion for summary decision, is insufficient to determine conclusively whether Richardson was, in fact, "a member of the *janitorial staff* of the school district" (emphasis added) *Brunner, supra*, at 158, so as to make him eligible for tenure under *N.J.S.A.* 18A:17-3.

If, on remand, it is determined that Richardson was not eligible for tenure under *N.J.S.A.* 18A:17-3, then further analysis under that statute is unnecessary,[1] However, the analysis cannot end there, since Richardson concurrently argues that he has acquired tenure pursuant to *N.J.S.A.* 38:16-1, the Veterans Tenure Act. In this regard, while the parties do not dispute that Richardson is a veteran who was honorably discharged, the current record is devoid of argument as to whether, or how, this law, which is not a part of New Jersey's statutory school tenure scheme, should be applied under these circumstances.

[1] Notably, in *Burrows, supra*, the Board similarly contended that petitioner, a Director of Building and Grounds, was not employed as a "janitor." *Burrows, supra* at 605. There, however, the ALJ *first* determined that Burrows had been, at all times during his employment, appointed by the Board for fixed, specific periods of time. She did not reach to the issue of whether Burrows was, in fact, employed as a "janitor." *Burrows, supra*, at 608.

Finally, to the extent that the issue of whether Richardson was appointed to a fixed or indefinite term of employment becomes relevant in forthcoming proceedings, the Commissioner finds, even assuming, *arguendo*, that Richardson was *initially* appointed to a fixed term,[2] the same conclusion could not be reached regarding his subsequent years of employment, where there was no Board appointment and Richardson signed only "Instructional Staff Contracts." The Commissioner herein finds that these documents represent, substantively, nothing more than "salary notifications" advising Richardson of his increases for 1997-98, 1998-99 and 1999-2000, "notwithstanding the nomenclature utilized in the titling of [these particular forms] or that [their] wording subjects the increase[s] to the successful completion of [Richardson's] job responsibilities [for those years]." (*Ralph McCullough v. Board of Education of the City of Trenton, Mercer County,* Commissioner Decision January 15, 2002, slip op. at 10, 11) Furthermore, "It is by now well-established that salary agreements, standing alone, do not establish yearly appointments for definite terms." (*McCullough citing Smith v. Board of Education of the Township of East Brunswick*, decided by the Commissioner August 15, 1983, *aff'd* State Board April 4, 1984) Consequently, based on the record before him, the Commissioner concludes that, at least after the 1997-98 school year, the Board did not appoint Richardson for a fixed term of employment.

Accordingly, this matter is remanded to the OAL for further factfinding and expansion of the record as may be necessary to determine whether Richardson was eligible for tenure under the janitor tenure statute, *N.J.S.A.* 18A:17-3 *and/or* the Veterans Tenure Act, *N.J.S.A.* 38:16-1, so as to establish his employment rights, if any, in accordance with the Commissioner's decision herein. Recognizing the potential for this consolidated matter to

[2] This, by virtue of a duly executed Employment Contract providing a starting date of December 1, 1997 and an ending date of June 30, 1998. (Board's Cross Motion for Summary Decision at Exhibit A)

proceed to a tenure hearing, the Commissioner notes that an interlocutory determination by the ALJ shall be appealable, upon request by either party, pursuant to *N.J.A.C.* 1:1-14.10.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 5/7/02

Date of Mailing: 5/7/02

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

194-02

IN THE MATTER OF THE TENURE	:	
HEARING OF DANIEL MC HARRIS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
TOWNSHIP OF NORTH BRUNSWICK,	:	
MIDDLESEX COUNTY.	:	
	:	

May 10, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4390-01

AGENCY DKT. NO. 208-6/01

IN THE MATTER OF THE TENURE HEARING OF DANIEL McHARRIS, SCHOOL DISTRICT OF THE TOWNSHIP OF NORTH BRUNSWICK, MIDDLESEX COUNTY

Anthony B. Vignuolo, Esq., for petitioner, School District of the Township of North Brunswick (Borrus, Goldin, Foley, Vignuolo, Hyman, Stahl and Clarkin, attorneys)

Ben A. Montenegro, Esq., for respondent, Daniel McHarris (Wilbert, Montenegro and Thompson, attorneys)

Record Closed: March 22, 2002 Decided: March 27, 2002

BEFORE **BRUCE R. CAMPBELL**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on July 12, 2001 for a hearing pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13.

After several conferences, the parties have reached a settlement.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

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

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

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

3. The parties have carefully conformed the settlement to *In the Matter of the Tenure Hearing of Frank Cardonick*, OAL Dkt. No. EDU 7094-81 (Feb. 17, 1982), rem. Comm'r of Ed. (Apr. 7, 1982), dec. St. Bd. of Ed. (Aug. 4, 1982) and stipulate that the agreement becomes effective only upon approval by the Commissioner of Education.

I **CONCLUDE** that this agreement meets the requirements of *N.J.A.C.* 1:1-19.1 and that the settlement should be approved.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

MAR 27 2002
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

3/28/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 28 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cad

WILBERT, MONTENEGRO & THOMPSON, P.C.
531 Burnt Tavern Road
P.O. Box 1049
Brick, NJ 08724
(732) 295-4500
Attorneys for Respondent, Daniel McHarris

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW
2002 MAR 22 P 2:31

NORTH BRUNSWICK TWP. BOARD OF EDUCATION, MIDDLESEX COUNTY, a municipal corporation, Petitioner, vs. **DANIEL McHARRIS,** Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION BEFORE THE COMMISSIONER OF EDUCATION **DOCKET NO.: 208-6/01** **SETTLEMENT AGREEMENT**

THIS AGREEMENT made on this _____ day of February 2002, by and between

DANIEL S. McHARRIS
with an address of 335 Corbin Court, Lakewood, New Jersey 08701 (hereinafter ''McHarris'')

AND

NORTH BRUNSWICK TOWNSHIP BOARD OF EDUCATION
with offices located at Maple Meade School, Old Georges Road, North Brunswick, New Jersey 08724 (hereinafter referred to as the ''Board'').

WHEREAS, McHarris is employed by the Board as a tenured teaching staff member at North Brunswick Township High School;

WHEREAS, the Board, on June 15, 2001, certified tenure charges against McHarris to the Commissioner of Education;

WHEREAS, McHarris is currently suspended with pay in accord with N.J.S.A. 18A:6-14;

WHEREAS, McHarris denies and contests the charges;

WHEREAS, for the purpose of avoiding the expense, distraction, distress, uncertainty of litigation, and to minimize disruption to the educational program created by further litigation to resolve McHarris' employment status, McHarris and the Board desire to resolve their differences amicably;

NOW THEREFORE, McHarris and the Board, intending to legally bound, and in consideration of these mutual promises, hereby agree as follows:

1. McHarris hereby tenders his resignation from employment with the Board, effective June 30, 2002.

2. The Board hereby grants McHarris a leave of absence, with pay and with benefits until June 30, 2002.

   a. If McHarris provides the Board notice of subsequent employment, the Board shall provide McHarris lump sum payment in the amount of pro-rata salary plus cash value of health benefits coverage from the date of said notice through June 30, 2002. McHarris' resignation shall then become effective on the date of the aforementioned notice.

3. The Board shall also pay McHarris a lump sum of $32,500.00 due upon approval of this settlement agreement by the Commissioner of Education, representing past and future salary and benefits payable to McHarris.

4. McHarris shall maintain his teaching certificate in good standing.

5. Subject to any required public document disclosure, the Board shall provide any non-education prospective employer contacting the district regarding McHarris solely McHarris' dates of employment. There shall be no such limitation with regard to education prospective employers contacting the district regarding McHarris, but McHarris in no way waives any remedies at law or equity, with regard to said communications.

6. This settlement shall in no way release the Board or preclude McHarris' civil claims against the Board and its agents in pending U.S. District Court action, Docket Number 01-2549(JWB). The within Agreement is not intended to act as an admission of liability or wrongdoing on the part of either party but a compromise of the respective positions resulting in a settlement which shall not be utilized in any subsequent proceedings, except to verify payments made by the Board to the plaintiff as a credit against plaintiff's damages asserted in the Federal Civil law suit, to the extent permitted by law. This settlement shall, in no way, release McHarris nor preclude the Board from seeking damages in the Federal Civil law suit for counsel fees and costs.

7. This settlement shall, in no way, release the Board or preclude McHarris' claim for indemnification pursuant to N.J.S.A. 18A:16-6.1, currently pending before the Office of Administrative Law, Docket Number 263-7/01. The parties agree that the aforesaid litigation shall be confined to the reasonableness of the fees and costs incurred and whether such costs ''arose out of'' McHarris' employment as defined in New Jersey law. The parties agree that the remaining proceeding shall not involve the validity of the Tenure Charges but, instead, shall be limited to the above issues.

8. This Settlement Agreement has been negotiated by the parties through their respective counsel. McHarris and the Board warrant, represent and agree that the terms of the Settlement Agreement were discussed with counsel and are voluntarily accepted by the parties.

9. This Settlement Agreement contains the entire agreement between McHarris and the Board relating to the cessation of McHarris' employment. There are no other understandings or agreements, verbal or otherwise, in relation thereto, between the parties except those herein expressly set forth.

10. This Settlement Agreement shall be construed and interpreted in accordance with the law of the State of New Jersey.

11. This Settlement Agreement, in accord with N.J.A.C. 6A:3-5.6, expressly provides the following:

    i. A copy of the charges are attached to this Agreement as Exhibit ''A''.

    ii. Circumstances justifying settlement:

        a. The allegations underlying the charges were tried by the Middlesex County Prosecutor's Office to a jury verdict of acquittal on all counts in a trial where McHarris took the stand and testified on his own behalf. The tenure charges originally filed by the Board were filed prior to the outcome of the criminal case.

        b. Due to long term of suspension and events while criminal charges pending, personal relationships between McHarris and district administration have eroded to the extent that McHarris' return to the district was not viable.

c. The criminal trial and discovery following the filing of tenure charges have brought forth facts regarding the allegations against McHarris to which the Board was not privy prior to the filing.

d. The Board has, through discovery, determined that identification, location and availability of certain witnesses necessary to prosecute the charges would be problematic.

e. Protracted litigation, in the face of all facts uncovered through discovery, would result in unreasonable and unnecessary expense, distraction, and distress to all parties involved while disrupting the North Brunswick School District's educational program.

iii. By their signatures below, both the charged and charging parties expressly consent to this Settlement Agreement.

iv. By his signature below, McHarris expressly represents that he has had the opportunity to review this Agreement with counsel and has a full understanding of his rights.

v. The agreement is in the public interest because:

a. protracted litigation in the face of facts developed through the criminal trial and discovery would be an unreasonable expenditure of public funds;

b. the relationship between the parties has eroded to the extent that McHarris' return to the district should he be successful in the tenure charges proceeding would be a distraction and have a negative impact on the education program in the District;

vi. By his signature below, McHarris expressly represents that he has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

Sworn and Subscribed this
22 Day of March, 2002.

DANIEL S. McHARRIS

Sworn and Subscribed this
19th Day of March, 2002.

ANTHONY B. VIGNUOLO
An Attorney At Law
Of New Jersey

NORTH BRUNSWICK
BD. OF EDUC.

STATEMENT OF INITIAL TENURE CHARGES

I, FRANK SINATRA, Interim Superintendent, do herewith charge Daniel McHarris, employed as a tenured teaching staff member at the North Brunswick Township High School, has engaged in conduct unbecoming of his position and office so as to require that his employment with the Board of Education of the Township of North Brunswick be terminated pursuant to N.J.S.A. 18A:6-11.

CHARGE #1

Daniel McHarris, in December of 1998, used excessive force and inappropriate professional judgment in connection with his students. This resulted in a letter of reprimand dated January 4, 1999 (Exhibit 1).

CHARGE #2

Daniel McHarris, on May 13, 1999, used inappropriate and unprofessional language with four (4) students calling them "asshole" in the presence of remaining class members and a school aide (Exhibits 2 and 3).

CHARGE #3

Daniel McHarris, commencing in the Fall of 1998 through May 27, 1999, used inappropriate and unprofessional language with one Leslie Lanier, a former student at the North Brunswick Township High School, making suggestive comments and offering to have sexual contact with her. Mr. McHarris placed his hands on her body touching her breasts and buttocks. (Exhibit 4; the Sworn Statement of Leslie Lanier).

CHARGE #4

Daniel McHarris, commencing in the Fall of 1998 through May 27, 1999, used inappropriate and unprofessional language with one Angela DelRio, a former student at the North Brunswick Township High School, making suggestive comments and offering to have sexual contact with her. Mr. McHarris placed his hands on her body touching her breasts and buttocks. (Exhibit 5; the Sworn Statement of Angela DelRio).

CHARGE #5

Daniel McHarris, commencing in the Fall of 1998 through May of 1999, used inappropriate and unprofessional language with one Erin Rubinich, a former student at the North Brunswick Township High School, by making offensive and inappropriate sexual remarks to her. He also solicited her sexually and made offensive comments concerning her relationship with another female student. (Exhibit 6, the Sworn Statement of Erin Rubinich and Exhibit 7, the Sworn Statement of Alana M. Lipovsky).

FRANK SINATRA, Interim Superintendent

Sworn to and Subscribed
before me this 2nd
day of May, 2001.

A Notary Public of New Jersey
My Commission Expires:

DONNA M. BERGEN
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 1/16/2002

STATEMENT OF EVIDENCE

The documentary evidence in support of the charges that Daniel McHarris has been guilty of conduct unbecoming and just cause exists for the termination of his employment. The documentary evidence is contained in the appendix of Exhibits annexed hereto.

FRANK SINATRA, Interim Superintendent

Sworn to and Subscribed
before me this 2nd
day of May, 2001.

A Notary Public of New Jersey
My Commission Expires:

DONNA M. BERGEN
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 1/16/2002

P:\USERS\ABV\WP51\NOBRUNS\MCHARRIS.CHG

APPENDIX OF EXHIBITS

1. Correspondence to Daniel McHarris dated January 4, 1999.
2. Correspondence to Daniel McHarris dated May 27, 1999.
3. Correspondence to Daniel McHarris dated June 29, 1999.
4. Sworn Statement of Leslie Lanier.
5. Sworn Statement of Angela DelRio.
6. Sworn Statement of Erin Rubinich.
7. Sworn Statement of Alana Lipovsky.

WILBERT, MONTENEGRO & THOMPSON, P.C.
531 Burnt Tavern Road
P.O. Box 1049
Brick, NJ 08724
(732) 295-4500
Attorneys for Respondent, Daniel McHarris

NORTH BRUNSWICK TWP. BOARD OF EDUCATION, MIDDLESEX COUNTY, a municipal corporation, Petitioner, vs. **DANIEL McHARRIS,** Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION BEFORE THE COMMISSIONER OF EDUCATION **DOCKET NO.: 208-6/01** **STIPULATION OF DISMISSAL WITH PREJUDICE**

THIS PARTIES, having amicably resolved the subject dispute, by Settlement Agreement dated _____, 2002, approved by the NJ Commissioner of Education, hereby stipulate to the dismissal with prejudice of the tenure charges in action 208-6/01.

BEN A. MONTENEGRO
Attorney for Respondent

ANTHONY B. VIGNUOLO
Attorney for Petitioner

OAL DKT. NO. EDU 4390-01
AGENCY DKT. NO. 208-6/01

IN THE MATTER OF THE TENURE	:	
HEARING OF DANIEL MC HARRIS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
TOWNSHIP OF NORTH BRUNSWICK,	:	
MIDDLESEX COUNTY.	:	
	:	

The record and Initial Decision incorporating a joint Settlement Agreement issued by the Office of Administrative Law (OAL) have been reviewed.

Upon such review, the Commissioner is unable to accept the settlement agreement in its present form. It is clear from the language of the agreement, specifically, Term No. 4 and Term No. 11.vi., that the parties envision that this matter will not be forwarded to the State Board of Examiners or, that if it were, proceedings against respondent's certificate would not be contemplated, or the Board would not cooperate in such proceedings. The Commissioner's agreement to such terms would be clearly contrary to the spirit and intent of *In re Cardonick*, decided by the Commissioner April 7, 1882, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, the parties' proposed settlement is rejected. The Commissioner hereby remands this matter to the OAL for further revision of the document consistent with the concern set forth above. If the parties are unwilling or unable to reach accord on a modified

agreement for submission to the Commissioner, the matter shall proceed to a hearing on the merits.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/10/02

Date of Mailing: 5/10/02

* This decision, as the Commissioner's final determination may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:2-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

195-02

CHERIE W. HUANG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF OCEAN CITY, CAPE MAY COUNTY *ET AL.*,	:	DECISION
RESPONDENTS.	:	

May 10, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4480-01

AGENCY REF. NO. 43-2/01

CHERIE W. HUANG,

Petitioner,

v.

BOARD OF EDUCATION OF OCEAN CITY,

CAPE MAY COUNTY, ET AL,

Respondents.

Cherie W. Huang, petitioner, *pro se*

Michael P. Stanton, Esquire, for respondent (Taht, Stanton & McCrosson, attorneys)

Record Closed: March 5, 2002 Decided: March 25, 2002

BEFORE LILLARD E. LAW, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter comes before this administrative tribunal pursuant to the Commissioner of Education (Commissioner) having granted petitioner's motion to reconsider his earlier dismissal

Pursuant to a Memorandum for the File, this tribunal set forth the following facts concerning the instant matter:

BACKGROUND FACTS

This matter was opened before the Commissioner by way of a 14 page Petition of Appeal on February 22, 2001, which set forth a wide array of allegations against the Ocean City Board of Education (Board). On March 14, 2001, the Commissioner dismissed petitioner's appeal and suggested that any allegations, which appear to focus on alleged violations of the New Jersey Law Against Discrimination (LAD), should be forwarded to the New Jersey Division of Civil Rights for review and action.

On July 3, 2001, on Motion by petitioner, the Commissioner vacated his Order of Dismissal and transmitted the matter to the Office of Administrative Law (OAL) for further proceedings. The matter was received by the OAL on July 20, 2001, and assigned to me on August 8, 2001.

On August 15, 2001, I arranged for a telephone Prehearing Conference with the parties and relied upon the telephone number petitioner supplied to the Commissioner (609-391-8747), which was transmitted to the OAL. Mr. Michael Stanton, Esquire, representing the Board was available for the prehearing, however, the telephone number for petitioner had been disconnected at her request.

On August 16, 2001, I sent a letter to petitioner by Certified Mail, Return Receipt Requested, to P.O. Box 864, Ocean City, New Jersey 08226, to advise petitioner that she was required to contact me within ten (10) days to establish a time when a Prehearing Conference could be conducted. In the event petitioner failed to respond with the ten (10) days, I would be compelled to dismiss her petition.

The United States Postal Service issued petitioner three notices dated, August 18, 23 and September 7, 2001. The Certified Mail was returned to the OAL as "Unclaimed." However, the envelope had been opened and the Return Receipt had not been signed.

Subsequently, Deputy Clerk, Joanne Restivo, was able to locate a different telephone number for petitioner (609-405-1422), and left a message on petitioner's voice-mail to contact me immediately. On Monday, September 17, 2001, petitioner telephoned my chambers at 9:00 a.m. to advise that she had been out of the State of New Jersey and would not be available for a Prehearing Conference until Monday, September 24, 2001.

The Prehearing Conference was then scheduled for September 24, 2001. I advised petitioner that in the event she was not available for the scheduled Prehearing Conference, I would be compelled to dismiss the petition.

In his letter to the parties, dated July 3, 2001, the Commissioner held, in part, that:

> . . . .any further proceedings in the matter will be *solely and strictly limited* to those aspects of the dispute which *arise under the school laws and over which I have jurisdiction.* (Commissioner's letter, July 3, 2001, page 3.)

Petitioner claims to have acquired a tenure status in the employ of the Board of Education of Ocean City (Board). The Prehearing Conference was held on September 24, 2001. A Prehearing Order was issued on October 2, 2001, and provided, among other things, the following agreements:

> 1.NATURE OF PROCEEDINGS AND ISSUES TO BE RESOLVED
>
> Pursuant to the Commissioner of Education's reconsideration, this matter is "solely and strictly limited to those aspects of petitioner's dispute which arise under the school laws and over which [the Commissioner has] jurisdiction. Petitioner claims to have acquired a tenure status with the Board of Education of the City of Ocean City (Board).

> Whether petitioner has acquired a tenure status with the Board in her employment position of Educational Computer Technician/ Technical Coordinator?

The Prehearing Order set forth the date, time and place of the hearing, setting aside the dates of March 5, 12, 18, & 22, 2002, at 9:00 a.m. at the Atlantic City OAL, Atlantic County Civil Courthouse. The Prehearing Order also stated that no adjournments would be granted except in strict accordance with the requirements of *N.J.A.C.* 1:1-9.6.

In granting petitioner's Motion to Reconsider, the Commissioner notes that petitioner ". . . also claimed unlawful employment discrimination within the meaning of the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*. . ." With respect, thereto, the Commissioner, in his letter to the parties, dated July 3, 2001, stated, in part, that:

> . . . If, however, it is determined that the Board is correct in its claim that petitioner is not tenured, I am recommending that the matter be held in abeyance at the OAL (Office of Administrative Law) pending the outcome of the NJDCR's (New Jersey Division on Civil Rights) investigation into petitioner's discrimination claims and the determination by that agency's Director as to whether or not probable cause exists to believe that unlawful discrimination occurred. . . . (Commissioner's Letter, *Id.)*

The Board and the Board's Superintendent of Schools appeared for the hearing scheduled for March 5, 2002, at the Atlantic City OAL, Atlantic County Civil Courthouse. Petitioner failed to appear. Petitioner also failed to advise this tribunal or her adversary of her intention not to appear for the hearing.

It is the policy of the OAL to wait for a period of 30 minutes to provide the tardy party the opportunity to appear for the hearing or to advise of the reasons for their nonappearance. This tribunal provided petitioner over one hour to appear or to advise of her nonappearance. Petitioner did neither. The Board's attorney represented to this tribunal that petitioner had not contacted him to advise of her nonappearance or to request an adjournment.

As a consequence, this tribunal opened the hearing record in petitioner's absence. The Board's legal counsel advised this tribunal that petitioner has a history for filing petitions and complaints and then fails to appear for the trial or hearing on the petition or complaint. Board's counsel also advised this tribunal that petitioner has failed to cooperate with the NJDCR in pursuit of her alleged LAD claims against the Board.

Having carefully considered the Commissioner's admonition that this tribunal hold any determination in abeyance, pending the outcome of the NJDCR's investigation into petitioner's discrimination claims and determinations by that agency, this tribunal respectfully disagrees.

Petitioner has demonstrated her distain for the judicial process by filing complaints and failing to appear before a court of competent jurisdiction to resolve the issues in dispute. In the instant matter, petitioner had caused undue and unwarranted expense to the Board where legal counsel was required to file an answer to her Petition of Appeal, respond to petitioner's Motion for Reconsideration, prepare for two Prehearing Conferences (one of which petitioner made herself unavailable), prepare discovery and appear for a hearing with the Superintendent of Schools. The Board without a resolution of the dispute must carry all of these expenses.

Having made no determination about the merits of petitioner's claim against the Board, it is this tribunal's considered judgment that petitioner has no intention of complying with any directive issued by the Commissioner or this administrative tribunal to attend any subsequent scheduled hearings.

Pursuant to the Uniform Administrative Procedure Rule found at *N.J.A.C.* 1:1-14-4(a), provides, in part, that:

> If, after appropriate notice, neither a party nor a representative appears at any proceeding scheduled by the Clerk or judge, the judge shall hold the matter for one day before taking action. If the judge does not receive an explanation for the nonappearance within one day, the judge may, pursuant to *N.J.A.C.* 1:1-3.3(b) and (c), direct the Clerk to return the matter to the transmitting agency for appropriate disposition.

Rather than hold this matter in abeyance or to return it to the Commissioner unresolved, **I CONCLUDE** that the Petition of Appeal submitted by Cherie W. Huang, should be dismissed with prejudice.

ORDERED

Accordingly, it is **ORDERED** that the Petition of Appeal of Cherie W. Huang be and is hereby **DISMISSED WITH PREJUDICE.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

25 March 2002
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

3/28/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 28 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

NONE

DOCUMENTS IN EVIDENCE

NONE

OAL DKT. NO. EDU 4480-01
AGENCY DKT. NO. 43-2/01

CHERIE W. HUANG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF OCEAN CITY, CAPE MAY COUNTY *ET AL.*,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his full and independent review, the Commissioner fully concurs with the findings and conclusions of the Administrative Law Judge.

Accordingly, the recommended Initial Decision of the OAL dismissing the Petition of Appeal is affirmed for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/10/02

Date of Mailing: 5/10/02

* This decision, as the Commissioner's final determination may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:2-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

197-02

PATRICIA ARENA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

May 14, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6487-00

AGENCY DKT. NO. 172-5/00

PATRICIA ARENA,

Petitioner,

v.

BUEAN REGIONAL BOARD OF EDUCATION,

Respondent.

Barbara Reifberg, Esq., for petitioner (Baron Reifberg & Ward, attorneys)

Kimberly Baldwin, Esq., for respondent (Capizola, Fineman & Lapham, attorneys)

Record Closed: March 25, 2002 Decided: March 27, 2002

BEFORE **LILLARD E. LAW,** ALJ:

This matter was transmitted to the Office of Administrative Law on August 28, 2000, for determination as contested cases, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is incorporated herein by reference and attachment.

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does

not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

27 March 2002
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

4-2-02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 3 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

FILED

MAR 25 11 28 AM '02

STATE OF NEW JERSEY
OFFICE OF
ADMINISTRATIVE LAW

BARON, RIEFBERG & WARD, P.A.
A Professional Corporation
1307 White Horse Road
Building F - Suite 600
Voorhees, New Jersey 08043
(856) 627-6000
Attorneys for Petitioner

PATRICIA ARENA, Petitioner, vs. BUENA REGIONAL BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL Docket No. EDUOR 06487-00S Agency Ref. No. 172-5/00 STIPULATION OF SETTLEMENT

Petitioner Patricia Arena (hereinafter "Petitioner") and Respondent Buena Regional High School District Board of Education (hereinafter "Respondent") having agreed to settle the above captioned matter amicably in accordance with the terms set forth herein, state the following:

1. Respondent agrees to restore a total of 41 sick days to Petitioner's account. Of this total, 30 days shall be restored without reimbursement to Respondent of temporary disability benefits.

2. Petitioner agrees to pay Respondent $1,249.60 out of the proceeds of her pending workers' compensation matter for the remaining 11 days. Said payment shall be deducted directly from her award by Scibal Associates and reimbursed directly to the Respondent.

3. Other than as specifically set forth herein, this Stipulation of Settlement shall have no effect upon the

Petitioner's workers' compensation benefits being received in a separate Section 20 settlement with dismissal with Scibal Associates.

We hereby agree to the terms set forth in this Stipulation of Settlement.

BARON, RIEFBERG & WARD, P.A.
Attorneys for Petitioner
Patricia Arena

By: Barbara E. Riefberg
BARBARA E. RIEFBERG

Dated: March 21, 2002

CAPIZOLA, FINEMAN & LAPHAM
Attorneys for Buena Regional
High School District Board
of Education

By: Kimberly Jo Baldwin
KIMBERLY BALDWIN

Dated: 12/5/01

OAL DKT. NO. EDU 6487-00
AGENCY DKT. NO. 172-5/00

PATRICIA ARENA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/14/02

Date of Mailing: 5/14/02

199-02

199-02

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Board challenged the Department's notice of determination regarding second level audit appeal of Title I Funds.

The ALJ concluded that the Board did not show by a preponderance of the credible evidence in the record that the disallowance complained of was in any way improper. The ALJ found that the Department did not act in an arbitrary, capricious or unreasonable manner.

The Commissioner adopted the findings and determination in the Initial Decision as his own.

May 16, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8280-00

AGENCY DKT. NO. 345-10/00

BOARD OF EDUCATION OF
THE CITY OF TRENTON,

Petitioner,

v.

NEW JERSEY DEPARTMENT
OF EDUCATION,

Respondent.

Jessica G. deKoninck, Esq., Special Counsel to the Board, for petitioner

Todd J. Schwartz, Deputy Attorney General, for respondent (David Samson, Attorney General of New Jersey, attorney)

Record Closed: February 15, 2002 Decided: April 1, 2002

BEFORE **BRUCE R. CAMPBELL**, ALJ:

The Trenton Board of Education (petitioner or Board) appeals items 4, 5 and 6 in a June 15, 2000 Notice of Determination (P-7) sent by the Director of the Office of Compliance, New Jersey Department of Education (respondent or Department), to the Board's president. The Notice dealt with the Board's second level audit appeal of the Department's examination report of the Board's fiscal operations of the Improving America's Schools Act (IASA) (1994) Title I

Program. Specifically, the Notice upheld findings 1, 4, 5 and 6 of an earlier report. This appeal followed.

This matter was opened before the Commissioner of Education, who transmitted it to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 through –13. The case was heard on December 20, 2001 at the Office of Administrative Law, Trenton. At hearing the Board withdrew its appeal as to items 1, 5 and 6. Counsel provided post hearing memorandums of law and the record closed on February 15, 2002.

EVIDENCE

Nancy Swirski, Assistant Business Administrator and Controller for the Board, testified. She was not personally involved in the subject Educational In-Roads (EIR) contract, but oversees Board funds, assists the Business Administrator and knows Board business documents generally. She identified the Notice of Determination concerning the Board's second level appeal in this case (P-7).

Swirski discussed the contract with Educational In-Roads to provide Title I instructional services to nonpublic pupils (P-1). Paragraph 4, in its entirety, states:

> EIR shall provide an appropriate number of vehicular units; including trailers and any additional units determined by need, all of which shall be used for the instructional programs set forth above, and EIR further agrees to furnish all necessary insurance, maintenance, and power and fuel for said vehicles. The number of such units shall be set forth in Section 9 and on a schedule, which schedule shall be incorporated into this Agreement subject to the approval of the Superintendent of Schools. It is further understood and agreed that if because of site restrictions, governmental regulations, or other conditions, EIR has to use its mobile instructional units to comply with the terms of this Agreement and to furnish the services then and, in that event, in recognition of the additional costs of these mobile instructional units, the price of this total Agreement shall be increased by 2% per annum per mobile instructional unit to cover the cost and charge for the use of the mobile instructional units.

Paragraph 21 provides:

> Board agrees to pay to EIR during each year of this Agreement for the aforesaid services the price per instructional unit as set forth on Schedule A attached hereto and made a part hereof. The price per instructional unit shall be adjusted for each renewal of the Agreement and shall be subject to the reasonable approval of the Superintendent of Schools. Further the Board agrees that should additional or supplemental funding occur in any given year an amount equal to the proportionate percentage received by the Board will be added as an adjustment. For each Agreement year, the Board agrees to pay EIR in ten (10) equal monthly installments beginning in September and ending in June of each Agreement year. Any adjustment necessary between the payments made and the services actually rendered shall be made in June of each Agreement year.

The ninth page of exhibit P-1 is the August 26, 1996 resolution of the Board renewing the contract for the period September 1, 1996 – June 30, 1997. The per pupil cost was calculated to be $381.70 and the total contract amount was not to exceed $180,925.80. Swirski said this amount was paid. The Board also paid an additional $92,000 relative to the trailers. A purchase order was cut and a check used to EIR on June 30, 1997. The district later received additional moneys. The Notice of Determination (P-7) at paragraph 4 states the district expended fiscal year 1996-97 Title I Capital Expense Funds in the amount of $92,000 for costs not actually incurred. The Board, upon its own review, adjusted the figure to $89,716 and sent the difference to the State after the 1998 audit. When the Notice of Determination was received, Swirski was employed by the Board as controller. She reviewed the Notice when received. She went through records. She found only the contract. Swirski sent this to the State as justification.

Paragraph 21 of the Notice refers to additional or supplemental funding. The $92,000 was paid to EIR per contract. She found no Board resolution covering this and found no contract addendum. The figure would have appeared in the Title I Capital Expense Application (R-1).

The difference between $89,716 and $92,000 -- $2,284 – was repaid by EIR. This repayment was reflected in the audit. The Board acted as a conduit between EIR and the Department of Education. Under the 1996-97 contract, the Board paid $180,925.80, the

maximum expressed in the Board resolution. The adjustment was based on provisions in the original contract. EIR was allowed overhead for maintenance and expense of the trailers. During the contract year, the Board made payments per contract paragraph 21. When it received additional funds, it paid EIR additional moneys, again per contract paragraph 21. That $92,000 was an adjustment under paragraph 21, obligated by paragraphs 4 and 21. The payment to EIR for the instructional portion was on a cost per pupil basis and could not be used for maintenance. If the Board had not received supplemental funds, EIR would have received the per pupil moneys only.

In the 1993-94 contract, the per pupil cost was $900. In the 1996-97 contract (the third renewal), it was $381.70. The contract was extended. The contract was amended. The amounts paid varied.

Robert W. Ortley, Manager, Auditing Unit, Division of Finance, New Jersey Department of Education testified. The Federal Title I Program requires the New Jersey Department of Education to do audits. The 1996-97 audit was an inclusive review of the district's Title I and other block moneys in accord with the spending application and plan filed with the Department. The witness supervised the two auditors who performed the audit.

Concerning the June 15, 2000 Notice of Determination (P-7), Ortley first addressed the fourth finding. Trenton had a contract with EIR under which EIR provided basic skills Title I instructional services to nonpublic school pupils at nonpublic school sites. The contract (P-1) was a renewal of a 1993-94 contract. Renewals were provided for in the 1993-94 contract.

Ortley's team disallowed the $92,000 payment charged off to a separate grant award. The team determined the amount was over and above the amount specified in the Board's enabling resolution. They relied in part on Office of Management and Budget Circular 8-87. Further, the $92,000 was not covered by a contract. Under the Public Schools Contract Law, *N.J.S.A.* 18A:18A-1 through -59, all public school contracts must be in writing.

On the Title I Capital Expense Application for fiscal year 1997 (R-1), the total amount was $92,000. It was allocated as Rentals, Function and Object Code 200-400, $45,000 and Other

Purchased Services, Function and Object Code 200-590, $47,000. He asked for documentation from the Board. His position is that EIR was already obligated to provide the trailers. There is a capital equipment item in R-1, but no specifics about what the entry represents. Unit leases in R-1, a $43,000 item, is represented as lease payments EIR incurred. In the end, however, EIR was obligated to provide trailers per paragraph 4 (P-1).

DETERMINATION AND ORDER

For the following reasons, the petition fails.

The Board argues there was a contract in place and the plain language of the contract authorized the payment. Paragraph 4 includes a price escalator clause to come into play if EIR was required to use mobile instructional units to comply with the contract terms. Full payment to vendors often is not made until the end of the year when Title I funds historically are received. The district and the vendor expected additional funds might be available "to fully fund the contract." Petitioner's memorandum at 5-6. The Board applied "for $92,000 to support the cost of using trailers by Educational In-roads." Petitioner's brief at 6. The figure later was adjusted to $89,716 and that amount was actually expended to pay for trailers used in the provision of educational services to nonpublic school pupils. The district should not be required to return that amount to the State.

The State's argument is that its disallowance of the $92,000 (later adjusted to $89,716) should be upheld because the obligation to pay is not embodied in a written contract. It is black letter law that school contracts must be in writing.

Initially, the State argues that Trenton's citation to the last sentence of paragraph 4 and argument that the $92,000 payment was justified as a 2% increase per annum per mobile unit must be rejected. I agree. The State would differentiate between trailers and mobile units, but this is too fine a distinction to make and is not necessary to the larger argument. Correctly pointing to the Board's August 26, 1996 resolution (P-1 at 9), the respondent notes the language includes a cap on expenditure of $180,925.80.

The Board also argues that the $92,000 should be viewed as supplemental funding to be paid over to EIR as an adjustment. There is nothing in the contract to support this and *N.J.S.A.* 18A:18A-40 commands a separate writing reflecting the specific obligation and payment to be made.

The Board would rely on that part of paragraph 21 that says:

> Further, the Board agrees that should additional or supplemental funding occur in any given year, an amount equal to the proportionate percentage received by the Board will be added as an adjustment.

But this ignores the requirements of a written contract. In addition, it is inconsistent with the resolution fixing an expenditure limit of $180,925.80.

The last contract provision the Board relies on is the final sentence of paragraph 21, "Any adjustment necessary between the payments made and the services actually rendered shall be made in June of each Agreement year." However, the Board offered no testimony that the services EIR rendered exceeded the payments the Board made.

Finally, public policy would support the Department's decision. The Board received nothing additional for the $92,000 payment. EIR was obligated to provide the agreed-upon services for the agreed-upon contract price. The $92,000 was a windfall.

I generally agree with the State's arguments. In addition, considering the reliance on the "proportionate percentage" language, I heard no testimony justifying the payment under paragraph 21 and no testimony about what constitutes a "proportionate percentage" and why. Other than the amount and the adjusted amount, I heard no accounting explanation whatsoever.

The language in paragraph 21, "Any adjustment necessary between the payments made and the services actually rendered shall be made in June of each agreement year," clearly applies to services. There is no mention of capital expense and the sentence cannot fairly be read to implicate capital expense.

Having considered the entire record including the memorandums of law, I **FIND** and **CONCLUDE** that the Trenton Board of Education has not shown by a preponderance of the credible evidence in the record that the disallowance complained of was in any way improper. Under the circumstances revealed by the evidence, the New Jersey Department of Education was not arbitrary, capricious or unreasonable.

Accordingly, the petition of appeal is dismissed. It is so **ORDERED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

APR 0 1 2002
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

4/1/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 2 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cad

WITNESSES

For petitioner:

Nancy Swirski

For respondent:

Robert W. Ortley

EXHIBITS

Petitioner's exhibits:

P-1 Contract between Educational In-Roads and Trenton Board of Education to provide basic skills instruction to nonpublic school pupils, undated, 10 pp.

P-2 Invoice, Educational In-Roads to Trenton Board of Education, July 28, 1997

P-3 Invoice (credit), Educational In-Roads to Trenton Board of Education, July 28, 1997

P-4 Memorandum, Office of Specialized Populations to Chief School Administrators, Title I Eligible LEAs, December 19, 1996, 15 pp.

P-5 Trenton Capital Expense Breakdown, 1996-97 School Year

P-6 Letter, King to Ali, May 26, 1999, 2 pp. with Report of Examination – Title I Audit, September 1, 1996 – August 31, 1997 attached, 8 pp.

P-7 Notice of Determination, King to Ali, June 15, 2000, 8 pp.

P-8 Letter, Fox to Ali, January 21, 2000, 2 pp. with First Level Appeal Decision, January 21, 2000 attached, 7 pp.

P-9 Excerpts, Comprehensive Annual Financial Report, July 1, 1997 – June 30, 1998, pp. 12, 13, 199, 120, 123

Respondent's exhibits:

R-1 Title I Capital Expense Application, January 29, 1997, 4 pp.

R-2 Check no 26435, Trenton Board of Education to Educational In-Roads, August 6, 1997

OAL DKT. NO. EDU 8280-00
AGENCY DKT. NO. 345-10/00

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record of this matter, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge. Accordingly, the Initial Decision is adopted for the reasons expressed therein and the Petition of Appeal is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/16/02

Date of Mailing: 5/16/02

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

198-02R

198-02

IN THE MATTER OF THE TENURE HEARING OF LEONARD J. MARANO, BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY.	:	
LEONARD J. MARANO, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION ON REMAND
LEONARD J. MARANO, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY, RESPONDENT.	:	

May 13, 2002

OAL DKT. NOS. EDU 12098-93,
EDU 8695-94 and EDU 2040-95 (CONSOLIDATED)
AGENCY DKT. NOS. 406-12/93,
353-8/94 and 477-12/94 (CONSOLIDATED)

IN THE MATTER OF THE TENURE HEARING OF LEONARD J. MARANO, BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY.	:	
LEONARD J. MARANO, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION ON REMAND
LEONARD J. MARANO, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY, RESPONDENT.	:	

This matter was remanded to the agency by the Appellate Division on March 28, 2002, decision number A-6218-99T1, directing "adoption of an amended final administrative decision adopting the recommendation of the ALJ that Morano's [sic] request for

salary entitlement under N.J.S.A. 18A:6-14 is denied." Slip Opinion at 13. On May 1, 2002, the State Board, in turn, remanded this matter to the Commissioner for effectuation of the Court's order.

In compliance with the Court's directive, the Commissioner hereby modifies his February 13, 1997 decision to affirm the ALJ's recommendation that the Lincoln Park Board of Education's motion for summary decision, denying back pay to Leonard J. Marano for the entire period of his suspension from October 1994 onward, be granted.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/13/02

Date of Mailing: 5/14/02

200-02

ANTHONY GARVIN,

PETITIONER,

V.

NEW JERSEY STATE BOARD OF EXAMINERS,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner challenged the State Board of Examiners' decision to deny his application for a teaching certificate as a result of his conviction for a disqualifying criminal offense under *N.J.S.A.* 18A:6-7.1.

The ALJ concluded that petitioner was ineligible for issuance of a teaching certificate. As a result of 1998 amendments, *N.J.S.A.* 18A:6-7.1 provides that any individual convicted of a disqualifying offense "shall be permanently disqualified from employment or service" and there is no provision for the individual to show rehabilitation. The ALJ determined that since petitioner submitted his application for a standard teaching certificate to the Department of Education on August 28, 1998, nearly two months after the act became effective, the new law applies and petitioner is "permanently disqualified" from obtaining a teaching certificate. Moreover, since petitioner did not dispute the accuracy of his criminal record, a hearing was unnecessary and the appealed may be resolved as a matter of law. Petition was dismissed.

The Commissioner adopted the findings and determination in the Initial Decision as his own.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7455-00
AGENCY DKT. NO. 215-8/99

ANTHONY GARVIN,
Petitioner,
v.
NEW JERSEY STATE BOARD OF EXAMINERS,
Respondent.

Anthony Garvin, *pro se*

Allison Colsey Eck, Deputy Attorney General, for respondent
(David Samson, Attorney General of New Jersey, attorney)

Record Closed: January 30, 2002 Decided: March 27, 2002

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal from the denial of petitioner's application for a teaching certificate as a result of his conviction for a disqualifying criminal offense under *N.J.S.A.* 18A:6-7.1. Previously, the statute had permitted an applicant convicted of a disqualifying offense to obtain a teaching certificate if he or she could demonstrate rehabilitation. Effective June 30, 1998, *N.J.S.A.* 18A:6-7.1 was amended to require

permanent disqualification of persons convicted of certain crimes, including drug-related offenses, and to eliminate the opportunity to demonstrate rehabilitation. *L.* 1998, *c.* 31, §5. Petitioner Anthony Garvin ("Garvin") claims that the amendment is being applied retroactively to his circumstances and that his due process rights have been violated by denial of his right to a hearing.[1] Respondent State Board of Examiners ("Board") maintains that the new law is applicable because Garvin applied for a standard teaching certificate after the effective date of the amendment. For the reasons that follow, the current law governs and Garvin is disqualified from holding a teaching certificate.

Procedural History

On April 15, 1999, the Board voted unanimously to deny Garvin's application for teaching certification because of his conviction in 1990 for possession of a controlled dangerous substance. Subsequently, on July 30, 1999, Garvin applied to the Commissioner of Education ("Commissioner") for a stay of the Board's ruling. By order dated January 20, 2000, the Commissioner denied Garvin's application for a stay.

Nearly half a year later, on June 6, 2000, Garvin sent a letter to the Commissioner, renewing his application for a stay and requesting the opportunity for a full hearing on the issue of rehabilitation. Treating the letter as a motion to reopen the record, the Commissioner requested additional information on why the case should be reopened. Garvin complied with this request on June 29, 2000. Accordingly, on or about August 14, 2000, the Commissioner reopened the record and transmitted the matter to the Office of Administrative Law ("OAL") for appropriate proceedings as a contested case.[2]

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[1] Initially, Garvin also alleged that the Board's action violated the *ex post facto* clause in the federal and state constitutions. *U.S. Const.* Art. 1, §9, cl. 3. *N.J. Const.* Art. IV, §7. Later, in his opposing papers, Garvin conceded that a licensing scheme is regulatory, not punitive, and does not constitute an *ex post facto* law. *See Doe v. Poritz*, 142 *N.J.* 1, 47 (1995).

[2] Garvin's letter of June 6, 2002 will be deemed to be his petition of appeal, without requiring more formal pleadings.

Thereafter, on August 3, 2001, the Board filed a motion for summary decision, together with supporting exhibits and brief. Garvin filed his opposing papers, including a certification and brief, on October 2, 2001. The Board filed a reply brief on October 18, 2001. The OAL held oral argument on the motion on January 9, 2002. Despite adequate notice, Garvin failed to appear at oral argument. Nevertheless, the dispute will be decided on its merits. The record remained open until January 30, 2002 to permit production of copies of the relevant judgments of conviction.

Findings of Fact

All of the material facts necessary to determine the summary decision motion are undisputed. From the pleadings, motion papers and exhibits, I **FIND** the following facts:

Anthony Garvin has been employed in a teaching capacity by the New Jersey Department of Corrections since June 1996.[3] Originally, he worked as a teaching assistant for the Mountainview Youth Correctional Facility at Annandale. At or about June 1997, he was reassigned to the Garden State Correctional Facility at Yardville. In July 1997, the State Board of Examiners issued him a one-year emergency certificate authorizing him to serve as teacher of the handicapped. In September 1998, the Board renewed his emergency certificate through July 1999. His emergency certificate has since expired and has not been renewed again.

Meanwhile, in or about May 1998, Garvin supplied certain materials in support of his eligibility for a standard instructional certificate to his supervisor at the Garden State Correctional Facility. Department of Correction officials forwarded the completed application for a teacher of the handicapped endorsement, along with payment of appropriate fees, to the New Jersey Department of Education on August 25, 1998.

[3] When a school in a correctional setting does work equivalent to that of the public schools, teachers in such school may be required "to hold a teacher's certificate of the same type as that held by a teacher in the public schools doing similar teaching." *N.J.S.A.* 30:1-10.1. Certified teachers in correctional facilities are eligible to acquire tenure. *N.J.S.A.* 18A:60-1.1, -1.2.

Department of Education representatives stamped the application as received on August 28, 1998.

In response to a question on the application form regarding whether he had been convicted of a crime, Garvin disclosed that he had been convicted of two narcotics offenses in the third degree, the first occurring in January 1990 and the second in November 1990. Although the application process involves the taking of an applicant's fingerprints and a check of his criminal history, the administrative record does not contain the results of such search. It does, however, include copies of two separate judgments of criminal conviction, both of which were entered by Judge Francis DeStefano of the Superior Court of New Jersey, Hudson County, Law Division, Criminal Part.

Judgment of conviction on Indictment No. 1223-4-90 reveals that Garvin pled guilty on November 8,1991 to one count of possession of a controlled dangerous substance, namely cocaine, within 1,000 feet of school property in violation of *N.J.S.A.* 2C:35-7. Judgment of conviction on Indictment No. 313-2-91 reveals that Garvin pled guilty on the same date to one count of possession of a controlled dangerous substance, namely heroin, in violation of *N.J.S.A.* 2C:35-10a(1). The Court imposed concurrent custodial sentences of three years, suspended Garvin's driver's license for six months, and imposed penalties and costs totaling $2,160.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that Garvin is ineligible for issuance of a teaching certificate.

Teachers and teacher aides are disqualified from employment in any facility, center, school or school system under supervision of the Department of Education if they have been convicted of certain crimes, including an offense involving the sale, possession or habitual use of a controlled dangerous substance. *N.J.S.A.* 18A:6-7.1(b). Before the change in the law, subsection (e) of the statute allowed a person convicted

of such disqualifying offense the opportunity to demonstrate affirmatively his or her rehabilitation by clear and convincing evidence.

As a result of the 1998 amendments, however, *N.J.S.A.* 18A:6-7.1 now provides that any individual convicted of a disqualifying offense "shall be permanently disqualified from employment or service." Similarly, the Legislature expressly repealed the provision in the law that had previously granted such individual the opportunity to show rehabilitation. Instead, subsection (e) limits the individual to "an opportunity to challenge the accuracy of the disqualifying criminal record." Enacted into law on June 30, 1998, the act expressly provides that it "shall take effect immediately." Further, the new law "shall first apply to criminal record checks conducted on or after the effective date of [the act.] *N.J.S.A.* 18A:6-7.1(g). Since Garvin submitted his application for a standard teaching certificate on August 28, 1998, nearly two months after the act became effective on June 30, 1998, the new law applies and Garvin is "permanently disqualified" from obtaining a teaching certificate.

Subsection (g) creates a narrow exception to permanent disqualification for an individual "employed by a board of education or a contracted service provider who is required to undergo a check upon employment with *another* board of education or contracted service provider." (Emphasis added.) Such person "shall be disqualified only for . . . any offense enumerated in this section prior to the effective date[.]" Garvin does not fit within this exception for two reasons. Although he was reassigned from one correctional facility to another, his entire service was for the Department of Corrections. Thus, he was never required to undergo a check due to a change from one employer to another. In addition, Garvin was convicted of "possession" of a controlled dangerous substance, which had been a disqualifying offense under the old law. Therefore, he remains subject to disqualification under the new law.

Generally, courts favor interpretations of statutes that afford prospective application only. *Nobrega v. Edison Glen Associates*, 167 *N.J.* 520, 536 (2001). Contrary to Garvin's protestation, however, the Board did not apply the amended version of *N.J.S.A.* 18A:6.71 retroactively. Garvin's erroneous assertion derives from

the misconception that he acquired some sort of entitlement from the issuance to him of two emergency certificates prior to the effective date of the new law.

An emergency certificate is "a substandard one-year certification issued only in the field of educational services, teacher of the handicapped, teacher of the blind and partially sighted, and teacher of the deaf and hard of hearing." *N.J.A.C.* 6:11-4.3 (a). Emergency certificates are issued only on the application of a public-school district when the district is unable to locate a suitable standard-certified teacher due to unforeseen shortages or other extenuating circumstances. *N.J.A.C.* 6:11-4.3(b). Emergency teachers are by definition unqualified to hold their position. They hold their positions temporarily, subject to termination or nonrenewal as soon as the district locates a provisionally or permanently certified teacher. *Breitwieser v. State-Operated Sch. Dist. of Jersey City*, 286 *N.J. Super.* 633, 640-641 (App. Div. 1996). Mere possession of an emergency certificate offers no assurance of continued employment of a teacher, nor does it ensure that the applicant will ultimately be issued a standard teaching certificate. Accordingly, the Board properly applied the new law prospectively to Garvin's application for a standard teaching certificate submitted after June 30, 1998.

Alternatively, Garvin contends that his due-process rights have been violated by the Board's refusal to hold a plenary hearing. Presumably, Garvin wants such a hearing in order to introduce evidence of his alleged rehabilitation. Summary decision may be granted if the pleadings, discovery and affidavits show "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." *N.J.S.A.* 1:1-12.5. *Contini v. Bd. of Educ.*, 286 *N.J. Super.* 106 (App. Div. 1995). In ruling on summary-decision motions, administrative agencies follow substantially the same standard as that governing motions for summary judgment in civil litigation. *Contini*, at 121. The essence of the inquiry is whether the evidence presents a sufficient disagreement to require submission to the trier-of-fact or whether it is so one-sided that one party must prevail. *Brill v. Guardian Life Ins. Co. of America,* 142 *N.J.* 520, 536 (1995). Pursuant to *N.J.S.A.* 18A:6-7.1 as revised, the only reason for development of a factual record would be to enable an applicant to challenge the accuracy of the disqualifying criminal record. Since Garvin does not dispute the

accuracy of his criminal record, a hearing is unnecessary and the appeal may be resolved as a matter of law.

Order

It is **ORDERED** that summary decision be granted in favor of the Board

And further **ORDERED** that Garvin's petition is hereby dismissed.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 27, 2002
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

4/3/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

APR 4 2002
DATE

OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Exhibits

No.	Description
P-1	Certification of Anthony Garvin, filed October 2, 2001
R-1	Copy of memorandum to Rosario James from Elizabeth Robbins, dated August 13, 1998
R-2	Copies of emergency certificates issued by the State Board of Examiners to Anthony A. Garvin July 1997 and September 1998
R-3	Copy of memorandum to Jack Eckstine from Rosario James, dated August 25, 1998
R-4	Copy of application for licensure, dated stamped received on August 28, 1998
R-5	Copy of United States postal money orders, undated
R-6	Copy of letter addressed to Whom It May Concern, from Anthony Garvin, dated August 18, 1998
R-7	Copy of letter to Anthony Garvin from Ida B. Graham, dated April 19, 1999
R-8	Copy of letter to the Commissioner of Education from Anthony Garvin, dated June 6, 2000
R-9	Copy of memorandum to Robert C. Sohl from Robert E. Stephens, dated June 2, 1995

R-10 Copy of letter to Ida B. Graham from Anthony Garvin, dated June 9, 1997

R-11 Copy of letter to Anthony Garvin from Deborah Antanaitis, dated June 12, 2000

R-12 Copy of letter to Deborah Antanaitis from Anthony Garvin, dated June 26, 2000

R-13 Copy of letter brief by William O. Perkins, Jr., Esq., dated June 29, 1999

R-14 Copy of document on the letterhead of Anthony Garvin, undated

R-15 Copy of certification of Anthony Garvin, undated

R-16 Copy of respondent's brief in opposition to petitioner's motion for stay, dated August 9, 1999

R-17 Copy of letter to Anthony Garvin from Ida B. Graham, dated April 19, 1999

R-18 Copy of denial of stay issued by the Commissioner of Education, dated January 20, 2000

R-19 Copy of excerpts of petitioner's answers to interrogatories propounded by respondent, undated

R-20 Copy of judgments of conviction in the matter entitled *State v. Garvin*, Superior Court of New Jersey, Hudson County, Law Division, Criminal Part, Ind. Acc. Nos. 1223-4-90 & 313-2-91, entered on November 8, 1991

OAL DKT. NO. EDU 7455-00
AGENCY DKT. NO. 215-8/99

ANTHONY GARVIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge. Accordingly, the Initial Decision is adopted for the reasons expressed therein, and the petition is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/20/02

Date of Mailing: 5/20/02

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

201-02

201-02

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (WESTMINSTER ACADEMY, SCHOOL #26) UNION COUNTY,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

"Abbott" District appealed the Department's determination on its whole school reform funding request for the 2001-2002 school year.

Upon review, Commissioner dismissed the appeal as requested by the District.

May 20, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5576-01
AGENCY DKT. NO. 185-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH
(WESTMINSTER ACADEMY, SCHOOL #26), UNION COUNTY
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION
Respondent.

Richard E. Shapiro, Esq., for petitioner,

Michael Lombardi, Deputy Attorney General, for respondent
(John J. Farmer, Attorney General of New Jersey, attorney)

Record Closed: November 13, 2001 Decided: December 19, 2001

BEFORE **EDITH KLINGER**, ALJ:

On June 13, 2001, petitioner, Board of Education of the City of Elizabeth (Board), filed a Verified Petition of Appeal before the Commissioner of Education seeking adequate funding to implement its whole school reform plan for all of the schools in the District pursuant to the decision of the Supreme Court in *Abbott v. Burke*, 153 *N.J.* 480 (1998) and the statutes and regulations promulgated there under. The present appeal concerns the school-based budget for Westminster Academy School #19. The respondent, Department of Education (Department), filed its answer on June

28, 2001. On July 9, 2001, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The hearing was held on October 1, 2, 3, 5, 11, 12, and 15, 2001. The record closed on November 13, 2001 when the final submissions were received from the parties.

DISCUSSION OF LAW

In December 1996, the Legislature enacted the Comprehensive Educational Improvement and Financing Act ("CEIFA"), *N.J.S.A.* 18A:7F-1 through –34, which "set academic standards that must be achieved by all students, identified programs to accomplish these goals, provided a funding mechanism to ensure their support, and included mechanisms for enforcement." *Abbott by Abbott v. Burke*, 153 *N.J.* 480, 541 App. I (1998) ("Abbott V").

Under CEIFA, the Board of Education of an "Abbott" school district must implement zero-based budgeting. *N.J.S.A.* 18A:7F-5(c), -6(C). Zero-based budgeting generally requires that the Board combine all of its sources of revenue or funding streams and use the aggregate amount as the basis for the entire school budget. That is, instead of allocating certain funds to specific programs, the Board must use the entirety of its funds to implement a "whole-school reform implementation plan" in the district as described in *N.J.A.C.* 6A:24-1.2, -2.2, -4.1, -4.4(a), and 7.1(a).

Implementation includes preparation of a school-based budget by each school in conformity with the Department's Guide for Implementing Urban Education Reform in Abbott Districts. (P-23) *See N.J.A.C.* 6A:24-1.2, -4.4. In accord with *N.J.S.A.* 18A:7F-6(c), each school submits its budget to the Department for review and approval. These budgets are based upon approved whole school reform models selected by the individual schools from the Guide for Implementing Urban Educational Reform in Abbott Districts. *See N.J.A.C.* 6A:24-1.2, -4.4.

The Department assists each Abbott school in preparing its budget by assigning to every school a member of the Department's School Review and Improvement Team, (*N.J.A.C.* 6A:24-1.3), as an Education Program and Development Specialist. This Specialist works directly with the School Management Team (SMT) (*N.J.A.C.* 6A:24-2), consisting of the school's principal and members of the school staff, to develop a school-based budget in compliance with the regulations and the Whole School Reform (WSR) model chosen by the school to improve its performance.

The proposed school-based budgets are submitted to the Department for review. *N.J.S.A.* 18A:7F-5(c), -6(c). The schools are then given the opportunity to provide further information if required by the Department to supplement data already provided and/or to provide additional justifications or explanations for the budget items requested.

The Commissioner, through the Department's Office of Program Review and Improvement and its Office of Fiscal Review and Improvement, reviews these budgets and determines whether they will meet the needs of the school to provide a thorough and efficient education. If they determine that the school's requests for funding are not appropriately justified, they may direct the removal of funds from the budget. *N.J.S.A.* 18A:7F-6(c).

By adopting CEIFA, the Legislature sought to establish uniform academic standards for all districts within the State, and to provide a framework for meeting those standards and a means of funding them. *N.J.S.A.*18A:7F-2b.

Following the enactment of CEIFA, the State Board of Education then adopted regulations

> in order to implement educational programs necessary to provide urban education reform initiatives that ensure that public school children . . . from poorer urban districts receive the educational entitlements guaranteed them by the Constitution and to meet the requirements of the decision of the New Jersey Supreme Court in *Abbott v. Burke*, decided

> May 21, 1998 . . . [and] to ensure the provision of a thorough and efficient system of education. . . .
>
> [*N.J.A.C.* 6A:24-1.1.]

These rules were designed to implement school-based budgeting and encourage participation in the decision-making process by the educational staff, the parents and the community in general. *State Board of Education Urban Education Reform in the Abbott Districts*, 32 *N.J.R.* 1329(a), 1332 (2000). The State Board believed that by effectively putting these local groups of people in a position where they could impact on ensuring a quality education for the students, the community would be more apt to support the required expenditures. *Ibid.* The State Board further proposed that such a system would "allow, at the school and district level, for a means of identifying inefficiencies and ensuring that money goes to necessary programs and services." *Ibid.*

In adopting the regulations necessary to implement CEIFA, the State Board attempted to provide the individual schools with discretionary power in budgeting to meet the needs of individual schools in the Abbott districts.

To date, only one case has discussed the standard of review to be used by the Commissioner in approving or eliminating items within a school-based budget. In *Abbott* V, the issue to be decided by the Supreme Court was the necessity for specialized classrooms for art, music and science. In reviewing the school's budget, which included these specialized classrooms, the Commissioner found that such rooms were not necessary. The Supreme Court held that, initially, the school should have discretion in deciding such issues, based on the particularized needs of the students at that school. The Supreme Court further held, upon review by the Department, "[t]he determination of the local education authorities should be reviewed with deference and with the understanding that local educators are in the best position to know the particularized needs of their students." *Abbott* V, *supra*, 153 *N.J.* at 522-523 (Emphasis added.)

In addition to the regulations which are public records, the Department provides the District with guidance and training in completing and submitting school-based budgets. The Department's exhaustive Guide for Implementing Urban Educational Reform in Abbott Districts (P-23), the assigned Specialists and the interim reviews and requests for additional justifications are just part of the process in developing the school-based budgets. The regulations give the Districts the responsibility to train every new SMT member in all WSR schools. *N.J.A.C.* 6A:24-2.3(a) The training, in consultation with the Specialists, is to:

> . . . include, but not be limited to, instruction regarding the roles, relationships and responsibilities of the SMT, development and implementation of the WSR implementation plan, needs assessment, particularized need, curriculum and instruction, teamwork and consensus building.
>
> 2. The training, if necessary, shall also include personnel and school-based budgeting.
>
> [*N.J.A.C.* 6A:24-2.3(b)]

Any SMT member that has not fulfilled the training requirement is to be removed from the SMT. *N.J.A.C.* 6A:24-2.3(d) As the respondent points out in its brief, the testimony of District witnesses makes it clear that they were familiar with the procedure for submitting school-based budgets.

The District asserts that the Department's written reviews of the budget requests do not in all cases specify the precise reasons why individual requests were eliminated from the budget and, therefore, it argues that the disapproved requests should be restored whether or not the requests were adequately justified by the District. According to the entirely credible testimony of the two Specialists assigned to all of the schools which are part of these school-based budget appeals, the written reviews in the record were far from the only interactions between the Department and the schools with respect to budgeted items. The Specialists were in frequent regular contact with school administration and staff in on-site face-to-face meetings, by mail, by telephone and during school visits. Both Specialists testified to repeated requests for additional

information from schools, not all of which was provided. There was no testimony that these conversations had not taken place.

At hearing, the Specialists were accused of constructing *ad hoc* rationalizations for disapproving specific budget requests. However, the record shows, that, for the most part, the reasons given by the Specialists at hearing were consistent with the reasons given in the written budget reviews, although perhaps more detailed or with additional comments based upon their interactions with the schools. In fact, some of these alleged *ad hoc* reasons in testimony were intended to address information provided to the Department for the first time at hearing.

The District argues that, where items have been disapproved, the Department is substituting its judgment for the discretion given to the school by the *Abbott* decisions. According to *Abbott V, supra,* 153 *N.J.* at 522-523, the local districts are entitled to deference only when asserting the particularized needs of their students. Deference to technical expertise is required only where such expertise is a pertinent factor. *Campbell v. New Jersey Racing Commission*, 169, *N.J.* 579, 588 (2001).

No special deference need be conferred when it comes to general educational expertise which continues to reside in the Department. Since the District is entitled to its area of expertise, the proper course is for the agency to accept the District's determination of its needs and then to assess whether its budget requests are appropriate to meet the stated needs. By analogy, see *Muise v. GPU, Inc.* 332 *N.J. Super.* 140, 161, (App. Div. 2000)

If the school's choice of methods to implement its needs is mistaken or not supported by the data provided, the Department is able to review the record and make its own determinations. By analogy, see *Campbell v. New Jersey Racing Commission*, 169, *N.J.* at 588. Even where substantial deference is required, the Department's review of the budgetary requests "is not simply a *pro forma* exercise in which [it] rubber stamp[s] findings that are not reasonably supported by the evidence; 'it calls for careful and principled consideration of the . . . record.'" *S.D. v. DHS, DFD,* 344 *N.J.Super.*

325, 336 (App. Div. 2001) [Citing *Chou v. Rutgers*, 283 *N.J.Super.* 524, 539 (App. Div. 1995), *certif.. denied,* 145 *N.J.*374 (1996)]

Based upon the principles related to deference enunciated in the case law, I **CONCLUDE** that the school districts are entitled to deference only in their designated area of expertise: the particularized needs of their students. I further **CONCLUDE** that the Department otherwise retains its expertise and experience in education, including its ability to review the budgetary requests of the districts and to exercise reasonable judgment with respect to these requests. I **CONCLUDE** that this reasonable judgment includes the Department's ability to evaluate the data provided and to apply its own expertise to determine whether the means embodied in the schools' budget requests are effective to accomplish their stated particularized needs.

In its brief, the school essentially argues that, pursuant to *Abbott V*, the burden of responsibility is shifted to the Department, particularly the assigned Education Program and Development Specialist, not the school, to ferret out, then with great specificity call for the required justifications for each budget request made by the individual schools to meet their obligations under WSR. This position is asserted notwithstanding the provisions of *N.J.A.C.* 6A:24-4.4 making it the responsibility of the school principal in consultation with the school business administrator and the SMT to develop and support the school based budget. The school must show that the means it chooses to implement its particularized needs are effective and supported by the data. I **CONCLUDE** that, pursuant to the regulations, the Specialist and the Department are there to assist the school to develop its budget not to direct or, in some cases, to anticipate and/or correct erroneous or unsupported requests made by the school.

Parenthetically, the District appears to take the inconsistent positions that the schools are due a great deal of deference in stating their local needs while at the same time asserting that it is the Department's responsibility to make sure that those needs are stated clearly and correctly with adequate justification. Either the schools have the expertise to recognize their needs, clearly state them and support them with adequate justifications in making budget requests or they do not. If the latter is the case, and the

Department makes an effort to understand and correct the shortcomings of the budget requests, it is unreasonable to expect the Department to "rubber stamp" the local educators.

I **CONCLUDE** that the principles stated above are the appropriate ones to be applied in the review of the Department's response to the following items in the school-based budget request.

THE PRESENT APPEAL

The school's request for additional funding for staff salaries was approved by the Department in August 2001. After additional clarification, the Department approved the addition of $28,044.00 to the budget for salaries and the issue was not litigated at hearing.

In resolving the dispute with respect to the salaries at which new staff could be hired, the Department denied that it intended to cap them at the second step of the District's salary guide. Where the District demonstrated that teachers with subject matter specialization, such as mathematics and science teachers with the necessary education and experience, could not be hired at the second step, the Department agreed that they could be hired at the step on the salary guide commensurate with their training and experience. The Department also agreed to work with the District to fill other teaching positions, such as gym, music and art teachers, if it were shown that these positions could not be filled at the second step of the salary guide. (R-1a)

With respect to all issues designated as settled for the purposes of the school-based budget appeals, the District reserves the right to raise any issues concerning the sufficiency of funding in a supplemental funding appeal. (R-1a)

Only the following budget item, which funding was denied by the Department of Education, Offices of Program Review and Improvement and Fiscal Review, remained in issue at the time of the scheduled hearing in this matter.

Workpaper W-1: Equipment – Color Laser Jet Printer

The school requested funding in the amount of $5,100.00 for a color laser printer for use in the production of student publications. With this printer, student photographs and artwork could be reproduced more cleanly and sharply than currently possible. The request was denied by letter dated May 14, 2001 for lack of sufficient justification. The need was not supported by the school's submitted plan for WSR, its individual technology plan or the District's technology plan.

Westminster has established a student-run newspaper to teach the students journalism while developing their skills in the area of teamwork and responsibility. The results were demonstrated at the New Jersey School Boards Convention in October 1999 and this increased the students' enthusiasm for the project.

Lydia Furnari, the principal of Westminster Academy, testified that the use of a color laser printer was consistent with the New Jersey Core Curriculum Standards and the workplace readiness standards. The newspaper teaches writing and journalism techniques. The requested printer would allow the students to present the newspaper in a more professional form so that the improved appearance of their work would increase student enthusiasm and willingness to participate. Since this type of printer is a reality of the workplace, its use would develop practical skills and increase employment opportunities. The printer would also be used for the school yearbook and an annual collection of student poetry and artwork. The number of these publications was presently limited due to the school's use of color ink jet printers.

Furnari also stated that the printer would increase the students' self-esteem which is important to their academic achievement. She conceded that the Core Curriculum standards do not make any mention of equipment.

The school now uses color inkjet printers that do not produce as desirable a result. It is also true that the cost of supplying the inkjet printers is more than that of the laser printer.

By letter, dated August 20, 2001 (P-78), Nancy A. Reid, Director of the Office of Program Review and Improvement and Scott D. Henry, Director of the Office of Fiscal Review and Improvement, jointly denied the request on the grounds that the school had not demonstrated the need for the new equipment.

Reid and Henry wrote in the joint letter that:

> Your request for a color laser jet printer was not approved because of the lack of justification to support the need. You are appealing this decision based on the need for clarity and quantity in producing publications. This item is not a required component of Whole School Reform. The additional justification and documentation provided does not justify the need for this item as part of your program . Your appeal is not approved.

Daryl Minus-Vincent was the member of the School Review and Improvement Team assigned by the Department to the Westminster Academy School as the Program and Development Specialist. There he worked directly with the School Management Team (SMT) consisting of the school principal and members of the school staff, to develop a school-based budget in compliance with the regulations and the Whole School Reform (WSR) model chosen by the school to improve its performance.

Minus-Vincent did not testify as to this issue with respect to Westminster, however, the same issue was raised on appeal with respect to the school-based budget of Elmora School #12 (OAL Dkt. No. EDU 5572-01) and the same testimony is applicable here. Elmora school also has color inkjet printers and the only advantage to the color laser printer would be more faithful reproduction and faster output. Minus-Vincent could not connect these reasons with "measurable results in enhancing the achievement levels of students" or the "undermin[ing of] the foundational education program of the school" if eliminated. See *N.J.A.C.* 6A:24-7.1(e).

The color laser printer is not part of the school's chosen WSR model. The school offered no evidence as to the manner in which the printer would help meet the core curriculum standards or generally improve the self-esteem of its students, other than those who choose to participate in the various publications. The uses for which the District claims the desired effects are limited to special printing jobs for a self-selected group of students at discreet times during the year when the various named publications are prepared.

The printer is not a part of the school's plan for introducing technology into the classroom. The printer is not part of a vocational or pre-vocational training program and there is no evidence that its use by students would be directed to such an end, or even that it would actually be operated by students at all.

Petitioner argues that the disapproval of this item constitutes the impermissible substitution of the Department's discretion for that of the local educators. I **CONCLUDE** that the deference due to the District does not deprive the Department of its own expertise to assess the budget requests and determine whether they are appropriate to meet the District's stated need. See *Muise v. GPU, Inc., supra.* at 161.

I **CONCLUDE** that the Department's review of this budgetary item in the light of the applicable regulations and its own expertise was appropriate. I **FIND** that, based upon the evidence, although the color laser printer might be effective in improving the performance of a group of students, it is a luxury and does not rise to a necessary item in the school-based budget. Therefore, I **FIND** that the Department's determination with respect to this item was correct based upon the data and justifications provided by the school and the applicable regulations. Accordingly, I **CONCLUDE** that the Department correctly disapproved this item in the school-based budget for the 2001-2002 school year.

SUMMARY OF CONCLUSIONS AND ORDERS

I **FIND** that the conclusions and orders below resolve all outstanding disputes between the parties with respect to the 2001-2002 school-based budget.

The Department approved the addition of $28,044.00 to the budget for salaries and this issue was not litigated at hearing. I **CONCLUDE** that this fully resolves this issue between the Department and Westminster Academy School #19. I **FIND** that the agreement between the parties is reasonable and it is, therefore, **ORDERED** that it be implemented in accord with their terms.

I **CONCLUDE** that the Department correctly disapproved the color laser printer in this budget. It is, therefore, **ORDERED** that this determination by the Department be **AFFIRMED** and petitioner's appeal with respect to this item be **DISMISSED WITH PREJUDICE**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 19, 2001
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

January 2, 2002
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 04 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:

Thomas Dunn, Jr.
Linda G. King
Pablo Muñoz
Lydia Furnari
Harold Kennedy

For Respondent:

Daryl Minus-Vincent

Exhibits:

P-23 Guide for Implementing Urban Education Reform in Abbott Districts
P-57 Class Size Reduction Plan
P-74 Letter, dated March 7, 2001, Keith Costello and Minus-Vincent to Furnari with attached Fiscal Review Comments
P-75 Letter, dated March 12, 2001, Furnari to Costello and Minus-Vincent with attached responses to P-74
P-76 Letter, dated May 14, 2001, Couselo and Henry to Furnari
P-77 Letter, dated June 1, 2001, Furnari to Couselo and Henry with attached responses to P-76
P-78 Letter, dated June 1, 2001, Reid and Henry to Furnari
P-109 Issues on Appeal after August 17, 2001
P-113 Professional Staff Positions – Salary Dispute

R-1a Schools and Issues Resolved – Post Hearing
R-2 Schools and Issues Remaining – Post Hearing

OAL DKT. NO. EDU 5576-01
AGENCY DKT. NO. 185-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (WESTMINSTER ACADEMY, SCHOOL #26) UNION COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and respondent's reply thereto were duly submitted in accordance with established timelines. Subsequently, petitioner filed a Motion to Dismiss this matter on the ground of mootness to which a response was filed by respondent. While the parties do not agree that the issues presented are moot, what is clear is that the District, that party which initiated these proceedings, no longer wishes to continue its appeal and asks that its appeal be dismissed.

Upon his independent and careful review of this local "Abbott" District's appeal of the Department's determination on its whole school reform funding request for the 2001-2002 school year, and based upon the papers filed by the parties with respect to petitioner's Motion to Dismiss, the Commissioner finds it unnecessary to reach to the decision of the ALJ, as he determines that this matter is appropriately dismissed.

Accordingly, the Petition of Appeal is hereby dismissed.

IT IS SO ORDERED*

COMMISSIONER OF EDUCATION

Date of Decision: 5/20/02

Date of Mailing: 5/21/02

* Pursuant to *P.L.* 2001, c. 130, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division at the New Jersey Superior Court.

202-02

202-02

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (ELMORA SCHOOL #12), UNION COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

"Abbott" District appealed the Department's determination on its whole school reform funding request for the 2001-2002 school year.

Upon review, Commissioner dismissed the appeal as requested by the District.

May 20, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5572-01
AGENCY DKT. NO. 190-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH
(ELMORA SCHOOL #25), UNION COUNTY
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION
Respondent.

Richard E. Shapiro, Esq., for petitioner,

Michael Lombardi, Deputy Attorney General, for respondent
(John J. Farmer, Attorney General of New Jersey, attorney)

Record Closed: November 13, 2001 Decided:

BEFORE **EDITH KLINGER**, ALJ:

On June 13, 2001, the petitioner, Board of Education of the City of Elizabeth (Board), filed a Verified Petition of Appeal before the Commissioner of Education seeking adequate funding to implement its whole school reform plan for all of the schools in the District pursuant to the decision of the Supreme Court in *Abbott v. Burke*, 153 *N.J.* 480 (1998) and the statutes and regulations promulgated there under. The present appeal concerns the school-based budget for Elmora School #12. The respondent, Department of Education (Department), filed its answer on June 28, 2001.

On July 9, 2001, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The hearing was held on October 1, 2, 3, 5, 11, 12, and 15, 2001. The record closed on November 13, 2001 when the final submissions were received from the parties.

DISCUSSION OF LAW

In December 1996, the Legislature enacted the Comprehensive Educational Improvement and Financing Act ("CEIFA"), *N.J.S.A.* 18A:7F-1 through –34, which "set academic standards that must be achieved by all students, identified programs to accomplish these goals, provided a funding mechanism to ensure their support, and included mechanisms for enforcement." *Abbott by Abbott v. Burke*, 153 *N.J.* 480, 541 App. I (1998) ("Abbott V").

Under CEIFA, the Board of Education of an "Abbott" school district must implement zero-based budgeting. *N.J.S.A.* 18A:7F-5(c), -6(C). Zero-based budgeting generally requires that the Board combine all of its sources of revenue or funding streams and use the aggregate amount as the basis for the entire school budget. That is, instead of allocating certain funds to specific programs, the Board must use the entirety of its funds to implement a "whole-school reform implementation plan" in the district as described in *N.J.A.C.* 6A:24-1.2, -2.2, -4.1, -4.4(a), and 7.1(a).

Implementation includes preparation of a school-based budget by each school in conformity with the Department's Guide for Implementing Urban Education Reform in Abbott Districts. (P-23) *See N.J.A.C.* 6A:24-1.2, -4.4. In accordance with *N.J.S.A.* 18A:7F-6(c), each school submits its budget to the Department for review and approval. These budgets are based upon approved whole school reform models selected by the individual schools from the Guide for Implementing Urban Educational Reform in Abbott Districts. *See N.J.A.C.* 6A:24-1.2, -4.4.

The Department assists each Abbott school in preparing its budget by assigning to every school a member of the Department's School Review and Improvement Team, (*N.J.A.C.* 6A:24-1.3), as an Education Program and Development Specialist. This Specialist works directly with the School Management Team (SMT) (*N.J.A.C.* 6A:24-2), consisting of the school's principal and members of the school staff, to develop a school-based budget in compliance with the regulations and the Whole School Reform (WSR) model chosen by the school to improve its performance.

The proposed school-based budgets are submitted to the Department for review. *N.J.S.A.* 18A:7F-5(c), -6(c). The schools are then given the opportunity to provide further information if required by the Department to supplement data already provided and/or to provide additional justifications or explanations for the budget items requested.

The Commissioner, through the Department's Office of Program Review and Improvement and its Office of Fiscal Review and Improvement, reviews these budgets and determines whether they will meet the needs of the school to provide a thorough and efficient education. If they determine that the school's requests for funding are not appropriately justified, they may direct the removal of funds from the budget. *N.J.S.A.* 18A:7F-6(c).

By adopting CEIFA, the Legislature sought to establish uniform academic standards for all districts within the State, and to provide a framework for meeting those standards and a means of funding them. *N.J.S.A.*18A:7F-2b.

Following the enactment of CEIFA, the State Board of Education then adopted regulations

> in order to implement educational programs necessary to provide urban education reform initiatives that ensure that public school children . . . from poorer urban districts receive the educational entitlements guaranteed them by the Constitution and to meet the requirements of the decision of the New Jersey Supreme Court in *Abbott v. Burke*, decided

> May 21, 1998 . . . [and] to ensure the provision of a thorough and efficient system of education. . . .
>
> [*N.J.A.C.* 6A:24-1.1.]

These rules were designed to implement school-based budgeting and encourage participation in the decision-making process by the educational staff, the parents and the community in general. *State Board of Education Urban Education Reform in the Abbott Districts*, 32 *N.J.R.* 1329(a), 1332 (2000). The State Board believed that by effectively putting these local groups of people in a position where they could impact on ensuring a quality education for the students, the community would be more apt to support the required expenditures. *Ibid.* The State Board further proposed that such a system would "allow, at the school and district level, for a means of identifying inefficiencies and ensuring that money goes to necessary programs and services." *Ibid.*

In adopting the regulations necessary to implement CEIFA, the State Board attempted to provide the individual schools with discretionary power in budgeting to meet the needs of individual schools in the Abbott districts.

To date, only one case has discussed the standard of review to be used by the Commissioner in approving or eliminating items within a school-based budget. In *Abbott* V, the issue to be decided by the Supreme Court was the necessity for specialized classrooms for art, music and science. In reviewing the school's budget, which included these specialized classrooms, the Commissioner found that such rooms were not necessary. The Supreme Court held that, initially, the school should have discretion in deciding such issues, based on the particularized needs of the students at that school. The Supreme Court further held, upon review by the Department, "[t]he determination of the local education authorities should be reviewed with deference and with the understanding that local educators are in the best position to know the particularized needs of their students." *Abbott* V, *supra*, 153 *N.J.* at 522-523 (Emphasis added.)

In addition to the regulations which are public records, the Department provides the District with guidance and training in completing and submitting school-based budgets. The Department's exhaustive Guide for Implementing Urban Educational Reform in Abbott Districts (P-23), the assigned Specialists and the interim reviews and requests for additional justifications are just part of the process in developing the school-based budgets. The regulations give the Districts the responsibility to train every new SMT member in all WSR schools. *N.J.A.C.* 6A:24-2.3(a) The training, in consultation with the Specialists, is to:

> . . . include, but not be limited to, instruction regarding the roles, relationships and responsibilities of the SMT, development and implementation of the WSR implementation plan, needs assessment, particularized need, curriculum and instruction, teamwork and consensus building.
>
> 2. The training , if necessary, shall also include personnel and school-based budgeting.
>
> [*N.J.A.C.* 6A:24-2.3(b)]

Any SMT member that has not fulfilled the training requirement is to be removed from the SMT. *N.J.A.C.* 6A:24-2.3(d) As the respondent points out in its brief, the testimony of District witnesses makes it clear that they were familiar with the procedure for submitting school-based budgets.

The District asserts that the Department's written reviews of the budget requests do not in all cases specify the precise reasons why individual requests were eliminated from the budget and, therefore, it argues that the disapproved requests should be restored whether or not the requests were adequately justified by the District. According to the entirely credible testimony of the two Specialists assigned to all of the schools which are part of these school-based budget appeals, the written reviews in the record were far from the only interactions between the Department and the schools with respect to budgeted items. The Specialists were in frequent regular contact with school administration and staff in on-site face-to-face meetings, by mail, by telephone and during school visits. Both Specialists testified to repeated requests for additional information from schools, not all of which was provided. There was no testimony that these conversations had not taken place.

At hearing, the Specialists were accused of constructing *ad hoc* rationalizations for disapproving specific budget requests. The record shows, however, that, for the most part, the reasons given by the Specialists at hearing were consistent with the reasons given in the written budget reviews, although perhaps more detailed or with additional comments based upon their interactions with the schools. In fact, some of these alleged *ad hoc* reasons in testimony were intended to address information provided to the Department for the first time at hearing.

The District argues that, where items have been disapproved, the Department is substituting its judgment for the discretion given to the school by the *Abbott* decisions. According to *Abbott V, supra,* 153 *N.J.* at 522-523, the local districts are entitled to deference only when asserting the particularized needs of their students. Deference to technical expertise is required only where such expertise is a pertinent factor. *Campbell v. New Jersey Racing Commission*, 169, *N.J.* 579, 588 (2001).

No special deference need be conferred when it comes to general educational expertise which continues to reside in the Department. Since the District is entitled to its area of expertise, the proper course is for the agency to accept the District's determination of its needs and then to assess whether its budget requests are appropriate to meet the stated needs. By analogy, see *Muise v. GPU, Inc.* 332 *N.J. Super.* 140, 161, (App. Div. 2000)

If the school's choice of methods to implement its needs is mistaken or not supported by the data provided, the Department is able to review the record and make its own determinations. By analogy, see *Campbell v. New Jersey Racing Commission*, 169 *N.J.* at 588. Even where substantial deference is required, the Department's review of the budgetary requests "is not simply a *pro forma* exercise in which [it] rubber stamp[s] findings that are not reasonably supported by the evidence; 'it calls for careful and principled consideration of the ... record.'" *S.D. v. DHS, DFD,* 344 *N.J.Super.* 325, 336 (App. Div. 2001) [Citing *Chou v. Rutgers*, 283 *N.J. Super.* 524, 539 (App. Div. 1995), *certif.. denied,* 145 *N.J.*374 (1996)]

Based upon the principles related to deference enunciated in the case law, I **CONCLUDE** that the school districts are entitled to deference only in their designated area of expertise: the particularized needs of their students. I further **CONCLUDE** that the Department otherwise retains its expertise and experience in education, including its ability to review the budgetary requests of the districts and to exercise reasonable judgment with respect to these requests. I **CONCLUDE** that this reasonable judgment includes the Department's ability to evaluate the data provided and to apply its own expertise to determine whether the means embodied in the school's budget requests are effective to accomplish their stated particularized needs.

In its brief, the school essentially argues that, pursuant to *Abbott V*, the burden of responsibility is shifted to the Department, particularly the assigned Education Program and Development Specialist, not the school, to ferret out, then with great specificity call for the required justifications for each budget request made by the individual schools to meet their obligations under WSR. This position is asserted notwithstanding the provisions of *N.J.A.C.* 6A:24-4.4 making it the responsibility of the school principal in consultation with the school business administrator and the SMT to develop and support the school based budget. The school must show that the means it chooses to implement its particularized needs are effective and supported by the data. I **CONCLUDE** that, pursuant to the regulations, the Specialist and the Department are there to assist the school to develop its budget not to direct nor, in some cases, to anticipate and/or correct erroneous or unsupported requests made by the school.

Parenthetically, the District appears to take the inconsistent positions that the schools are due a great deal of deference in stating their local needs while at the same time asserting that it is the Department's responsibility to make sure that those needs are stated clearly and correctly with adequate justification. Either the schools have the expertise to recognize their needs, clearly state them and support them with adequate justifications in making budget requests or they do not. If the latter is the case, and the Department makes an effort to understand and correct the shortcomings of the budget

requests, it is unreasonable to expect the Department to "rubber stamp" the local educators.

I **CONCLUDE** that the principles stated above are the appropriate ones to be applied in the review of the Department's response to the following items in the school-based budget request.

THE PRESENT APPEAL

The school's requests for additional funding for staff salaries and for field trip transportation were approved by the Department in August 2001. After additional clarification, the Department approved the addition of $9,522.00 to the budget for salaries and $3,850.00 for field trip transportation and the issue was not litigated at hearing.

In resolving the dispute with respect to the salaries at which new staff could be hired, the Department denied that it intended to cap them at the second step of the District's salary guide. Where the District demonstrated that teachers with subject matter specialization, such as mathematics and science teachers with the necessary education and experience, could not be hired at the second step, the Department agreed that they could be hired at the step on the salary guide commensurate with their training and experience. The Department also agreed to work with the District to fill other teaching positions, such as gym, music and art teachers, if it were shown that these positions could not be filled at the second step of the salary guide. (R-1a)

With respect to all issues designated as settled for the purposes of the school-based budget appeals, the District reserves the right to raise any issues concerning the sufficiency of funding in a supplemental funding appeal. (R-1a)

Only the following budgeted items for which funding was denied by the Department of Education, Offices of Program Review and Improvement and Fiscal Review, remained in issue at the time of the scheduled hearing in this matter.

Workpaper T-1: Partnership with Stevens Institute (Object Code 390)

The school requested $8,500.00 to enter into a partnership with Stevens Institute to provide additional staff training for the infusion of technology into the curriculum. According to petitioner's brief, it was supposed to "provide hands-on teacher training enabling the faculty to master technology to improve the understanding and delivery of science, mathematics and other subject areas." It would "infuse technology into curriculum" and provide "customized curriculum activities and a Hands-on lab throughout the year." The Department denied this item by letter dated May 14, 2001, because it was not supported by the school's submitted plan for WSR. The Department also stated that the services to be provided by Stevens Institute duplicated those that the school's technology coordinator and the District's technology coordinator were able to, or should have been able to, provide.

Maryury Freyre is the technology coordinator for Elmora. She testified that she does not have the ability to introduce technology into the school curriculum in any depth with respect to mathematics and science. For this reason, she investigated the program sponsored by Stevens Institute that trains school staff and provides access to materials and resources in mathematics and science that might otherwise be unavailable to Elmora.

Richard Esperon, the District's technology coordinator, testified that the District was unable to provide the schools with the training or staff development that would accomplish the same type of enrichment that the Stevens program offered. He was aware that this program was in use in other schools in the State. He recalled that the Department in the past had approved the District's request to seek a program out of District but could not recall what program that was.

Neither Esperon nor Freyre addressed the issues of whether the District or Elmora could meet core curriculum standards or infuse technology into Elmora without

the Stevens program, only that apparently neither of them can do it without outside help. This did not seem to be a problem in any of the other schools in the District.

Daryl Minus-Vincent was the member of the School Review and Improvement Team assigned by the Department to the Elmora School as the Program and Development Specialist. There he worked directly with the School Management Team (SMT) consisting of the school principal and members of the school staff, to develop a school-based budget in compliance with the regulations and the Whole School Reform (WSR) model chosen by the school to improve its performance.

He testified that the District had never discussed the Stevens plan with him and never told him that existing District resources were insufficient to meet the needs. He said that the District already had a technology coordinator and a curriculum department to work with the schools and there was a technology coordinator in every school. These people should have been able to answer the questions of the teachers and coordinators so the existing staffing made the Stevens program redundant. If any of them were unable to perform his or her designated functions, it was the opinion of Minus-Vincent that the person was unqualified to hold the position. He recommended that the budget request be disapproved because it duplicated functions that were already performed, or should have been performed, by existing District or school staff.

There is nothing in the record that shows Elmora could not introduce technology into the classroom or meet core curriculum standards without the proposed relationship with Stevens. There is nothing that requires a school to exceed core curriculum standards, including those met with the assistance of technology, in order to provide a thorough and efficient education to its students. There was no reason to believe that the Stevens program would "undermine the foundational education program of the school if eliminated." See *N.J.A.C.* 6A:24-7.1(e)

I **CONCLUDE** that the Department's review of this budgetary item in the light of the applicable regulations and its own expertise was appropriate. Therefore, I **FIND** that the conclusion reached was correct based upon the data and justifications provided

by the school and the applicable regulations. Accordingly, I **CONCLUDE** that the Department correctly disapproved this item in the school-based budget for the 2001-2002 school year.

Workpaper W-1: Equipment – Color Laser Printer

The school requested funding in the amount of $4,000.00 for a color laser printer to be used for mass student projects and publications. The request was denied by letter dated May 14, 2001 for lack of sufficient justification. The need was not supported by the school's submitted plan for WSR, its individual technology plan or the District's technology plan.

Lourdes Couto, the chairperson of the Elmora SMT, testified that the color laser printer was needed because the school's present color inkjet printers are too slow for thirty students to print their work. The school also intends to use it to prepare illustrated booklets for parents and other mass printings.

In its response of February 2, 2001 to Minus-Vincent's recommendations with respect to the school's budget, Joseph Caporaso, principal of Elmora wrote:

> The color laser printer will facilitate mass class projects including internet-based research, thematic projects, and cross-grade student presentations. The color laser will expose our children to an important technology tool often used in secondary school and later in the workplace. The color laser will also meet our state and district technology goals. Additionally, this equipment will be a vital tool in our WSR model. This includes parent notices, Elmora Times school newsletter, "Back to School Night" information and our "Pride of Elmora" display board.

In a letter, dated February 28, 2001, Caporaso responded to the Fiscal Review Comments of Minus-Vincent and Keith Costello, Fiscal Manager, which requested further information and justification with respect to the color laser printer. Other than identifying the make and model number of the chosen printer, his response to the additional request provided no more information than his earlier response.

When the budget request was disapproved by letter dated May 14, 2001, Caporaso added a little more explanation. On June 1, 2001, he wrote:

> The benefit of a color laser printer is supported by our whole school reform model; district technology plan and school technology plan as it enables infusion of technology at a higher level. At the same time it will comply with the community component or our WSR. We look forward to generating a school newsletter where our students will become active participants in its development. This newsletter will be the vehicle for informing our parents and community of all past, current, and upcoming events at the school level. As our students become stakeholders in the development of the newsletter, a love for writing and valuable skills for the future will be fostered. Thus complying with the NJCCCS.

The school now uses color inkjet printers that do not produce as rapid a result. It is also true that the cost of supplying the inkjet printers is more than that of the laser printer.

Minus-Vincent testified that the school already has printers in the building and in various offices. Elmora also has color inkjet printers and the only advantage to the color laser printer would be more faithful reproduction and faster output. Minus-Vincent could not connect these reasons with "measurable results in enhancing the of student achievement levels of students" or the "undermin[ing of] the foundational education program of the school if eliminated." See *N.J.A.C.* 6A:24-7.1(e).

By letter, dated August 17, 2001, Nancy A. Reid, Director of the Office of Program Review and Improvement and Scott D. Henry, Director of the Office of Fiscal Review and Improvement, jointly denied the request on the grounds that the school had not demonstrated the need for the new equipment.

Reid and Henry wrote in the joint letter that:

> Based on our review, we do not consider a color laser printer a viable option for the projected uses that have been listed since computer printers already exist in the school. The non-approval of this item will not adversely impact the integration of technology into the classroom

> curriculum or prevent the school from developing a newsletter. The school does not explain how current hardware will impede the progress of integrating technology. Based on the additional justification and documentation provided by the school, your appeal is not approved.

I **FIND** that this response of Reid and Henry accurately summarizes the lack of justification for the color laser printer as revealed by the testimony and the documentary evidence.

Petitioner argues that the disapproval of this item constitutes the impermissible substitution of the Department's discretion for that of the local educators. I **CONCLUDE** that the deference due to the District does not deprive the Department of its own expertise to assess the budget requests and determine whether they are appropriate to meet the District's stated needs. See *Muise v. GPU, Inc., supra.* at 161.

I **CONCLUDE** that the Department's review of this budgetary item in the light of the applicable regulations and its own expertise was appropriate. I **FIND** that, based upon the evidence, although the color laser printer might be effective in improving the school's computer output, it is a luxury and does not rise to a necessary item in the school-based budget. Therefore, I **FIND** that the Department's determination with respect to this item was correct based upon the lack of justification provided by the school and the applicable regulations. Accordingly, I **CONCLUDE** that the Department correctly disapproved this item in the school-based budget for the 2001-2002 school year.

SUMMARY OF CONCLUSIONS AND ORDERS

I **FIND** that the conclusions and orders below resolve all outstanding disputes between the parties with respect to the 2001-2002 school-based budget.

The Department approved the addition of $9,522.00 to the budget for salaries and $3,850.00 for field trip transportation and these issues were not litigated at hearing. I **CONCLUDE** that this fully resolves these issues between the Department and Elmora

School #12. I **FIND** that the agreements between the parties are reasonable and it is, therefore, **ORDERED** that they be implemented in accord with their terms.

I **CONCLUDE** that the Department correctly disapproved the addition of $8,500.00 to the budget for the costs of a partnership with Stevens Academy. It is, therefore, **ORDERED** that this determination by the Department be **AFFIRMED** and petitioner's appeal with respect to this item be **DISMISSED WITH PREJUDICE**.

I **CONCLUDE** that the Department correctly disapproved the color laser printer in this budget. It is, therefore, **ORDERED** that this determination by the Department be **AFFIRMED** and petitioner's appeal with respect to this item be **DISMISSED WITH PREJUDICE**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 19, 2001
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

January 2, 2002
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 04 2002
DATE

DIRECTOR AND ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:

Thomas Dunn, Jr.
Linda G. King
Pablo Muñoz
Lourdes Couto
Harold Kennedy
Maryury Freyre
Richard Esperon

For Respondent:

Daryl Minus-Vincent

Exhibits:

P-23 Guide for Implementing Urban Education Reform in Abbott Districts

P-42 Excerpts from the Whole School Reform Implementation Plan

P-43 2001-2002 Implementation Plan Recommendations, January 18, 2001

P-44 Letter of February 2, 2001 with attached responses to P-43, Joseph Caporaso to Minus-Vincent

P-45 Letter, dated February 23, 2001, Keith Costello and Minus-Vincent to Caporaso with attached Fiscal Review Comments

P-46 Letter of February 28, 2001 with attached responses to P-45, Caporaso to Minus-Vincent and Keith Costello

P-47 Letter, dated May 14, 2001, Couselo and Henry to Caporaso

P-48 Letter dated June 1, 2001, Caporaso to Couselo and Henry with attached responses to P-47

P-49 Letter, dated August 17, 2001, Reid and Henry to Dwight A. Klett

P-57 Class Size Reduction Plan

P-109 Issues on Appeal after August 17, 2001

P-113 Professional Staff Positions – Salary Dispute

R-1a Schools and Issues Resolved – Post Hearing

R-2 Schools and Issues Remaining – Post Hearing

OAL DKT. NO. EDU 5572-01
AGENCY DKT. NO. 190-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (ELMORA SCHOOL #12), UNION COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and respondent's reply thereto were duly submitted in accordance with established timelines. Subsequently, petitioner filed a Motion to Dismiss this matter on the ground of mootness to which a response was filed by respondent. While the parties do not agree that the issues presented are moot, what is clear is that the District, that party which initiated these proceedings, no longer wishes to continue its appeal and asks that its appeal be dismissed.

Upon his independent and careful review of this local "Abbott" District's appeal of the Department's determination on its whole school reform funding request for the 2001-2002 school year, and based upon the papers filed by the parties with respect to petitioner's Motion to Dismiss, the Commissioner finds it unnecessary to reach to the decision of the ALJ, as he determines that this matter is appropriately dismissed.

Accordingly, the Petition of Appeal is hereby dismissed.

IT IS SO ORDERED*

COMMISSIONER OF EDUCATION

Date of Decision: 5/20/02

Date of Mailing: 5/21/02

* Pursuant to *P.L.* 2001, c. 130, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division at the New Jersey Superior Court.

203-02

203-02

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (ALEXANDER HAMILTON MIDDLE SCHOOL #72), UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

"Abbott" District appealed the Department's determination on its whole school reform funding request for the 2001-2002 school year.

Upon review, Commissioner dismissed the appeal as requested by the District.

May 20, 2002

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5584-01

AGENCY DKT. NO. 199-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH

(ALEXANDER HAMILTON MIDDLE SCHOOL #72), UNION COUNTY

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION

Respondent.

Richard E. Shapiro, Esq., for petitioner,

Michael Lombardi, Deputy Attorney General, for respondent
(John J. Farmer, Attorney General of New Jersey, attorney)

Record Closed: November 13, 2001 Decided: December 19, 2001

BEFORE **EDITH KLINGER**, ALJ:

On June 13, 2001, the petitioner, Board of Education of the City of Elizabeth (Board), filed a Verified Petition of Appeal before the Commissioner of Education seeking adequate funding to implement its whole school reform plan for all of the schools in the District pursuant to the decision of the Supreme Court in *Abbott v. Burke*, 153 *N.J.* 480 (1998) and the statutes and regulations promulgated there under. The

present appeal concerns the school-based budget for Alexander Hamilton Middle School #72. The respondent, Department of Education (Department), filed its answer on June 29, 2001. On July 9, 2001, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The hearing was held on October 1, 2, 3, 5, 11, 12, and 15, 2001. The record closed on November 13, 2001 when the final submissions were received from the parties.

DISCUSSION OF LAW

In December 1996, the Legislature enacted the Comprehensive Educational Improvement and Financing Act ("CEIFA"), *N.J.S.A.* 18A:7F-1 through –34, which "set academic standards that must be achieved by all students, identified programs to accomplish these goals, provided a funding mechanism to ensure their support, and included mechanisms for enforcement." *Abbott by Abbott v. Burke*, 153 *N.J.* 480, 541 App. I (1998) ("Abbott V").

Under CEIFA, the Board of Education of an "Abbott" school district must implement zero-based budgeting. *N.J.S.A.* 18A:7F-5(c), -6(C). Zero-based budgeting generally requires that the Board combine all of its sources of revenue or funding streams and use the aggregate amount as the basis for the entire school budget. That is, instead of allocating certain funds to specific programs, the Board must use the entirety of its funds to implement a "whole-school reform implementation plan" in the district as described in *N.J.A.C.* 6A:24-1.2, -2.2, -4.1, -4.4(a), and 7.1(a).

Implementation includes preparation of a school-based budget by each school in conformity with the Department's Guide for Implementing Urban Education Reform in Abbott Districts. (P-23) *See N.J.A.C.* 6A:24-1.2, -4.4. In accord with *N.J.S.A.* 18A:7F-6(c), each school submits its budget to the Department for review and approval. These budgets are based upon approved whole school reform models selected by the

individual schools from the Guide for Implementing Urban Educational Reform in Abbott Districts. *See N.J.A.C.* 6A:24-1.2, -4.4.

The Department assists each Abbott school in preparing its budget by assigning to every school a member of the Department's School Review and Improvement Team, (*N.J.A.C.* 6A:24-1.3), as an Education Program and Development Specialist. This Specialist works directly with the School Management Team (SMT) (*N.J.A.C.* 6A:24-2), consisting of the school's principal and members of the school staff, to develop a school-based budget in compliance with the regulations and the Whole School Reform (WSR) model chosen by the school to improve its performance.

The proposed school-based budgets are submitted to the Department for review. *N.J.S.A.* 18A:7F-5(c), -6(c). The schools are then given the opportunity to provide further information if required by the Department to supplement data already provided and/or to provide additional justifications or explanations for the budget items requested.

The Commissioner, through the Department's Office of Program Review and Improvement and its Office of Fiscal Review and Improvement, reviews these budgets and determines whether they will meet the needs of the school to provide a thorough and efficient education. If they determine that the school's requests for funding are not appropriately justified, they may direct the removal of funds from the budget. *N.J.S.A.* 18A:7F-6(c).

By adopting CEIFA, the Legislature sought to establish uniform academic standards for all districts within the State, and to provide a framework for meeting those standards and a means of funding them. *N.J.S.A.*18A:7F-2b.

Following the enactment of CEIFA, the State Board of Education then adopted regulations

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> from poorer urban districts receive the educational entitlements guaranteed them by the Constitution and to meet the requirements of the decision of the New Jersey Supreme Court in *Abbott v. Burke*, decided May 21, 1998 . . . [and] to ensure the provision of a thorough and efficient system of education. . . .
> [*N.J.A.C.* 6A:24-1.1.]

These regulations were designed to implement school-based budgeting and encourage participation in the decision-making process by the educational staff, the parents and the community in general. *State Board of Education Urban Education Reform in the Abbott Districts*, 32 *N.J.R.* 1329(a), 1332 (2000). The State Board believed that by effectively putting these local groups of people in a position where they could impact on ensuring a quality education for the students, the community would be more apt to support the required expenditures. *Ibid.* The State Board further proposed that such a system would "allow, at the school and district level, for a means of identifying inefficiencies and ensuring that money goes to necessary programs and services." *Ibid.*

In adopting the regulations necessary to implement CEIFA, the State Board attempted to provide the individual schools with discretionary power in budgeting to meet the needs of individual schools in the Abbott districts.

To date, only one case has discussed the standard of review to be used by the Commissioner in approving or eliminating items within a school-based budget. In *Abbott* V, the issue to be decided by the Supreme Court was the necessity for specialized classrooms for art, music and science. In reviewing the school's budget, which included these specialized classrooms, the Commissioner found that such rooms were not necessary. The Supreme Court held that, initially, the school should have discretion in deciding such issues, based on the particularized needs of the students at that school. The Supreme Court further held, upon review by the Department, "[t]he determination of the local education authorities should be reviewed *with deference and with the understanding that local educators are in the best position to know the particularized needs of their students*." *Abbott* V, *supra*, 153 *N.J.* at 522-523 (Emphasis added)

In addition to the regulations which are public records, the Department provides the District with guidance and training in completing and submitting school-based budgets. The Department's exhaustive Guide for Implementing Urban Educational Reform in Abbott Districts (P-23), the assigned Specialists and the interim reviews and requests for additional justifications are just part of the process in developing the school-based budgets. The regulations give the Districts the responsibility to train every new SMT member in all WSR schools. *N.J.A.C.* 6A:24-2.3(a) The training, in consultation with the Specialists, is to:

> . . . include, but not be limited to, instruction regarding the roles, relationships and responsibilities of the SMT, development and implementation of the WSR implementation plan, needs assessment, particularized need, curriculum and instruction, teamwork and consensus building.
>
> 2. The training , if necessary, shall also include personnel and school-based budgeting.
>
> [*N.J.A.C.* 6A:24-2.3(b)]

Any SMT member that has not fulfilled the training requirement is to be removed from the SMT. *N.J.A.C.* 6A:24-2.3(d). As the respondent points out in its brief, the testimony of District witnesses makes it clear that they were familiar with the procedure for submitting school-based budgets.

The District asserts that the Department's written reviews of the budget requests do not in all cases specify the precise reasons why individual requests were eliminated from the budget and, therefore, it argues that the disapproved requests should be restored whether or not the requests were adequately justified by the District. According to the entirely credible testimony of the two Specialists assigned to all of the schools which are part of these school-based budget appeals, the written reviews in the record were far from the only interactions between the Department and the schools with respect to budgeted items. The Specialists were in frequent regular contact with school administration and staff in on-site face-to-face meetings, by mail, by telephone and during school visits. Both Specialists testified to repeated requests for additional

information from schools, not all of which was provided. There was no testimony that these conversations had not taken place.

At hearing, the Specialists were accused of constructing *ad hoc* rationalizations for disapproving specific budget requests. The record shows, however, that, for the most part, the reasons given by the Specialists at hearing were consistent with the reasons given in the written budget reviews, although perhaps more detailed or with additional comments based upon their interactions with the schools. In fact, some of these alleged *ad hoc* reasons in testimony were intended to address information provided to the Department for the first time at hearing.

The District argues that, where items have been disapproved, the Department is substituting its judgment for the discretion given to the school by the *Abbott* decisions. According to *Abbott V, supra,* 153 *N.J.* at 522-523, the local districts are entitled to deference only when asserting the particularized needs of their students. Deference to technical expertise is required only where such expertise is a pertinent factor. *Campbell v. New Jersey Racing Commission*, 169, *N.J.* 579, 588 (2001).

No special deference need be conferred when it comes to general educational expertise which continues to reside in the Department. Since the District is entitled to its area of expertise, the proper course is for the agency to accept the District's determination of its needs and then to assess whether its budget requests are appropriate to meet the stated needs. By analogy, see *Muise v. GPU, Inc.* 332 *N.J. Super.* 140, 161, (App. Div. 2000)

If the school's choice of methods to implement its needs is mistaken or not supported by the data provided, the Department is able to review the record and make its own determinations. By analogy, see *Campbell v. New Jersey Racing Commission*, 169 *N.J.* at 588. Even where substantial deference is required, the Department's review of the budgetary requests "is not simply a *pro forma* exercise in which [it] rubber stamp[s] findings that are not reasonably supported by the evidence; 'it calls for careful and principled consideration of the . . . record.'" *S.D. v. DHS, DFD,* 344 *N.J. Super.*

325, 336 (App. Div. 2001) [Citing *Chou v. Rutgers*, 283 *N.J.Super.* 524, 539 (App. Div. 1995), *certif.. denied,* 145 *N.J.*374 (1996)]

Based upon the principles related to deference enunciated in the case law, I **CONCLUDE** that the school districts are entitled to deference only in their designated area of expertise: the particularized needs of their students. I further **CONCLUDE** that the Department otherwise retains its expertise and experience in education, including its ability to review the budgetary requests of the districts and to exercise reasonable judgment with respect to these requests. I **CONCLUDE** that this reasonable judgment includes the Department's ability to evaluate the data provided and to apply its own expertise to determine whether the means embodied in the schools' budget requests are effective to accomplish their stated particularized needs.

In its brief in the present matter, the school essentially argues that, pursuant to *Abbott V*, it is the responsibility of the Department, particularly the assigned Education Program and Development Specialist, not the school, to ferret out, then with great specificity call for the required justifications for each budget request made by the individual schools to meet their obligations under WSR. This position is asserted notwithstanding the provisions of *N.J.A.C.* 6A:24-4.4 making it the responsibility of the school principal in consultation with the school business administrator and the SMT to develop and support the school based budget. The school must show that the means it chooses to implement its particularized needs are effective and supported by the data. I **CONCLUDE** that, pursuant to the regulations, the Specialist and the Department are there to assist the school to develop its budget not to direct or, in some cases, to anticipate and/or correct erroneous or unsupported requests made by the school.

Parenthetically, the District appears to take the inconsistent positions that the schools are due a great deal of deference in stating their local needs while at the same time asserting that it is the Department's responsibility to make sure that those needs are stated clearly and correctly with adequate justification. Either the schools have the expertise to recognize their needs, clearly state them and support them with adequate justifications in making budget requests or they do not. If the latter is the case, and the

Department makes an effort to understand and correct the shortcomings of the budget requests, it is unreasonable to expect the Department to "rubber stamp" the local educators.

I **CONCLUDE** that the principles stated above are the appropriate ones to be applied in the review of the Department's response to the following items in the school-based budget request.

THE PRESENT APPEAL

The school's requests for additional funding for staff salaries, resource room textbooks, and a new keyboard for the chorus were approved by the Department in August 2001. After additional clarification, the Department approved the addition of $52,371.00 to the budget for salaries, $3,650.00 for textbooks and $1,000.00 for the keyboard and these issues were not litigated at hearing.

The school requested $5,778.00 for the SMT to conduct summer interviews. The Department did not approve the request on the grounds that a sufficient number of hours were already budgeted for regular SMT meetings. The District withdrew the request and the item is no longer in issue in this appeal.

In resolving the dispute with respect to the salaries at which new staff could be hired, the Department denied that it intended to cap them at the second step of the District's salary guide. Where the District demonstrated that teachers with subject matter specialization, such as mathematics and science teachers with the necessary education and experience, could not be hired at the second step, the Department agreed that they could be hired at the step on the salary guide commensurate with their training and experience. The Department also agreed to work with the District to fill other teaching positions, such as gym, music and art teachers, if it were shown that these positions could not be filled at the second step of the salary guide. (R-1a)

With respect to all issues designated as settled for the purposes of the school-based budget appeals, the District reserves the right to raise any issues concerning the sufficiency of funding in a supplemental funding appeal. (R-1a)

The following issues were resolved by the parties during the hearing.

Workpaper M-1: Stipends – Breakfast Program Supervision and Summer Interviews (Object Code 101)

The school requested $12,479.00 for three teachers to supervise the breakfast program. After discussions between the parties, it was agreed that this issue would be withdrawn from the present appeal to be resolved elsewhere. I **FIND** that this agreement fully resolves this issue with respect to this school-based budget and I **CONCLUDE** that it is no longer in dispute in this appeal.

Workpaper N-1: Classroom Expenses – Expenses for Alternative Middle School

The school requested $20,000.00 to send four students to the Alternative Middle School. After discussions between the parties, it was agreed that this issue would be withdrawn from the present appeal to be resolved elsewhere. I **FIND** that this agreement fully resolves this issue with respect to this school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

Workpaper Q-1 and Q-2: Other Student Support Services – Terra Nova Assessment Testing, Monitoring and Scoring (Object Codes 390 and 610)

The school's request for this budget item was withdrawn and it was no longer in issue in this appeal.

Workpaper U-2: Administration – Cafeteria Chairs and Food Service (Object Coder 610 and 800)

The school requested $9,298.00 for new cafeteria chairs and $500.00 to provide a back-to-school breakfast and luncheon to new and returning staff. After discussions between the parties, it was agreed that this issue would be withdrawn from the present appeal to be resolved elsewhere. I **FIND** that this agreement fully resolves these issues with respect to this school-based budget and I **CONCLUDE** that it is no longer in dispute in this appeal.

Workpaper W-1: Equipment – Choral Keyboard and Cafeteria Tables

As stated above the matter of the choral keyboard was resolved prior to hearing. The school's request for $15,000.00 for new cafeteria tables was discussed between the parties and it was agreed that this issue would be withdrawn from the present appeal to be resolved elsewhere. I **FIND** that this agreement fully resolves these issues with respect to this school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

Only the following three budgeted items for which funding was denied by the Department of Education, Offices of Program Review and Improvement and Fiscal Review, remained in issue at the time of the scheduled hearing in this matter.

Workpaper B-6, B-7, B-8: Regular Classroom Teachers – New Positions (17 Requested, 8 Approved)

The school requested funding for seventeen new classroom teachers. Only eight of the seventeen were approved and the school was directed to reduce the school-based budget by $344,493.00. The additional teaching staff was requested to implement the school's plan to reduce the teacher/student ratio to 1:23 for middle school students by September 2002, pursuant to the requirements of *N.J.A.C.* 6A:24-

4.1(j)9. The additional teachers were denied because the Department determined that the school should apply progressive steps in achieving class-size reduction goals and the eight approved teachers allowed progress to that goal at a reasonable rate.

In his responses to Responses to Fiscal Review Comments, dated February 21, 2001, Richard Hueston, the principal of Alexander Hamilton, explained that the school is overcrowded and there are not sufficient classrooms to meet the required teacher/student ratio. As a result, he requested funding to put more than one teacher in some classrooms in a team teaching arrangement thereby reducing the teacher student ratios in those classrooms to 1:13 or 1:14. No description of the team teaching method was supplied to the Department and the school's plan for team-teaching was never addressed at hearing.

One of the reasons that the Department disapproved the request was that the student population did not support the additional nine teachers, that is, the addition of nine teachers would achieve unnecessarily low teacher/student ratios (1:13 and 1:14) in some classes.

Daryl Minus-Vincent was the member of the School Review and Improvement Team assigned by the Department to the Alexander Hamilton Middle School as the Program and Development Specialist. There he worked directly with the School Management Team (SMT) consisting of the school principal and members of the school staff, to develop a school-based budget in compliance with the regulations and the Whole School Reform (WSR) model chosen by the school to improve its performance.

Minus-Vincent testified that the building's classrooms are small, just barely able to hold a class of twenty-seven with one teacher. In the Department's opinion, the introduction of an additional adult into these small classrooms would be chaotic and exacerbate, not improve, the educational detriments attached to large class size. This would be particularly true in light of the fact that the school had provided no plan to implement team teaching so there was no way to understand the manner in which the two teachers would interact with the class and each other. He explained that team

teaching is a specific method of instruction requiring planning and coordination of the roles each member of an interdisciplinary team is to play; it is not accomplished by merely adding an additional teacher to an otherwise fully staffed classroom. The team teachers are supposed to meet regularly to discuss the students and plan the program but, from his observation, this was not happening at Hamilton.

He stated that the District's plan to improve students' performance, attendance or self-esteem by introducing another teacher into the classroom was not supported by research in the field. There are studies that show that smaller class size helps students learn but there are no studies that show just lowering teacher/student ratios will work. He measured improved performance by improvement on standardized tests and this measurement was both reasonable and uncontested.

The District referred to an article, submitted for the first time at hearing, that generally supports the efficacy of team-teaching. It is written in the context of SAGE, a five year program featuring class-size reduction that was being implemented in 60 Wisconsin schools. No testimony provided specifics adapting the SAGE, or any other, method to Alexander Hamilton so that this article could not be applied to the petitioner's situation. An article entitled "Team Teaching" from the Northern Nevada Writing Project Teacher-Researcher Group sets out clearly the careful thought necessary to implement a team teaching strategy and supports the position of Minus-Vincent.

In the opinion of Minus-Vincent and the Department, placing another teacher in an already overcrowded classroom solely for the purpose of achieving a given ratio would be detrimental to the objectives of WSR. For this reason also, the request for funding for additional teachers was denied since the method by which they were to be used to reduce the teacher/student ratio was not deemed to be educationally sound. The school was advised to take progressive, and more effective, steps to achieve class-size reduction and the Department agreed to support these steps in the future.

According to Hueston, the student population was increasing at a rate faster than expected and the teacher/student ratio was becoming worse because the additional

nine teachers were denied. Minus-Vincent stated that this increasing enrollment will only make matters worse if previously overcrowded classrooms contain as many as thirty to thirty-five students and already have two teachers.

The District maintains that the reduction in teacher/student ratio is all that is required by the regulations and it is necessary to add the nine teachers now so that the requirements of *N.J.A.C.* 6A:24-4.1(j)9 will be fully implemented by September 2002. This regulation, however, does not require that the 1:23 teacher/student ratio be accomplished by September 2002, only that "[a] plan shall be in place to continue to reduce class size" by that time.

A major stumbling block to the reduction of class size is the fact that there is simply no more space in the building for additional classrooms. Funds for school construction and renovation have already been approved for the District. Louis Couto, the Director of Plant, Property and Equipment for the District, testified that no additional facilities to relieve overcrowding would be available for several years. Nothing in the regulations, however, prevents the District from including the addition of new classroom space in the class-size reduction plan in place by September 2002, even if the actual space does not yet exist at the time.

Minus-Vincent testified that he suggested Hueston explore other methods of reducing class size, for example, sending some Hamilton students to other school buildings with unused space to relieve the overcrowding. He said Hueston told him that he could not even consider other options at the time. Hueston did not remember the conversation but his testimony on exploring options was consistent with that of Minus-Vincent. Hueston stated that there was an inflexible District policy that each school in the District must draw students from its own neighborhood.

Based upon the testimony of the witnesses and the documentary evidence, I **FIND** that the school's request for funding the introduction of nine additional teachers into already staffed classrooms, that is, merely reducing the teacher/student ratio, does not appear to be an effective solution to its goal of improving student performance. I

FIND that, with no recognizable team-teaching plan to support the request for additional staff, the Department's position that this particular method of implementing local goals may actually prove detrimental to them is persuasive. In addition, the insistence on the immediate implementation of the 1:23 teacher/student ratio is contrary to the language of *N.J.A.C.* 6A:24-4.1(j)9 which only requires that a class-size reduction plan be in place by September 2002. I **FIND** that, realistically, unless the school can develop more effective strategies for introducing a second teacher into a classroom, the ultimate implementation of the reduced teacher/student ratio may have to await construction and improvement of school facilities. Accordingly, I **CONCLUDE** that the Department correctly disapproved this item in the school-based budget for the 2001-2002 school year.

Workpaper D-1: Categorical Programs – Non Self-Contained Bilingual/ESL Program Teachers

The school requested funding in the amount of $90,000.00 for three new bilingual/ESL teachers based upon current enrollment and the language needs of the students. Funding for one new teacher was approved prior to hearing based upon the projected enrollment. A second was approved after testimony that one of the existing bilingual/ESL teachers was being transferred and the addition of only one new teacher would merely replace her and not result in a net gain in the school's staffing in this area. In this appeal, the school seeks $38,277.00 in funding for the addition of a third bilingual/ESL teacher.

In a letter dated August 17, 2001, the Department wrote:

> Based on the projected enrollment figures provided in this Workpaper, the one approved teacher will bring class-sizes to a reasonable number for this non self contained program. In the future, we will continue to support your class-size reduction efforts. Your appeal is not approved.

The Department meant to approve funding for one more bilingual/ESL teacher than was on the staff during the 2000-2001 school year. As stated above, its mistake was rectified at hearing and the actual addition of one new teacher approved.

Minus-Vincent testified that the bilingual and ESL programs were not self-contained. These teachers do not have their own classrooms. Based upon the projected enrollment, he calculated that the ratio of teachers in these classes would be 1:23.

In his May 31, 2001 response to the Department's review of school-based budget requests dated May 14, 2001, Hueston claimed that the teacher/student ratio in these classes was 1:30 or more. This, he said, was caused by the rising number of Hispanic students and an "explosion" of Haitian students over the prior year. Hueston testified that Hamilton has the largest percentage of non-English speaking students in the District. Those who have language problems become angry and frustrated leading to discipline problems. Due to the an insufficient number of bilingual/ESL teachers, some of these students are also put into regular English and reading classes before they are prepared causing them to score badly on standardized tests.

Hueston testified that, as of May 31, 2001 the bilingual/ESL population was 158 students to six teachers. It increased from 134 to 158 students between March and June 2001. I **FIND** that, with the seven bilingual/ESL teachers now available, this population does not support the 1:30 teacher/student ratios claimed by Hueston. As a result, I **FIND** that the Department correctly determined that the school did not provide sufficient justification for adding an eighth in the 2001-2001 school year.

I **CONCLUDE** that the Department's review of this budgetary item in the light of the applicable regulations and its own expertise was appropriate. Therefore, I **FIND** that the conclusion reached was correct based upon the data and justifications provided by the school and the applicable regulations. Accordingly, I **CONCLUDE** that the Department correctly disapproved this item in the school-based budget for the 2001-2002 school year.

Workpaper G-1: Instructional Specialists –New Positions

The school requested funding for the addition of a new computer teacher because it is unable to schedule every student for computer training with its existing staff. The Department denied funding for the position on the grounds that the school had failed to adequately document the need.

Hueston testified that there were currently 150 students who were not receiving any computer training in violation of core curriculum standards. The present computer teachers' contracts do not permit them to teach more than five class periods a day. Because of this restriction, the specialized computer rooms sit empty while students are not being served.

The position of the Department is that eight new teaching positions have already been approved in the 2001-2001 school year budget and Minus-Vincent had suggested that the District use four of them to hire teachers with computer skills. Hueston agreed that, if a newly hired teacher had computer training, that teacher could follow his or her students to the computer laboratory to provide instruction and this would serve 40 out of the 150 students lacking computer skills.

The most difficult part of the Department's position to understand is that the eight new teachers were approved to alleviate serious overcrowding in regular classes. In fact, it is undisputed that only a minimum number of new teachers were approved because the school did not demonstrate the means by which more new teachers could be integrated into existing classrooms without defeating the purpose for which they were hired.

Even the manner in which the eight approved new teachers will be integrated was not explained at hearing. If they are assuming the duties of regular classroom teachers, in a team or otherwise, to relieve overcrowding, it was not made clear by Minus-Vincent how they could be spared to accommodate computer classes into their schedules.

I **FIND** that the school's request for an additional computer teacher is supported by the justifications provided by the school. I **FIND** that, unless funding for such a teacher is approved, many Hamilton students will be deprived of the training in technology that the District is required to provide.

I, therefore, **CONCLUDE** that the Department's review of this budgetary item was appropriate but I **FIND** that the conclusion reached was incorrect based upon the data and justifications provided by the school and the applicable regulations. Accordingly, I **CONCLUDE** that the Department incorrectly disapproved this item in the school-based budget for the 2001-2002 school year.

I **FIND** that the amount to be added to the budget with respect to this salary item must be determined on the basis of the agreement between the parties stated in full above.

SUMMARY OF CONCLUSIONS AND ORDERS

I **FIND** that the conclusions and orders below resolve all outstanding disputes between the parties with respect to the 2001-2002 school-based budget.

The Department approved the addition of $52,371.00 to the budget for salaries and $3650 for resource room textbooks, $1,000.00 for a new keyboard and these issues were not litigated at hearing. I **CONCLUDE** that this fully resolves these two issues between the Department and Alexander Hamilton Middle School #72. I **FIND** that these agreements between the parties are reasonable and it is, therefore, **ORDERED** that they be implemented in accord with their terms.

I **FIND** that the school withdrew its requests for funding to conduct summer interviews; for TerraNova assessment; for breakfast and lunch for back-to-school training; for supervision of the breakfast program; for tuition for alternative middle school; and for cafeteria chairs and tables. I, therefore, **CONCLUDE** that these issues

are resolved between the parties with respect to this appeal and it is **ORDERED** that the school's appeal with respect to them in the 2001-2002 school-based budget is hereby **DISMISSED**.

I **CONCLUDE** that the Department correctly disapproved funding for nine additional team teachers and an additional bilingual/ESL teacher. It is, therefore, **ORDERED** that these determinations by the Department be **AFFIRMED** and petitioner's appeal with respect to these items be **DISMISSED WITH PREJUDICE**.

I further **CONCLUDE** that the Department incorrectly disapproved funding for an additional computer teacher. It is, therefore, **ORDERED** that this determination by the Department be **REVERSED** and funding for the salary of a new computer teacher be restored to the budget in accord with the salary agreement between the parties.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 19, 2001
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

January 2, 2002
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 04 2002
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:

Thomas Dunn, Jr.
Linda G. King
Pablo Muñoz
Richard Hueston
Harold Kennedy
Louis Couto

For Respondent:

Daryl Minus-Vincent

Exhibits:

P-23 Guide for Implementing Urban Education Reform in Abbott Districts
P-57 Class Size Reduction Plan
P-79 Workpapers from the Whole School Reform Implementation Plan
P-80 Letter, dated February 16, 2001, Keith Costello and Minus-Vincent to Hueston with attached SBB Fiscal Review Comments
P-81 Letter, dated February 16, 2001, Hueston to Costello and Minus-Vincent with responses to SBB Fiscal Review Comments
P-82 Letter, dated May 14, 2001, Couselo and Henry to Hueston
P-83 Letter, dated May 31, 2001, Hueston to Couselo and Henry with attached responses to SBB Fiscal Review Comments
P-109 Issues on Appeal after August 17, 2001
P-113 Professional Staff Positions – Salary Dispute
P-115 Article, Educational Leadership Volume 57 No. 1 September 1999 pp.50-53

R-1a Schools and Issues Resolved – Post Hearing

R-2 Schools and Issues Remaining – Post Hearing

R-3 Letter dated February 1, 2001, Hueston to Minus-Vincent with attached responses to Implementation Plan Recommendations

R-4 Article, Team Teaching

OAL DKT. NO. EDU. 5584-01
AGENCY DKT. NO. 199-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (ALEXANDER HAMILTON MIDDLE SCHOOL #72), UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and respondent's reply thereto were duly submitted in accordance with established timelines. Subsequently, petitioner filed a Motion to Dismiss this matter on the ground of mootness to which a response was filed by respondent. While the parties do not agree that the issues presented are moot, what is clear is that the District, that party which initiated these proceedings, no longer wishes to continue its appeal and asks that its appeal be dismissed.

Upon his independent and careful review of this local "Abbott" District's appeal of the Department's determination on its whole school reform funding request for the 2001-2002 school year, and based upon the papers filed by the parties with respect to petitioner's Motion to Dismiss, the Commissioner finds it unnecessary to reach to the decision of the ALJ, as he determines that this matter is appropriately dismissed.

Accordingly, the Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/20/02

Date of Mailing: 5/21/02

*Pursuant to *P.L.* 2001, c. 130, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division at the New Jersey Superior Court.

204-02

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (ABRAHAM LINCOLN SCHOOL #14) UNION COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

"Abbott" District appealed the Department's determination on its whole school reform funding request for the 2001-2002 school year.

Upon review, Commissioner dismissed the appeal as requested by the District.

May 20, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5574-01
AGENCY DKT. NO. 200-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH
(ABRAHAM LINCOLN SCHOOL, #14), UNION COUNTY
Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION
Respondent.

Richard E. Shapiro, Esq., for petitioner,

Michael Lombardi, Deputy Attorney General, for respondent
(John J. Farmer, Attorney General of New Jersey, attorney)

Record Closed: November 13, 2001 Decided: November 19, 2001

BEFORE **EDITH KLINGER**, ALJ:

On June 13, 2001, the petitioner, Board of Education of the City of Elizabeth (Board), filed a Verified Petition of Appeal before the Commissioner of Education seeking adequate funding to implement its whole school reform plan for all of the schools in the District pursuant to the decision of the Supreme Court in *Abbott v. Burke*, 153 *N.J.* 480 (1998) and the statutes and regulations promulgated there under. The present appeal concerns the school-based budget for Abraham Lincoln School #14. The respondent, Department of Education (Department), filed its answer on June 29,

2001. On July 9, 2001, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The hearing was held on October 1, 2, 3, 5, 11, 12, and 15, 2001. The record closed on November 13, 2001 when the final submissions were received from the parties.

DISCUSSION OF LAW

In December 1996, the Legislature enacted the Comprehensive Educational Improvement and Financing Act ("CEIFA"), *N.J.S.A.* 18A:7F-1 through –34, which "set academic standards that must be achieved by all students, identified programs to accomplish these goals, provided a funding mechanism to ensure their support, and included mechanisms for enforcement." *Abbott by Abbott v. Burke*, 153 *N.J.* 480, 541 App. I (1998) ("Abbott V").

Under CEIFA, the Board of Education of an "Abbott" school district must implement zero-based budgeting. *N.J.S.A.* 18A:7F-5(c), -6(C). Zero-based budgeting generally requires that the Board combine all of its sources of revenue or funding streams and use the aggregate amount as the basis for the entire school budget. That is, instead of allocating certain funds to specific programs, the Board must use the entirety of its funds to implement a "whole-school reform implementation plan" in the district as described in *N.J.A.C.* 6A:24-1.2, -2.2, -4.1, -4.4(a), and 7.1(a).

Implementation includes preparation of a school-based budget by each school in conformity with the Department's Guide for Implementing Urban Education Reform in Abbott Districts. (P-23) *See N.J.A.C.* 6A:24-1.2, -4.4. In accord with *N.J.S.A.* 18A:7F-6(c), each school submits its budget to the Department for review and approval. These budgets are based upon approved whole school reform models selected by the individual schools from the Guide for Implementing Urban Educational Reform in Abbott Districts. *See N.J.A.C.* 6A:24-1.2, -4.4.

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These regulations were designed to implement school-based budgeting and encourage participation in the decision-making process by the educational staff, the parents and the community in general. *State Board of Education Urban Education Reform in the Abbott Districts*, 32 *N.J.R.* 1329(a), 1332 (2000). The State Board believed that by effectively putting these local groups of people in a position where they could impact on ensuring a quality education for the students, the community would be more apt to support the required expenditures. *Ibid.* The State Board further proposed that such a system would "allow, at the school and district level, for a means of identifying inefficiencies and ensuring that money goes to necessary programs and services." *Ibid.*

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In addition to the regulations which are public records, the Department provides the District with guidance and training in completing and submitting school-based budgets. The Department's exhaustive Guide for Implementing Urban Educational Reform in Abbott Districts (P-23), the assigned Specialists and the interim reviews and requests for additional justifications are just part of the process in developing the school-based budgets. The regulations give the Districts the responsibility to train every new SMT member in all WSR schools. *N.J.A.C.* 6A:24-2.3(a) The training, in consultation with the Specialists, is to:

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No special deference need be conferred when it comes to general educational expertise which continues to reside in the Department. Since the District is entitled to its area of expertise, the proper course is for the agency to accept the District's determination of its needs and then to assess whether its budget requests are appropriate to meet the stated needs. By analogy, see *Muise v. GPU, Inc.* 332 *N.J. Super.* 140, 161, (App. Div. 2000)

If the school's choice of methods to implement its needs is mistaken or not supported by the data provided, the Department is able to review the record and make its own determinations. By analogy, see *Campbell v. New Jersey Racing Commission*, 169 *N.J.* at 588. Even where substantial deference is required, the Department's review of the budgetary requests "is not simply a *pro forma* exercise in which [it] rubber stamp[s] findings that are not reasonably supported by the evidence; 'it calls for careful and principled consideration of the. . . record.'" *S.D. v. DHS, DFD,* 344 *N.J. Super.* 325,

336 (App. Div. 2001) [Citing *Chou v. Rutgers*, 283 *N.J. Super.* 524, 539 (App. Div. 1995), *certif.. denied,* 145 *N.J.*374 (1996)]

Based upon the principles related to deference enunciated in the case law, I **CONCLUDE** that the school districts are entitled to deference only in their designated area of expertise: the particularized needs of their students. I further **CONCLUDE** that the Department otherwise retains its expertise and experience in education, including its ability to review the budgetary requests of the districts and to exercise reasonable judgment with respect to these requests. I **CONCLUDE** that this reasonable judgment includes the Department's ability to evaluate the data provided and to apply its own expertise to determine whether the means embodied in the school's budget requests are effective to accomplish their stated particularized needs.

In its brief in the present matter, the school essentially argues that, pursuant to *Abbott V*, it is the responsibility of the Department, particularly the assigned Education Program and Development Specialist, not the school, to ferret out, then with great specificity call for the required justifications for each budget request made by the individual schools to meet their obligations under WSR. This position is asserted notwithstanding the provisions of *N.J.A.C.* 6A:24-4.4 making it the responsibility of the school principal in consultation with the school business administrator and the SMT to develop and support the school based budget. The school must show that the means it chooses to implement its particularized needs are effective and supported by the data. I **CONCLUDE** that, pursuant to the regulations, the Specialist and the Department are to assist the school to develop its budget not to direct or, in some cases, to anticipate and/or correct erroneous or unsupported requests made by the school.

Parenthetically, the District appears to take the inconsistent positions that the schools are due a great deal of deference in stating their local needs while at the same time asserting that it is the Department's responsibility to make sure that those needs are stated clearly and correctly with adequate justification. Either the schools have the expertise to recognize their needs, clearly state them and support them with adequate justifications in making budget requests or they do not. If the latter is the case, and the

Department makes an effort to understand and correct the shortcomings of the budget requests, it is unreasonable to expect the Department to "rubber stamp" the local educators.

I **CONCLUDE** that the principles stated above are the appropriate ones to be applied in review of the Department's response to the following items in the school-based budget request.

THE PRESENT APPEAL

The school's requests for additional funding for staff salaries and school supplies were approved by the Department in August 2001. After additional clarification, the Department approved the addition of $59,513.00 to the budget for salaries and $523.00 for supplies and these issues were not litigated at hearing.

In resolving the dispute with respect to the salaries at which new staff could be hired, the Department denied that it intended to cap them at the second step of the District's salary guide. Where the District demonstrated that teachers with subject matter specialization, such as mathematics and science teachers with the necessary education and experience, could not be hired at the second step, the Department agreed that they could be hired at the step on the salary guide commensurate with their training and experience. The Department also agreed to work with the District to fill other teaching positions, such as gym, music and art teachers, if it were shown that these positions could not be filled at the second step of the salary guide. (R-1a)

With respect to all issues designated as settled for the purposes of the school-based budget appeals, the District reserves the right to raise any issues concerning the sufficiency of funding in a supplemental funding appeal. (R-1a)

Only the following item for which funding was denied by the Department of Education, Offices of Program Review and Improvement and Fiscal Review, remained in issue at the time of the scheduled hearing in this matter.

Workpaper B: Regular Classroom Teachers- New Positions

The school requested funding for seven new classroom teachers. Only two of the seven were approved and the school was directed to reduce the school-based budget by $230,000.00. The additional teaching staff was requested to implement the school's plan to reduce the teacher/student ratios to 1:21 and 1:23 students by September 2002, pursuant to the requirements of *N.J.A.C.* 6A:24-4.1(j)9. The additional teachers were denied because the Department determined that the two additional positions would allow the school to create a number of team teaching situations. This would meet teacher/student ratios in a number of classrooms until the school's lack of facilities was resolved.

Pablo Muñoz, the District Director of Curriculum and Instruction, testified that the schools that were required to reduce the teacher/student ratio had to do it by team teaching because there were no classrooms available to divide the students up into smaller classes. He said that all of the schools in the District requested additional teachers but only three, including Lincoln, were denied.

The petitioner presented no witnesses from the Lincoln school and no documents were introduced into evidence relating to this school-based budget appeal.

Daryl Minus-Vincent was the member of the School Review and Improvement Team assigned by the Department to the Abraham Lincoln School as the Program and Development Specialist. There he worked directly with the School Management Team (SMT) consisting of the school principal and members of the school staff, to develop a school-based budget in compliance with the regulations and the Whole School Reform (WSR) model chosen by the school to improve its performance.

Minus-Vincent testified that the building's classrooms were already overcrowded with only one teacher. In the Department's opinion, the introduction of an additional adult into these small classrooms would be chaotic and exacerbate, not improve, the

educational detriments attached to large class size. It appears from his testimony that the school may have already tried team teaching without evidence of improved performance or attendance so that there was no reason to continue funding it.

For the 2001-2002 school year, the school provided no plan to implement team teaching so there was no way to understand the manner in which the two teachers would interact with the class and each other. Minus Vincent explained that team teaching is a specific method of instruction requiring planning and coordination of the roles each member of an interdisciplinary team is to play; it is not accomplished by merely adding an additional teacher to an otherwise fully staffed classroom. The team teachers are supposed to meet regularly to discuss the students and plan the program but, from his observation, it did not work for Lincoln.

He stated that the District's plan to improve students' performance, attendance and self-esteem by introducing another teacher into the classroom was not supported by research in the field. There are studies that show that smaller class size helps students learn but there are no studies that show just lowering teacher/student ratios will work. He measured improved performance by improvement on standardized tests and this measurement was both reasonable and uncontested.

The District referred to an article, submitted for the first time at hearing, that generally supports the efficacy of team-teaching. It is written in the context of SAGE, a five-year program featuring class-size reduction that was being implemented in 60 Wisconsin schools. No testimony provided specifics adapting the SAGE, or any other, method to Abraham Lincoln so that these articles could not be applied to the petitioner's situation. An article entitled "Team Teaching" from the Northern Nevada Writing Project Teacher-Researcher Group sets out clearly the careful thought necessary to implement a team teaching strategy and supports the position of Minus-Vincent.

In the opinion of Minus-Vincent and the Department, placing another teacher in an already overcrowded classroom solely for the purpose of achieving a given ratio would be detrimental to the objectives of WSR. For this reason also, the request for

funding for additional teachers was denied since the method by which they were to be used to reduce the teacher/student ratio was not deemed to be educationally sound. Minus-Vincent stated that this increasing enrollment will only make matters worse if previously overcrowded classrooms contain as many as thirty to thirty-five students and already have two teachers.

The District maintains that the reduction in teacher/student ratio is all that is required by the regulations and it is necessary to add the additional teachers now so that the requirements of *N.J.A.C.* 6A:24-4.1(j)9 will be fully implemented by September 2002. This regulation, however, does not require that the 1:21 or 1:23 teacher/student ratio be accomplished by September 2002, only that "[a] plan shall be in place to continue to reduce class size" by that time.

A major stumbling block to the reduction of class size is the fact that there is simply no more space in the building for additional classrooms. Funds for school construction and renovation have already been approved for the District. Louis Couto, the Director of Plant, Property and Equipment for the District, testified that no additional facilities to relieve overcrowding would be available for several years. Nothing in the regulations, however, prevents the District from including the addition of new classroom space in the class-size reduction plan in place by September 2002, even if the actual space does not yet exist at the time.

Based upon the testimony of the witnesses and the documentary evidence, I **FIND** that the school's request for funding the introduction of five additional teachers into already staffed classrooms, that is, merely reducing the teacher/student ratio, does not appear to be an effective solution to its goal of improving student performance. I **FIND** that, with no recognizable team-teaching plan to support the request for additional staff, the Department's position that this particular method of implementing local goals may actually prove detrimental to them is persuasive. In addition, the insistence on the immediate implementation of the applicable regulatory teacher/student ratio is contrary to the language of *N.J.A.C.* 6A:24-4.1(j)9 which only requires that a class-size reduction plan be in place by September 2002. I **FIND** that, realistically, unless the school can

develop more effective strategies for introducing a second teacher into a classroom, the ultimate implementation of the reduced teacher/student ratio may have to await construction and improvement of school facilities. Accordingly, I **CONCLUDE** that the Department correctly disapproved this item in the school-based budget for that year.

SUMMARY OF CONCLUSIONS AND ORDERS

I **FIND** that the conclusions and orders below resolve all outstanding disputes between the parties with respect to the 2001-2002 school-based budget.

The Department approved the addition of $59,513.00 to the budget for salaries and $523.00 for supplies and these issues were not litigated at hearing. I **CONCLUDE** that this fully resolves these two issues between the Department and Abraham Lincoln School #14. I **FIND** that these agreements between the parties are reasonable and it is, therefore, **ORDERED** that they be implemented in accord with their terms.

I **CONCLUDE** that the Department correctly disapproved funding for five additional team teachers. It is, therefore, **ORDERED** that this determination by the Department be **AFFIRMED** and petitioner's appeal with respect to this item be **DISMISSED WITH PREJUDICE**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 19, 2001
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

January 2, 2002
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 04 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:

Thomas Dunn, Jr.

Linda G. King

Pablo Muñoz

Harold Kennedy

Louis Couto

For Respondent:

Daryl Minus-Vincent

Exhibits:

P-23 Guide for Implementing Urban Education Reform in Abbott Districts

P-57 Class Size Reduction Plan

P-109 Issues on Appeal after August 17, 2001

P-113 Professional Staff Positions – Salary Dispute

P-115 Article, Educational Leadership Volume 57 No. 1 September 1999 pp.50-53

R-1a Schools and Issues Resolved – Post Hearing

R-2 Schools and Issues Remaining – Post Hearing

R-4 Article, Team Teaching

OAL DKT. NO. EDU 5574-01
AGENCY DKT. NO. 200-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (ABRAHAM LINCOLN SCHOOL #14) UNION COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and respondent's reply thereto were duly submitted in accordance with established timelines. Subsequently, petitioner filed a Motion to Dismiss this matter on the ground of mootness to which a response was filed by respondent. While the parties do not agree that the issues presented are moot, what is clear is that the District, that party which initiated these proceedings, no longer wishes to continue its appeal and asks that its appeal be dismissed.

Upon his independent and careful review of this local "Abbott" District's appeal of the Department's determination on its whole school reform funding request for the 2001-2002 school year, and based upon the papers filed by the parties with respect to petitioner's Motion to Dismiss, the Commissioner finds it unnecessary to reach to the decision of the ALJ, as he determines that this matter is appropriately dismissed.

Accordingly, the Petition of Appeal is hereby dismissed.

IT IS SO ORDERED*

COMMISSIONER OF EDUCATION

Date of Decision: 5/20/02

Date of Mailing: 5/21/02

* Pursuant to *P.L.* 2001, c. 130, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division at the New Jersey Superior Court.

205-02

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (WOODROW WILSON SCHOOL #19), UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

"Abbott" District appealed the Department's determination on its whole school reform funding request for the 2001-2002 school year.

Upon review, Commissioner dismissed the appeal as requested by the District.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5589-01
AGENCY DKT. NO. 202-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH
(WOODROW WILSON SCHOOL, #19), UNION COUNTY
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION
Respondent.

Richard E. Shapiro, Esq., for petitioner

Michael Lombardi, Deputy Attorney General, for respondent
(John J. Farmer, Attorney General of New Jersey, attorney)

Record Closed: November 13, 2001 Decided: December 19, 2001

BEFORE **EDITH KLINGER**, ALJ:

On June 13, 2001, the petitioner, Board of Education of the City of Elizabeth (Board), filed a Verified Petition of Appeal before the Commissioner of Education seeking adequate funding to implement its whole school reform plan for all of the schools in the District pursuant to the decision of the Supreme Court in *Abbott v. Burke*, 153 *N.J.* 480 (1998) and the statutes and regulations promulgated there under. The present appeal concerns the school-based budget for Woodrow Wilson School #19. The respondent, Department of Education (Department), filed its answer on June 28,

2001. On July 9, 2001 the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The hearing was held on October 1, 2, 3, 5, 11, 12, and 15, 2001. The record closed on November 13, 2001 when the final submissions were received from the parties.

DISCUSSION OF LAW

In December 1996, the Legislature enacted the Comprehensive Educational Improvement and Financing Act ("CEIFA"), *N.J.S.A.* 18A:7F-1 through –34, which "set academic standards that must be achieved by all students, identified programs to accomplish these goals, provided a funding mechanism to ensure their support, and included mechanisms for enforcement." *Abbott by Abbott v. Burke*, 153 *N.J.* 480, 541 App. I (1998) ("Abbott V").

Under CEIFA, the Board of Education of an "Abbott" school district must implement zero-based budgeting. *N.J.S.A.* 18A:7F-5(c), -6(C). Zero-based budgeting generally requires that the Board combine all of its sources of revenue or funding streams and use the aggregate amount as the basis for the entire school budget. That is, instead of allocating certain funds to specific programs, the Board must use the entirety of its funds to implement a "whole-school reform implementation plan" in the district as described in *N.J.A.C.* 6A:24-1.2, -2.2, -4.1, -4.4(a), and 7.1(a).

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No special deference need be conferred when it comes to general educational expertise which continues to reside in the Department. Since the District is entitled to its area of expertise, the proper course is for the agency to accept the District's determination of its needs and then to assess whether its budget requests are appropriate to meet the stated needs. By analogy, see *Muise v. GPU, Inc.* 332 *N.J. Super.* 140, 161, (App. Div. 2000)

If the school's choice of methods to implement its needs is mistaken or not supported by the data provided, the Department is able to review the record and make its own determinations. By analogy, see *Campbell v. New Jersey Racing Commission*, 169 *N.J.* at 588. Even where substantial deference is required, the Department's review of the budgetary requests "is not simply a *pro forma* exercise in which [it] rubber stamp[s] findings that are not reasonably supported by the evidence; 'it calls for careful and principled consideration of the . . . record.'" *S.D. v. DHS, DFD*, 344 *N.J. Super.*

325, 336 (App. Div. 2001) [Citing *Chou v. Rutgers*, 283 *N.J.Super.* 524, 539 (App. Div. 1995), *certif. denied*, 145 *N.J.*374 (1996)]

Based upon the principles related to deference enunciated in the case law, I **CONCLUDE** that the school districts are entitled to deference only in their designated area of expertise: the particularized needs of their students. I further **CONCLUDE** that the Department otherwise retains its expertise and experience in education, including its ability to review the budgetary requests of the districts and to exercise reasonable judgment with respect to these requests. I **CONCLUDE** that this reasonable judgment includes the Department's ability to evaluate the data provided and to apply its own expertise to determine whether the means embodied in the schools' budget requests are effective to accomplish their stated particularized needs.

In its brief in the present matter, the school essentially argues that, pursuant to *Abbott V*, the onus is on the Department, particularly the assigned Education Program and Development Specialist, not the school, to ferret out, then with great specificity call for the required justifications for each budget request made by the individual schools to meet their obligations under WSR. This position is asserted notwithstanding the provisions of *N.J.A.C.* 6A:24-4.4 making it the responsibility of the school principal in consultation with the school business administrator and the SMT to develop and support the school based budget. The school must show that the means it chooses to implement its particularized needs are effective and supported by the data. I **CONCLUDE** that, pursuant to the regulations, the Specialist and the Department are there to assist the school to develop its budget not to direct or, in some cases, to anticipate and/or correct erroneous or unsupported requests made by the school.

Parenthetically, the District appears to take the inconsistent positions that the schools are due a great deal of deference in stating their local needs while at the same time asserting that it is the Department's responsibility to make sure that those needs are stated clearly and correctly with adequate justification. Either the schools have the expertise to recognize their needs, clearly state them and support them with adequate justifications in making budget requests or they do not. If the latter is the case, and the

Department makes an effort to understand and correct the shortcomings of the budget requests, it is unreasonable to expect the Department to "rubber stamp" the local educators.

I **CONCLUDE** that the principles stated above are the appropriate ones to be applied in the review of the Department's response to the following items in the school-based budget request.

THE PRESENT APPEAL

The school's requests for additional funding for staff salaries and for workbooks for the self-contained bi-lingual education program were approved by the Department in August 2001. After additional clarification, the Department approved the addition of $21,425.00 to the budget for salaries and $6,105.00 for the workbooks and these issues were not litigated at hearing.

In resolving the dispute with respect to the salaries at which new staff could be hired, the Department denied that it intended to cap them at the second step of the District's salary guide. Where the District demonstrated that teachers with subject matter specialization, such as mathematics and science teachers with the necessary education and experience, could not be hired at the second step, the Department agreed that they could be hired at the step on the salary guide commensurate with their training and experience. The Department also agreed to work with the District to fill other teaching positions, such as gym, music and art teachers, if it were shown that these positions could not be filled at the second step of the salary guide. (R-1a)

With respect to all issues designated as settled for the purposes of the school-based budget appeals, the District reserves the right to raise any issues concerning the sufficiency of funding in a supplemental funding appeal. (R-1a)

Only the following two budgeted items for which funding was denied by the Department of Education, Offices of Program Review and Improvement and Fiscal Review, remained in issue at the time of the scheduled hearing in this matter.

Workpaper J-1: Non-Instructional Staffing – School Nurse

The school requested funding in the amount of $24,500.00 for a half-time school nurse to assist the full time school nurse in the performance of the duties listed below. The duties are taken from the school's response of May 29, 2001 to the Department's review of the school-based budget. (P-66) (A substantially different response, set forth in full below, was provided to the Department's budget review of May 14, 2001.) (P-64):

> Since the school day at Woodrow Wilson will be extended for before and after care for pre-K[indergarten] and K[indergarten], as well as for those children who have siblings in the Wrap-Around Program we feel that a half time position for a school nurse is justified. Our full time school nurse will not be available to provide coverage for those hours. In anticipation of an increase in school enrollment, we feel there will be more students in need of medical attention. We are submitting hard data which documents the nurse's present workload. Also, as noted in the data, there are certain times during the year when the influx of paper work is too much for one person to handle to comply with the required time frames i.e. registration, documentation of student immunizations.

By letter, dated August 17, 2001 (P-67), Nancy A. Reid, Director of the Office of Program Review and Improvement and Scott D. Henry, Director of the Office of Fiscal Review and Improvement, jointly denied the request on the grounds that the school had not demonstrated the need for the new position. (The "hard data" submitted was the nursing office monthly log for the 2000-2001 school year. This will be discussed fully below.)

Reid and Henry wrote in the joint letter that:

> The justification and documentation dated May 29, 2001 have included monthly reports that detail student visits to the medical room, registration meetings with parents, the number of pupils sent home for medical reasons, as well as the causes for which pupils were sent home. The

> school has not demonstrated how these basic functions are excessive or translate into a need for more staff in this department.

The issue of the after-school program was addressed in testimony by Daniel Lloyd Manies, Principal of Woodrow Wilson School. He testified that the student population had increased from 587 to 756 in one year, too many for only one nurse to handle. In addition, the hours of nursing coverage were increased. Thirteen hours were added on Saturdays and the siblings of students in the before- and after-hours Wrap-Around Program required services. He said that the present school nurse threatened to resign if she were not provided with some relief from her workload.

According to the Whole School Reform (WSR) Schedule F. Class Size Reduction Plan (P-57) for Woodrow Wilson, the projected Pre-K through Grade 5 enrollment for the 2001-2002 school year was 632 of which 136 were in the early childhood program and 576 were in Grades 1 through 5. The enrollment for the 2000-2001 school year for Pre-K through Grade 5 was 652 of which 164 were in the early childhood program and 556 were in Grades 1 through 5 (P-57).

The information on the increase in actual enrollment over the projected was not provided to the Department until hearing. The school's response of May 29, 2001 to the Department's review of the school-based budget is set forth in full above. (P-66) The school's response of February 26, 2001 to the Department's budget review of May 14, 2001 (P-64) describes the justification for an additional half-time nurse for the elementary school as follows:

> The basis for requesting a new .5 FTE nurse position is to provide services during enrollment when required medical information needs to be researched and to five hygiene lessons to all classes. Due to a transient community coming to us from foreign countries, the student's immunization records need constant updating.

Daryl Minus-Vincent was the member of the School Review and Improvement Team assigned by the Department to the Woodrow Wilson School as the Program and Development Specialist. There, he worked directly with the School Management Team

(SMT) consisting of the school principal and members of the school staff, to develop a school-based budget in compliance with the regulations and the Whole School Reform (WSR) model chosen by the school to improve its performance.

The chosen model, the Accelerated Schools Project (ASP), provides a sample "illustrative school-based budget" based upon a student enrollment of 416 students in Grades 1-5. The school argues that, across the board, the number of staff positions required for the sample enrollment in the illustrative budget must be prorated to accommodate the actual enrollment for the school.

Minus-Vincent stated that the amount of nursing services needed can not be prorated based solely upon the number of students. He said it must be based upon actual experience since the number of visits to the nursing office fluctuated during that year as did the enrollment. Therefore, he asked the SMT to provide the nursing office log for more than one year because he could not project an increased need for elementary school nursing services based upon only one year's data. The school submitted only the monthly logs of nurses visits for the 2000-2001 school year to support this budget request. (P-66) The services recorded in the log include those provided to Pre-K and K students as well as the others. It also included services provided by the school doctor.

Minus-Vincent never received the requested information. He testified that the school never provided justification that the existing school nurse could not meet the need for nursing services for the elementary school students for the 2001-2002 school year.

In addition, Minus-Vincent was not told by the school before hearing that there would be no nurse available for the before and after school programs but this did not change his opinion for the following reason. He was informed of no before or after school programs for the regular elementary education students and testified that these two programs mainly provide services to Pre-K and K students. For this reason, they should be funded through Early Childhood budget requests, not through the school-

based budget. The only regular students present after school are siblings of early education students and there was no way to predict how many of them there might be. There could be as few as five or ten. It was his opinion that the request for an additional half-time nurse should have been made in the school's early childhood budget rather than the school-based budget and, in fact, may have been provided for there.

This is one of the examples where the Department is accused of providing *ad hoc* rationalizations for disapproving a budget item but the information was first provided to the Department in testimony at hearing and responded to at the time.

Based upon the testimony of the witnesses and the documentary evidence, I **FIND** that the school's request for funding an additional half-time nurse should have been made in the District's early childhood budget since the preponderance of the evidence shows that most of the services requiring the presence of an additional nursing staff member will be generated by the school's Pre-K and K population in the 2001-2002 school year. Accordingly, I **CONCLUDE** that the Department correctly disapproved this item in the school-based budget for that year.

Workpaper U-2: School Administration – Purchase for Replacement of Office Supplies (Object Code 610)

A new position of vice-principal was approved for the 2001-2002 school year. There was no existing office for a vice-principal and the school was required to furnish one and stock it with supplies. A request for $3066.69 was included in the budget for basic office essentials such as paper clips, desk pads, chairs, a conference table, pencils, etc.

The budget already included an approved request for $22,000.00 in supplies for the school generally. This is the same amount that was approved in the 2000-2001 budget. Manies testified that the whole $22,000.00 was exhausted on supplies in the last school year but admitted that no itemized list of the expenditures covered was

provided to the Department to substantiate the need for an increase in funding to cover the office furniture and supplies of the new vice-principal.

The furniture and supplies are to be used for the vice-principal, not for any educational program or service for the students. The school argues that the Department cannot override the school's determination of need and substitute its own opinion as to whether the school already had adequate funding for these purposes.

Minus-Vincent testified that he interpreted the review of the necessity for this budgetary item in light of the factors enumerated in *N.J.A.C.* 6A:24-7.1(e), although he did not cite the regulation in his testimony. This regulation requires that an expenditure directly serve the students in the school, and have "measurable results in enhancing the achievement levels of students in the school" and "undermine the foundational education program of the school" if eliminated. Since the provision of pencils, chairs and paper clips to the new vice-principal did not directly serve any of these purposes and there was no data to show that the full amount budgeted for supplies in the prior year had been exhausted, he recommended that the request for the additional supplies be disapproved.

I **CONCLUDE** that the Department's review of this budgetary item in the light of the applicable regulations and its own expertise was appropriate. Therefore, I **FIND** that the conclusion reached was correct based upon the data and justifications provided by the school and the applicable regulations. Accordingly, I **CONCLUDE** that the Department correctly disapproved this item in the school-based budget for the 2001-2002 school year.

SUMMARY OF CONCLUSIONS AND ORDERS

I **FIND** that the conclusions and orders below resolve all outstanding disputes between the parties with respect to the 2001-2002 school-based budget.

The Department approved the addition of $21,425.00 to the budget for salaries and $6,105.00 for the workbooks and these issues were not litigated at hearing. I **CONCLUDE** that this fully resolves these two issues between the Department and Woodrow Wilson School #19. I **FIND** that the agreements between the parties are reasonable and it is, therefore, **ORDERED** that they be implemented in accordance with their terms.

I **CONCLUDE** that the Department correctly disapproved the half-time school nurse's position in this budget. I further **CONCLUDE** that the Department correctly disapproved the increase in funding to provide furniture and supplies for the office of the new vice-principal. It is, therefore, **ORDERED** that these determinations by the Department be **AFFIRMED** and petitioner's appeal with respect to these items be **DISMISSED WITH PREJUDICE**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

OAL DKT. NO. EDU 5589-01

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 19 2001
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

1/22/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 07 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

OAL DKT. NO. EDU. 5589-01
AGENCY DKT. NO. 202-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (WOODROW WILSON SCHOOL #19), UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and respondent's reply thereto were duly submitted in accordance with established timelines. Subsequently, petitioner filed a Motion to Dismiss this matter on the ground of mootness to which a response was filed by respondent. While the parties do not agree that the issues presented are moot, what is clear is that the District, that party which initiated these proceedings, no longer wishes to continue its appeal and asks that its appeal be dismissed.

Upon his independent and careful review of this local "Abbott" District's appeal of the Department's determination on its whole school reform funding request for the 2001-2002 school year, and based upon the papers filed by the parties with respect to petitioner's Motion to Dismiss, the Commissioner finds it unnecessary to reach to the decision of the ALJ, as he determines that this matter is appropriately dismissed.

Accordingly, the Petition of Appeal is hereby dismissed.

IT IS SO ORDERED*

COMMISSIONER OF EDUCATION

Date of Decision: 5/20/02

Date of Mailing: 5/21/02

* Pursuant to *P.L.* 2001, c. 130, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division at the New Jersey Superior Court.

206-02

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (GROVER CLEVELAND MIDDLE SCHOOL #70), UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

"Abbott" District appealed the Department's determination on its whole school reform funding request for the 2001-2002 school year.

Upon review, Commissioner dismissed the appeal as requested by the District.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5592-01
AGENCY DKT. NO. 205-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH
(GROVER CLEVELAND MIDDLE SCHOOL, #70), UNION COUNTY
Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION
Respondent.

Richard E. Shapiro, Esq., for petitioner,

Michael Lombardi, Deputy Attorney General, for respondent
(John J. Farmer, Attorney General of New Jersey, attorney)

Record Closed: November 13, 2001 Decided:

BEFORE **EDITH KLINGER**, ALJ:

On June 13, 2001, the petitioner, Board of Education of the City of Elizabeth (Board), filed a Verified Petition of Appeal before the Commissioner of Education seeking adequate funding to implement its whole school reform plan for all of the schools in the District pursuant to the decision of the Supreme Court in *Abbott v. Burke*, 153 *N.J.* 480 (1998) and the statutes and regulations promulgated there under. The present appeal concerns the school-based budget for Grover Cleveland Middle School #70. The respondent, Department of Education (Department), filed its answer on June

29, 2001. On July 9, 2001 the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The hearing was held on October 1, 2, 3, 5, 11, 12, and 15, 2001. The record closed on November 13, 2001 when the final submissions were received from the parties.

DISCUSSION OF LAW

In December 1996, the Legislature enacted the Comprehensive Educational Improvement and Financing Act ("CEIFA"), *N.J.S.A.* 18A:7F-1 through –34, which "set academic standards that must be achieved by all students, identified programs to accomplish these goals, provided a funding mechanism to ensure their support, and included mechanisms for enforcement." *Abbott by Abbott v. Burke*, 153 *N.J.* 480, 541 App. I (1998) ("Abbott V").

Under CEIFA, the Board of Education of an "Abbott" school district must implement zero-based budgeting. *N.J.S.A.* 18A:7F-5(c), -6(C). Zero-based budgeting generally requires that the Board combine all of its sources of revenue or funding streams and use the aggregate amount as the basis for the entire school budget. That is, instead of allocating certain funds to specific programs, the Board must use the entirety of its funds to implement a "whole-school reform implementation plan" in the district as described in *N.J.A.C.* 6A:24-1.2, -2.2, -4.1, -4.4(a), and 7.1(a).

Implementation includes preparation of a school-based budget by each school in conformity with the Department's Guide for Implementing Urban Education Reform in Abbott Districts. (P-23) *See N.J.A.C.* 6A:24-1.2, -4.4. In accordance with *N.J.S.A.* 18A:7F-6(c), each school submits its budget to the Department for review and approval. These budgets are based upon approved whole school reform models selected by the individual schools from the Guide for Implementing Urban Educational Reform in Abbott Districts. *See N.J.A.C.* 6A:24-1.2, -4.4.

The Department assists each Abbott school in preparing its budget by assigning to every school a member of the Department's School Review and Improvement Team, (*N.J.A.C.* 6A:24-1.3), as an Education Program and Development Specialist. This Specialist works directly with the School Management Team (SMT) (*N.J.A.C.* 6A:24-2), consisting of the school's principal and members of the school staff, to develop a school-based budget in compliance with the regulations and the Whole School Reform (WSR) model chosen by the school to improve its performance.

The proposed school-based budgets are submitted to the Department for review. *N.J.S.A.* 18A:7F-5(c), -6(c). The schools are then given the opportunity to provide further information if required by the Department to supplement data already provided and/or to provide additional justifications or explanations for the budget items requested.

The Commissioner, through the Department's Office of Program Review and Improvement and its Office of Fiscal Review and Improvement, reviews these budgets and determines whether they will meet the needs of the school to provide a thorough and efficient education. If they determine that the school's requests for funding are not appropriately justified, they may direct the removal of funds from the budget. *N.J.S.A.* 18A:7F-6(c).

By adopting CEIFA, the Legislature sought to establish uniform acar standards for all districts within the State, and to provide a framework for meetir standards and a means of funding them. *N.J.S.A.*18A:7F-2b.

Following the enactment of CEIFA, the State Board of Educatio regulations

> in order to implement educational programs necessary tc education reform initiatives that ensure that public sch from poorer urban districts receive the educati guaranteed them by the Constitution and to meet the decision of the New Jersey Supreme Court in *Abt*

> May 21, 1998 . . . [and] to ensure the provision of a thorough and efficient system of education. . . .
> [*N.J.A.C.* 6A:24-1.1.]

These regulations were designed to implement school-based budgeting and encourage participation in the decision-making process by the educational staff, the parents and the community in general. *State Board of Education Urban Education Reform in the Abbott Districts*, 32 *N.J.R.* 1329(a), 1332 (2000). The State Board believed that by effectively putting these local groups of people in a position where they could impact on ensuring a quality education for the students, the community would be more apt to support the required expenditures. *Ibid.* The State Board further proposed that such a system would "allow, at the school and district level, for a means of identifying inefficiencies and ensuring that money goes to necessary programs and services." *Ibid.*

In adopting the regulations necessary to implement CEIFA, the State Board attempted to provide the individual schools with discretionary power in budgeting to meet the needs of individual schools in the Abbott districts.

To date, only one case has discussed the standard of review to be used by the Commissioner in approving or eliminating items within a school-based budget. In *Abbott* V, the issue to be decided by the Supreme Court was the necessity for specialized classrooms for art, music and science. In reviewing the school's budget, which included these specialized classrooms, the Commissioner found that such rooms were not necessary. The Supreme Court held that, initially, the school should have discretion in deciding such issues, based on the particularized needs of the students at that school. The Supreme Court further held, upon review by the Department, "[t]he determination of the local education authorities should be reviewed *with deference and with the understanding that local educators are in the best position to know the particularized needs of their students*." *Abbott* V, *supra*, 153 *N.J.* at 522-523 (Emphasis added)

In addition to the regulations which are public records, the Department provides the District with guidance and training in completing and submitting school-based budgets. The Department's exhaustive Guide for Implementing Urban Educational Reform in Abbott Districts (P-23), the assigned Specialists and the interim reviews and requests for additional justifications are just part of the process in developing the school-based budgets. The regulations give the Districts the responsibility to train every new SMT member in all WSR schools. *N.J.A.C.* 6A:24-2.3(a). The training, in consultation with the Specialists, is to:

> . . . include, but not be limited to, instruction regarding the roles, relationships and responsibilities of the SMT, development and implementation of the WSR implementation plan, needs assessment, particularized need, curriculum and instruction, teamwork and consensus building.
>
> 2. The training , if necessary, shall also include personnel and school-based budgeting.
>
> [*N.J.A.C.* 6A:24-2.3(b)]

Any SMT member that has not fulfilled the training requirement is to be removed from the SMT. *N.J.A.C.* 6A:24-2.3(d). As the respondent points out in its brief, the testimony of District witnesses makes it clear that they were familiar with the procedure for submitting school-based budgets.

The District asserts that the Department's written reviews of the budget requests do not in all cases specify the precise reasons why individual requests were eliminated from the budget and, therefore, it argues that the disapproved requests should be restored whether or not the requests were adequately justified by the District. According to the entirely credible testimony of the two Specialists assigned to all of the schools which are part of these school-based budget appeals, the written reviews in the record were far from the only interactions between the Department and the schools with respect to budgeted items. The Specialists were in frequent regular contact with school administration and staff in on-site face-to-face meetings, by mail, by telephone and during school visits. Both Specialists testified to repeated requests for additional

information from schools, not all of which was provided. There was no testimony that these conversations had not taken place.

At hearing, the Specialists were accused of constructing *ad hoc* rationalizations for disapproving specific budget requests. The record shows, however, that, for the most part, the reasons given by the Specialists at hearing were consistent with the reasons given in the written budget reviews, although perhaps more detailed or with additional comments based upon their interactions with the schools. In fact, some of these alleged *ad hoc* reasons in testimony were intended to address information provided to the Department for the first time at hearing.

The District argues that, where items have been disapproved, the Department is substituting its judgment for the discretion given to the school by the *Abbott* decisions. According to *Abbott V, supra,* 153 *N.J.* at 522-523, the local districts are entitled to deference only when asserting the particularized needs of their students. Deference to technical expertise is required only where such expertise is a pertinent factor. *Campbell v. New Jersey Racing Commission*, 169, *N.J.* 579, 588 (2001).

No special deference need be conferred when it comes to general educational expertise which continues to reside in the Department. Since the District is entitled to its area of expertise, the proper course is for the agency to accept the District's determination of its needs and then to assess whether its budget requests are appropriate to meet the stated needs. By analogy, see *Muise v. GPU, Inc.* 332 *N.J. Super.* 140, 161, (App. Div. 2000)

If the school's choice of methods to implement its needs is mistaken or not supported by the data provided, the Department is able to review the record and make its own determinations. By analogy, see *Campbell v. New Jersey Racing Commission*, 169 *N.J.* at 588. Even where substantial deference is required, the Department's review of the budgetary requests "is not simply a *pro forma* exercise in which [it] rubber stamp[s] findings that are not reasonably supported by the evidence; 'it calls for careful and principled consideration of the . . . record.'" *S.D. v. DHS, DFD,* 344 *N.J. Super.*

325, 336 (App. Div. 2001) [Citing *Chou v. Rutgers*, 283 *N.J. Super.* 524, 539 (App. Div. 1995), *certif.. denied,* 145 *N.J.*374 (1996)]

Based upon the principles related to deference enunciated in the case law, I **CONCLUDE** that the school districts are entitled to deference only in their designated area of expertise: the particularized needs of their students. I further **CONCLUDE** that the Department otherwise retains its expertise and experience in education, including its ability to review the budgetary requests of the districts and to exercise reasonable judgment with respect to these requests. I **CONCLUDE** that this reasonable judgment includes the Department's ability to evaluate the data provided and to apply its own expertise to determine whether the means embodied in the schools' budget requests are effective to accomplish their stated particularized needs.

In its brief in the present matter, the school essentially argues that, pursuant to *Abbott V*, it is the responsibility of the Department, particularly the assigned Education Program and Development Specialist, not the school, to ferret out, then with great specificity call for the required justifications for each budget request made by the individual schools to meet their obligations under WSR. This position is asserted notwithstanding the provisions of *N.J.A.C.* 6A:24-4.4 making it the responsibility of the school principal in consultation with the school business administrator and the SMT to develop and support the school based budget. The school must show that the means it chooses to implement its particularized needs are effective and supported by the data. I **CONCLUDE** that, pursuant to the regulations, the Specialist and the Department are there to assist the school to develop its budget not to direct or, in some cases, to anticipate and/or correct erroneous or unsupported requests made by the school.

Parenthetically, the District appears to take the inconsistent positions that the schools are due a great deal of deference in stating their local needs while at the same time asserting that it is the Department's responsibility to make sure that those needs are stated clearly and correctly with adequate justification. Either the schools have the expertise to recognize their needs, clearly state them and support them with adequate justifications in making budget requests or they do not. If the latter is the case, and the

Department makes an effort to understand and correct the shortcomings of the budget requests, it is unreasonable to expect the Department to "rubber stamp" the local educators.

I **CONCLUDE** that the principles stated above are the appropriate ones to be applied in the review of the Department's response to the following items in the school-based budget request.

THE PRESENT APPEAL

The school's requests for additional funding for staff salaries and administrative supplies were approved by the Department in August 2001. After additional clarification, the Department approved the addition of $9,522.00 to the budget for salaries and $5,397.00 for the supplies and these issues were not litigated at hearing.

In resolving the dispute with respect to the salaries at which new staff could be hired, the Department denied that it intended to cap them at the second step of the District's salary guide. Where the District demonstrated that teachers with subject matter specialization, such as mathematics and science teachers with the necessary education and experience, could not be hired at the second step, the Department agreed that they could be hired at the step on the salary guide commensurate with their training and experience. The Department also agreed to work with the District to fill other teaching positions, such as gym, music and art teachers, if it were shown that these positions could not be filled at the second step of the salary guide. (R-1a)

With respect to all issues designated as settled for the purposes of the school-based budget appeals, the District reserves the right to raise any issues concerning the sufficiency of funding in a supplemental funding appeal. (R-1a)

The school's request for two new bi-lingual teachers, uniforms for security guards and substitute coverage for absent teachers were withdrawn and were no longer in issue in this appeal.

The school requested $11,454.00 in additional travel expenses for eleven members of the school staff to attend a program in Seattle sponsored by its WSR model, Coalition of Essential Schools (CES). The request became moot because the program was held prior to the outcome of this hearing. The Department had already approved $50,000.00 for the model's developer's fee and training, including funding for two members of the school staff to attend the Seattle program.

The following issues were resolved by the parties during the hearing.

Workpaper M: Stipends

The school requested $4,162.00 for a teacher to supervise the breakfast program. After discussions between the parties, it was agreed that this issue would be withdrawn from the present appeal to be resolved elsewhere. I **FIND** that this agreement fully resolves this issue with respect to the school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

Workpaper U: Administration

The school requested $13,560.00 for material and supplies for faculty action committees pursuant to the chosen WSR model. Only $8,163.00 of this request was approved. After hearing testimony that these committees were required by the model, CES, the Department agreed to restore $3,230.00 to the budget. I **FIND** that this agreement fully resolves this issue with respect to the school-based budget, and I **CONCLUDE** that it is no longer in dispute in this appeal.

Only the following two issues remained to be litigated at hearing.

Workpaper O: Attendance and Social Work

The schools requested $4,200.00 for the costs of principal's attendance celebrations. The request was disapproved because other incentives were already budgeted for that purpose (Workpaper Q).

Deborah Dixon, principal of Grover Cleveland, testified that she instituted various incentive programs to acknowledge even small improvements by students and reward them. For the past four to five years, she has held monthly attendance celebrations for sixth, seventh and eighth grade students with perfect or outstanding attendance during the month. These students are taken from their regular classes for one hour a week and treated to refreshments and music in the cafeteria. The celebrations include learning the "Electric Slide." The students may also end the celebrations by singing "We Are Family" and returning to their classes.

Dixon stated that these celebrations are responsible for improving student attendance from eighty-two percent to over ninety percent. She also believes that good adult relationships are necessary for students and these celebrations help her to establish them.

Pernell Brice was the member of the School Review and Improvement Team assigned by the Department to the Grover Cleveland Middle School as the Program and Development Specialist. There he worked directly with the School Management Team (SMT) consisting of the school principal and members of the school staff, to develop a school-based budget in compliance with the regulations and the Whole School Reform (WSR) model chosen by the school to improve its performance.

Brice attended some of Dixon's attendance celebrations and was less than impressed with them. He characterized them as a "waste of time" and "abominable." In the elementary schools (Marshall, Columbus and Franklin) that feed Grover Cleveland, attendance celebrations are held during regular student assemblies and students with

good attendance receive certificates. They are not taken from their classes, thereby disrupting their learning. He was only aware that these celebrations were in place for one year at Cleveland but did not dispute that they might have been given earlier.

The school argues that the Department has funded these attendance celebrations in the past. The Department states that there is no requirement by the New Jersey Supreme Court that the State must continue to fund items solely because they were funded in the past. As the Department points out in its brief, the Supreme Court only directed the Department to fund "extant worthy programs, including special education" in individual school-based budgets. *Abbott V*, 153 *N.J.* at 495 (Emphasis added).

The District argues that, since the written communications from the Department with respect to the budget do not specify the reason testified to by Brice, the item should be reinstated. This should be done whether or not the attendance celebrations have any real value in accomplishing improved attendance and in spite of the fact that improvements in attendance come at the expense of unnecessarily removing children from classes.

There was no testimony by the District that rewarding attendance in regular student assemblies will not perform the same function as the principal's attendance celebrations. There was also no testimony that presenting students with certificates during regular assemblies will incur any significant costs, whether or not provided for in Workpaper Q. It should be noted that these celebrations with refreshments and dancing are not part of the CES model.

Brice testified that he visited Grover Cleveland innumerable times and had many face-to-face discussions with Dixon and the members of the SMT at which all aspects of the school-based budgets were discussed. I **FIND** that the reason given in his testimony is consistent with the reason given by the Department in its formal written communications with the school and was most likely made clear to the school by Brice in his interactions with Dixon and the SMT. From the demeanor of Brice during his

testimony, there is no doubt that he freely and forcefully communicates his opinions in the interests of improving the schools for which he serves as Specialist.

I **FIND** Brice's assessment of the attendance celebrations to be persuasive. I **FIND**, based upon his testimony, that there are just as effective ways of encouraging student attendance without disrupting the students' learning and without incurring the additional costs. Based upon the law as stated above, it is within the Department's authority and expertise to assess whether the school's budget requests are appropriate to meet its stated needs, and I **CONCLUDE** that the Department appropriately disapproved this item in the budget.

Workpaper X: Teacher Tutors

The school requested $229,662.00 for six teacher tutors. The request was denied by the Department on May 15, 2001 because the teacher tutors are not part of the CES middle school model and there was insufficient justification for their use.

On June 7, 2001, the school explained that the teacher tutors were to be used to decrease the number of students assigned to each instructional group to "assist students with achieving the Core Curriculum Content Standards which will be measured by TerraNova and G.E.P.A." On August 17, 2001, the Department disapproved the request because it now believed that the teacher tutors were to be used for the purpose of reducing class size. See *N.J.A.C.* 6A:24-4.1(j)9.

In her testimony at hearing, Dixon explained that the teacher tutors were needed at Grover Cleveland because of the number of middle school students who were reading and doing mathematics below grade level. She agreed that they were not part of the CES model and that is why she applied for them as a supplemental program to meet a local particularized need on Workpaper X. (See *N.J.A.C.* 6A:24, Subchapter 5) According to the application, these new staff members were intended to team teach with existing grade level teachers, serve as one-to-one tutors and assist the school in achieving required student/teacher ratios.

Brice said he did not consider the request for tutors as a local particularized need because he erroneously concluded that the request did not have the approval of the Board as evidenced by a Board resolution. *N.J.A.C.* 6A:24-5.2. It appears that the request did have the approval of the Board and there was a Board resolution to support it. Notwithstanding the foregoing, the request was reviewed and disapproved by the Department for the reasons expressed above.

Dixon said that teacher tutors are used in elementary schools as part of the Success for All (SFA) models.

In *Abbott V*, the Supreme Court considered the SFA model and described the use of teacher tutors as follows:

> SFA strives to ensure that, as each student moves from pre-school through elementary school, he or she reads at the appropriate level. For ninety minutes each day, students are put in reading groups of fifteen that are organized according to reading level, regardless of age or grade. For first through third graders who are having trouble with reading, SFA includes an additional daily twenty-minute one-on-one tutoring session; for students in higher elementary grades, SFA includes a daily group tutoring session composed of slightly larger groups. Children are assessed every eight weeks to determine their progress and their need for the extra tutoring session.
>
> [*Abbott V*, 153 *N.J.* at 495]

The SFA model has only been implemented in the Elizabeth elementary schools for the past three years. Dixon said that the students who were already in fourth grade by the time the SFA model was implemented did not have the intensive tutoring now available in the first three grades and they arrived at the middle school seriously behind in their ability to read and do mathematics.

Brice testified that Dixon was having a great deal of trouble writing her budget and did not share the responsibility with her SMT. He tried to get Dixon to adopt the Comer model which would better serve the school's needs and make it much easier for

her to prepare her budget. He discussed Dixon's request for teacher tutors with her on a number of occasions and tried to dissuade her from making this request in the school-based budget. Brice was required to conduct these discussions with Dixon pursuant to *N.J.A.C.* 6A:24-4.5.

According to Brice, CES, the WSR model chosen by the school, did not provide for intensive tutoring and, therefore, was not a good choice to address an important particularized need of the school. In addition, CES, provides a sample "illustrative school-based budget" based upon the activities that are part of the model. The addition of the teacher tutors based upon the SFA model far exceeds the illustrative budget in the model.

According to Brice, and this is confirmed by the description of the teacher tutor functions in the SFA model as described above by the Supreme Court in *Abbott V*, the use of teacher tutors is meant for the elementary schools. The program is not compatible with middle school programs. In elementary schools, the students remain in their classrooms and can easily be taken out for extended one-to-one sessions with a teacher tutor. This is not true in middle schools where the students go to different rooms for different subjects. The use of teacher tutors following the SFA model in a middle school setting would be more disruptive than anything else. Brice knew of no middle schools that used teacher tutors in the manner of the SFA model and stated that it should not be done. He did not dispute that tutoring can improve student performance but not in the manner requested by Dixon.

If Dixon intended to use teacher tutors in some other manner, this was not made clear to the Department. Daryl Minus-Vincent is another member of the School Review and Improvement Team assigned to the District as a Program and Development Specialist. He testified that team teaching is a specific method of instruction requiring planning and coordination of the roles each member of an interdisciplinary team is to play; it is not accomplished by merely adding additional teachers to a classroom and designating the result as a team. There is nothing in the documentary evidence or the

testimony of Dixon that would have conveyed her concept of team teaching at Grover Cleveland to the Department.

Based upon the testimony of the witnesses and the documentary evidence, I **FIND** that the school's request for funding six teacher tutors does not appear to be an effective solution to its goal of improving student performance. I **FIND** that, with no recognizable team-teaching plan to support the request for the addition of the teacher tutors, the Department's position that this particular method of implementing the local need to improve student performance in reading and mathematics may actually prove disruptive, rather than helpful. Accordingly, based upon the law as stated above, it is within the Department's authority and expertise to assess whether the school's budget requests are appropriate to meet its stated needs, and I **CONCLUDE** that the Department appropriately disapproved this item in the budget.

SUMMARY OF CONCLUSIONS AND ORDERS

I **FIND** that the conclusions and orders below resolve all outstanding disputes between the parties with respect to the 2001-2002 school-based budget.

The Department approved the addition of $9,522.00 to the budget for salaries and $5,397.00 for supplies and these issues were not litigated at hearing. I **CONCLUDE** that this fully resolves these two issues between the Department and Grover Cleveland Middle School #70. I **FIND** that these agreements between the parties are reasonable and it is, therefore, **ORDERED** that they be implemented in accord with their terms.

I **FIND** that the school withdrew its requests for funding for two new bi-lingual teachers, uniforms for security guards, substitute coverage for absent teachers and a teacher to supervise the breakfast program. I **FIND** that the issue of the school's request for $11,454.00 in additional travel expenses became moot. I, therefore, **CONCLUDE** that these issues are resolved between the parties with respect to this

appeal, and it is **ORDERED** that the school's appeal with respect to them in the 2001-2002 budget is hereby **DISMISSED.**

I **CONCLUDE** that the Department correctly disapproved the request for $4,200.00 to fund the attendance celebrations. I further **CONCLUDE** that the Department correctly disapproved $229,662.00 in funding for six teacher tutors. It is, therefore, **ORDERED** that these determinations by the Department be **AFFIRMED** and petitioner's appeal with respect to these items be **DISMISSED WITH PREJUDICE**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 19, 2001
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

January 2, 2002
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 04 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

APPENDIX

Witnesses:

For Petitioner:

Thomas Dunn, Jr.

Linda G. King

Pablo Muñoz

Deborah Dixon

Harold Kennedy

For Respondent:

Pernell Brice

Exhibits:

P-23 Guide for Implementing Urban Education Reform in Abbott Districts

P-57 Class Size Reduction Plan

P-95 Application for Local Particularized Need

P-96 Workpapers

P-97 Letter, dated May 15, 2001, Couselo and Henry to Dixon

P-98 Letter, dated June 7, 2001, Dixon to Couselo and Henry with attached responses to SBB Fiscal Review Comments

P-99 Letter, dated August 17, 2001, Reid and Henry to Dixon

P-109 Issues on Appeal after August 17, 2001

P-111 Board Resolution, November 16, 2000

P-113 Professional Staff Positions – Salary Dispute

R-1a Schools and Issues Resolved – Post Hearing

R-2 Schools and Issues Remaining – Post Hearing

OAL DKT. NO. EDU. 5592-01
AGENCY DKT. NO. 205-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH (GROVER CLEVELAND MIDDLE SCHOOL #70), UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and respondent's reply thereto were duly submitted in accordance with established timelines. Subsequently, petitioner filed a Motion to Dismiss this matter on the ground of mootness to which a response was filed by respondent. While the parties do not agree that the issues presented are moot, what is clear is that the District, that party which initiated these proceedings, no longer wishes to continue its appeal and asks that its appeal be dismissed.

Upon his independent and careful review of this local "Abbott" District's appeal of the Department's determination on its whole school reform funding request for the 2001-2002 school year, and based upon the papers filed by the parties with respect to petitioner's Motion to Dismiss, the Commissioner finds it unnecessary to reach to the decision of the ALJ, as he determines that this matter is appropriately dismissed.

Accordingly, the Petition of Appeal is hereby dismissed.

IT IS SO ORDERED*

COMMISSIONER OF EDUCATION

Date of Decision: 5/20/02

Date of Mailing: 5/21/02

* Pursuant to *P.L.* 2001, c. 130, "*Abbott*" determinations are final agency actions appealable directly to the Appellate Division at the New Jersey Superior Court.

208-02

M.N., on behalf of minor child, M.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF SEA ISLE CITY, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

May 24, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4850-01

AGENCY DKT. NO. 216-6/01

M. N. OBO M.F.,

Petitioner,

v.

SEA ISLE CITY BOARD OF EDUCATION,

Respondent.

Ira Fingles, Esq., for petitioner (Herbert Hinkle, attorney)

Michael Stanton, Esq., for respondent (Taht, Stanton & McCrosson, attorneys)

Record Closed: March 28, 2002 Decided: April 9, 2002

BEFORE **EDGAR R. HOLMES,** ALJ:

This matter was transmitted to the Office of Administrative Law on August 22, 2001, for determination as contested cases, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is incorporated herein by reference and attachment.

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

4/9/02
DATE

EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

4/12/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 15 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

Mark Ferrari, et al. v. Sea Isle City Board of Education
Agency Docket No. 216-6/01

STIPULATION OF SETTLEMENT

The parties to this matter stipulate and agree as follows:

1. Petitioners shall withdraw their appeal of Respondent's ~~sea~~ residency determination.
2. In exchange for this consideration, Respondent shall deem M.F. to have been domiciled within ~~the~~ its school district until the present
3. ~~In exchange for th~~ Respondent and Petitioners agree that from this date forward, M.F. shall be conclusively ~~can~~ and presumptively considered not to be domiciled in ~~Respond~~ for school funding purposes, Respondent's school district, regardless of his actual circumstances. As a result, M.F. shall not be entitled to any further educational services, rights, or funding from Respondent at any point in time after the execution of this agreement.

Denise C. LaBar 8/21/01
Denise C. LaBar

8-21-01
Michelle Nagle

OAL DKT. NO. EDU 4850-01
AGENCY DKT. NO. 216-6/01

M.N., on behalf of minor child, M.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF SEA ISLE CITY, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner approves the settlement which consents to the withdrawal of this matter. In so holding, however, the Commissioner cannot accept term 3 because, in the event that petitioner's son may have, at some point in the future, a statutory entitlement to be educated by respondent, the settlement in this matter cannot supercede statute. Consequently, to the extent that the withdrawal of this matter is contingent upon term 3, that term is herein declared null and void.

Accordingly, the matter is deemed to be withdrawn and is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/24/02

Date of Mailing: 5/24/02

* The Commissioner notes that the record contains a Consent Order entered into by the parties on August 21, 2001 before the Office of Administrative Law (OAL) with respect to a special education due process matter bearing the OAL Docket Number EDS 0680-01. Because a special education due process decision issued by the OAL is by regulation a final decision, the Commissioner does not have jurisdiction to review or render a final decision regarding that Consent Order.

207-02

D.F., on behalf of minor child, K.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MEDFORD, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

May 17, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 333-02

AGENCY DKT.NO. 460-11/01

D.F. O/B/O MINOR CHILD K.F.

Petitioner,

v.

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

Respondent.

Steven S. Neder, Esq., for petitioner

Frank P. Cavallo, Jr., Esq., for respondent

Record Closed: March 27, 2002 Decided: March 27, 2002

BEFORE **ANA C. VISCOMI**, ALJ

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -13. This matter was scheduled for a hearing on March 27, 2002. At that time the parties agreed to a settlement and prepared a written agreement indicating the times thereof, which is attached and fully incorporated herein. In addition, the

parties entered the agreement on the record as amended, relative to any enforcement provision, and petitioner accepted all terms of the settlement agreement as outlined on the record.

I have reviewed the record and the terms of the settlement and I find:

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

March 28, 2002
DATE

ANA C. VISCOMI, ALJ

Receipt Acknowledged:

4-2-02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 3 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jck

THE PARTIES TO THIS MATTER, Petitioner DENISE Foster o/b/o her daughter, Kristina Foster and Respondent Township of Medford Board of Education HEREBY AGREE AS FOLLOWS:

(1.) Petitioner shall pay tuition to Respondent in the amount of $786.00 per month for the months of April, May and JUNE, 2002. The tuition [redacted] shall be paid on or before the 10th day of each month and shall be paid by either money order or Certified/Bank Checks.

(2) Petitioner shall be responsible for payment

(3.) Respondent shall not take any further action with respect to Petitioner's domicile and/or the collection of tuition for the time periods February 2001 to June 2001 and September 2001 to March 2002.

Denise M Foster
Denise Foster, Petitioner

F. P. Cawley Jr. BSC
Frank P. Cawley Jr, Esq
Attorney for Respondent

Steven S. Neder Esquire
Attorney For Petitioner

OAL DKT. NO. EDU 333-02
AGENCY DKT. NO. 460-11/01

D.F., on behalf of minor child, K.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MEDFORD, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/17/02

Date of Mailing: 5/21/02

210-02

IRVINGTON EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

May 24, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5390-01

AGENCY DKT. NO. 125-4/01

IRVINGTON EDUCATION ASSOICATION,

Petitioner,

v.

BOARD OF EDUCATION OF IRVINGTON,

ESSEX COUNTY,

Respondent.

Nancy I. Oxfeld, Esq., for Petitioner
(Oxfeld Cohen, LLC, attorneys)

Ma'Lee Wing, Esq., for Respondent
(Hunt, Hamlin & Ridley, attorneys)

Record Closed: April 11, 2002 Decided: April 15, 2002

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on June 22, 2001, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A hearing was scheduled for May 20 & 21, 2002 at the OAL, 185 Washington Street, Newark, New Jersey. Prior to the hearing, settlement discussions were held and a settlement was reached.

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

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

April 15, 2002
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

4/19/02
DATE

Debbie Cutaneastis (ta)
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 22 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

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STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

APR 11 4 04 PM '02

OXFELD COHEN, LLC
50 Commerce Street
Newark, New Jersey 07102
(973) 642-0161
Attorneys for Petitioner

BEFORE THE COMMISSIONER OF EDUCATION
AND THE OFFICE OF ADMINISTRATIVE LAW
OAL DKT. NO. EDU 5390-01
AGENCY DKT. NO. 125-4/01

IRVINGTON EDUCATION ASSOCIATION,	:	
Petitioner,	:	
-vs-	:	SETTLEMENT AGREEMENT
BOARD OF EDUCATION OF IRVINGTON, ESSEX COUNTY,	:	
Respondent.	:	

This matter having been opened to the Commissioner of Education by way of a petition filed by the Irvington Education Association alleging that the President of Respondent, Andrea McElroy, had acted improperly in her position as President of the Respondent by personally giving permission to visitors to visit a first grade class at Mt. Vernon School any time they chose, in violation of Board policies, and that McElroy had

personally come to Mt. Vernon School and collected plan books from the teaching staff at Mt. Vernon School in violation of Board policies and the law; and

The Respondent, Board of Education of the City of Irvington, having denied such conduct and stated that such conduct would not take place; and

The Association acknowledging and recognizing the Board's position that the facts as alleged would not have occurred; and

Both parties acknowledging the following Board policies:

1. Board Policy 9271 (attached hereto as Exhibit A), the Code of Ethics, which contains the following items:

> 3. I will confine my Board action to policy making, planning and appraisal . . .
>
> 4. I will carry out my responsibility, not to administer the schools, but together with my fellow Board Members, to see that they are well run . . .
>
> 10. I will refer all complaints to the Chief School Administrator and act on such complaints at public meetings only after failure of an administrative solution;

2. Board Policies 3219, 3221 and 3222 (attached hereto as Exhibit B) concerning supervision and evaluation of teaching staff; and

3. Board Policy 1250 (attached hereto as Exhibit C) concerning visitors;

It is hereby agreed by the Irvington Education Association that it will withdraw the petition in the within matter.

OXFELD COHEN, LLC
Attorneys for Petitioner
By:

NANCY I. OXFELD, ESQ.

Dated: 4/8/02

HUNT, HAMLIN & RIDLEY
Attorneys for Respondent
By:

MA'Lee WING, ESQ.

Dated:

OAL DKT. NO. EDU 5390-01
AGENCY DKT. NO. 125-4/01

IRVINGTON EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/24/02

Date of Mailing: 5/24/02

209-02

209-02

MARCELLA BAKER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

May 24, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9910-00
AGENCY DKT. NO. 373-9/00

MARCELLA BAKER,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

Ashton E. Thomas, Esq., for petitioner

Ken Iwama, Chief Labor Counsel, for respondent
(Charlotte Kitler, General Counsel, attorney)

Record Closed: April 9, 2002 Decided: April 18, 2002

BEFORE **DIANA C. SUKOVICH,** ALJ:

Petitioner filed a petitioner with the State Department of Education (DOE) on September 15, 2000, contesting the withholding of an increment for the 1999-2000 school year by respondent. Respondent filed an answer on September 28, 2000, and the DOE transmitted the matter to the Office of Administrative Law on November 27, 2000 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to 13.

A telephone conference was conducted on February 15, 2001, and a hearing scheduled for October 24, 2001 was adjourned at the requests of the parties because of pending settlement negotiations.

An executed Stipulation of Settlement and a copy of an Acknowledgement of Settlement, dated February 14, 2002, in a matter pending before the United States Equal Employment Opportunity Commission between petitioner and respondent, were filed on February 21, 2002. At this judge's request, petitioner's counsel and respondent's counsel filed letters on April 2, 2002 and April 9, 2002, respectively, clarifying certain aspects of the stipulation. The record is deemed closed on the latter date. Attached herewith are copies of the Stipulation of Settlement, the Acknowledgement of Settlement, and counsel's letters.

Having reviewed the record and the settlement terms, I **FIND:**

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is

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

Apr 15 2002
DATE

DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 25 2002
DATE

CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

\mvh

MARCELLA BAKER, Charging Party, v. JERSEY CITY PUBLIC SCHOOLS, Respondent.	:	BEFORE THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION CHARGE NO. 171A10522 STIPULATION OF SETTLEMENT

In consideration of the mutual promises and undertakings contained in this Stipulation of Settlement (hereinafter "Settlement"), Marcella Baker and the State-Operated School District of Jersey City (hereinafter "School District"), improperly plead as the Jersey City Public Schools, hereby agree that the above-captioned matter and any and all other claims, rights and obligations between the undersigned parties shall be resolved as follows:

1. The parties agree that this Settlement represents the compromise of disputed claims and is not an admission of liability, negligence or wrongdoing by either party.

2. Marcella Baker agrees to resign from her employment with the School District on July 1, 2002. This settlement shall constitute the School District's formal acceptance of Marcella Baker's resignation.

3. Marcella Baker agrees to withdraw, with prejudice, the Charge of Discrimination filed with the Equal Employment Opportunity Commission (hereinafter "EEOC") bearing Charge Number 171A10522.

4. Marcella Baker agrees to withdraw, with prejudice, any and all appeals of the withholding of her salary increments which are currently pending before the Commissioner of Education and/or the Office of Administrative Law.

5. Marcella Baker, and anyone who succeeds her rights and responsibilities such as her heirs and/or the executor of her estate, hereby releases and forever discharges the School District, its successors and assigns, and its past, present or future officers, directors, agents or employees, from any and all claims, including those of which Marcella Baker is not aware and those not mentioned in this Settlement, arising from her employment with the School District including, but not limited to, the following: any and all claims set forth in the Charge of Discrimination filed with the EEOC bearing Charge number 171A10522; and any and all claims arising from the withholding of any and all salary increments.

6. The School District agrees to withdraw the tenure charges served upon Marcella Baker on May 30, 2000, charging her with inefficiency as a teacher.

7. The School District agrees to grant Marcella Baker permissive and/or extended leave from February 1, 2002, through her date of retirement on July1, 2002, contingent upon Marcella Baker submitting the required documentation substantiating the medical need for such leave in accordance with School District policy and procedure.

8. Marcella Baker acknowledges that she has discussed all aspects of this Settlement with her legal counsel prior to signing it. Marcella Baker further acknowledges that she has carefully read and understands all of the provisions herein and that she has knowingly and voluntarily executed same without coercion and duress and that she is not taking any medication nor is she suffering from any physical or mental disabilities which would affect her understanding of the terms of this Settlement or her decision to enter into this Settlement.

9. This Settlement constitutes the entire agreement with respect to the subject matter hereof and shall not be amended, modified or amplified except in writing signed by both parties.

Ken Iwama
Attorney for Respondent
State-Operated School District of
Jersey City

Date: 2/14/02

Marcella Baker
Marcella Baker
Complainant

Date: 1/31/02

Douglass Ortelere, Esq.
Attorney for Marcella Baker

Date: 2/7/2002

OAL DKT. NO. EDU 9910-00
AGENCY DKT. NO. 373-9/00

MARCELLA BAKER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/24/02

Date of Mailing: 5/24/02

* It is noted that paragraph 6 of the parties' Stipulation of Settlement references tenure charges served on respondent on May 30, 2000. The record here reflects that respondent was on that date served with charges alleging inefficiency as a teacher and was provided the requisite 90-day period within which to remedy her inefficiencies. However, before the remedial period concluded, respondent went out on sick leave from which she has not returned. Consequently, the referenced tenure charges were never certified to the Commissioner. *See* letter, dated April 8, 2002, from Ken Iwama, District Counsel, to Administrative Law Judge Diana Sukovich.

213-02

WALTER A. ROMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF EAST NEWARK, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

May 20, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 5174-01

AGENCY DKT. NO. 60-3/01

WALTER A. ROMAN,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF EAST NEWARK, HUDSON COUNTY,

Respondent.

Stephen J. Edelstein, Esq., for Petitioner
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Kenneth Davie, Esq., for Respondent
(Cifelli & Davie, attorneys)

Record Closed: April 1, 2002 Decided: April 2, 2002

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on June 7, 2001, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

Prior to a hearing being scheduled, Petitioner has voluntarily agreed to dismiss the matter and has prepared a Notice of Voluntary Dismissal, which is attached and fully incorporated herein.

I have reviewed the Notice of Voluntary Dismissal and I **FIND**:

1. The Petitioner has voluntarily agreed to the dismissal as evidenced by their representatives' signature.

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

I **CONCLUDE** that this dismissal meets the requirements of *N.J.A.C.* 1:1-19.2 and that the dismissal should be approved. I approve of the dismissal and, therefore, **ORDER** that this proceeding be concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

April 2, 2002
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

4-5-02
DATE

Deborah N. Antonatos
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 9 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ATTORNEY GENERAL

APR 1 8 53 AM '02

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER, LLP
Ten James Street
Florham Park, New Jersey 07932
(973) 301-0001/FAX (973) 301-0203
Attorneys for Petitioner

BEFORE THE COMMISSIONER
OF EDUCATION OF NEW JERSEY

Walter A. Roman, individually as a resident of the Borough of East Newark, and officially as Borough Administrator for the Borough of East Newark

Petitioner,

- *vs.* -

Borough of East Newark Board of Education, Ralph Turre, and Susan Turre.

Respondents.

AGENCY DOCKET NO. 60-3/01
OAL DOCKET NO. EDU 0517401

NOTICE OF VOLUNTARY DISMISSAL PURSUANT TO N.J.A.C. 1:1-19.2

The undersigned, counsel for Petitioner, Walter A. Roman, hereby voluntarily dismisses the above-captioned matter, pursuant to N.J.A.C. 1:1-19.2, without prejudice and without costs.

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER, LLP
Attorneys for Petitioner

By _____
STEPHEN J. EDELSTEIN

Dated: 3/27/02

{00118929; 1}

OAL DKT. NO. EDU 5174-01
AGENCY DKT. NO. 60-3/01

WALTER A. ROMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF EAST NEWARK, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Notice of Voluntary Dismissal and Initial Decision issued by the Office of Administrative Law have been reviewed.

Upon review, the Commissioner agrees with the conclusion of the Administrative Law Judge that, in light of petitioner's Notice of Voluntary Dismissal, the requirements of *N.J.A.C.* 1:1-19.2 have been met and the proceedings may be deemed to be concluded. Accordingly, the matter is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/20/02

Date of Mailing: 5/29/02

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

211-02

211-02

PLAINFIELD EDUCATION ASSOCIATION, LOVIE CALDWELL, ORA BAILEY HILL, MICHAEL PEREZ, MOLLY BANTA, MARY ANNE LOZAK AND WILLIAM DUNCAN,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY AND VISITING INTERNATIONAL FACULTY PROGRAM (VIF),	:	DECISION
RESPONDENTS.	:	

May 24, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1525-01

AGENCY DKT. NO. 420-11/00

PLAINFIELD EDUCATION ASSOCIATION,
LOVIE CALDWELL, ORA BAILEY HILL,
MICHAEL PEREZ, MOLLY BANTA,
MARY ANNE L0ZAK and WILLIAM DUNCAN,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY and VISITING INTERNATIONAL FACULTY PROGRAM (VIF),

Respondents.

Kathleen A. Naprstek, Esq., for petitioner
(Zazzali, Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Victor E.D. King, Esq. for co-respondent, Board of Education of Plainfield
(King, King & Goldsack, attorneys)

Charles J. Vinicome, Esq., for co-respondent VIF
(Drinker, Biddle & Shanley, attorneys)

Record Closed: April 18, 2002 Decided: April 18, 2002

BEFORE **KEN R. SPRINGER**, ALJ:

This matter was transmitted to the Office of Administrative Law on February 7, 2001 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

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

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

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

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

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

P.L. 2002, CHAPTER 9, *approved March 19, 2002*
Assembly, No. 1152

AN ACT concerning the employment of teachers from foreign countries, amending N.J.S.18A:26-1 and N.J.S.18A:26-8.1, and supplementing chapter 27 of Title 18A of the New Jersey Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. N.J.S.18A:26-1 is amended to read as follows:

18A:26-1. Every permanent teaching staff member employed in any of the free public schools for nine months or more, in any year shall be a citizen of the United States, except that any citizen of any other country, who has declared his intention of becoming a United States citizen and to whom there has been issued a teaching certificate in accordance with law, may be employed as a teacher so long as he holds a valid teacher's certificate and a teacher of foreign languages who has been a resident of the United States for less than 10 years and who is not a citizen of the United States may be employed in such capacity.

The requirement of citizenship shall not be construed to apply to a teacher from a foreign country who is enrolled with an approved international agency which operates a teacher placement program or teacher exchange program.

(cf: N.J.S.18A:26-1)

2. N.J.S.18A:26-8.1 is amended to read as follows:

18A:26-8.1. a. The state board of examiners may, with the approval of the commissioner, issue a teacher's certificate to teach in the public schools to any citizen of any other country who has declared his intention of becoming a United States citizen and who is otherwise qualified, but any such certificate may be revoked by the state board of examiners if the board is satisfied that the holder thereof has abandoned his efforts to become a United States citizen, or has become disqualified for citizenship, or shall not have become a United States citizen, within five years of the date of its issuance.

b. A declaration of intention to become a United States citizen shall not be required of a teacher from a foreign country who is enrolled with an approved international agency which operates a teacher placement program or teacher exchange program in order for

EXPLANATION - Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and intended to be omitted in the law.

Matter underlined thus is new matter.

OAL DKT. NO. EDU 1525-01
AGENCY DKT. NO. 420-11/00

PLAINFIELD EDUCATION ASSOCIATION, LOVIE CALDWELL, ORA BAILEY HILL, MICHAEL PEREZ, MOLLY BANTA, MARY ANNE LOZAK AND WILLIAM DUNCAN,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY AND VISITING INTERNATIONAL FACULTY PROGRAM (VIF),:	:	DECISION
RESPONDENTS.	:	

The record of this matter, Initial Decision and Stipulation of Dismissal With Prejudice transmitted by the Office of Administrative Law have been reviewed. Upon review of the file, the Commissioner accepts the Stipulation and hereby dismisses this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/24/02

Date of Mailing: 5/24/02

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

APR 18 3 13 PM '02

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN, P.C.
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioners

PLAINFIELD EDUCATION ASSOCIATION, LOVIE CALDWELL, ORA BAILEY HILL, MICHAEL PEREZ, MOLLY BANTA, MARY ANNE LOZAK, and WILLIAM DUNCAN, Petitioners, v. BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY and VISITING INTERNATIONAL FACULTY PROGRAM (VIF), Respondents.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL DKT NO. EDUOR 01525-01N Agency Ref. No. 420-11/00 **STIPULATION OF DISMISSAL WITH PREJUDICE**

The matter in dispute in the above-entitled action having been amicably resolved by and between the parties with the adoption into law of Bill and Joint Resolution A1152, a copy of which is attached hereto, it is hereby stipulated and agreed that the Petition of Appeal be and is hereby dismissed with prejudice without costs against either party.

Dated: April 5, 2002

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN, P.C.
Attorneys for Petitioners

By: _____
Kathleen A. Naprstek, Esq.

KING, KING & GOLDSACK
Attorneys for Respondent, Board of Education of the City of Plainfield

By: _____
Victor E. D. King, Esq.

DRINKER, BIDDLE & SHANLEY, LLP
Attorneys for Respondent, Center for International Education, Inc.

By: _____
Charles J. Vinicombe, Esq.

ZAZZALI, FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

the teacher to obtain any necessary certification to teach in the public schools.

(cf: N.J.S.18A:26-8.1)

3. (New section) a. A board of education may employ a teacher from a foreign country who is enrolled with an approved international agency which operates a teacher placement program in a subject area in which the State Board of Education has determined there is a contemporaneous critical shortage of certified teachers. Prior to the employment of a teacher from a teacher placement program in a subject area of critical shortage, the board of education shall first make a good faith effort to employ a State certified teacher and shall document its inability to hire an appropriately certified teacher with the Department of Education.

b. A board of education may employ a teacher from a foreign country who is enrolled with an approved international agency which operates a teacher exchange program, permitting a teacher from a foreign country to directly substitute for the services of a permanently employed State certified teacher.

4. (New section) a. A teacher from a foreign country shall be authorized to teach in the United States under an international teacher placement program or a teacher exchange program as authorized by any federal law, and shall be certified in accordance with the provisions of subsection b. of this section to teach for a period of no more than three years.

b. In order for a teacher from a foreign country to be certified under this section, the teacher shall:

(1) meet the eligibility requirements for a provisional instructional certificate or possess equivalent qualifications as determined by the State Board of Education; and

(2) demonstrate the ability to speak, read and write the English language fluently, in accordance with criteria established by the State Board of Education.

c. A teacher from a foreign country employed pursuant to this act shall be deemed to be an employee of the public school district, and as such shall be eligible to become a member of the bargaining unit defined in the applicable agreement with the public school district.

5. This act shall take effect immediately.

Exempts teachers from foreign countries from teacher citizenship requirements and permits boards of education to temporarily employ such teachers.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

April 18, 2002
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

4/23/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 25 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

214-02

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON REMAND
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning Board contested the Department's determination that student S.R., who was living in a Correction Center, was a resident of the District and that the Board was responsible for the costs of her education. The Department contended that the Board was properly assigned responsibility for S.R. because S.R.'s parent or guardian resided in the District on January 15, 1997, the date of S.R.'s placement in the Center. The Board sought restoration of $12, 281 in State aid. The 1998-99 school year was the period in question.

The ALJ ordered the amount of $12,281 be restored to the State aid received by the Board, concluding that without more evidence, the Department could not show that S.R.'s parent or guardian was a resident in the District on January 15, 1997. The Commissioner set aside the Initial Decision. Noting that the Board carried the burden in this matter, the Commissioner found that he was unable to rule in the absence of an analysis conducted under the proper burden of proof. The matter was remanded for further proceedings.

On remand, the ALJ found that the Board's case was based entirely on hearsay and that the Board did not carry the burden of persuasion in this matter. The petition was dismissed.

The Commissioner concurred that the Board failed to meet its burden of proving that the parent of S.R. was not a resident of its District when S.R. was placed in a State institution, so that the Department's determination that the Board was the District responsible to pay tuition for S.R. for the 1998-99 school year must be upheld.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6441-01

AGENCY DKT. NO. 417-9/98

(EDU 10117-98 REMANDED)

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,

Respondent.

Robert A. Blanda, Esq., for petitioner (Blanda & Blanda, attorneys)

Todd J. Schwartz, Deputy Attorney General, for respondent (David Samson, Attorney General of New Jersey, attorney)

Record Closed: February 26, 2002 Decided: April 12, 2002

BEFORE **BRUCE R. CAMPBELL**, ALJ:

The petitioner, South River Board of Education, disputes the Division of Finance, New Jersey Department of Education determination that S.R., a minor, is or was resident in the District and that the Board is responsible for the costs of her education. The Board seeks restoration of $12,281.00 in State aid.

The respondent, Department of Education, argues that the Board properly was assigned responsibility for the pupil because the pupil's parent resided in South River on January 5, 1997, the date of the pupil's placement.

The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case. *N.J.S.A.* 52:14F-1 through – 13. Following a limited hearing, the matter was extensively briefed. On November 1, 2000, an initial decision issued finding for the South River Board of Education. The matter was remanded following a decision of the Commissioner on December 18, 2000, which was affirmed by the State Board of Education on July 10, 2001. The matter was received in the Office of Administrative Law in October 2001. The parties have filed additional letter briefs. The initial decision is incorporated by reference.

The South River Board of Education argues that the leading decision in this matter is *State-Operated School District of the City of Newark v. New Jersey State Department of Education, Division of Finance*, Comm'r of Ed. (Mar. 22, 1999). The *Newark* decision had only one issue: whether or not the board had established by a preponderance of the credible evidence that the Division's determination that *Newark* was the district of residence in that matter was arbitrary, capricious or unreasonable. More important is the conclusion reached in that decision in which the Commissioner said the absence of any evidence to the contrary made it reasonable for Newark to rely on DYFS's records concerning where the subject parent lived at the time the pupil was originally placed by DYFS.

The further conclusion was that the petitioner had not borne its burden of proof that it was unreasonable, arbitrary or capricious for the Division to rely upon DYFS records, which plainly indicated that the pupil's mother was a resident of Newark until February 1989. More important still is the final conclusion that the Division's determination that Newark was the district of resident of the pupil's mother prior to the original placement was reasonable.

South River contends that the original initial decision in this matter in no way shifted the burden of proof and neither the respondent nor the Commissioner must take out of context the

wording of that decision but look at the entire decision as well as the criteria set forth in *Newark*, above.

Inquiries made by Dr. Marino on behalf of the Board established that she made all efforts to determine whether or not the parent of S.R. was a resident of South River at any time. Her testimony was that she reviewed all of the records of the petitioner to show that not only S.R. was never a student at South River Public Schools, but none of her siblings was ever a student in those schools. There is no argument that the testimony of Dr. Marino is other than credible and consistent with experience in matters of this type.

Again, the criteria in *Newark* stated that the absence of any evidence to the contrary made it reasonable for Newark to rely on DYFS records. That is distinguishable from the facts in this matter because the petitioner made all of these inquiries and did all it could do through the investigation of Dr. Marino.

The initial decision concluded that the presence of an IEP is inconclusive. Dr. Marino did inquire as to the address given for the parent in South River and was able to obtain a statement from the landlord at that address that this parent had not lived there as a tenant before 1996 or thereafter. In *Newark*, the DYFS report was reasonable proof that the parent lived in Newark. In the present case, neither party can show that the parent was a resident of South River on January 15, 1997. This is not a shift of the burden of proof but rather goes to the issue of whether the petitioner has met its proof that the action taken by the respondent is unreasonable, capricious or arbitrary. The only evidence provided on behalf of the respondent is basically what S.R. told state authorities while incarcerated. There is no time established when the parent was a resident of South River.

Experience is important as to what one can conclude from the facts. The respondent does have an obligation to not place this financial burden on any local school district unless it has clear evidence of residency. The witnesses produced and all evidence produced by the respondents fall short of any criteria that would conclude that the parent was a resident on January 15, 1997. The initial decision did not conclude that the respondent was required to conduct its own investigation, but rather that the proofs submitted and relied upon as to the

parent residing in South River were inadequate. The Department contends that it can rely on the district of residency information submitted to it by the Department of Corrections. However, that determination was made only upon statements that are not sworn to. The respondent has not made any attempts to search the records to determine the address of the parent and yet argues it should be allowed to rely on the meager evidence presented.

The Division of Finance argues that the party asserting a claim has the burden to prove the claim *WCI-Westinghouse, Inc. v. Edison Township*, 7 *N.J.* Tax 610 (Tax Ct. 1985), aff'd 9 *N.J.* Tax 86 (App. Div. 1986). As the Commissioner of Education stated in *Board of Education of Bradley Beach v. New Jersey Department of Education*, OAL DKT. No. EDU 4975-99, Comm'r of Ed. (July 3, 2000), it is well established that when a Board contesting a district of residence determination based upon the information provided by the Department of Human Services, the Board bears the burden of proving that such determination was in error. The Division also cites *Newark*, above.

The standard of proof in administrative proceedings is a preponderance of the evidence. *In Re Polk License Revocation*, 90 *N.J.* 550 (1982). Thus, in this case, South River had the burden of proving by a preponderance of the credible evidence that the Department's determination assigning the district responsibility for S.R. for the 1998-99 school year was in error.

The Department's decision that South River was the district of residence for the year in question should be upheld because the Department correctly relied on the information furnished by the Department of Corrections. *N.J.S.A.* 18A:7B-12 and the companion regulation, *N.J.A.C.* 6:20-5.3, assign financial responsibility for a child who has been placed in a residential state facility by a state agency. Under the statutory and regulatory plan, the district of residence of the parent as of the last school day prior to October 16, is responsible for the child for the current year. If that cannot be determined, then the district in which the parent is residing at the time of the initial placement is the district responsible for the cost of the student's education.

In this matter, the Department was unable to determine the residency of the parent on October 15, 1997. It made its determination in accord with the second element of the statutory

test, namely, where the parent resided at the time of the student's initial placement in State facility. The placement occurred on January 15, 1997. Thus, the key date in the matter is where the parent lived on January 15, 1997.

At the pertinent time, *N.J.A.C.* 6:20-5.3(b) read:

> The Commissioner shall determine the "present district of residence" or "district of residence" referred to in *N.J.S.A.* 18A:7B-12(b) based upon the address submitted by the Department of Corrections or the Department of Human Services on forms prepared by the Department of Education.

In the case involving the Newark Board of Education, the administrative law judge held that:

> [B]y requiring the Department of Education to determine residence based upon information from the Department of Human Services, *N.J.A.C.* 6:20-5.3(b), the regulation inferentially did not require the Division to conduct its own independent investigation. To require such a search in the absence of an expressed requirement would put an additional and unnecessary burden on the Division.

In the present case, the Department determined the district of residence precisely in that way. Exhibit R-3 is a Department of Corrections memorandum dated February 17, 1998 on the subject of address verification. The memorandum identifies M.R. as S.R.'s mother and lists her address as 31A Maple Street, South River, New Jersey. The recipient of the memorandum testified at hearing that the sources of the information were an interview with S.R., the pre-sentencing investigation and a Monroe Township Board of Education IEP. Sarlo further testified that there were no documents in his office reflecting a different address.

At hearing, South River failed to prove that the Department's determination was incorrect. First, the district presented testimony that a records check was performed and no person with S.R.'s name was ever enrolled in the South River public schools. That is not the standard, however. The criterion in this case is the parent's residence at the time of the child's initial placement by a State agency. There are many instances in which a parent lives in a district, but his or her children are not enrolled in the public schools of that district.

Second, the district seeks to rely on an alleged statement made by M.R. that she moved to 10 Livingston Avenue in New Brunswick in "August '97, I think." This was clearly hearsay because M.R. was not at the hearing. The South River Director of Student Personnel Services testified to the comment. Even assuming, *arguendo,* that the statement is admissible, its supports the Department's decision rather than South River's position. The key date is January 5, 1997, when S.R. was placed. If M.R. did not move until August 1997, that suggests she was still in South River in January 1997.

Third, South River would rely on a checklist purportedly signed by the owner of 31A Maple Street that M.R. never lived there. Once again, this document is clearly hearsay. The owner did not testify at the hearing. Assuming, *arguendo*, that the checklist is admissible, that the landlord was not aware of M.R. is not dispositive. M.R. may have lived there, but not been shown on the lease. There was no testimony about whether or how often the landlord visited the property.

South River's case is based entirely on hearsay. Accordingly, it failed to show by a preponderance of the evidence that the Department's determination in this case was in error.

DETERMINATION AND ORDER

The South River Board of Education expended considerable time and effort in an attempt to verify the critical address. Its efforts were akin to trying to prove a negative. It is fair to say that the South River Board of Education raised doubt as to the accuracy of the Department's information which, of course, came in turn from the Department of Corrections. Information gathered from inmates has occasionally been known to be inaccurate.

As the Department of Education correctly points out, however, the standard of proof in an administrative proceeding is a simple preponderance of the credible evidence in the record.

Had South River been able to produce enough evidence to preponderate, it would have been the Department's burden to rebut or mitigate that evidence. As the matter stands, however,

the evidence adduced does not clear that hurdle. Although I have no criticism of South River's evidence and arguments and considerable respect for its efforts, I nevertheless **FIND** that it has not carried the burden of persuasion in this matter. Accordingly, I **CONCLUDE** that the petition of appeal must be **DISMISSED**.

In consideration of the foregoing, the petition of the Board of Education of the Borough of South River is **DISMISSED**. It is so **ORDERED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

APR 12 2002
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

4/16/02
DATE

Debbie Antonaitis (for)
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 18 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cad

WITNESSES

For Petitioner:

Judith A. Marino, Ed.D.

For Respondent:

Anthony J. Sarlo

EXHIBITS

Petitioner's

P-1 Letter, Marino to Cagno, June 24, 1999

P-2 Letter, Marino to Cagno, July 13, 1999, 2 pp.

P-3 Memorandum, Yetman to Marino, March 3, 2000, 2 pp., and letter, Marino to Yetman, January 18, 2000

Respondent's

R-1 New Admissions Interview form re: S.R., January 13, 1997

R-2 Memorandum to Sarlo from Chukumba re: S.R., February 17, 1998

R-3 Individualized Education Program for S.R. prepared by Monroe Township Public Schools, April 1990, 17 pp.

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON REMAND
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner filed exceptions and respondent filed reply exceptions in accordance with *N.J.A.C.* 1:1-18.4, and these were duly considered when rendering the within decision.

Upon careful and independent review of the record, the Commissioner concurs that petitioner has failed to meet its burden of proving that the parent of S.R. was not a resident of petitioner's district when S.R. was placed in a State institution, so that respondent's determination that petitioner was the district responsible to pay the tuition for S.R. for the 1998-1999 school year must be upheld.

Accordingly, the Initial Decision of the ALJ is adopted as the final decision in this matter for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/31/02

Date of Mailing: 5/31/02

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

215-02

JO ANNE CRAIG,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning First Steps Academy, an early childhood education provider, charged that the Board improperly pulled Abbott-funded students from its institution and sought reversal of this action. The Board contended that it terminated its agreement with First Steps "due to material breach." (Due to the arrest of petitioner for fraud and the confiscating of the institute's records, the Board terminated the contract on April 9, 2001, for "failure to comply with applicable federal, state, or local requirements.") The contract was a one-year contract expiring on June 30, 2001.

The ALJ concluded that the dispute was a contract action for money damages and did not arise under school laws, and that the issue to be decided was whether under the terms of the agreement or by reason of overriding public policy, the Trenton BOE acted properly in terminating the agreement. The ALJ concluded that the dispute belonged in the Superior Court as a civil action for damages. Since school laws were not at issue, the ALJ dismissed the matter.

The Commissioner affirmed with modification the ALJ's determination to dismiss the petition. The Commissioner fully agreed that petitioner's specific claims and the Board's defense to them constituted a contract dispute properly heard in Superior Court, rather than an education law dispute cognizable before the Commissioner. However, because the ALJ concluded that *all* issues arising from a termination of the contract at issue would properly be raised in Superior Court, the Commissioner clarified that, *had it been raised herein*, the question of whether the contract between petitioner and the Board was properly terminated pursuant to the *specific requirements of the termination subsection for failure to provide early childhood education services* of said agreement would constitute an issue properly cognizable before the Commissioner. Finally, the Commissioner rejected petitioner's claims concerning nonrenewal of the contract as time barred and moot. The petition was dismissed.

May 30, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4136-01

AGENCY DKT. NO. 215-6/01

JOANNE CRAIG,

Petitioner,

v.

CITY OF TRENTON

BOARD OF EDUCATION,

Respondent.

Steve Hallett, Esq., for the petitioner

Richard E. Golden, Esq., for the respondent (Sumners, George & Dortch, P.C., attorneys)

Record Closed: February 28, 2002 Decided: April 12, 2002

BEFORE **ANTHONY T. BRUNO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner ("Craig") petitioned the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-9 for "relief granting a stay of the Trenton Board of Education's ['Trenton BOE'] action to deny . . . Abbott Funding" to First Steps Academy ("First Steps"). Trenton BOE responded that it terminated its agreement with First Steps "due to material breach."

On June 22, 2001 this matter was transmitted to the Office of Administrative Law for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A* 52:14F-1 to –13. Craig's request for emergent relief was heard on July 2, 2001 and continued to July 24 to allow the parties time to exchange documents and pleadings. On July 24 the hearing of Craig's application for emergent relief concluded and an Order Denying Emergent Relief was entered on July 26. The Commissioner issued his concurrence with the determination on August 8; the plenary hearing on the merits was scheduled for October 22. The plenary hearing commenced on that date and was concluded on January 4, 2002. Witnesses who testified and exhibits admitted into evidence are listed in the appendix.

The parties were granted leave to submit post-hearing memoranda. Because of counsel's illness the memoranda were not submitted simultaneously. Accordingly, the hearing record remained opened until February 28 should any responses be filed. The hearing record closed on February 28, 2002.

FACTUAL CONSIDERATIONS

The joint exhibits (J-1 and –2) provide the relevant background in this matter. In July 2000 Craig, Executive Director and owner of First Steps signed a contract with Trenton Board of Education (Exhibit J-1) whereby First Steps, a Department of Health Services licensed Child Care Program agreed to provide an early childhood educational program to Trenton children and the Trenton BOE was to pay First Step $3500 per child. The term of the contract was "from July 1, 2000 to June 30, 2001" (Paragraph III, A), and was renewable for "an additional one (1) year term" upon Trenton BOE's written notification issued on or before May 1 (Paragraph III, B) but then subject to First Steps, written acceptance or rejection of the renewal offer within 30 days (Paragraph III,C).

In March 2001 Trenton BOE received information from an undisclosed person that First Steps altered the birth certificates of several of young people attending First Steps. Subsequent investigation produced evidence that the birth certificates offered by First Steps to Trenton BOE

for 5 children had different dates of birth than shown of the birth certificates on file with the Trenton Director of Vital Statistics (Exhibit R-3).

Based upon information provided by the Trenton BOE the Trenton Police Department issued 6 criminal complaints on April 9 against Ardenia Jones (Exhibit J-2), Craig's daughter and payroll and human resource person at First Steps. Jones was charged 4 times with forgery with purpose to defraud, once with forgery without authorization, and once with theft by deception.

On April 5, Trenton BOE personnel and Trenton police arrived at First Steps at 7 a.m. Based upon a claim of search warrant all of the First Steps records were taken, including computers, files for all students, and documents to relating to post and current students. On April 5 Trenton BOE personnel posted a notice on the door at First Steps directing parents to the Trenton BOE Central Administration Building. First Steps did not open because it no longer had required personal records and information in its office.

The next morning Sherry Byrd, Center Community Liaison for the Trenton BOE met parents at First Steps to also advise them of where to go for services.

On April 9 the Trenton BOE addressed a letter to Craig purporting to terminate its Abbott Preschool Educational Program contract with First Steps because of First Steps "failure to comply with applicable federal, state, or local requirements." (Exhibit R-4),

ANALYSIS AND CONCLUSION

Petitioner instituted this matter pursuant to *N.J.S.A.* 18A:6-9: "The commissioner shall have jurisdiction to hear and determine without cost to parties, all controversies and disputed arising under school laws, . . ." Although neither party questioned the role of the commissioner in this matter, it must be noted that the issue in this matter is no longer whether a stay should be ordered. A conclusion stated in the Order Denying Emergent Relief was "that petitioner's potential for recovery is limited to the contract term ending June 30, 2001."

The contract was a one-year contract expiring on June 30, 2001. Craig's petition is dated June 21, filed on that date, and was transmitted to the Office of Administrative Law the next day. Trenton BOE also received the petition and supporting documents on June 22, at the earliest. The hearing on the application for emergent relief could not be scheduled before July 2, six business days later. I agree with the statements of the attorney for Trenton BOE made at that hearing that the contract was expired and that the loss, if any, suffered by Craig could be covered by money damages. I **CONCLUDE** that the dispute between Craig and the Trenton BOE is a contract action for money damages and does not arise under school laws. The issue to be decided is whether under the terms of the agreement or by reason of overriding public policy, the Trenton BOE acted properly in terminating that agreement on April 9. The collateral issues are the amount of money owed to Craig and the amount of money paid by Trenton BOE for underaged children attending First Steps under the Abbott Preschool Educational Programs. I find the hearing record woefully inadequate to answer either issue.

Craig questioned the authenticity of the birth certificates (Exhibit R-3). She could not distinguish whether the certificates may have been altered. The birth certificates submitted into evidence for N.A.A. and N.L.A. shows dates of birth of 9/21/1997 and 10/21/1997. S.E.C.'s birth certificates show 9/03/1997 and 10/03/1997 as his dates of birth. The birth certificates for N.S.H. and E.N.B. indicate the same birthday of 3/12/1997 but the birth records were not filed with the Registrar until March 1998. The memorandum dated March 9, 2001 from Howard B. White attached to copies of the birth certificates and the Certification of Margaret Herbert were excluded from the hearing record pursuant to *N.J.A.C.* 1:1-15.1(c)2.

The absence of the opportunity for Craig "to resolve the deficiency" as provided at Paragraph V,B of the agreement appears to demonstrate that notwithstanding the claimed failure of First Steps to comply with "applicable federal, state or local requirements" Trenton BOE ignored the 10 day period First Steps was afforded in the contract to correct any deficiency. Whether First Steps could have resolved the alleged deficiency within 10 days was not addressed during the hearing.

Because the date the contract ended date is vital to assessing the damage claims of the parties, an accurate amount cannot be concluded at this time. The $3500 per pupil compensation

fixed by the contract was translated by Craig to $350 per pupil per month. She estimated pupil population of 56 or 58 for March and that Trenton BOE owed First Steps $19,600 for that month. Although Trenton BOE did not advance its offset, one presumes the claim includes the amount paid First Steps for the 5 underaged children for the 7 months between September 1 and March 31.

The foregoing speculations re-enforce the conclusion that this dispute belongs in the Superior Court as a civil action for damages. School laws are not in issue and therefore this matter should be dismissed as moot.

ORDER

Accordingly, it is **ORDERED** that the petition in this matter be **DISMISSED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 12, 2002
DATE

ANTHONY T. BRUNO, ALJ

Receipt Acknowledged:

4-15-02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 16 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

tmp

APPENDIX

WITNESSES

For petitioner:

Joanne Craig

Ardenia Jones

Patricia Leverett

For respondent:

Sherry Byrd

EXHIBITS

For petitioner:

P-1 Roster and Attendance Reports – April & May 2001

For respondent:

R-1 Pupil Registration forms (5)

R-2 Payment Ledger – September – February

R-3 Ten (10) birth certificates

R-4 Termination letter (4/9/01

Joint:

J-1 Abbott Preschool Educational Program Contract (7/27/00)

J-2 Six criminal complaints against Ardenia Jones (4/9/01)

OAL DKT. NO. EDU 4136-01
AGENCY DKT. NO. 215-6/01

JO ANNE CRAIG,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	
RESPONDENT.	:	

The record and Initial Decision of the Office of Administrative Law in this matter have been reviewed. Petitioner filed exceptions 11 days out of time, and, as such, they were not considered in rendering the within decision. *See, N.J.A.C.* 1:1-18.4.[1]

Upon review, the Commissioner affirms, with modification, the Administrative Law Judge's (ALJ) determination to dismiss the petition. The Commissioner fully agrees that petitioner's claims constitute a contract action properly brought in Superior Court, rather than an education law dispute cognizable before the Commissioner. As determined by the ALJ, "[t]he issue to be decided is whether under the terms of the agreement or by reason of overriding public policy, the Trenton BOE acted properly in terminating that agreement on April 9" (Initial Decision at 4), thus raising the question of whether, pursuant to *contract* law, the agreement was properly terminated by the Board, a question not encompassed within educational law over which the Commissioner has jurisdiction pursuant to *N.J.S.A.* 18A:6-9, but rather to be

[1] Because the exceptions were not considered, neither was respondent's reply to them.

adjudicated in Superior Court. *See, Picogna v. Board of Educ.*, 249 *N.J. Super.* 332 (App. Div. 1991); *South Orange-Maplewood Ed. Assn. v. Bd. of Ed. of So. Orange*, 146 *N.J. Super.* 457 (App. Div. 1977).

However, contrary to the analysis of the ALJ, who concluded that *all* issues arising from a termination of the contract at issue would properly be raised in Superior Court, the Commissioner clarifies that, *had it been raised herein*, the question of whether the contract between Petitioner Craig and the respondent Board was properly terminated pursuant to the *specific requirements of the termination subsection* of said agreement would constitute an issue properly cognizable before the Commissioner.

Specifically, the contract at issue sets forth, in subsection V, certain provisions governing termination of the contract. (*See*, Exhibit J-1 at 4.) This subsection requires ten days notice to the provider to correct deficiencies in the event the terms of the agreement or applicable Federal, State or local requirements are not met. The subsection also explicitly states that appeals of the Board's termination of the contract *pursuant to subsection V* are to the Commissioner in accordance with *N.J.A.C.* 6A:3. (*Ibid., emphasis supplied*)

Therefore, the Commissioner clarifies herein that subsection V of the contract at issue governs termination of the contract for *failure to satisfy provisions* thereof, or Federal, State or local requirements, *pertaining to the provision of early childhood educational services to children in the Trenton School District*, which is an Abbott district. As such, the Commissioner concludes that he was properly vested by the terms of the contract with jurisdiction over disputes arising from termination of the contract in accordance with subsection V because it concerns termination of the contract

for *educational* reasons; *i.e.* failure to properly provide early childhood services. Such issues, because they are educational in nature, not contractual, are within the scope of the Commissioner's jurisdiction. Thus, appeal of a contract termination *specifically effectuated in accordance with subsection V thereof* would properly be filed with the Commissioner.

In this case, the Board does not argue that it terminated the contract pursuant to subsection V for failure to comply with the terms of the contract or applicable policies pertaining to the provision of early childhood services in this Abbott district. Rather, the Board has conceded that it did not terminate pursuant to subsection V, and, instead, has argued that it properly terminated the agreement based on a material breach on the part of petitioner because the arrest of petitioner and her daughter and the removal of the records of the pupils petitioner was serving in her facility resulted in petitioner becoming legally unable to fulfill the contract. (*See*, respondent's Post-Hearing Brief, dated January 17, 2002.) Petitioner's material breach, the Board argues, is what permitted immediate termination of the contract. (*Ibid.*) Therefore, as held by the ALJ, the matter at hand is a contractual dispute over which the Commissioner lacks jurisdiction, and the ALJ's dismissal of the petition for that reason must be affirmed.

Finally, the Commissioner rejects petitioner's arguments in its submissions below seeking renewal of the contract. Initially, the Commissioner notes that petitioner never filed a petition or amended petition seeking renewal of the contract, and that the only relief sought in the petition was a stay of the termination of the agreement for the 2000-2001 school year at issue herein. Moreover, it is clear from the terms of the contract that renewal is at the discretion of the Board, and that the Board did

not notify petitioner of its intent to renew pursuant to subsection III of the agreement. (*See*, Exhibit J-1 at 4.) Likewise, because petitioner never asserted claims concerning the nonrenewal of the contract in the petition, and, considering that one year has passed since the Board declined to renew the contract, the Commissioner determines that such claims are time barred and moot.

Based on the foregoing, the ALJ's Initial Decision recommending dismissal of the petition, as modified herein, is adopted as the final decision in this matter.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5/30/02

Date of Mailing: 6/3/02

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* within 30 days of filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

218-02

BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	
PETITIONER,	COMMISSIONER OF EDUCATION
V.	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, **(IN THE MATTER OF THE DISTRICT'S EARLY CHILDHOOD AID APPLICATION)**,	
RESPONDENT.	

June 6, 2002

OAL DKT. NO. EDU 679-02
AGENCY DKT. NO. 45-2/02

BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	
PETITIONER,	COMMISSIONER OF EDUCATION
V.	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, **(IN THE MATTER OF THE DISTRICT'S EARLY CHILDHOOD AID APPLICATION),**	
RESPONDENT.	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 6/6/02

Date of Mailing: 6/6/02

219-02

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY, PETITIONER, V. NEW JERSEY STATE DEPARTMENT OF EDUCATION, **(IN THE MATTER OF THE DISTRICT'S EARLY CHILDHOOD AID APPLICATION),** RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

June 6, 2002

OAL DKT. NO. EDU 4436-99
AGENCY DKT. NO. 109-5/99

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, **(IN THE MATTER OF THE DISTRICT'S EARLY CHILDHOOD AID APPLICATION),**	:	
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 6/6/02

Date of Mailing: 6/6/02

220-02

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY, PETITIONER, V. NEW JERSEY STATE DEPARTMENT OF EDUCATION, **(IN THE MATTER OF THE DISTRICT'S EARLY CHILDHOOD AID APPLICATION),** RESPONDENT.	COMMISSIONER OF EDUCATION DECISION

June 6, 2002

OAL DKT. NO. EDU 680-02
AGENCY DKT. NO. 44-2/02

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, **(IN THE MATTER OF THE DISTRICT'S EARLY CHILDHOOD AID APPLICATION)**,	:	
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 6/6/02

Date of Mailing: 6/6/02

222-02

BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION **(IN THE MATTER OF THE DISTRICT EARLY CHILDHOOD AID APPLICATION)**	:	DECISION
RESPONDENT.	:	

June 10, 2002

OAL DKT. NO. EDU 4029-99
AGENCY DKT. NO. 48-3/99

BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION **(IN THE MATTER OF THE DISTRICT EARLY CHILDHOOD AID APPLICATION)**	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 6/10/02

Date of Mailing: 6/10/02

223-02

223-02

HARRY INDAR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 10, 2002

OAL DKT. NO. EDU 9519-00
AGENCY DKT. NO. 361-9/00

HARRY INDAR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 6/10/02

Date of Mailing: 6/10/02

224-02

224-02

VERA JACKSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 11, 2002

OAL DKT. NO. EDU 9521-00
AGENCY DKT. NO. 358-9/00

VERA JACKSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 6/11/02

Date of Mailing: 6/11/02

225-02

225-02

ARLEATHA GAINER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 11, 2002

OAL DKT. NO. EDU 10219-00
AGENCY DKT. NO. 414-11/00

ARLEATHA GAINER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 6/11/02

Date of Mailing: 6/11/02

226-02

KEVIN LEAHY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 11, 2002

OAL DKT. NO. EDU 9912-00
AGENCY DKT. NO. 375-9/00

KEVIN LEAHY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 6/11/02

Date of Mailing: 6/11/02

227-02

GEORGE GIPSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 11, 2002

OAL DKT. NO. EDU 10351-00
AGENCY DKT. NO. 285-9/99

GEORGE GIPSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 6/11/02

Date of Mailing: 6/11/02

228-02

JOEL DIAMOND,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 11, 2002

OAL DKT. NO. EDU 10353-00
AGENCY DKT. NO. 285-9/99

JOEL DIAMOND,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 6/11/02

Date of Mailing: 6/11/02

229-01

RITA FARMER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 11, 2002

OAL DKT. NO. EDU 10352-00
AGENCY DKT. NO. 285-9/99

RITA FARMER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 6/11/02

Date of Mailing: 6/11/02

230-02

DR. LOUIS TALARICO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 11, 2002

OAL DKT. NO. EDU 02164-00
AGENCY DKT. NO. 38-1/00

DR. LOUIS TALARICO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 6/11/02

Date of Mailing: 6/11/02

231-02

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTAGUE, SUSSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

June 12, 2002

OAL DKT. NO. EDU 5170-01
AGENCY DKT. NO. 91-4/01

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTAGUE, SUSSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 6/12/02

Date of Mailing: 6/12/02

240-02

R.B., on behalf of minor children, I.L. and S.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 18, 2002

OAL DKT. NO. EDU 6561-01
AGENCY DKT. NO. 369-9/01

R.B., on behalf of minor children, I.L. and S.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 6/18/02

Date of Mailing: 6/18/02

241-02

JOSEPH CONLON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 18, 2002

OAL DKT. NO. EDU 10354-00
AGENCY DKT. NO. 285-9/99

JOSEPH CONLON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 6/18/02

Date of Mailing: 6/18/02

243-02

S.B., III, on behalf of minor children, S.B., IV, V.B. AND L.L.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY, RESPONDENT.	:	

SYNOPSIS

Petitioning parent challenged the Board's residency determination that S.B., IV, V.B. and L.L. were not domiciled in the District. The Board counterclaimed for tuition.

In light of testimony of the parties involved, the ALJ determined that S.B., III, had custody of the children and that since he was domiciled within the Union Township school district, the children were entitled to attend the District's public schools free of charge. The ALJ reversed the Board's determination denying domicile eligibility to the children and ordered the children be permitted to attend the Union Township public schools.

The Commissioner adopted the findings and determination in the Initial Decision as his own.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9659-01
AGENCY DKT. NO. 480-11/01

S.B., III, ON BEHALF OF MINOR CHILDREN, S.B., IV, V.B. AND L.L.,

Petitioner,

v.

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

Respondent.

Shellie J. Williams, Esq., appearing for Petitioner

Joseph M. Wenzel, Esq., appearing for respondent
(Lum, Danzis, Drasco, Positan & Kleinberg, attorneys)

Grace Cortes, Interpreter, appearing pursuant to *N.J.A.C.* 1:1-14.3(c)

Record Closed: April 17, 2002 Decided: May 3, 2002

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

Petitioner is challenging the Board of Education of the Township of Union (Board) residency determination. The Board is counterclaiming for tuition.

The Department of Education transmitted the matter to the Office of Administrative Law (OAL) on December 19, 2001, for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

FINDINGS OF FACT

Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I make the following findings of fact, which are essentially undisputed, in this matter.

1) S.B., III, is the parent of S.B., IV, V.B. and L.L.

2) S.B., III, resides and is domiciled at the Union address.

3) S.B., III, owns the property at Quebec Avenue, Irvington, where M.V.B., S.B., III's, estranged wife resides with S.B., III's, nephew.

4) S.B., III, has custody of S.B., IV, L.L., and V.B. pursuant to an agreement executed by S.B., III, and M.V.B. on August 1, 2001.

5) S.B., III, is the owner of record of the premises located in Irvington.

DISCUSSION AND CONCLUSION

The Respondent has asserted that S.B., IV, V.B., and L.L. are not domiciled within the district; consequently, they are not entitled to a public education in Union.

The statute provides that the public schools of a district are free to persons over five and under twenty years of age who are domiciled within the school district. *N.J.S.A.* 18A:38-1. Accordingly, the issue to be resolved in this matter is whether or not these students are domiciled within the Union Township school district.

Generally speaking, domicile is the place of a person's abode, where he or she has the present intention of remaining and to which, if absent, he or she intends to return. A person may have multiple residences, but may have only one true domicile at one time. Residence may coincide with domicile, but does not alone determine it. Where there are several residences domicile is that place which the person regards as his or her true and permanent home and once established continues until it is superceded by a new domicile. *Board of Education of Twp. of Middle, Cape May Co. v. K.K.,* 93 *N.J.A.R.* 2d (EDU) 461 (1992). Citation omitted. In this matter, the question involves the domicile of minor children. Here, the father has custody of the three children found by the district to be ineligible. Ordinarily, the domicile of a child follows that of the parents when there are no complicating factors such as divorce or separation or assertion of separate domicile by the other parent. *Id.* Citations omitted.

There is no question that the parents, S.B., III and M.V.B. are estranged and living separate and apart. The estrangement was clearly demonstrated during the course of the hearing when I had the opportunity to observe the interaction between the two. Moreover, there was testimony from S.B.B. that she resides with S.B., III, and their daughter at the Union County address. In addition, M.V.B. corroborated the testimony of S.B.B. Documentary proof in the form of driver's license and car registration, as well as copies of two successive leases on the premises at the address listed in the school records were admitted into evidence. In addition, S.B., III, testified that he has no intention of returning to the property he owns in Irvington.

Accordingly, it is clear that S.B., III's, domicile is in the Township of Union, Union County, and I do so **FIND**.

Since there is the complicating factor of a separation between the parents, the issue of the domicile of the children must be resolved. In a document dated August 1, 2001, M.V.B. clearly gives over custody to the three children to S.B., III. Her testimony was that at the time she intended to move to New York; however, after signing the document and giving custody over to S.B., III, she decided to remain in New Jersey.

Both S.B.B. and M.V.B. testified to the custody arrangement as did S.B., III. It was clear to me during the hearing that this was an extremely difficult situation for both of the women involved. For this reason I **FIND** their testimony to be credible.

In addition to her testimony with regard to the custody agreement, M.V.B. testified that there are occasions when the children, either all or some, will stay at her home in Irvington during the week. Moreover, she testified that she picks them up each and every morning in Union Township and transports either some or all of them to the high school. She corroborated S.B., III's testimony that the children were with her for an extended continuous period of time during the month of November 2001, when S.B., III was involved with the settlement of his sister's estate.[1]

Accordingly, I **FIND** that custody has been given over to S.B., III, and I **CONCLUDE**, since S.B., III, is domiciled within the Union Township school district, the children are entitled to attend the Union Township public school.

ORDER

It is, therefore, hereby **ORDERED** that the determination denying domicile (residence) eligibility to these children be and hereby is **REVERSED** and the children be permitted to attend the Union Township public high school.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and

[1] His sister died in October 13, 2001. S.B., III, testified that he was extremely involved in estate administration during November 2001 and he asked M.V.B. to keep the children during this period only. They returned to the Union address some time at the end of November or beginning of December.

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 3, 2002
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

5/7/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 13 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Witnesses

David Deventer

Eduardo Goncalves

Grace Cortes

S.B.B.

M.V.B.

S.B.

Exhibits

For Petitioner:

- P-1 St. Michael's Medical Center Discharge Instruction
- P-2 St. Michael's Medical Center Surgical Pathology Report
- P-3 Notarized Letter, August 1, 2001
- P-4 Death Certificate

For Respondent:

- R-1 Investigator's Report, November 7, 2001
- R-2 Investigator's Report (February 14 & 20, 2002)
- R-3 Investigator's Report (March 12, 2002)

Joint:

- J-1 Tuition Rates 2001-02
- J-2 School Year Calendar, 2001-02
- J-3 S.B., III – vehicle registration and operator license
- J-4 Verizon bill, September 11, 2001
- J-5 AT&T letter, August 20, 2001
- J-6 Civil Action Order, June 23, 1992
- J-7 Residential Lease, August 1, 2001
- J-8 Residential Lease, March 1, 2002

OAL DKT. NO. EDU 9659-01
AGENCY DKT. NO. 480-11/01

S.B., III, on behalf of minor children, S.B., IV, V.B. AND L.L.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY, RESPONDENT.	:	

The record and Initial Decision in this matter have been reviewed. No exceptions were filed by the parties.

Upon such review, the Commissioner determines to adopt the Initial Decision of the Administrative Law Judge, concluding that petitioner's children are domiciled in respondent's district and entitled to a free education in respondent's district, as the final decision in this matter for the reasons set forth therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/20/02

Date of Mailing: 6/20/02

242-02

#242-02E

K.Mc., ON BEHALF OF R.A.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE GATEWAY REGIONAL SCHOOL DISTRICT,	:	DECISION ON MOTION
RESPONDENT	:	

June 19, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 04285-02
AGENCY DKT. 182-6/02

K. MC., ON BEHALF OF HER CHILD, R.A.K.,
Petitioner,
v.
BOARD OF EDUCATION OF GATEWAY REGIONAL SCHOOL DISTRICT, GLOUCESTER COUNTY,
Respondent.

K. Mc., petitioner, *pro se*
Russell Paul, Esq., for respondent

Record Closed: June 19, 2002 Decided: June 19, 2002

Before **JEFF S. MASIN**, Acting Chief ALJ:

In this matter the parent of a now 18-year-old student appeals a decision of the local school district denying her daughter, a senior at the Regional High School, participation in the graduation exercises to be held this evening, June 19, 2002. The District determined that the student failed senior English and has not met the State and District academic requirements for graduation. The reasons for her failure may in part relate to attendance problems, but that is at best a speculation, and the Board is not denying her participation based upon any attendance issues. The record is clear that the student did fail English, that the Board's policies and the Student Handbook each specifically advised that failure to complete academic course requirements would bar a student's participation in the graduation, that the student knew she was

in trouble, and that her commendable efforts to raise her grade above the failing mark were, unfortunately, not successful. The parent's concerns about her knowledge of the situation are spread on the record, but the school did communicate with both the student and the aunt with whom the student lived and whose address was the address of record for the student. Based upon the evidence presented and the positions of the parties, and cognizant of the well settled law in New Jersey that the decisions of local school boards are entitled to a presumption of correctness and will stand undisturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motive," *J.M., by his Guardian, D.M. v. Hunterdon Central Regional High School District, Hunterdon County*, 96 *N.J.A.R.2d* (EDU) 415, 419; *Kpera v. West Orange Bd. of Educ.*, 60 *N.J. Super* 288 (App. Div. 1960), I **FIND** that the Board of Education has a rational and legally appropriate grounds for its refusal to permit Ms. K. to participate in the graduation ceremonies and that the Commissioner and State Board of Education will not under such circumstances interfere with that determination. The full reasoning and discussion of the grounds supporting this opinion are contained in the oral decision rendered from the bench this morning. Suffice it to say that there is no question but that the Board decision is, while a difficult one, nevertheless fully supportable under both its own policies and those of the State. Therefore, the emergency appeal cannot succeed on its merits, emergency relief is **DENIED** and the examination of the facts and law demonstrates that no plenary relief could be afforded. The appeal is therefore **DISMISSED.** It is so **ORDERED.**

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

June 19, 2002
DATE

JEFF S. MASIN, Acting Chief ALJ

OAL DKT. NO. EDU 04285-02
AGENCY DKT. NO. 182-6/02

K.Mc., ON BEHALF OF R.A.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE GATEWAY REGIONAL SCHOOL DISTRICT,	:	DECISION ON MOTION
RESPONDENT	:	

The record of this emergent matter and the Administrative Law Judge's (ALJ) Order, which included a summary of the evidence presented at the emergent hearing conducted at the Office of Administrative Law (OAL) on June 19, 2002, have been reviewed.

Upon such review, which has been delegated to him pursuant to *N.J.S.A.* 18A:4-34, the Assistant Commissioner concurs that petitioner has failed to satisfy the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) necessary to warrant the extraordinary remedy of emergent relief.

Accordingly, the recommended Order of the ALJ is affirmed for the reasons expressed therein. This matter is being returned to the OAL for such further proceedings as may be necessary to bring it to conclusion.

IT IS SO ORDERED.*

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 6/19/02

Date of Mailing: 6/19/02

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

244-02

S.R., on behalf of minor child, J.G.	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	
RESPONDENT.	:	

June 21, 2002

OAL DKT. NO. EDU 9446-01
AGENCY DKT. NO. 354-9/01

S.R., on behalf of minor child, J.G.	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	
RESPONDENT.	:	

The record and letter from counsel for respondent indicating that it no longer objects to J.G. attending its schools because petitioner now has legal custody of J.G. have been reviewed. Respondent's letter withdrawing its objection to J.G. attending its schools was treated as a withdrawal of the petition by the Office of Administrative Law and the file was returned to the agency. Because a respondent cannot withdraw a petition, the Commissioner hereby dismisses the petition and cross-petition based on respondent's representation that J.G. is properly attending its schools.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/21/02

Date of Mailing: 6/21/02

233-02

THEODORE J. JENKINS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 12, 2002

OAL DKT. NO. EDU 06187-93
AGENCY DKT. NO. 147-5/93

THEODORE J. JENKINS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 6/12/02

Date of Mailing: 6/12/02

234-02

T.M. AND M.M., on behalf of minor child, D.M.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF ROCHELLE PARK, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parents sought recision of the two-day suspension of their son, D.M., and a declaration that the Board's rule prohibiting him from attending his eighth-grade class trip was not applicable. D.M. was involved in an assault on another pupil.

The ALJ found that in light of the testimony of witnesses, the Board acted reasonably in affirming the decision of the principal to suspend D.M. for two days. Petitioners failed to meet their burden of persuasion that the Board acted in an arbitrary and capricious manner.

The Commissioner adopted the Initial Decision. Petition was dismissed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3692-02
AGENCY DKT. NO. 66-3/02

T.M. AND M.M., ON BEHALF OF MINOR CHILD, D.M.,
Petitioner,
v.
BOARD OF EDUCATION OF ROCHELLE PARK, BERGEN COUNTY,
Respondent.

T.M., father of **D.M.,** appearing pursuant to *N.J.A.C.* 1:1-5.4(a)7 for petitioner

Ralph J. Padovano, Esq., appearing for respondent
(Beattie Padovano. LLC, attorneys)

Record Closed: June 5, 2002 Decided: June 6, 2002

BEFORE **MARGARET M. HAYDEN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners seek recision of the two-day suspension of their son, D.M., and declaration that the rule prohibiting him from attending his eighth grade class trip is not applicable. The Board of Education of Rochelle Park (Board) argued that it acted

reasonably suspending D.M. and that the school regulation that anyone suspended cannot attend the eighth grade trip was uniformly applied.

The Department of Education transmitted the matter to the Office of Administrative Law (OAL) on April 29, 2002, for a hearing as a contested case. A hearing was held June 5, 2002. As the parties indicated they would probably appeal any adverse decision to the Commissioner, the decision was expedited to allow time before the trip, scheduled for June 13, 2002.

FACTS

Undisputed Facts

The following facts in this case are not in dispute and I **FIND** them to be **FACTS** in the case.

In the afternoon of December 13, 2001, during a break between classes several eighth graders were in the boys' lavatory when one of the students had his head held in the urinal while the water was being flushed. That student, M.A., went to the principal, Dennis Murphy, and reported the event, stating that C.F. and the minor at issue here, D.M., were the pupils who perpetrated the assault. Another student, R.M., came to Mr. Murphy and said that he had been in the lavatory and he had seen C.F. holding M.A.'s head in the urinal and D.M. had his hand on the handle and flushing it.

Mr. Murphy sent for D.M. and asked him about the report. D.M. denied that he was involved in the urinal incident. Next, Mr. Murphy sent for C.F., who had first denied the accusation but then admitted that he had been involved along with D.M. Mr. Murphy again sent for D.M. and told him that C.F. had said he was involved. D.M. at this point admitted that he was involved. Mr. Murphy told both students they would be suspended for two days for the incident.

The principal called D.M.'s father the same afternoon to tell him about the incident and suspension. Later that day D.M.'s father questioned D.M. who denied the incident and said he only admitted it to the principal because he felt harassed. Four boys called D.M. on that day. D.M. reported to the father that these four boys were astonished that he was disciplined as he had not been involved in the incident. The father gave Mr. Murphy the name of these four boys to investigate, stating that they would exonerate his son.

On December 14, 2001, Mr. Murphy interviewed the four boys at the father's request. Three of the boys gave written statements. J.L. stated that he was not in the bathroom when the problem occurred and he did not understand why D.M. would mention his name as he was not in the bathroom. D.K. stated that he did not see the incident. When he left the bathroom C. and D. were still in the bathroom. A.M. stated that he and D.M. both went into the stalls and then walked out and reported seeing no incident. T.J. stated that he went into the bathroom with D.M. but they went into stalls. He did not see the incident. When he left the bathroom only D.M. and M.A. were there with M.A. lying on the floor. D.M. was still in the bathroom stall when this incident happened. Based on the interviews of these four boys as well as the three boys who gave statements on December 13, 2001, Mr. Murphy again determined that D.M. was involved in the incident and upheld the two-day suspension. Mr. Murphy based his decision on his belief in the credibility of the three eyewitnesses who saw it, rather than the four friends, all of whom denied seeing the incident or that anything happened.

D.M.'s parents were both upset by the suspension because their son said that he had not done anything. The father asked his son to get written statements from his four friends. The statements are inconsistent with the statements which the students gave to Mr. Murphy. The father never gave these statements to the Board until after the Board made its decision and he obtained an attorney, who wrote the Board asking for reconsideration of the decision.

D.M.'s written statement said that he was in a stall when he heard C.F. and M.A. start to fight. When he left the stall he washed his hands and left. D.K.'s statement said he was aware that C.F. and M.A. were fooling around but D.M. was not involved. A.M. stated that he was in the bathroom washing his hair when D.M. walked out of the stall and saw C.F. sticking M.S.'s head in the urinal. D.M. laughed at them and kept walking. D.M. did not flush the toilet. T.R. merely stated that D.M. did not do anything.

Because the parents were dissatisfied with Mr. Murphy's ruling they went to the superintendent. The superintendent stated that they have a right to go to the Board of Education to present their case. In January 2002 the parents came to the Board of Education which was in executive caucus to present their case. The Board unanimously decided to uphold the suspension.

The Board has a policy printed in its manual that no eighth grade student will be permitted to accompany the class on the class trip if he or she has been suspended from school. See Ex. B-1 & B-2. The parents acknowledge that they were aware of the policy and had seen the printed school policy as well as had received the letter in September 2001 and signed understanding that was the policy.

Disputed Facts

The petitioners dispute that their son was involved in the incident. They dispute Mr. Murphy's claim that he did not harassed D.M. into admitting that he was involved in the incident. The petitioners also claimed that while they were waiting to appear in front of the Board they overheard the discussion of the case where one Board member said "if you cannot do the time do not do the crime. The boy is guilty." Hence, they dispute the testimony of the principal, Board member, and superintendent that the Board did not listen to the parents because they had their minds made up already.

LEGAL DISCUSSION AND CONCLUSION

Local board of educations must maintain orderly conduct of the public schools and are vested with Board's discretion in matters of public discipline. See *Goss v. Lopez*, 419 U.S. 565, 573, 95 S. Ct. 729, 736, 42 L. Ed. 2d. 725, 734 (1975). It is well-established that the presumption of reasonableness attaches to the action of an administrative agency, leaving the party who challenges the validity of that action the burden of showing that it is arbitrary, reasonable or capricious. When the administrative record discloses a reasonable basis for administrative action, the reviewing court's duty is ordinarily to uphold such action. *Boyle v. Riti, 175 N.J. Super.* 158, 166 (App. Div. 1980).

Generally, discretionary action of a local board may not be overturned by the Commissioner of Education absent blatantly arbitrary, irrational or improperly motivated action. *K.L. v. Bd. of Educ. of Matawan/Aberdeen High Sch. Dist.*, 91 *N.J.A.R.* 2d 74, 76. As noted in *K.O.H. v. Bd. of Educ. of Edison*, OAL Dkt. No. EDU 7179-94, "The judicial rationale for the deference to the local board of education appears to be two-fold: (1) the ability of the local board of education as to fact-finder in the first instance to see and hear the witnesses to determine credibility, and (2) the expertise of the local board with respect to its knowledge of local condition and circumstances."

I **FIND** that Mr. Murphy acted reasonably when he made his decision based on the statements of the victim, one of the two perpetrators, and independent eyewitness.

I further **FIND** that the Board acted reasonably in affirming the decision of the principal based upon the evidence presented. Thus, I **CONCLUDE** that the petitioners have not met their heavy burden of persuasion that the Board acted in an arbitrary and capricious way. Mr. Murphy interviewed the seven students and found the three accusers credible. The credibility of the statements of the alleged victim is bolstered by the fact that the father said that M.A. is a long time friend of his son and he never

recanted his statement. Moreover, two of the boys denied seeing anything happen. No motive was provided for why the three accusers would say D.M. was involved.

Based on the foregoing, I **CONCLUDE** that the evidence showed that the Board acted reasonably in accepting the statements of the victim, co-perpetrator and eyewitness who stated that D.M. was involved with the incident. Because the petitioners failed to show that the Board acted unreasonably, the Board's action of suspending D.M. for two days must be upheld. As the neutral policy of the Board is that no one who has been suspended during eighth grade may go on the eighth grade trip, there is no reason to waive that requirement. Hence, I **CONCLUDE** that the Board's decision upholding the suspension must stand.

ORDER

Based on the foregoing, it is **ORDERED** that the petitioners' petition must be **DENIED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

ANY APPLICATION TO HAVE THE APPEAL TO THE COMMISSIONER EXPEDITED MUST BE MADE TO THE COMMISSIONER.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 6, 2002
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

June 6, 2002
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Witnesses

For Petitioner:

T.M., father

For Board:

Dennis Murphy, Principal
Salvator Montagna, Superintendent of Schools
Gary Kropilak, Member of Board

Exhibits

For Petitioner:

P-1 Statement of D.K.
P-2 Statement of A.M.
P-3 Statement of T.R.
P-4 Statement of D.M.

For Board:

B-1 Midland School Parent/Student Handbook
B-2 Letter from principal to parents re class trip
B-3 J.L.'s statement and principal's notes, December 14, 2001
B-4 Letter from principal to parents, December 17, 2001
B-5 Statement of T.R. and principal's notes
B-6 Statement of A.M. and principal's notes
B-7 Letter from Board President to parents, January 22, 2002
B-8 Notes on D.M.'s verbal statement

OAL DKT. NO. EDU-3692-02
AGENCY DKT. NO. 66-3/02

T.M. AND M.M., on behalf of minor child, D.M.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF ROCHELLE PARK, BERGEN COUNTY,	:	
RESPONDENT.	:	

The record and Initial Decision in this matter have been reviewed. Exceptions were not filed by the parties.[1]

Based on his review of the record, the Commissioner adopts the Initial Decision, recommending dismissal of the Petition of Appeal, as the final decision in this matter for the reasons set forth therein and hereby dismisses the Petition of Appeal.[2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/12/02

Date of Mailing: 6/13/02

[1] Because the relief sought by petitioners involves a class trip scheduled for June 13, 2002, this final decision is being issued prior to expiration of the time in which exceptions may be filed.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* within 30 days of filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

235-02

T.L., on behalf of minor child, T.L.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent appealed Board's policy requiring his son, T.L., who had been suspended for developing a "hit list" of teachers and friends, to undergo a psychiatric or psychological examination at Board expense before being allowed to return to the school population.

The ALJ concluded that neither the Board policy requiring psychological or psychiatric clearance within the context of assuring safe conditions in school, nor implementation of the policy under the circumstances of the record, has been shown to be arbitrary or capricious, The ALJ noted that T.L.'s return to classes is within the control reposing in his parents.

The Commissioner concurred that petitioner failed to prove that the Board's policy or its application was arbitrary, capricious or unreasonable. Petition was dismissed.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6671-01
AGENCY DKT. NO. 421-10/01

T.L., o/b/o MINOR CHILD, T.L.,
Petitioners
v.
BOARD OF EDUCATION OF MIDDLETOWN TOWNSHIP, MONMOUTH COUNTY,
Respondent.

T.L., father, for petitioner, *pro se*

Malachi J. Kenney, Esq., for respondent (Kenney & Gross, attorneys)

Record Closed: March 15, 2002 Decided: April 29, 2002

BEFORE **JOSEPH LAVERY,** ALJ:

STATEMENT OF THE CASE

Petitioner, T.L., on behalf of his son **T.L.**, brings this appeal from a policy requirement of respondent Board of Education that his son undergo psychiatric or psychological examination.

Respondent, Middletown Township Board of Education, (the Board) contests the appeal.

Today's Initial Decision affirms the Board's requirement that T.L. undergo psychiatric or psychological[1] examination before being returned to the school population.

PROCEDURAL HISTORY

This matter was declared a contested case, and filed in the Office of Administrative Law on October 19, 2001, docketed as EDU 6671-01. Later, a companion special education case, EDS 6990-01, was filed on November 16, 2001 for "possible consolidation." This matter was dismissed at hearing, for the reasons outlined below. Consolidation was not possible, given that the final administrative decisions in each case were to be rendered by separate officials: the Commissioner of Education, and the administrative law judge.

Hearings convened on November 2, 2001, and February 11, 2002. Post-hearing submissions followed, the last being filed on March 15, 2002. On that date, the record closed.

ANALYSIS OF THE RECORD

Background:

Petitioner is the father of a son, T.L. who is the subject of this appeal. The incident from which it arises occurred on May 8, 2001. On that day, T.L. traveled by school bus to classes in Bayshore Middle School (Bayshore). At the time, T.L. was in 6th grade. With him was his stepsister, S.K., a 7th grader. At some point during the trip, T.L. and S.K. prepared what was titled and came to be known as a " hit list."' On it were the names of teachers and friends. In the course of the journey, the list was thrown away. It was recovered by a teacher from Fairview School, whose Principal forwarded it to Bayshore, where it was concluded that T.L. and S.K. should be questioned. They were, and admitted to the authorship.

[1] The Board has left the choice of either psychological or psychiatric evaluation to the parents.

With this information in place, the children's mother, R.K. (petitioner's former wife), with whom they reside, was called, and she appeared at the school that day, meeting with the Vice-principal, Dr. Bonnie J. Brown, and Sharon Constantino, the guidance counselor.

On the following day, the children returned to school for classes. Both T.L. and S.K. were interviewed during the morning by the school psychologist, Mary Anayiotis, and the social worker, Michelle Merola. Shortly thereafter, the school Crisis Intervention Team was convened. It consisted of Dr. Jarrach, the principal, Dr. Brown, the vice-principal, the school guidance counselors, the school psychologist, and the school social worker. After Ms. Anayiotos and Ms. Merola gave their reports and recommendations, Dr. Jarrach listened to the opinions of the other team members. The team consensus was that it would be unsafe for T.L. and for the school population to have him return without first undergoing a psychiatric or psychological evaluation. It did not perceive such a risk in his stepsister, S.K. (who later was disciplined with a suspension of 3 days). Dr. Jarrach, accepting this consensus, determined to so notify the parents. The school took these actions on the strength of Board of Education Policy No. 5131 and No. 5131R (and attached chart).

However, during the same day as the Crisis Intervention Team meeting, T.L. attended a class taught by a substitute teacher, with whom he had words, and for which he was referred to the office of the Principal, Dr. Jarrach. A permanent teacher who found the referring note from the substitute tried to discuss this with T.L., but, seeing his reaction as objectionable also referred him for discipline (Exh. R-D). The interview with the Principal did not go well. Again after an exchange of words, this time with Dr. Jarrach, T.L. received a 5-day suspension for his behavior with the substitute teacher, and a concurrent 5-day suspension for his conduct with the referring regular teacher, Ms. Campbell (Exh. R-D).

Dr. Jarrach then notified the mother, R.K. by phone that day, and with written notice of May 11, 2001, that the bar from school was in place, and that T.L. would be prohibited from return unless and until he underwent a psychological examination, at school expense. This decision was reiterated by the Superintendent of Schools for the Township, on July 11, 2001 (Exh. R-I). The parents declined to permit such an examination, and at impasse, petitioner

prosecuted this appeal on behalf of his son, T.L. The disciplinary penalties imposed for the two incidents involving the substitute teacher and the principal were not imposed in view of T.L.'s absence because of the dispute over the psychological evaluation. The police, who had been notified by the school, interviewed the children at home on the last day of the academic week, but no action has been taken by that department or by the prosecutor to date.

The New Jersey Department of Education then forwarded the case to the Office of Administrative Law on October 19, 2001 to resolve the issue of "suspension" pending psychological examination, but with the caveat that special education claims must first be addressed, because petitioner had cited the Individuals with Disabilities Education Act (IDEA). The department copied it's own Office of Special Education, which filed on November 16, 2001, a second matter, EDS 6990-01 for "possible consolidation with EDU 6671-01." It was confirmed during hearing that this appeal had not been brought by either parents or the Board. It is not disputed that T.L., who has since been promoted, and continues to make academic progress, has not been classified under the IDEA, and neither the parents nor the school intend to move for referral thereunder. Petitioner simply relies on selected provisions of the IDEA to obtain relief before the Commissioner of Education.

Arguments of the Parties:

The Board's case:

The Board maintains that, under its lawfully established policy, it has the right to exclude T.L. from school, until he undergoes either a psychiatric or psychological evaluation, at Board expense. The Board argues that its reasonable policy is designed as a protective measure for both T.L. and the school population. It introduced the testimony of staff involved to support its position:

Former Principal, now retired, **George Jarrach** testified that he decided to exclude T.L. after relying on the recommendations of the Crisis Intervention Team, and acted consistent with Board policy excluding any student who compromised safety. Dr. Jarrach could not point to a specific citation identifying the applicable policy. He saw the "hit list" created by T.L. as a

threat of violence. Dr. Jarrach stressed that the prohibition of T.L. from class attendance is not disciplinary, or related to the separate suspensions for inappropriate behavior with the substitute and permanent teachers.

Bonnie J. Brown, who on May 8, 2001, was Asst. Principal, recalled that when asked of the incident, T.L. denied that a "hit list" existed. However, when confronted with the actual document, he became very angry, admitted authorship, and implicated his stepsister. He said the list included those with whom he also was angry, and for whom he wished an unspecified harm. Dr. Brown was unable to convene the Crisis Intervention Team until the next day, after the interviews of T.L. and S.K. by the psychologist and social worker. This testimony was corroborated by **Sharon Constantino**, Guidance Counselor.

After her interviews with the two children separately, School Psychologist **Mary Anayiotos**, reported to the assembled committee. She recalled the difficulty encountered in calming him. Once he felt safe, however, T.L. admitted a continuing state of anger and depression, at home and in school, even though the "hit list" arose from a specific event, she said. Mood swings also troubled him. He described serious depressive episodes suffered routinely by his mother, as well, Ms. Anayiotos added. She concluded from this that T.L.'s condition was serious enough to call for psychological assistance, which she volunteered. After hearing the social worker's report, Ms. Anayiotos concluded that T.L. lived with considerable stress, and had the potential to be a threat to others. His stepsister, on the other hand, did not display these characteristics. The girl posed no danger, she thought.

Social Worker **Michelle Merola** held similar views. She interviewed both children on May 9, 2001. Ms. Merola recalled that it took some time to calm him enough for a discussion. T.L was agitated, jumpy. He was also angry, frustrated and sad over treatment at the hands of others, as he conceived it. They talked of family dynamics. Though she had no prior contact with T.L., she concluded that he was in need of psychological help, and sensed that he could become explosive. When questioned, Ms. Merola stated that she was trained as a social worker to gauge emotional states. His stepsister, in contrast, displayed no anger but was fearful over the mental state of her brother. She was also contrite over the incident. S.K. recounted to Ms.

Merola that she convinced T.L. to throw the list away, because she was afraid. Ms. Merola observed that S.K. did not present as threatening to anyone.

In letter-briefs, respondent Board argued that it was petitioner's burden to prove that the Board's policy of exclusion from class until psychological clearance was unlawful, or applied with caprice or arbitrariness. Assuring school safety was a valid exercise of its authority, and well within its discretion. In the Board's view, petitioner's reliance on IDEA provisions is inexplicable, given the parents' firm position that they do not wish to have their child classified. Finally, respondent Board objects to petitioner's introduction for the first time of the Parents' Right to Conscience Act, *N.J.S.A.* 18A:35-4.6, *et seq.*. The Board perceives this as a supplementing of the evidentiary record, despite not having proffered this issue during hearing.

Petitioner's case:

Petitioner maintains through his own testimony and that of his son, and T.L's mother, as well as through post-hearing argument, that the Board is without reason or authority to compel a psychiatric or psychological evaluation.

Testifying himself, **T.L.** conceded that he and his sister had created the hit list. He stated that he was frustrated, but meant no harm. He eventually threw the list into a nearby gutter. Not until the school staff spoke of calling the police did he think this act would bring him trouble. T.L. admitted that he at first denied authorship of the list. After his admission, he had told Dr. Brown and Ms. Constantinos that he was just "venting." T.L. testified that to cope with recurring anger, he tries to reach a bathroom, and put water on his face. At home, he goes to his room and lies down.

Addressing the incident with the substitute teacher, T.L. recalled that he was angry because on the previous day, the substitute would not listen to his complaint of being punched in the back. At that time, he cursed the teacher. During the incident reported, he had lost his temper and said to another student, "Are all teachers such jerks?" Learning of this, the substitute teacher reported him. When the regular teacher questioned him next day, T.L. recalled, he was in a bad

mood. As a result, he cursed, kicked the wall, and slammed his fist on the window, though without focusing his anger on anyone in particular.

Finally, T.L. denied that he showed anger and frustration to the school psychologist or social worker, and was certain that he never experienced urges to violence.

In support, the boy's mother, **R.A.K.**, testified that it was unfair to punish one child with a compelled psychological evaluation, and not the other. "Zero tolerance" wasn't the charge. Consequently, the school handbook has no rule the Board can point to as countenancing its action.

In briefed argument, petitioner maintains that T.L. has been denied constitutionally-protected privileges through his absence from school. Additionally, *N.J.S.A.* 18A:35-4.8 and the concepts of the IDEA incorporated within the Board's policies bar evaluation without parental consent. Exclusion under the present circumstances is unlawful, since the Board's justification is not supported by clear authority, and psychological clearance is part of its disciplinary policy, which is unlawful in any event. Petitioner maintains the Board has acted only under a "perceived" threat. There is no history of violence on T.L.'s part. The investigation by the school was flawed, and simple anger is inadequate cause for the Board's response.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact:

To resolve disputes of material fact, I make the following **FINDINGS**:

1. The hit list included students and teachers with whom T.L. was angry, and for whom he wished an unspecified harm.
2. T.L. described to the school psychologist, Ms. Anayiotos, a continuing state of depression and anger, and a propensity to mood swings.

3. T.L. conceded to the school social worker, Ms. Merola, that he was angry, frustrated and sad over treatment at the hands of others, and Ms. Merola was persuaded that these emotions could render T.L. explosive in his reactions.
4. Principal Jarresh excluded T.L. from school pending psychological clearance as a result of consensus within the Crisis Intervention Team.

Conclusions of Law:

Application of the IDEA:

When petitioner at hearing raised on his behalf the protective provisions of the IDEA, this tribunal asked whether he sought to refer T.L. for evaluation and classification under the IDEA. Petitioner was emphatic in his position: he had no wish to have T.L. classified under the IDEA. As a matter of law, he believed, he was nonetheless entitled to any IDEA protective provisions that could remove him from the current "discipline" procedures, which, in his view, were without legal foundation.

Similarly, respondent Board denied any evidence existed to bring T.L. within the provisions of the IDEA. It knew that T.L. was being promoted to the next grade level in a regular educational setting, and was making recognizable progress within it. The Board therefore had no intention to refer for evaluation and classification.

Acting on that record, this tribunal ruled that the special education element suspected by the Department of Education when referring to the OAL through its Office of Special Education Programs had no support in facts established of record. The special education case docketed in the OAL as EDS 6990-01, therefore was dismissed. Unless and until either parents or school moved for identification, referral, or classification under the IDEA, this tribunal is without jurisdiction to apply its provisions. No dispute exists over whether T.L. is emotionally, physically, or educationally disabled. The questions for resolution, phrased below, fall entirely under regular education law.

Burden of proof:

The burden of persuasion falls on petitioner, the applicant for exception. He must demonstrate that the policy and decision of the Board in this case is unreasonable and arbitrary. The administrative law judge in his initial decision's recommendation and the Commissioner of Education in a final administrative decision, as a matter of law, may not simply substitute their judgments for that of the Board. *Kopera v. West Orange Bd. Of Education*, 60 *N.J. Super.* 288, 296-97 (App. Div. 1960).

Additionally, petitioner's evidentiary burden must be carried by a preponderance of the credible evidence, which is the standard in administrative proceedings, *Atkinson v. Parsekian,* 37 *N.J.* 143 (1962). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to a given conclusion, *Bornstein v. Metropolitan Bottling Co.,* 26 *N.J.* 263 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power, *State v. Lewis,* 67 *N.J.* 47 (1975). Credibility, or more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well, *Spagnuolo v. Bonnet,* 16 *N.J.* 546, 554-55 (1954).

Resolution of the Issues:

The parties agree that the exclusive issues for resolution are:[2]

1. Whether the policy imposed by the Board of Education under which the Board compels an examination of T.L by a psychiatrist or psychologist before returning to school, because of his stipulated creation of a " hit list," is arbitrary or capricious and thereby unlawful, and
2. Whether the Board, if the policy is not unlawful, applied it in an arbitrary, capricious and thereby unlawful manner.

[2] These issues were established on the record of hearing convened on November 2, 2001.

Neither the Board's expression of policy nor its application was an arbitrary or capricious exercise, and consequently both must be affirmed here. *Kopera v. W. Orange Board of Education*, *supra*, 60 *N.J. Super.*, at 294.

The Board and its witnesses have credibly related that its reaction to this incident was focused on safety. Discipline, if any, abides T.L's eventual return to school. The key to that return is in the hands of the parents. The Board has enacted its Policy No. 5131, and No. 5131 R. Nothing of record discloses that the policy was not lawfully legislated. Acting under it, the school excluded T.L. from return until completion of a psychiatric or psychological evaluation. In the table of the Middle School Discipline Policy, incorporated in Policy No. 5131R, the first category is "Written Threats/Terroristic Threats." It provides on the first offense for "Exclusion from school until psychiatric clearance. Consultation with police." Psychiatric clearance is what the school now seeks. Should discipline be imposed thereafter, the accompanying procedural safeguards will be available at that time, and petitioner may fully avail himself of them.

Only the clearance is at issue. In itself, it is not discipline, albeit part of the entire discipline complex of Policy No. 5131, and No. 5131 R. The establishment of safety in the public schools is a legitimate statutory imperative, carried out here under lawfully enacted policies. *N.J.S.A.* 18A:17-42 through -48. In a nationwide climate of concern for student and teacher safety which can be officially noticed, a compelled psychological or psychiatric evaluation in the factual circumstances here is a rational requirement. There is no evidence that this component of the above policies has been unlawfully applied. The parents may choose either a psychologist or psychiatrist, and the expense will be borne by respondent Board. The record is devoid of proofs demonstrating prejudice to be incurred by this arrangement.

Petitioner's argument that a combined consideration of *N.J.S.A.* 18A:35A-4.8 and IDEA law redounds to his benefit is not persuasive. Aside from introduction of the issue post-hearing, he has not demonstrated that a policy requirement of psychological clearance under lawfully-enacted Policy No. 5131R [See chart] is somehow prohibited by the two laws. The section speaks of "medical" treatment. It does not specifically override the statutory responsibility of the Board to assure school safety. As ruled above, a policy of psychological clearance required in the

context of satisfying that obligation under appropriate circumstances is not arbitrary or capricious. The factual matrix here discloses just such a setting.

Conclusion:

Neither the Board policy requiring psychological or psychiatric clearance within the context of assuring safe conditions in school, nor implementation of the policy under the circumstances of record have been shown to be arbitrary or capricious. T.L.'s return to classes is therefore within the control reposing in his parents, to be accomplished at Board expense.

ORDER

I ORDER therefore, consistent with the above rationale, that the relief sought by petitioner be, and hereby is, **DENIED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 29, 2002
DATE

JOSEPH LAVERY, ALJ

Receipt Acknowledged:

4/30/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 2 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

mph

WITNESS LIST

For petitioners:

George E. Jarrach

T.L.

R.A.K.

For respondent:

Bonnie J. Brown

Sharon Constantino

Mary Anayitos

Michelle Merola

DOCUMENTS IN EVIDENCE

For petitioner:

P-1 Case Note – T.L. May 9, 2001

P-2 Policy, Board of Education, Middletown Township, Suspension and Expulsion

P-3 Policies, Middletown Township Board of Education

P-4 Policy, Board of Education, Middletown Township, Vandalism/Violence

P-5 Policy, Board of Education, Middletown Township, Disciplinary Hearings

P-6 Policy, Board of Education, Middletown Township, Disruptive Pupils

P-7 Policy, Board of Education, Middletown Township, Schools and the Police

P-8 Policy, Board of Education, Middletown Township, Home Instruction

P-9 Attendance Record, T.L., October 2001

For respondent:

R-A Hitlist

R-B Policy, Board of Education, Middletown Township, Secondary Student Attendance and Discipline

R-C Letter to R.K., from George E. Jarrach, Principal, dated May 9, 2001

R-D Student Referral, May 9, 2001

R-E Letter to Middletown Township Public Schools, Dr. Jarrach, from R.A.K. and T.L., dated May 16, 2001

R-F Letter to R.A.K., from George E. Jarrach, dated May 17, 2001

R-G Letter to Dr. DeTalvo, from R.A.K. and T.L., dated May 21, 2001

R-H Letter to Members of Middletown School Board from R.A.K., dated May 23, 2001

R-I Letter to T.L. from Alan M. Feuer, dated July 11, 2001

R-J Letter to Monmouth County Department of Education from R.A.K. and T.L., dated August 27, 2001

R-K Letter to Middletown Township Board of Education from R.A.K. and T.L., dated September 11, 2001

OAL DKT. NO. EDU 6671-01
AGENCY DKT. NO. 421-10/01

T.L., on behalf of minor child, T.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review, the Commissioner concurs, for the reasons set forth in the Initial Decision, that petitioner has failed to prove that the Board's policy requiring an examination of T.L. by a psychiatrist or psychologist prior to his return to school is improper.[1] Neither has petitioner demonstrated that the Board applied its policy in a manner that was arbitrary, capricious and unreasonable, under these circumstances.[2] As such, the Commissioner may not legally substitute his judgment for that of the Board. *Kopera, supra.*

Accordingly, the Petition of Appeal is dismissed. The Commissioner underscores that T.L.'s return to school is "within the control reposing in his parents***." (Initial Decision at 11)

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 6/13/02

Date of Mailing: 6/13/02

[1] T.L. has been receiving home instruction since his removal from school and, apparently, has not fallen behind his grade level work.

[2] In *T.L. and R.K., on behalf of minor T.L. v. Middletown Township Board of Education*, OAL Dkt. No. EDS 6990-01, ALJ Lavery determined that the Individuals with Disabilities Education Act (IDEA) does not apply in this case, as petitioner had no intent "to characterize his son as disabled, or to initiate the IDEA process of establishing (or not) the presence of any impairment" and the Board similarly maintains it has no intention of referring T.L. for an evaluation and classification. Slip op. at 3.

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

239-02

239-02

CATHERINE COLACINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 18, 2002

OAL DKT. NO. EDU 1581-00
AGENCY DKT. NO. 17-1/99

CATHERINE COLACINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, approves the withdrawal. Consequently, the matter is no longer deemed to be a contested matter before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 6/18/02

Date of Mailing: 6/18/02

238-02

BOARD OF EDUCATION OF THE BOROUGH OF BERLIN, CAMDEN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
CHARLOTTE LEE,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning Board averred that respondent was in conflict of interest pursuant to *N.J.S.A.* 18A:12-2. The Board sought removal of respondent as a Board member.

Because respondent had a tort claim against the school district on behalf of her two minor children, the ALJ declared respondent in conflict of interest.

The Commissioner concurred that, for the reasons set forth in the Initial Decision, respondent was not eligible to be a member of the petitioning Board.

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

June 14, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6050-01

AGENCY DKT. NO. 143-5/01

BOARD OF EDUCATION OF THE BOROUGH OF BERLIN, CAMDEN COUNTY,

Petitioner,

v.

CHARLOTTE LEE,

Respondent.

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

Charlotte Lee, respondent, *pro se*

Record Closed: March 13, 2002 Decided: April 29, 2002

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, petitioner, Board of Education of the Borough of Berlin, Camden County, initially filed a Request for Summary Decision (P-1) as its petition alleging that respondent is in conflict of interest pursuant to *N.J.S.A.* 18A:12-2 because she has an interest in a claim against

the school district. Therefore, it sought her removal as a board member. The matter was transmitted to the Office of Administrative Law (OAL) on September 4, 2001, for hearing as a contested case. The matter was assigned to me on September 28, 2001, and a telephone prehearing conference was scheduled for October 19, 2001. At that time, the parties agreed to follow certain procedures in order to convert the matter from a motion for summary decision to a request for declaratory ruling on the part of petitioner. After respondent entered into certain agreements, attorney for petitioner requested that this matter be converted to a petition for a declaratory ruling pursuant to *N.J.A.C.* 6A:3-2.1 and that the matter proceed accordingly (P-3).

It was my understanding that written submissions were to follow. However, it was subsequently determined that the parties were requesting that the matter be decided on the pleadings and other documents in the file in summary fashion since there did not appear to be any dispute as to the underlying facts. Accordingly the record with respect to the motion for a declaratory ruling closed on March 13, 2002.

FACTUAL DISCUSSION

The essential facts in this matter have not been disputed, and may be gleaned by reviewing petitioner's Request for Summary Decision (P-1), petitioner's Affidavit and Law In Support of Summary Decision request, with attachments (P-2), respondent's answer (R-1) and other documents which have been submitted.

Petitioner is a board of education which is duly organized under the Statutes of the State of New Jersey and is subject to the specific statutes covered in Title 18A of the New Jersey Statutes. Respondent is a member of the board of education of the petitioner, which governs and operates the Borough of Berlin School District in the County of Camden.

On or about October 1, 2001, an incident occurred at the Berlin Community School, which is operated by the petitioner, which incident is alleged to have had an adverse effect on the children of the respondent. As a result of the incident, on December 16, 1999, per correspondence date of November 12, 1999, a Tort Claim Notice (P-2, Exhibit A) was filed with the petitioner by attorney Thomas M. Keeley-Cain on behalf of the children of the respondent,

namely K.L. and R.L., alleging current and accruing damages. To the best of the knowledge of the petitioner, this Tort Claim Notice is still of record at the time of the filing of this matter and has not been retracted. At the time of the filing of the Tort Claim Notice, the respondent was a sitting member of the board of education.

On May 1, 2000, the respondent was re-elected and sworn in to serve as a board member of the petitioner and remains as a board member as of the date of the filing of this matter with her term to expire in the year 2003.

Petitioner asserts that in January 2001, during a committee meeting attended by some of the members of the board of education, including administration and the board solicitor, the issue regarding the pending Tort Claim Notice with respect to respondent's children, K.L. and R.L., was discussed by some of the board members present as they reviewed a Nominating Petition for Annual School Election (P-2, Exhibit E). The Nominating Petition states that, "No board of education member shall be directly or indirectly involved in any contract with, or claim against the board." At the request of some of the board members who were present, the administration was requested to direct that an opinion letter be obtained from the board solicitor to the president of the respondent as soon as conveniently possible regarding the eligibility of the respondent to remain as a board member of the petitioner.[1]

In petitioner's Affidavit and Law In Support petitioner offered as a stipulation that at all times relevant to this matter, the respondent has not participated in, nor has the respondent been present for, discussions regarding the incident of October 1, 1999, or the fallout resulting in any claims by anyone, including, but not limited to, those of the respondent's children, K.L. and R.L. Petitioner also offered as a stipulation that at all times relevant to this matter the respondent has always acted and performed respondent's duties as a board member for the petitioner lawfully and diligently in all respects. (P-2, paragraphs 11 and 12)

In accordance with the direction of the administration, the board solicitor issued a written opinion to the Berlin Borough Board of Education (P-2, Exhibit B). In this written opinion, the

[1] In her answer, respondent neither admits or denies the assertions of petitioner set forth in this paragraph, and leaves petitioner to its proofs.

board solicitor concluded that the respondent was ineligible to continue as a board member for the petitioner based on case law set forth in *Board of Education of the Township of Holmdel v. O'Connell,* 1990 *S.L.D.* 674.

On March 9, 2001, upon the advice of the board solicitor, the president of the petitioner directed that a *Rice Notice* (P-2, Exhibit C) be sent to the respondent so that the matter could be discussed by the board members of the petitioner. On March 12, 2001, the respondent replied to the *Rice Notice* and requested that the matter be discussed at the March 15, 2001 meeting in public session. (P-2, Exhibit D)

The matter was discussed at a March 15, 2001, meeting of the board of education in public session at which time the respondent advised the other board members of the petitioner that the respondent was not resigning the respondent's board position. The minutes of that meeting reveal that respondent read a statement for the record in which she stated that a Tort Claim Notice was filed on behalf of her children. She discussed this with the board solicitor who advised her that it would be fine as long as she was excluded from all information concerning the October 1, 1999 incident. The entire board was notified of this and everyone has complied for the past 18 months. She stated that the board solicitor has changed his opinion and has requested her resignation. She indicated that she refuses to resign, stating that she is an elected representative of the community and a dedicated board member. She stated that this is not a "claim" only a "notice of intent" which is valid until two years after her children's eighteenth birthday and, at that point, they will be legal adults and she would have no interest in any claim, if filed. She asked the board to allow the board solicitor to file whatever is necessary so the matter can be decided and that if summary decision is against her, she will step down, but not until then. (R-1, Exhibit A)

After discussion and based on the recommendation of the board solicitor, with respondent recusing herself, the petitioner authorized the board solicitor to send the matter to the New Jersey Commissioner of Education.

Before the request for summary decision was to be made by the board solicitor it was further directed that the petitioner and respondent have an opportunity to review the documents to be filed with the request for summary decision.

The notice of claim filed in this matter pursuant to the New Jersey Tort Claims Act, Title 59 of the New Jersey Statutes, is dated November 12, 1999. It is executed by Thomas M. Keeley-Cain, an attorney at law, on behalf of his clients, K.L. and R.L. It indicates that an accident occurred on October 1, 1999 at the Berlin Community School and that the public entity is the Berlin Borough Board of Education. It specifies that the amount of medical bills as of that date was $1,326.25 accruing, and further indicates that the amount claimed as of that date cannot be ascertained since the damages are presently incurred and will continue for some time in the future, and that this information will be provided on an ongoing basis. It does not name the parents of K.L. and R.L., but it appears that a copy of the notice of claim was provided to Donald L. Lee. (P-2, Exhibit A)

LEGAL DISCUSSION AND ANALYSIS

The parties to this matter have requested a declaratory ruling as to whether respondent is in conflict of interest pursuant to *N.J.S.A.* 18A:12-2 because she has an interest in a claim against the school district. With respect to declaratory rulings, *N.J.S.A.* 52:14B-8 provides that 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.

N.J.A.C. 6A:3-2.1(a) provides that pursuant to *N.J.S.A.* 52:14B-8, any interested person or persons may petition the Commissioner for a declaratory ruling with respect to rights, responsibilities and status arising from any statute or regulation within the jurisdiction of the Commissioner. The determination to entertain such petitions for declaratory ruling are within the sole discretion of the Commissioner. If such a request is granted, the matter shall proceed in

accordance with these regulations as they pertain to petitions. A declaratory ruling shall be binding upon the Commissioner and all parties to the proceedings on the specific statement of facts set forth therein.

N.J.A.C. 6A:3-2.1(a)1 provides that a request for a declaratory ruling shall reflect adverse positions on the statute or rule in question by the parties in interest, may not seek consequential relief beyond a declaration as to the meaning of the statute or rule, and may not be based on underlying facts which are future, contingent, uncertain or disputed.

In this matter, there is no dispute that a Notice of Tort Claim was filed on behalf of respondent's two minor children, K.L. and R.L. during the time period when respondent is and remains a member of the petitioner board of education.

According to the board solicitor, this matter stems from two (2) concerns on the part of the petitioner board of education. The first concern is how the language, "No board of education member shall be directly or indirectly involved in any contract with, or claim against the board" found in a Nominating Petition for Annual School Election, may affect a sitting board member. The second is how the provisions of *N.J.S.A.* 18A:12-2 may affect a sitting board member.

As to the first concern regarding board candidacy versus board membership, the board solicitor took the position that conflicts of interest apply to membership, not candidacy, and that if a conflict may be cured prior to taking a seat, the successful candidate may be sworn in as a board member.

In actuality, the language in the Nominating Petition is a restatement of the prohibition against conflicts of interest on the part of school board members which is covered by *N.J.S.A.* 18A:12-2. This provision states as follows:

> No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board, nor, in the case of local and regional school districts, shall hold the office

> as mayor or as a member of the governing body of a municipality, nor, in the case of county special services school districts and county vocational school districts, shall he hold office as a member of the governing body of a county.

I agree with the board solicitor that the leading case which gives significant guidance as to this issue is *Board of Education of the Township of Holmdel v. O'Connell*, 190 *S.L.D.* 674. In that case, the Commissioner of Education, in discussing the language of the Act, indicated that it is clear and unambiguous on its face and the words of the statute define the Legislature's intent. On its face, *N.J.S.A.* 18A:12-2 mandates that no board member may serve who is interested directly or indirectly in any claim against the Board. The Commissioner relies on *Board of Education of the City of Newark v. Edgar Brown and Oliver Brown*, 1984 *S.L.D.* 671, and indicates that the statute should be applied by making an initial determination as to whether the circumstances demonstrate that the claim made by the member would result in a "substantial and material" benefit to him. Individual circumstances in each case are required to be examined to determine whether the claim is substantial and material so as to require disqualification. *In the Matter of the Election of Dorothy Bayless to the Board of Education of Lawrence Township School District*, 1974 *S.L.D.* 595, reversed, State Board 603.

In this matter, as in the *O'Connell* case, the notice of claim of respondent's children appears to seek reimbursement for medical bills which are accruing and will continue to accrue into the future. It may be inferred that the parents of these two minor children are the individuals who are incurring these medical bills and to whom any reimbursement would be made. While this claim may not be of the same nature as the claim in the *O'Connell* case which sought damages for mental anguish, mental distress, humiliation and pecuniary loss, plus compensatory damages of $25,000, it nevertheless may be a substantial claim. Only six weeks after the incident giving rise to the claim, medical costs of over $1,300 have been incurred and apparently will increase. It may be inferred that the parents have seen fit to notify the school district of the claim because it may be substantial. As pointed out by the board solicitor the board member does have the potential for a material and substantial claim in this matter. There is nothing in the record to suggest otherwise.

Because this matter involves a Tort Claim Notice, the question is whether this is a formal

claim which is sufficient to disqualify a member from his or her seat on the board of education. Attorney for petitioner contends that this is fully discussed in the case of the *Board of Education of the Township of Holmdel v. O'Connell,* 1990 *S.L.D.* 674. He indicated in his opinion letter that the summary of this case defines the issue at hand and that a notice of claim filed against a board is incompatible with board membership. A substantial claim for compensatory and punitive damages for alleged intentional assault of minor son while at BOE sponsored football camp was the claim in the case cited above.

In her statement to the board on March 15, 1999, respondent took the position on this issue that the claim in this mattter is not a "claim" but only a "notice of intent" which is valid until two years after her children's eighteenth birthday. She also contends that after her children attain age 18, they will be legal adults and she would have no interest in any claim, if filed.

In an effort to determine the nature of the notice of claim filed in this matter, it may be helpful to examine the provisions of the New Jersey Tort Claims Act, *N.J.S.A.* 59:1-1 to 59:12-3. Specifically, *N.J.S.A.* 59:8-3 provides that no action shall be brought against a public entity unless the claim upon which it is based shall have been presented to the public entity in accordance with the provisions of the Act. A number of court decisions have generally indicated that the purpose of the notice provisions of the Act is to provide the public entity with time prior to suit for possible settlement without incurring litigation expenses. *Murray v. Brown,* 259 *N.J. Super.* 360 (Law Div. 1991); *Reale v. Wayne Tp.,* 132 *N.J. Super.* 100 (Law Div. 1975). Filing such a notice is a precondition to bringing suit against the public entity. *Madej v. Doe,* 194 *N.J. Super.* 580 (Law Div. 1984).

Based upon the foregoing, it can be seen that the notice of a tort claim is not merely an inchoate claim that may be pursued at some future date, but represents an actual claim against a public entity which may be subject to settlement and, failing that, may be the subject of a future court action against the public entity. Thus, the claim of respondent's children against the school district has been made and is in existence by virtue of the notice of claim. It is only its pursuit by means of litigation that may be delayed because of the provisions of the New Jersey Tort Claims Act. I also find it to be significant that *N.J.S.A.* 18A:12-2 specifically prohibits an interest in a "claim" against the board and not an "action" or "pending litigation".

Lack of conflicting interest is a qualification for board membership. *Visotcky v. City Council of Garfield*, 113 *N.J. Super.* 263 (App. Div. 1971). The interest which disqualifies is not necessarily a direct pecuniary interest, nor is the amount of such an interest of paramount importance; it is based on the moral rule that no man can serve two masters whose interests conflict. *Aldom v. Borough of Roseland*, 42 *N.J. Super.* 495, 502 (App. Div. 1956). The board solicitor relies on the case of *Taliafero vs. Hawthorne Board of Education,* 94 *N.J.A.R. 2d* (EDU) 197 wherein a Board member's indirect interest in his wife's lawsuit against a board of education disqualified him from board membership.

In this matter, respondent, as the parent of R.L. and K.L., has at least an indirect interest, and more likely a direct interest in a claim made by her minor children against the school district. To hold otherwise would be to engage in a fiction which would be inappropriate.

Therefore, I **FIND** that respondent must choose between her duty to her children and her duty to the public which elected her to be a member of the board of education. To me, there would appear to be no choice but for a parent to protect the interest of his or her children. However, that is a decision which is best left to the individual involved. Under these circumstances, I **FIND** that respondent should be considered to be disqualified to remain as a member of the board of education based upon her interest in a claim against the school district on behalf of her children. Therefore, I **CONCLUDE** that petitioner's request for a declaratory ruling as to this matter should be **GRANTED** and that it should be declared that respondent is in conflict of interest pursuant to *N.J.S.A.* 18A:12-2 because she has an interest in a claim against the school district.

DECISION AND ORDER

Based upon the foregoing discussion, it is hereby **ORDERED** and **DECLARED** pursuant to *N.J.S.A.* 52:14B-8 and *N.J.A.C.* 6A:3-2.1(a) that respondent is in conflict of interest pursuant to the provisions of *N.J.S.A.* 18A:12-2 because she has an interest in a claim made on behalf of her two minor children against the school district.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 29, 2002
DATE

JOSEPH F. MA RTONE, ALJ

Receipt Acknowledged:

4/30/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 1 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

APPENDIX

LIST OF WITNESSES:

For petitioner:

None

For respondent:

None

LIST OF EXHIBITS:

For petitioner:

P-1 Request for Summary Decision

P-2 Affidavit and Law In Support of Request for Summary Decision with the following attachments:

Exhibit A. November 12, 1999 notice of claim

Exhibit B. February 12, 2001 board solicitor opinion letter

Exhibit C. "Rice" notice to respondent dated March 9, 2001

Exhibit D. Respondent letter dated March 12, 2001, responding to "Rice" notice

Exhibit E. Sample Nominating Petition for Annual School Election

P-3 Request to amend Request for Summary Decision to be construed as a petition for Declaratory Ruling pursuant to *N.J.A.C.* 6A:3-2.1

For respondent:

R-1 Respondent's answer to petitioner's Request for Summary Decision with attachment:

Exhibit A. Berlin Borough Board of Education Minutes of Meeting of March 15, 2001

OAL DKT. NO. EDU 6050-01
AGENCY DKT. NO. 143-5/01

BOARD OF EDUCATION OF THE BOROUGH OF BERLIN, CAMDEN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
CHARLOTTE LEE,	:	
RESPONDENT.	:	

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

Upon careful and independent review, the Commissioner concurs, for the reasons set forth in the Initial Decision, that respondent is not eligible to be a member of the petitioning Board, pursuant to *N.J.S.A.* 18A:12-2.[1]

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 6/14/02

Date of Mailing: 6/14/02

[1] The Commissioner notes that he does not concur that this matter was properly converted "from a motion for summary decision to a request for declaratory ruling***." (Initial Decision at 2) (*See, N.J.A.C.* 6A:3-2.1(a).) However, since the outcome herein would have been the same in either event, the Commissioner finds no cause to disturb the ALJ's decision.

[2] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.,* within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

237-02

237-02E

ADAM BUSH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MAPLE SHADE, BURLINGTON COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

June 14, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

DENYING EMERGENT RELIEF

OAL DKT. NO. EDU 4185-02

AGENCY DKT. NO. 176-6/02

ADAM BUSH,

Petitioner,

v.

MAPLE SHADE TOWNSHIP

BOARD OF EDUCATION,

BURLINGTON COUNTY,

Respondent.

Scott T. Schweiger, Esq., for petitioner (Mitnick, Josselson & DePersia, attorneys)

Frank P. Cavallo, Esq., for respondent (Parker, McCay & Criscuolo, attorneys)

BEFORE **SOLOMON A. METZGER,** ALJ:

This matter arises out of petitioner's application for emergent relief from respondent's decision to bar him from the senior prom on June 14, 2002 and commencement exercises on June 25, 2002. The matter was transmitted to the Office of Administrative Law on June 12, 2002 and the parties were heard on June 13, 2002.

The facts are undisputed. Petitioner is a senior student in the respondent district who went on the senior class trip to Orlando, Florida during the week of May 6, 2002. While at Universal Studios Theme Park with the group, petitioner was caught shoplifting at one of the stores in the park. He admitted to removing the items in question from the store, although he claimed it was an accident. Raymond S. Marini, the school principal, was a chaperone on this trip and park security personnel presented him with two options. Petitioner could agree to leave the premises and not return for a period of one year, or be handed over to the Orlando Police Department. Mr. Marini took custody of petitioner and after consulting by telephone with his parents, had him flown home. On May 14, 2002, Mr. Marini met with petitioner and his parents. The student handbook and instructions to those taking the senior class trip make plain that any drug, alcohol, or theft infractions on the trip would result in the loss of privileges to participate in commencement exercises and all other senior class activities. Nonetheless, Mr. Marini chose to place petitioner on probation and at the same time warned him that he would be barred from the prom and graduation if he committed any further disciplinary violations during the remainder of the semester.

On June 3, 2002, petitioner arrived late to school, which required him to sign in and get a pass from the guidance office. As it happens his class was engaged in a fire drill as he was getting to school and he joined the class and then went on to the classroom. His teacher noticing his lateness asked him to produce a late pass. Petitioner stood up and feigned a search for the pass in his pockets and book bag and then indicated that he could not find it. On the following day the teacher again asked him to produce the late pass and petitioner indicated again that he could not find it. She replied that she would go to the guidance office later to check whether he had signed in and at this point petitioner acknowledged that he had not actually secured a pass. After class petitioner sought to persuade this teacher to excuse his behavior and when she would not he left in an angry state slamming the door behind him. The teacher brought the matter to the attention of the assistant principal, who issued a one-day in-school suspension for failing to get a late pass and for twice fibbing about it to his teacher. Mr. Marini decided that this conduct violated the understanding he had reached with petitioner and he imposed the discipline that was due after the Florida shoplifting incident. This is the substance of the record.

This matter is governed by the tenets expressed in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Petitioner must show, among other things, that he would likely prevail on the merits at a plenary hearing. This has not been done. Boards of Education enjoy wide policy-making discretion and their decisions may not be disturbed unless arbitrary and capricious. *Thomas v. Board of Educ. of Morris,* 89 *N.J. Super.* 327, 332 (App. Div. 1965); *Kopera v. Board of Educ. of West Orange,* 60 *N.J. Super.* 288, 294 (App. Div. 1960). Shoplifting is a criminal offense and of itself was sufficient cause to exclude petitioner from the prom and graduation exercises. However, the district gave him a second chance and petitioner could not manage to stay out of difficulty for the remainder of the semester. Instead of obtaining a late pass he lied twice to his teacher about having done so. Mr. Marini's actions were well within the range of reasonable and it is highly unlikely that petitioner could prove that the district was arbitrary and capricious.

Based on the foregoing, it is my conclusion that petitioner has not met the *Crowe* standards and the application for emergent relief is denied.

This order on application for emergency relief may be adopted, modified or rejected by the **DEPARTMENT OF EDUCATION**, which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Department of Education does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

6/13/02
DATE

SOLOMON A. METZGER, ALJ

/caa

OAL DKT. NO. EDU. 4185-02
AGENCY DKT. NO. 176-6/02

ADAM BUSH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MAPLE SHADE, BURLINGTON COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter, which included the audiotape of the hearing conducted at the Office of Administrative Law (OAL) on June 13, 2002, and the Initial Order of the Administrative Law Judge (ALJ) have been reviewed by the Assistant Commissioner to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34.

Upon such review, the Assistant Commissioner affirms the Order denying emergent relief, concurring with the ALJ's determination that petitioner has not satisfied the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the within application for emergent relief is hereby denied. This matter is being returned to the OAL for such further proceedings as may be necessary to bring it to conclusion.

IT IS SO ORDERED.*

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 6/14/02
Date of Mailing: 6/14/02

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

249-02

249-02

MARGARET CAVERA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 26, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3120-00
AGENCY DKT. NO. 42-1/00

MARGARET CAVERA,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

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

Charlotte Kitler, Esq., for respondent

Record Closed: May 8, 2002 Decided: May 9, 2002

BEFORE **MARGARET M. MONACO,** ALJ:

On or about January 31, 2000, petitioner filed a Verified Petition challenging the deduction of days from her sick leave bank following an alleged work-related accident. Respondent State-Operated School District of the City of Jersey City filed an answer to the Petition on or about February 15, 2000. The Department of Education transmitted the matter to the Office of Administrative Law where, on March 22, 2000, it was filed for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The undersigned subsequently entered Consent Orders placing the matter on the inactive list in view of a pending action filed by petitioner with the Division of Workers' Compensation (C.P. No. 2000-15946). By letter dated April 30, 2002, petitioner's counsel advised that an amicable resolution had been reached following a ruling from the Division of Workers' Compensation regarding the length of petitioner's temporary disability. Counsel for respondent, thereafter, submitted the attached

Stipulation of Settlement indicating the terms of agreement, which the undersigned received on May 8, 2002.

Having reviewed the record and the terms of the settlement, I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

May 9, 2002
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Receipt Acknowledged:

5-15-02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 16 2002
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
MAY 8 1 24 PM '02

FEINTUCH, PORWICH & FEINTUCH
721 Newark Avenue
Jersey City, New Jersey 07306
(201) 656-8600
Attorneys for Petitioner

MARGARET CAVERA, Petitioner, vs. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, COUNTY OF HUDSON, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL DKT NO. EDU-3120-00 Agency Ref. No. 282-9/99 **STIPULATION OF SETTLEMENT**

THIS MATTER having been brought before the office of Administrative Law by Feintuch, Porwich & Feintuch, attorneys for petitioner, with Charlotte Kitler, Esq., appearing for respondent, and the parties having adjusted the differences between them as a result of the Division of Workers' Compensation ruling on the length of petitioner's temporary disability in Margaret Cavera vs. Jersey City Board of Education, C.P. No. 2000-15946, and for good cause being shown,

IT IS on this day of , 2002,

STIPULATED AND AGREED that Respondent shall restore thirteen days to Petitioner's sick leave bank which were deducted for the period from December 7, 1999 through December 23, 1999.

WE HEREBY CONSENT TO THE FORM AND ENTRY OF THE ABOVE STIPULATION.

FEINTUCH, PORWICH & FEINTUCH
Attorneys for Petitioner

By: _____
ALAN S. PORWICH
DATED: April 30, 2002

_____
CHARLOTTE KITLER, ESQ.
Attorney for Respondent
DATED: May 7 , 2002

OAL DKT. NO. EDU 3120-00
AGENCY DKT. NO. 42-1/00

MARGARET CAVERA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/26/02

Date of Mailing: 6/26/02

250-02

WARREN D. JONES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS AND BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY,	:	DECISION
RESPONDENTS.	:	

June 27, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6842-00

AGENCY DKT. NO. 26-2/00

WARREN D. JONES,

Petitioner,

v.

NEW JESEY STATE BOARD OF EXAMINERS AND BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY,

Respondent.

Richard A. Friedman, Esq., for the petitioner (Zazzali, Fagella & Nowak, attorneys)

Allison Eck, Deputy Attorney General, for the respondent, New Jersey State Board of Examiners (David Samson, Attorney General of New Jersey, attorney)

Andrew P. Oddo, Esq., for the respondent, Hillsborough Township Board of Education (Fogarty & Hara, attorneys)

Record Closed: May 6, 2002 Decided: May 8, 2002

BEFORE **BRUCE R. CAMPBELL**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on September 22, 2000, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was scheduled for a hearing on June 7, 2001. The matter was adjourned due to a new Deputy Attorney General being assigned to the case. After several conferences, the parties have reached a settlement. The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of the settlement.

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

MAY 0 8 2002
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

May 14 2002
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 15 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cad

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioner

WARREN D. JONES, Petitioner, v. NEW JERSEY STATE BOARD OF EXAMINERS and BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSBOROUGH, Respondents.	: BEFORE THE OFFICE OF ADMINISTRATIVE LAW : OAL Docket No.: EDU 6842-00 **STIPULATION OF SETTLEMENT AND SETTLEMENT AGREEMENT**

The parties to the within matter agree that the matter shall be deemed settled and resolved, subject to the following terms and conditions:

1. The parties agree that each and every term of this agreement is a material and integral part of this agreement.

2. The parties recognize that this agreement must be approved by the Commissioner of Education, and that if the Commissioner of Education rejects any term or provision of this agreement, this settlement agreement shall be deemed null and void, and this matter shall be returned to the Office of Administrative Law for the resumption of proceedings as a contested case.

3. The parties agree that they have considered the merits of each others'

positions, recognize that there were no allegations of wrongful conduct, of just cause for termination of employment, of any impropriety on the part of petitioner (hereinafter Mr. Jones), that Mr. Jones' performance for the 1997-98 school year was overall satisfactory, and in view of all of the facts and of these circumstances, hereby agree that the matter pending before the Commissioner of Education shall be settled and resolved based upon the following conditions:

A. If any inquiries or requests are made to the respondent Hillsborough Board of Education or to any of its officers, agents, members, employees, or representatives for any references for Mr. Jones' or in relation to the nature, character, length, or caliber of Mr. Jones' employment or performance with the Hillsborough Township Board of Education, they shall be answered with the following statement only:

> Mr. Jones' performance was overall satisfactory, but Mr. Jones decided to leave the district on his own.

B. If any inquiries are made to the State Board of Examiners or to any of its agents, employees, officers, members, or representatives regarding whether Mr. Jones acquired standard certification as the result of his employment with the Hillsborough Board of Education, they shall be answered as follows:

> While employed by the Hillsborough Township Board of Education, Mr. Jones' performance was overall satisfactory but Mr. Jones decided to leave the district on his own. After his service concluded, there was a disagreement between Mr. Jones and the Hillsborough Township Board of Education whether Mr. Jones should be issued standard certification. There was a challenge by Mr. Jones to the Hillsborough Township Board of Education's failure to recommend that he be issued standard certification, and that challenge was resolved through agreement by the parties that Mr. Jones' performance overall was satisfactory, and that Mr. Jones left the district on his own

3/21/02 AFD 3/21/02 RAF 3/21/02 WTG 3/21/02

+ Matching allegations of Corporal Punishment made known to the Board were investigated + subsequently found

accord.

In addition, in response to any such inquiries, the response shall include the statement that Mr. Jones was issued standard certification as a result of employment with the Trenton Board of Education ~~on~~ in October of 1999 ~~November~~ 3/21/02

Warren D Jones
Petitioner, Warren D. Jones

Dated: 3/2/02

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN
Attorneys for Petitioner

By: RAF
Richard A. Friedman, Esq.

Dated: 3/21/02

Board of Education of the
Township of Hillsborough

By: _____
Superintendent

Dated: _____

FOGARTY & HARA
Attorneys for Respondent
Hillsborough Township Board
of Education

By: _____
Andrew P. Oddo, Esq.

Dated: 3/21/02

John J. Farmer, Attorney General
Attorney for State Board of Examiners

By: _____
[illegible], DAG

Dated: 3/21/02

STATE BOARD OF EXAMINERS
By: [illegible], Deputy Attorney General
JAY DOCKMAN, ACTING SECRETARY

DATED: 3/21/02

Allison Eck, DAG

FOGARTY & HARA
COUNSELLORS AT LAW

RODNEY T. HARA
STEPHEN R. FOGARTY
ELLEN MARIE WALSH

JANE GALLINA MECCA
JANET L. PARMELEE
ANDREW P. ODDO
MARIA A. GIAMMONA
JENNIFER MAZAWEY
EDWARD J. QUIGLEY
JASON J. STEPHANS

16-00 ROUTE 208 SOUTH
FAIR LAWN, NEW JERSEY 07410

(201) 791-3340
TELECOPIER (201) 791-3432

2002 MAY -6 A 9:34

May 3, 2002

Honorable Bruce R. Campbell, A.L.J.
Office of Administrative Law
9 Quakerbridge Plaza
P.O. Box 049
Trenton, New Jersey 08625-0049

Re: Warren D. Jones v. State of Examiners and Hillsborough Township Board of Education
OAL Docket No. EDU 6842-00
Agency Reference No. 26-1/99
Our File No. 127

Dear Judge Campbell:

This office represents the Hillborough Township Board of Education (the "Board"). Enclosed you shall find a resolution executed by the Board adopting the settlement entered on the record on March 21, 2002 in the above captioned matter.

Respectfully Submitted,

FOGARTY & HARA

BY: _____
ANDREW P. ODDO

APO:lr
Enclosure
cc: Richard A. Friedman, Esq.
Allison Eck, DAG
Dr. Robert Gulick
Superintendent of Schools
Mr. Thomas Venanzi
Assistant Superintendent for
Business/Board Secretary

RESOLUTION

2002 MAY -5 A 9:24

WHEREAS, the Hillsborough Township Board of Education (hereinafter referred to as the "Board") employed Warren D. Jones (hereinafter referred to as "Jones") as a teacher during the 1997-1998 school year; and

WHEREAS, a dispute arose between the parties regarding whether or not Jones should be issued a standard teaching certification; and

WHEREAS, in settlement of this dispute, the parties have agreed to enter into a Stipulation of Settlement and Settlement Agreement and be bound by its terms and conditions; and

WHEREAS, the parties are desirous of memorializing the terms of their agreement.

NOW, THEREFORE, BE IT RESOLVED that the matter in controversy titled Warren D. Jones v. New Jersey State Board of Examiners and Board of Education of the Township of Hillsborough is hereby amicably resolved between the parties;

BE IT FURTHER RESOLVED that the parties have memorialized the terms and conditions of their dispute in the Stipulation of Settlement and Settlement Agreement annexed hereto and incorporated herein by reference;

BE IT FURTHER RESOLVED that the parties are desirous of mutually binding themselves to the terms and conditions of the Stipulation of Settlement and Settlement Agreement;

BE IT FURTHER RESOLVED that the Board hereby approves and adopts the terms and conditions of the Settlement Agreement and agrees to be bound thereby.

ROLL CALL VOTE:

AYES: 7

NAYS: 0

ABSTENTIONS: 0

CERTIFICATION

I hereby certify that the within Resolution was adopted by the Hillsborough Board of Education by a majority vote at its duly authorized meeting on April 15, 2002.

Mr. Thomas Venanzi
Board Secretary/
Assistant Superintendent for Business

DATED: May 1, 2002

OAL DKT. NO. EDU 6842-00
AGENCY DKT. NO. 26-2/99

WARREN D. JONES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS AND BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY,	:	DECISION
RESPONDENTS.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/27/02

Date of Mailing: 6/27/02

246-02

246-02

DONALD MAGAW,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY, DR. JACK DE TALVO AND DR. DENNIS HURLEY,	:	DECISION
RESPONDENTS.	:	

June 26, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8708-00
AGENCY DKT. NO. 364-9/00

DONALD MAGAW,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, DR. JACK DE TALVO AND DR. DENNIS HURLEY, MONMOUTH COUNTY,
Respondents.

Michael E. McGann, Esq., for petitioner (Amdur, Boyle, Maggs & McGann, attorneys)
Robert J. Pruchnik, Esq., for respondents (Kenney, Gross, Kovats & Campbell, attorneys)

Record Closed: May 2, 2002 Decided: May 9, 2002

BEFORE **JOSEPH F. MARTONE**, ALJ:

Petitioner asserts that the respondent Board of Education has failed to pay full salary without loss of sick time for an injury sustained in the course of employment pursuant to NJSA 18A:30-2.1, notwithstanding a Division of Workers' Compensation determination that it was a work-related illness and a New Jersey Appellate Division decision affirming the decision of the Division of Workers' Compensation. This matter was transmitted to the Office of Administrative Law on November 29, 2000, for hearing as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was assigned to me on February 16, 2001, and after a telephone conference and a series of telephone status conferences, the matter was scheduled for hearing on December 18, 2001. Prior to the hearing date, the attorneys represented that they would be able to enter into a stipulation of facts in order to dispense with the necessity of a hearing, and the scheduled hearing on December 18, 2001, was adjourned. Thereafter, the attorneys represented that they would be able to settle the matter, but because of the complexity of the issues, it would take some time to finalize.

The parties have agreed to a settlement and have prepared and submitted a Stipulation of Settlement on May 2, 2002, indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 9, 2002
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

May 14 2002
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 15 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

mph

2002 MAY -2 P 2:36

Kenney, Gross, Kovats & Campbell
130 Maple Avenue, Building 8
P.O. Box 8610
Red Bank, New Jersey
(732) 530-7500
Attorneys for Respondent.

DONALD MAGAW,

Petitioner,

vs

MIDDLETOWN TOWNSHIP BOARD OF EDUCATION,

Respondent.

STATE OF NEW JERSEY
BEFORE THE COMMISSIONER OF EDUCATION
OFFICE OF ADMINISTRATIVE LAW
HONORABLE JOSEPH F. MARTONE, ALJ

DOCKET NO. EDU-08708-00S
AGENCY REF. NO. 364-9/00

STIPULATION OF SETTLEMENT

The Middletown Township Board of Education, Monmouth County (the "**BOARD**"), with principal offices at 59 Tindall Road, Middletown, New Jersey 07748, and Donald Magaw (the "**PETITIONER**"), residing at 8 Vanada Drive, Neptune, New Jersey 07753, desiring to settle this matter before the Commissioner of Education in an amicable and mutually satisfactory way, hereby set forth their full and complete agreement, as follows:

WHEREAS, on November 29, 2000, **PETITIONER** filed a Petition of Appeal with the Commissioner of Education claiming, in part, that pursuant to N.J.S.A. 18A:30-2.1 that he was

entitled, for the 1994-95 and 1995-96 school years, to restoration of both certain sick leave benefits and salary; and

WHEREAS, the Petition of Appeal was predicated upon an Order, dated September 15, 1998, by the Honorable J. William Boyle, Judge of Compensation, determining that the **PETITIONER'S** cancer was caused by occupational exposure to secondhand tobacco smoke while employed at the **BOARD'S** Thorne Middle School; and

WHEREAS, Judge Boyle ordered that:

1. Petitioner was entitled to temporary disability benefits from October 26, 1994 until September 7, 1996 at the rate of $462.00 per week;

2. That Respondent reimburse the Petitioner all of his accumulated sick time that was used during his period of disability;

3. Respondent reimburse sick time to all of those individuals who donated their sick time to the Petitioner during his period of disability; and

WHEREAS, in the instant Petition of Appeal **PETITIONER** claimed entitlement to all sick leave donated to him by fellow staff members during the 1994-95 school year; and

WHEREAS, the **BOARD'S** records reflect the fact that, during the 1994-95 school year, a total of sixty-five (65) sick days were contributed by the **PETITIONER'S** fellow employees; and

WHEREAS, the **BOARD'S** records reflect the fact that, currently, fifty (50) of these days can be restored to existing staff members; and

WHEREAS, **PETITIONER** and the **BOARD** have entered into settlement discussions in an effort to avoid the costs and uncertainty of further litigation;

NOW, THEREFORE, be it and it herewith is agreed as follows:

1. Pursuant to N.J.S.A. 18A:30-2.1, for the 1994-95 and 1995-96 school years, **PETITIONER** is entitled to partial salary reimbursement in the amount of $31,654.35.

2. Pursuant to N.J.S.A. 18A:30-2.1, the **BOARD** is entitled to a credit for the workmen's compensation benefits that the **PETITIONER** received between March, 1995 and October, 1995 in the amount of $10,028.00.

3. Therefore, the **BOARD** will reimburse **PETITIONER** the amount of $21,626.05 in back salary.

4. Additionally, the **BOARD** will partially reimburse the **PETITIONER** for his attorney's fees and costs in this matter in the amount of $1,000.00.

5. Of the sixty-five (65) sick days contributed to the **PETITIONER** by fellow staff members, a total of fifteen (15) days will be restored to the **PETITIONER** and a total of fifty (50) days will be restored to the various staff members who contributed those days to the **PETITIONER** and who continue to be employed by the **BOARD**.

6. Additionally, pursuant to N.J.S.A. 18A:30-2.1, the **BOARD** will reimburse the **PETITIONER** for the eighteen (18) sick days he utilized between October 26, 1994 and March 14,

1995, the number of personal sick days that the **PETITIONER** exhausted prior to beginning unpaid medical leave on March 15, 1995.

7. The **BOARD** will restore to the **PETITIONER'S** sick leave bank an additional two (2) days that were utilized in October, 1994, in connection with his medical treatment although prior to the October 26, 1994, effective date of his disability.

8. Therefore, the **BOARD** will be restoring to the **PETITIONER'S** sick leave bank a total of thirty-five (35) sick days. However, the **PETITIONER** agrees that the **BOARD** shall deduct from the thirty-five (35) sick days a total of twenty and a half (20 1/2) sick days, representing the number of days that the **PETITIONER** was docked between January, 2001, to date. Accordingly, **PETITIONER** will be retroactively reimbursed for the amount of salary docked during this period of time, i.e., $6,756.28.

9. **PETITIONER** contends that three and one-half (3 1/2) of the aforementioned thirty-five (35) sick days (3/19/01, 3/29/01, 4/4/01, and 6/5/01) should have been charged as workmen's compensation days. If the **BOARD** determines through its insurance carrier that the **PETITIONER** is correct, three and one-half (3 1/2) sick days will be credited to the **PETITIONER'S** sick leave bank. However, this would have no impact or effect on the amount of monies owed to the **PETITIONER** under this Agreement.

10. A check in the amount of $29,382.33 representing all monies owed to **PETITIONER** under this Agreement, will be issued to **PETITIONER** within five (5) business days of the **BOARD OF EDUCATION'S** regular monthly meeting to be held on April 23, 2002.

11. The parties agree that nothing in this Settlement Agreement shall constitute an admission or acknowledgment by the **BOARD** that the **BOARD** of any of its officers, employees, or agents have engaged in any unlawful acts.

12. In consideration for the above, **PETITIONER** agrees that the terms of this agreement shall constitute a full and complete settlement of all claims he has or may have against the Middletown Township Board of Education as set forth by the **PETITIONER** in his Petition of Appeal filed on November 29, 2000.

13. **PETITIONER** acknowledges that he is entering this Agreement on his own accord, without coercion or pressure of any kind, that he has obtained independent legal counsel of his own selection and that he has been dully apprised of his legal rights; that all provisions of this Agreement, as well as all questions pertaining thereto, have been satisfactorily explained to him; and that the settlement embodied in this Agreement is in all respects acceptable to him.

FOR THE BOARD:

FOR THE PETITIONER:

DONALD MAGAW, Petitioner

DATED: 4-2-02

DATED: 3/26/2002

WITNESS

WITNESS

DATED: 4/2/02

DATED: 3/26/02

OAL DKT. NO. EDU 8708-00
AGENCY DKT. NO. 364-9/00

DONALD MAGAW,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY, DR. JACK DE TALVO AND DR. DENNIS HURLEY,	:	DECISION
RESPONDENTS.	:	

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

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The Commissioner notes, however, that the parties' settlement sets forth terms that were to be effectuated prior to approval of the settlement by the Commissioner pursuant to *N.J.A.C.* 1:1-19.1. He, therefore, reminds the parties that they acted at their peril in so doing and cautions them, and other litigants whose controverted matters have been duly transmitted to the OAL, against effectuation of any settlement prior to its submission to, and approval by, the Commissioner.

The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/26/02

Date of Mailing: 6/26/02

245-02

245-02E

C.L., on behalf of minor child, M.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

June 24, 2002

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING EMERGENT RELIEF
OAL DKT. NO. EDU 5014-02

C.L. on behalf of minor, M.L.,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

Charles I. Auffant, Esq., for petitioner

Joe Verga, Esq., for respondent
(Newark Public School Office of General Counsel)

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner contends that respondent, the State-Operated School District of Newark, effectively expelled her great-grandson, M.L., without due process. Petitioner seeks an order for emergent relief to readmit M.L. into the regular high school program and an appropriate assessment to address his academic and behavioral needs.

On May 16, 2002, the matter was transmitted to the Office of Administrative Law (OAL) for emergent relief.

FACTS

Based on a review of the relevant evidence and moving papers, I **FIND** as **FACT**:

1. M.L., a 17-year-old male, is a twelfth-grade student who was enrolled in West Side High School for school year 2001-2002.

2. On February 26, 2002, M.L. was summoned from his class to the school security office and arrested by a detective from the Newark Police Department.

3. The school principal, Fernard Williams, Sr., was present during the arrest. Williams was given a police report, which revealed the charges.[1]

4. M.L. was taken into custody and placed in the Essex County Juvenile Detention Facility, and was released on or about April 4, 2002.

5. On April 8, 2002, M.L., accompanied by C.L., returned to school. M.L. and C.L. were directed to the attendance office and informed by an administrator that M.L. had been dropped from the school's register. They were further advised that M.L. could not return to school without authorization from the school principal. Before

[1] The alleged incident, that M.L. had threatened another student with a gun, did not occur on school property.

leaving the building C.L. attempted to meet with the principal, but he was unavailable.

6. Thereafter, C.L. attempted to contact Williams by telephone, but she was unsuccessful.

7. C.L. contacted Kathy Bone, an employee with the Juvenile Detention Facility, for assistance in getting M.L. readmitted to school. They were unsuccessful.

8. In mid-April 2002, petitioner retained legal counsel, who conducted a telephone conference with Principal Williams and C.L. The principal advised petitioner that M.L. had been "dropped" for non-attendance.

9. On April 22, 2002, respondent transferred M.L. to the West Side High School Twilight Program, an alternative program for students who have been identified as having academic, behavior and attendance problems.

10. On or about May 9, 2002, petitioner moved for emergent relief.

POSITIONS OF THE PARTIES

Petitioner contends that he was expelled from West Side High School without due process or written notice of the reason for the school's action. Moreover, respondent failed to conduct a hearing within twenty-one days of the date of M.L.'s removal from school. Thus, petitioner seeks emergent relief of reinstatement to West Side High School. Also, petitioner seeks an assessment to address his education and behavior needs.

Respondent argues that it did not expel or suspend M.L. from the high school. Rather, it made an administrative transfer, which placed M.L. into the West Side High School Twilight Program, an alternative program for students who have been identified as having academic, behavior, and attendance problems.

DISCUSSION

Pursuant to *N.J.A.C.* 6A:3-1.6, the Commissioner of Education may order temporary emergent relief under the standard set forth in *Crowe v. De Gioia*, 90 *N.J.* 126 (1982). The moving party must demonstrate:

> 1. Irreparable injury will result if the application is not granted;
>
> 2. The legal right underlying petitioner's claim must be settled;
>
> 3. A reasonable probability of success on the merits;
>
> 4. The relative hardship to the moving party outweighs the hardship to the other side.
>
> [90 *N.J.* at 132-34.]

Petitioner asserts that he is suffering irreparable harm because he "has been out of school since February 26, 2002. Every day out of school represents an educational day forever lost." Petitioner's Brief at 3.

Further, petitioner asserts that the administration of the school imposed "this indefinite out-of-school suspension" in violation of his due process rights. Indeed, respondent failed to provide "written notice of the charge supporting the suspension and the factual allegations on which the charge is based." Petitioner's Brief at 6. Moreover, petitioner avers, "Removal or indefinite suspension without a hearing of any kind" violates his right to a thorough and efficient public education. *Ibid.* Thus, petitioner seeks "immediate reinstatement to school." *Id.* at 7.

Petitioner further asserts that, "If [M.L.] exhibits dangerous conduct after readmission, the District may suspend him consistent with the requirements of due process and the procedural protections of applicable law." *Ibid.* Petitioner maintains, however, that the District must provide intervention strategies necessary to enable him to succeed in school. Therefore, M.L. also seeks an order that the District conduct the appropriate assessments that might assist him with "both academic and behavioral difficulties." *Id.* at 8.

Petitioner correctly affirms that he is entitled to a thorough and efficient public education and related services under *N.J. Const.* art. VIII, § 4, ¶ 1. However, M.L.'s assertion that he has been on suspension since Febuary 26, 2002, is unsupported. To the contrary, the undisputed evidence reveals that respondent did not remove M.L. from school from February 26 to April 8, 2002. More exactly, M.L. was arrested on charges, placed in custody where he received educational instruction, and released on April 4, 2002. Thus, M.L.'s absence from West Side High School from February 26 to April 8, 2002 resulted from his alleged transgression, not respondent's action

The undisputed evidence further reveals, however, from April 8 to 21, respondent denied M.L. readmission to the school district. Moreover, the record discloses that respondent did not take steps to assess M.L.'s academic and behavior needs until petitioner brought in legal counsel. On April 22, 2002, M.L. was placed in the West Side High School Twilight Program, an alternative program for students who have been identified as having academic, behavior, and attendance problems.

Public school students are entitled to an education in a reasonably safe environment. For good cause a student may be suspended or expelled from school, subject to due process requirements. Petitioner correctly notes that prior to suspension or expulsion due process requires notice of the charge, a

statement of the factual allegation on which a charge is based, discovery of the name of any person with knowledge of any relevant fact and discovery of any relevant document, and a hearing not more than twenty-one days after the suspension. *N.J.S.A.* 18A:37-1 to -5; *R.R. v. Shore Reg'l High Sch. Bd. of Educ.*, 109 *N.J. Super.* 337 (Ch. Div. 1970).

In *P.J. and K.J. on behalf of D.J. v. Board of Education of the Township of Egg Harbor*, EDU 2387-98, Initial Decision (March 18, 1998) <http://lawliBriefary.rutgers.edu/oal/search.html>, the petitioners challenged the reasonableness of a ten-day suspension for fighting in school. Because the suspensions had commenced the petition was heard as a motion for emergent relief. The ALJ noted that a school administrator, upon reasonable belief that a student presents a danger to herself or to others or to school property, "may temporarily suspend the student, pending and conditioned upon notice and a hearing before the board of education. *N.J.S.A.* 18A:37-5. However, where a suspended student is not provided, *e.g.*, a preliminary hearing and instruction to allow her to keep up with her class, she may be ordered readmitted to school. *R.R. v. Shore Regional High Sch. Bd. of Educ.* [*supra*, 109 *N.J. Super.* 337]." The ALJ also concluded, "[t]he hearing in this case satisfies the above-described rights."

Here, the parties dispute whether M.L. was suspended and/or expelled from West Side High School. The evidence reveals that on April 8, 2002, he was "dropped from the rolls" without notice and denied admission into the regular school program.

Based on the undisputed facts, I **CONCLUDE** that the determination of respondent to deny M.L. entrance into the regular school without notice was in effect expulsion.

I further **CONCLUDE** that prior to expulsion, M.L. was denied due process as required in *N.J.S.A.* 18A:37-1 to -5; *R.R. v. Shore Reg'l High Sch. Bd. of Educ., supra*, 109 *N.J. Super.* 337.

I have considered whether respondent has satisfied the criteria for emergent relief. First, petitioner must demonstrate he will suffer irreparable harm if he is not immediately returned to the general education program at West Side High School.

Petitioner acknowledged that he has "academic and behavior difficulties." Petitioner's Brief at 8. Thus, he requests respondent to "implement intervention strategies, including behavioral strategies" to assist him in the general education program. *Ibid.* Further, petitioner states, "while it is not necessary that the Commissioner decide at this point the precise interventions and services needed by M.L., the District should be ordered to conduct the appropriate assessment."

I am persuaded by the evidence, however, that the appropriateness of M.L.'s educational program will depend in large part on the assessment of his academic and behavior needs. Indeed, the parties agree that M.L. will have a better chance at succeeding in school if he is in an appropriate educational program. Although the hearing for emergent relief did not present detailed information from individual school personnel on M.L.'s school record, Principal Williams testified that in prior and current school years M.L. exhibited academic, attendance, and behavior problems. Based on M.L.'s failing grades, he will not graduate with his class in June 2002. Although Williams maintained that he dropped M.L. from the "roll" due to attendance, he conceded that safety was also an issue. Williams has intervened in disciplinary matters between M.L. and another student, who was the alleged victim in the incident which resulted in M.L.'s arrest on February 26, 2002.

Williams referred M.L. to the Pupil Resource Committee (PRC) after he participated in a telephone conference with petitioner and her attorney. Williams further testified that the PRC, an intervention team comprised of counselors and other professionals, including some members of the child study team, assesses students who exhibit academic and behavior problems. On April 22, 2002, the PRC met with C.L., assessed M.L. and recommended that he be placed in the alternative school program.

Principal Williams further testified that the West Side High School Twilight Program provides smaller classes and fewer academic courses than the general academic program offers. The student will be reassessed at the end of one year to determine if the continued placement is appropriate. Thus, M.L.'s placement in the alternative educational program at West side High School might provide him with the assistance he seeks and needs to address his "academic and behavioral difficulties."

Although petitioner's counsel, and perhaps the threat of legal action, prompted respondent to readmit M.L. to the school district, I further **CONCLUDE** that respondent, within a reasonable time from excluding petitioner from school on April 8, 2002, provided M.L. with a program that it believed would address his academic and behavior needs.

Although respondent failed to provide petitioner a hearing prior to dropping him from the roll on April 8, 2002, I **CONCLUDE** that the hearing in this matter provided petitioner with the opportunity to be fully heard on respondent's refusal to readmit him to the general high school program. Petitioner may challenge the appropriateness of the assessment and placement in the alternative program. However, I **CONCLUDE** that M.L. has not demonstrated the first criteria for emergent relief; that he will suffer irreparable injury if he is not immediately readmitted to the regular program at West Side High School.

Therefore, I **CONCLUDE** that petitioner has not satisfied the criteria for emergent relief.

It is **ORDERED** that petitioner's motion for the emergent relief of immediate readmission to the twelfth grade at West Side High School be **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

June 3, 2002
DATE

Mumtaz Bari-Brown
MUMTAZ BARI-BROWN, ALJ

OAL DKT. NO. EDU 5014-02
AGENCY DKT. NO. 143-5/02

C.L., on behalf of minor child, M.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record, including the audio tapes of the emergent relief hearing, and the Decision on Motion for Emergent Relief issued by the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon such review, which has been delegated to him pursuant to *N.J.S.A.* 18A:4-34, the Assistant Commissioner concurs with and adopts as his own the recommended Decision on Motion denying emergent relief to petitioner for failure to meet the standards for the grant of such relief set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, petitioner's request for immediate readmission of M.L. to West Side High School is denied and the matter shall proceed to a hearing on the merits.

IT IS SO ORDERED.*

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 6/24/02

Date of Mailing: 6/24/02

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

251-02

251-02

N.A.W. AND J.K., on behalf of minor child, B.B., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWN OF SECAUCUS, HUDSON COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

June 27, 2002

OAL DKT. NO. EDU 5432-01
AGENCY DKT. NO. 145- 5/01

N.A.W. AND J.K., on behalf of minor child, B.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF SECAUCUS, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on June 7, 2002, providing them thirteen (13) days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by the parties, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/27/02

Date of Mailing: 6/27/02

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

252-02

IN THE MATTER OF THE TENURE :
HEARING OF JANET INGRAM, :
SCHOOL DISTRICT OF BLOOMINGDALE, :
PASSAIC COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The Board certified tenure charges of unbecoming conduct and insubordination against respondent teacher due to her alleged refusal to cooperate with school administration and her refusal to comply with the Board's directive to undergo a physical and a psychiatric examination.

The ALJ concluded that the Board met its burden of proving that respondent had committed several acts of insubordination sufficient to merit termination from her position. The ALJ ordered respondent dismissed from her employment as a teacher with the school district.

In light of the ALJ's credibility assessments, the Commissioner concurred that the Board proved its charges of insubordination against respondent and that her termination was warranted. The Commissioner adopted the Initial Decision as his own.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9068-01
AGENCY DKT. NO. 367-9/01

IN THE MATTER OF THE TENURE HEARING OF JANET INGRAM, BLOOMINGDALE HIGH SCHOOL DISTRICT, PASSAIC COUNTY.

Gregory D. Winter, Esq., appearing for petitioner Janet Ingram
(Winter & Winkle, attorneys)

Vito Gagliardi, Jr., Esq., appearing for respondent Bloomingdale School District
(Porzio, Bromberg & Newman, attorneys)

Record Closed: April 5, 2002 Decided: May 17, 2002

BEFORE **MARGARET M. HAYDEN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Bloomingdale Board of Education (the Board) has charged that Janet Ingram, a tenured teacher in the district, is guilty of unbecoming conduct and insubordination and has requested termination of her tenure pursuant to *N.J.S.A.* 18A:6-11. Ms. Ingram denied the charges and requests dismissal of the petition.

The Department of Education transmitted the matter to the Office of Administrative Law (OAL) on October 4, 2001, for a hearing as a contested case. The hearing was held on January 30, 2002 and February 14, 2002. The record was held opened until April 5, 2002, for written summations and briefs.

CHARGES

Charge I: The Board charged that Ms. Ingram has been guilty of conduct unbecoming a public employee and insubordination in violation of *N.J.S.A.* 18A:6-10 due to her consistent refusal to cooperate with school administration to address her poor and unacceptable performance.

Charge II: The Board charged that Ms. Ingram has been guilty of unbecoming conduct and insubordination in violation of *N.J.S.A.* 18A:6-10 due to her refusal to comply with the Board's directive to undergo a physical and a psychiatric examination.

FACTS

Undisputed Facts

Janet Ingram was employed by the Board since November 1, 1970. In the 2000-2001 school year Ms. Ingram was working at the Walter T. Brennan School. Steve Naccara was the principal of the school that year. From September 2000 until January 1, 2001, Anthony Gonnella was the interim superintendent of schools for the district. On January 1, 2001, Joan Hall became the superintendent of schools.

On or about November 2000, Mr. Naccara requested that Ms. Ingram produce her grade book to substantiate student grades. Ms. Ingram was unable to immediately locate her grade book. Ms. Ingram eventually located her grade book but Mr. Naccara deemed the data inadequate and incomplete. Ms. Ingram kept her grades on ditto

sheets in a loose leaf binder and produced some of them for Mr. Gonnella. Both Mr. Naccara and Mr. Gonnella thought that the documentation provided by Ms. Ingram was not sufficient and could not substantiate the students' grades.

Mr. Naccara observed Ms. Ingram in her classroom on December 4, 2000, and found areas of teaching that needed improvement. Ms. Ingram and Mr. Naccara met on December 8, 2000, concerning the observation. On December 20, 2000, Mr. Naccara wrote a memo directing Ms. Ingram to provide the material to substantiate her grades immediately or he would consider her insubordinate.

On January 11, 2001, Dr. Hall observed Ms. Ingram in her classroom. Ms. Ingram's attendance records show that she had been absent January 2 through January 5, 2001. After the observation, Dr. Hall advised Ms. Ingram to schedule a pre-observation conference to review Ms. Ingram's teaching performance. Dr. Hall also directed Ms. Ingram to bring her lesson plan book and grading records. Dr. Hall made repeated attempts to contact Ms. Ingram to schedule a conference, which was suppose to be done within 10 days of the observation.

On or about January 18, 2001, Ms. Ingram left a message for Dr. Hall that she was too busy to meet with Dr. Hall until some time after January 29, 2001. Dr. Hall wrote a memo dated January 19, 2001, advising Ms. Ingram that she was required to attend a conference in Mr. Naccara's office at the school on January 22, 2001. Mr. Naccara personally delivered this memo to Ms. Ingram on January 19, 2001. When Ms. Ingram did not appear at Mr. Naccara's office for the meeting scheduled by Dr. Hall, Mr. Naccara located Ms. Ingram in her classroom and escorted her to his office. Although she went to the principal's office, the meeting did not occur.

On January 30, 2001, Ms. Hall wrote Ms. Ingram to advise that she was recommending Ms. Ingram's suspension for a reasonable period necessary to undergo a complete medical and psychiatric examination. On or about February 1, 2001, Ms. Ingram requested and was permitted to take unpaid medical leave. On February 1,

2001, Michael Schneck, M.D., wrote a note stating that Ms. Ingram was under his care for post-traumatic stress disorder and was unable to work. On February 12, 2001, the Board issued a resolution requiring Ms. Ingram to submit to a physical and psychiatric exam to be arranged through the office of Dr. Hall. On February 14, 2001, the Board Secretary wrote Ms. Ingram telling her about the Board's directive.

In February 2001, Sanford Oxfeld, Esq., purporting to represent Ms. Ingram, requested that the physical and psychiatric examinations be postponed for a short time to afford Ms. Ingram time to decide whether to retire from the district. By letter dated April 26, 2001, the Board's attorney advised Mr. Oxfeld that unless Ms. Ingram made a decision about retiring within seven days, the exams would be scheduled and Ms. Ingram's failure to cooperate would be deemed an act of gross insubordination. On or about May 3, 2001, Mr. Oxfeld advised the Board's attorney that Ms. Ingram would undergo the ordered examinations provided she was compensated for her time. Mr. Oxfeld also asked the Board's attorney to extend the unpaid leave of absence until the end of the school year.

In a May 7, 2001 letter from the Board's attorney to Mr. Oxfeld the Board confirmed that it would pay Ms. Ingram for her time undergoing the ordered examinations as she requested. The Board further advised that Ms. Ingram should contact the Board physician, Dr. Paul Ostergaard, to schedule an appointment.

On June 4, 2001, the Board's attorney contacted Mr. Oxfeld to advise that Ms. Ingram had failed to contact Dr. Ostergaard. In August 2001, as Ms. Ingram had failed to contact Dr. Ostergaard, the Board brought tenure charges against her.

Disputed Testimony – Board of Education

Mr. Naccara requested Ms. Ingram's grade book in November 2000 because the parents had expressed concerns about the random manner in which her students were being graded. He had to ask several times for the grade book. Ms. Ingram said she did

not know its whereabouts and did not have the time to find it. When she submitted the grade book it was mostly blank and failed to substantiate the students' grades. Specifically, there were no grades listed for any students for the second marking period although progress reports for the second marking period were due in a few days. Mr. Naccara asked Ms. Ingram to provide other specific material including tests, quizzes, map skills, and homework. Because she did not provide the material to Mr. Naccara, in December he sent her a directive that continuing failure to provide the material would be deemed insubordinate and would result in serious consequences. Ms. Ingram never produced the requested material to Mr. Naccara.

Dr. Hall, after hearing Mr. Naccara's concern about Ms. Ingram's behavior, arranged to observe her on January 11, 2001. Dr. Hall felt that Ms. Ingram refused to cooperate with the observation and persisted in speaking to Dr. Hall during the class period rather than instructing her students. Dr. Hall noted that Ms. Ingram failed to teach any lesson. She merely assigned assorted written assignments to the students to work on independently for two-thirds of the class. When the students completed the assignments she told them to take out a book or magazine to read. When Dr. Hall requested to see Ms. Ingram's lesson plan book, Ms. Ingram stated that, contrary to district requirements, she usually recorded what the students had done after they leave class rather than plan before hand. Dr. Hall felt this practice was against basic teaching methods as well as in violation of a district requirement to have a plan in place before class started.

After the observation, Dr. Hall directed Ms. Ingram to schedule a post observation conference. On January 18, 2001, Ms. Ingram left a message for Dr. Hall that she was too busy to meet so Dr. Hall scheduled a conference for Ms. Ingram's convenience at her school. The meeting was scheduled during Ms. Ingram's preparation period so as not to interrupt any of her classes, which was a common practice for such meetings. Dr. Hall's memo to Ms. Ingram stated that the meeting must take place and that any further postponement of the meeting was unacceptable and would be considered "direct insubordination." When Mr. Naccara personally

delivered the January 19, 2001 memo from Dr. Hall to Ms. Ingram, he told her that it was from Dr. Hall and that it was important.

After Ms. Ingram did not show for the scheduled meeting, Dr. Hall sent Mr. Naccara to locate her. Mr. Naccara found Ms. Ingram in her classroom sitting at her desk. When he told her they were waiting for her she asked "What for?" Ms. Ingram stated that she had not read the letter from Dr. Hall because she had been too busy.

Although Ms. Ingram again told Mr. Naccara that she did not have time for a conference, she agreed to go to his office where Dr. Hall was waiting. When she walked in, Ms. Ingram stated that she did not have time for a conference; she even refused to sit down. According to Mr. Naccara, her words were incoherent, rapid and mumbling. Ms. Ingram claimed that she was overwhelmed and in constant pain because of a disability about which she did not disclose any details. Mr. Naccara pleaded with her to just stay a few minutes in order to have the conference but Ms. Ingram left. During the attempted interview, Ms. Ingram spoke with complete distain to Dr. Hall. She was very clear that she had no intention of meeting as requested. By memo dated January 31, 2001, Mr. Naccara expressed concern to Dr. Hall over Ms. Ingram's mental instability and suggested that she be removed from the classroom.

As a result of denials by Ms. Ingram of certain communications from her lawyer and under concession by Ms. Ingram's present attorney that the attorney client privilege was waived concerning this incident, Ms. Ingram's former attorney, Sanford Oxfeld, who represented her until December 2001, testified under subpoena. Mr. Oxfeld first became involved in the matter in February 2001 and helped negotiate Ms. Ingram's medical leave. He did this either at the request of Ms. Ingram or Ms. Ingram's union representative. Mr. Oxfeld had several conversations during this time with Ms. Ingram about the Board's medical exam directive as well as other issues. During this period, some time in April, Mr. Oxfeld met with Ms. Ingram concerning another matter.

On May 3, 2001, Ms. Ingram came to see him and they discussed, among other things, the Board's request for her to undergo a medical examination. At the end of the meeting Mr. Oxfeld sent the Board's attorney a faxed message saying that Ms. Ingram had asked if her unpaid leave could extend to the end of the year. She also told Mr. Oxfeld to tell the Board that she was willing to see any doctor so long as she was paid for her time. Shortly after this request the Board's attorney sent a letter on May 7, 2001 advising that Ms. Ingram should contact the Board's physician scheduling an appointment. Mr. Oxfeld testified that he immediately forwarded this letter to Ms. Ingram by way of his May 10, 2000 cover letter. Ms. Ingram shortly thereafter telephoned Mr. Oxfeld asking that he again confirm if the Board would indeed pay for her time undergoing an exam. Mr. Oxfeld did this and spoke to her again and specifically reminded Ms. Ingram that the Board had the right to request that she undergo these examinations.

In June 2001, the Board's attorney advised Mr. Oxfeld that Ms. Ingram had failed to contact Dr. Ostergaard. Mr. Oxfeld conveyed this sentiment to Ms. Ingram in a July 10, 2001 letter whereby he told her again to contact Dr. Ostergaard immediately in order to protect her job. Mr. Oxfeld had no reason to believe that she did not get these letters as they were not returned to him by the post office.

When Ms. Ingram was served with the tenure charges in August 2001 Mr. Oxfeld continued to represent her. He remained her attorney until after a December 2001 settlement conference when it became apparent that a conflict had arise between Mr. Oxfeld and Ms. Ingram. He then withdrew and was ultimately substituted by her present counsel.

Disputed Testimony – Janet Ingram

Ms. Ingram testified that she had no objection to being examined by any of the Board's physicians but that she had never received any specific requests to do so. She had spoken with Mr. Oxfeld concerning the necessity for the examination and she

believed that the request would be made directly to her as it had been done with her workers' compensation claim. She did not recall ever receiving any requests from Mr. Oxfeld that she see a specific physician or that she contact a specific physician employed by the Board.

Although the Board had a policy that teachers keep their grades in grade books, Ms. Ingram found this policy inconvenient. Rather she kept the grades on longer ditto papers in a loose leaf binder because it was easier to enter the grades on the sheet rather than the small spaces in the grade book. When Mr. Naccara first requested her grade book it took her a while to obtain the information and present it to him. She presented all her grades to Mr. Naccara as well as to Mr. Gonnella. Both appeared to be satisfied with the grades she had produced.

In December 2001 when Mr. Naccara observed her class, she was surprised by his criticism. Her teaching style was the one that was presented in workshops given by the Board. When she had heard some parents had been complaining she wished to contact the person who was complaining. Ms. Ingram had had numerous awards and had once been teacher of the year in the district.

The first time that Ms. Ingram met Dr. Hall was on the day Dr. Hall came to observe her class. One of the criticisms Dr. Hall made was that Ms. Ingram was asking the students what had occurred previously but Ms. Ingram testified that it was necessary because it was her first day back after being out sick. She also did not have a lesson plan because it was her first day back. It was Ms. Ingram's practice to keep track of what the students were doing in order that a substitute might be better able to take up the class without any interruption. Ms. Ingram did not know why her attendance records do not show that she had been out sick the prior four days.

When Dr. Hall wanted to schedule a meeting Ms. Ingram was willing to meet with her but it was necessary to get all of her grades together and issue report cards first. Ms. Ingram feared serious repercussion if her grades were not in at the appropriate

time. Because of a work-related injury Ms. Ingram was working more slowly than in the past and she was afraid if she did not have sufficient time the grades would not be completed. The January 22, 2001, meeting was scheduled during her free period and Ms. Ingram had planned to use this as preparation time for her next class. Ms. Ingram testified that the teacher's contract guaranteed that they would have one free period a day and Dr. Hall wanted to meet during this period. Ms. Ingram had informed Dr. Hall of her time constraints and had assumed that the meeting would be rescheduled after January 29, 2001. Hence, she was surprised on January 22, 2001 when Mr. Naccara came to her classroom and escorted her to the principal's office. At the meeting, Ms. Ingram was polite but she informed Dr. Hall that the meeting could not take place on that day.

Ms. Ingram had met with Mr. Oxfeld on a number of occasions concerning various issues relating to her employment with the Board. However, Mr. Oxfeld did not become her attorney until some time in August 2001 after she was served with the tenure charges. Ms. Ingram acknowledge having a conversation with him about the examination but only as a friend, not as an attorney. She denied meeting with him in May 2001 and requesting that he help her get her leave extended. She denied receiving any letter or any specific request from him concerning contacting Dr. Ostergaard. She does not think that she received Mr. Oxfeld's July 2001 letter because she was on vacation a lot during that time. She did not understand that a request had been made for a physical examination until her tenure charges were filed. She was willing to be examined by any physician that the Board wanted.

LEGAL DISCUSSION AND CONCLUSION

A Board of Education may dismiss a tenured teacher for acts of "inefficiency, incapacity, unbecoming conduct, or other just cause." *N.J.S.A.* 18A:6-10. To ensure an efficient and orderly administration a teacher's blatantly insubordination is grounds for dismissal of a tenured teacher. *Teaneck Bd. of Educ. v. Wilburn*, 91 *N.J.A.R.* 2d (EDU) 48.

The Board argued that the credible evidence introduced at the hearing demonstrates that Ms. Ingram committed several acts of insubordination warranting her termination, including willfully refusing to provide her supervisors with requested material after repeated requests, refusing to meet with Dr. Hall and Mr. Naccara despite a specific directive, and refusing to comply with the Board's directive to undergo a medical examination. Ms. Ingram argued that she committed no act of insubordination. At worst the claim that she did not have the requested materials of lesson plans and test data is a claim of inefficiency for which the teacher must be given a 90-day period to correct the inefficiency. *N.J.S.A.* 18A:6-11. Moreover, she never refused to comply with the directives to provide her records and to meet with Dr. Hall. She did not get the physical exam because she did not know about the directive to make an appointment.

This case clearly turns on credibility. Where the facts are contested, the trier of fact must weigh the credibility of the witnesses in order to make factual findings concerning the disputed facts. Credibility is the value that a fact finder gives to a witness's testimony, requiring an overall assessment of the witness's story in light of its rationality, internal consistency, and manner in which it hangs together with other evidence. *Carbo v. United States*, 314 *F.*2d 718 (9th Cir. 1963). Credible testimony must proceed from the mouth of a credible witness and must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. *State v. Taylor*, 38 *N.J. Super.* 6, 24 (App. Div. 1955). A fact finder is expected to base credibility decisions on common sense, which is also referred to as intuition or experience. *Barnes v. United States*, 412 *U.S.* 837, 93 *S. Ct.* 2357, 37 *L. Ed.* 2d 380 (1973).

In this case, having had the opportunity to observe the witness and consider the evidence, I **FIND** Ms. Ingram to be less than credible. Her affect and manner of speaking seemed vague and confused. Her answers were inconsistent, illogical and at times bizarre. Moreover, I **FIND** the witnesses for the district to be candid, forthright and completely believable. Testimony of the witnesses are supported by the underlying

memorandums and letters. For these reasons I credit the testimony of the Board's witnesses.

An insubordinate act can be a willful refusal to comply with a supervisor's directive. *Wilburn v. Bd. of Educ.* In Wilburn the Commissioner held the ALJ's decision that the teacher's disregard for a supervisor's legitimate request to provide lesson plans was an act of insubordination warranting termination. *Wilburn, Id.* at 59. Here Ms. Ingram noted that she was too busy to produce her grade book and only produced it after several occasion when the principal visited her classroom and asked for the grade book. When the information in the grade book was determined to be inadequate, Mr. Naccara directed Ms. Ingram to produce tests, quizzes, maps and homework to substantiate how she was determining the grades. After Ms. Ingram failed to produce this material, Mr. Naccara warned her in a memo dated December 20, 2001, that unless she provided the material she would be deemed insubordinate. Ms. Ingram failed to comply with the directive up to and including the time that she went in on sick leave.

Additionally, the district argued that Ms. Ingram's failure to attend the January 22, 2000, meeting as required by Dr. Hall was insubordination. Ms. Ingram argued that she did not refused to have a meeting she just wanted it after January 29 after she had her grades in. The facts as testified by the Board's witnesses show that Ms. Ingram willfully chose to ignore the legitimate request of the superintendent of schools to meet to discuss her performance. Ms. Ingram's testimony that after being handed an envelope by her principal and told that it was an important memorandum from Dr. Hall she chose to not read it was either incredible or demonstrated utter disdain for her supervisors. The memo stated that any further postponement of the meeting would be unacceptable and would be direct insubordination. Ms. Ingram should have read the letter and she should have known that the meeting was required. Ms. Ingram's actions in coming to the meeting then refusing to participate and walking out demonstrated complete defiance of legitimate authority. Ms. Ingram walked out of the principal's office in direct contravention of both of her direct supervisor and the superintendent's

orders. This overt act against both supervisors' directive clearly constituted insubordination.

In February 2001, the Board directed Ms. Ingram to undergo a physical and psychiatric examination. Ms. Ingram admitted that she received a copy of this resolution setting forth the Board's directive. Ms. Ingram never challenged the appropriateness of the Board's directive. At Ms. Ingram's attorney's request the order was temporarily postponed to afford Ms. Ingram time to decide whether to retire. In late April when she had not notified the district of plans to retire, the Board put Ms. Ingram's attorney on notice that unless she made a decision within seven days exams would be scheduled and failure to cooperate would be deemed an act of gross insubordination. On May 3, 2001, Mr. Oxfeld advised the Board's attorney that Ms. Ingram would undergo the exams. Mr. Oxfeld testified that there was no indication that Ms. Ingram misunderstood her obligation. Mr. Oxfeld immediately forwarded the Board's letter directing Ms. Ingram to contact the Board's physician to schedule the appointment. In July 2001, Mr. Oxfeld sent the June letter to Ms. Ingram and told her that if she had any hopes of saving her job she must contact Dr. Ostergaard immediately. Hence, I **FIND** Ms. Ingram's testimony that she at all times was ready and willing to go to a doctor but did not understand that she was supposed to make an appointment completely unworthy of belief. Despite credible evidence that Ms. Ingram knew in May 2001 that she had to contact Dr. Ostergaard, she failed to do so, which I **FIND** amounted to insubordination. I **CONCLUDE** that the Board has met its burden of proving that Ms. Ingram had committed several acts of insubordination against her supervisor and the Board.

Ms. Ingram served the district well for many years but at the time of her leave in February 2001 her behavior seemed to have deteriorated greatly to the point where she was unable or unwilling to be accountable to the legitimate authority in the school district. Ms. Ingram made vague mention of some sort of disability but produced no evidence, documentation, or specifics on the alleged disability or how this alleged disability would prevent her from having a physical or psychiatric examination,

producing records, or attending a required meeting. A psychiatric exam might have explained her behavior and could have resulted in an involuntary or voluntary disability retirement but Ms. Ingram tacitly refused to comply with the Board's directive so the Board could not take that path. Accordingly, I **CONCLUDE** that the acts of insubordination are sufficient to merit termination from her position.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the charges by the Bloomingdale Board of Education against Janet Ingram are hereby **AFFIRMED**. It is further **ORDERED** that Janet Ingram is dismissed from her employment as a teacher with the Bloomingdale school district.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 17, 2002
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 23 2002
DATE

ACTING DIRECTOR/CHIEF ADMINISTRATIVE

OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Witnesses

For District:

Steven L. Naccara

Joan Hall

Sanford Oxfeld, Esq.

For Ms. Ingram:

Janet Ingram

Exhibits

Board:

B-1 Memo – Naccara to Ingram, November 28, 2000

B-2 Memo – Naccara to Ingram, December 5, 2000

B-3 Observation of Ingram, December 4, 2000

B-4 Memo – Naccara to Ingram, December 20, 2000

B-5 Memo – Hall to Ingram, January 19, 2001

B-6 Memo – Naccara to Hall, January 22, 2001

B-7 Observation of Ingram, January 11, 2001

B-8 Letter – Hall to Ingram, January 30, 2001

B-9 Dr. Schneck's letter, February 1, 2001

B-10 Board Minutes – extracts, February 12, 2001

B-11 Letter – Hagl to Ingram, February 14, 2001

B-12 Gagliardi to Oxfeld, April 26, 2001

B-13 Fax – Oxfeld to Gagliardi

B-14 Letter – Gagliardi to Oxfeld, May 7, 2001

B-15 Letter – Gagliardi to Oxfeld, June 4, 2001

B-16 Ingram Attendance Record

B-17 Letter – Tesi to Ingram, July 20, 1999

B-18 Letter – Ingram to Tesi, June 30, 1999

B-19 Letter – Oxfeld to Ingram

B-20 Letter – Oxfeld to Ingram, July 10, 2001

Petitioner:

P-1 Notes – Gonnella re Ingram

* P-2 Letter – Oxfeld to Ingram, April 27, 2001

* Identification only.

OAL DKT. NO. EDU 9068-01
AGENCY DKT. NO. 367-9/01

IN THE MATTER OF THE TENURE	:	
HEARING OF JANET INGRAM,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF BLOOMINGDALE,	:	DECISION
PASSAIC COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Respondent's exceptions were untimely filed pursuant to *N.J.A.C.* 1:1-18.4(a), in that the Initial Decision was mailed to the parties on May 23, 2002, and the exceptions were filed on June 10, 2002, outside the 13-day period prescribed by regulation. Accordingly, neither the exceptions nor the reply thereto is considered in the Commissioner's determination of this matter.

Upon review, and based upon the credibility assessments of the ALJ, *N.J.S.A.* 52:14B-10(c), the Commissioner concurs that petitioner has proven its charges of insubordination against respondent. Under these circumstances, the Commissioner further agrees that respondent's acts of insubordination are sufficient to warrant her termination. (Initial Decision at 13)

Accordingly, the Initial Decision is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/27/02

Date of Mailing: 6/27/02

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

253-02

IN THE MATTER OF THE TENURE	:	
HEARING OF DEBBIE BROWN,	:	COMMISSIONER OF EDUCATION
PASCACK VALLEY REGIONAL HIGH	:	DECISION ON REMAND
SCHOOL DISTRICT, BERGEN COUNTY.	:	
	:	

June 27, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1454-02

AGENCY DKT. NO. 163-6/01

IN THE MATTER OF THE TENURE OF DEBBIE BROWN, PASCACK VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,

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Rodney T. Hara, Esq., appearing for petitioner Pascack Valley Regional High School District (Fogarty & Hara, attorneys)

Nancy I. Oxfeld, Esq., appearing for respondent Debbie Brown (Oxfeld Cohen, attorneys)

Record Closed: May 23, 2002 Decided: May 29, 2002

BEFORE **MARGARET M. HAYDEN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

An initial decision in OAL Dkt. No. EDU 5343-01 approving the settlement agreement of the parties was issued by the undersigned on November 9, 2001. The Commissioner remanded the matter to the Office of Administrative Law (OAL) on December 31, 2001, for further consideration in light of *In re Cardonick* and *N.J.A.C.* 6A:3-5.6. The Department of Education transmitted the matter to the OAL on January 25, 2002, for a hearing pursuant the Commissioner's decision. Subsequently, hearing

dates were scheduled and then adjourned pending settlement. On May 7, 2002, the parties appeared and agreed to a settlement on the record, subject to the approval by the Board of Education. On May 20, 2002, the Board approved the Stipulation of Settlement. The Resolution was received by the OAL on May 23, 2002, at which time the record was closed.

At the May 7, 2002 hearing, the issue was whether the proposed settlement should be adopted. Debbie Brown testified that she fully understood and voluntarily agreed to the terms of the agreement. In addition, she submitted a note from a treating physician that she was fully capable of entering into a decision. At the request of the petitioner, that note was not reviewed by the district and is being transmitted under seal for the agency's review.

Based upon a review of the record and the testimony of the hearing, I **FIND** that the proposed settlement is consistent with the public interest for the following reasons.

1) Debbie Brown has been employed by the district as an executive secretary for the Child Study Team (CST) since 1987. Subsequently, she acquired tenure as a secretary in the district.

2) In May 2001 the Board accused Ms. Brown of unbecoming conduct for attempting to interfere with the hiring of an executive secretary who had been offered a position that Ms. Brown had also sought. The Board charged her with multiple counts of conduct unbecoming a school employee, as this term is used in *N.J.S.A.* 18A:6-10, and charged that this conduct merited her dismissal. (See Board's petition and statement of supporting evidence).

3) Prior to the remand hearing, the parties became convinced that it was in the public interest to settle the matter. The Superintendent of Schools testified credibly as to the considerations that made the Board decide to settle rather than try the matter, including the cost of the litigation, the length of time the litigation has taken, the uncertainty of the outcome of any litigation, and the impact on the parties if Ms. Brown returned to employment.

4) Ms. Brown under oath testified credibly and responded appropriately to questions and was not, according to her physician as well as my observation, under any emotional strain or coercion. Before entering into the agreement, Ms. Brown was advised by counsel and fully understood her rights.

Therefore, I **CONCLUDE** that the terms of the settlement are in the public interest as well as in the parties' interest and otherwise meet the requirements of *N.J.A.C.* 6A:3-5.6.

ORDER

It is **ORDERED** that the parties comply with the settlement agreement and that these proceedings are hereby concluded.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

5-29-2002
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

5-31-02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN - 3 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

jb

J-1 Ex

FOGARTY & HARA, ESQS.
16-00 Route 208 South
Fair Lawn, New Jersey 07410
(201) 791-3340
Attorneys for Petitioner

IN THE MATTER OF THE TENURE HEARING OF DEBBIE BROWN AND THE PASCACK VALLEY REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION	:	BEFORE THE COMMISSIONER OF EDUCATION /OFFICE OF ADMINISTRATIVE LAW
	:	O.A.L. Docket No. EDU 5343-01 EDU 1454-02
	:	Agency Ref. No. 153-6/01
	:	STIPULATION OF SETTLEMENT

WHEREAS, tenure charges were filed by the Pascack Valley Regional High School District Board of Education ("Board") against a tenured secretary by the name of Debbie Brown ("Brown");

WHEREAS, the tenure charges contained nine allegations of unbecoming conduct, which involved two specific incidents (See Written statement of Evidence in Support of Tenure Charges Against Debbie Brown which was filed with the Commissioner of Education on June 8, 2001);

WHEREAS, after considering the allegations contained in the tenure charges, the costs of litigation, the length of litigation, the uncertainty of litigation, and the impact on the parties if Brown returned to employment in the Pascack Valley

Regional High School District ("District"), it is in the public's and parties' best interests to settle the tenure charges without having to resort to further litigation;

NOW, WHEREFORE, based on the foregoing premises and the mutual promises and covenants contained herein, the parties agree that the following paragraphs shall constitute the terms and conditions of the Stipulation of Settlement:

1. Brown shall be placed on a leave of absence with pay through January 31, 2003. Salary for the one hundred twenty (120) day suspension, without pay, shall not be restored. Brown shall receive her increments for the 2001-2002 school year and for the period of her employment during the 2002-2003 school year. Paid medical coverage shall be provided by the Board in accordance with the applicable collective negotiations agreement.

2. Brown hereby resigns from her tenured position in the Pascack Valley Regional High School District, effective February 1, 2003. This resignation shall be irrevocable.

3. The Board shall pay Brown her accrued vacation of sixty four (64) days after her resignation takes effect in one check.

4. The Board shall pay the insurance premiums for coverage available to Brown under COBRA for a maximum of eighteen (18) months. Payments shall cease if Brown obtains insurance from an alternate source. Insurance coverage shall be for Brown and spouse, if applicable, in accordance with law.

5. All reference checks shall be forwarded to the superintendent of schools who shall provide the dates of employment and her voluntary resignation from the District. A letter of reference consistent with the foregoing shall be placed in the personnel file and provided to prospective employers and Brown. Information required to be disclosed to the public pursuant to Executive Order No. 11 (1974) shall be made available upon request.

6. Brown shall release the Board, its members, agents and employees from any and all claims that she may have against the foregoing entities and persons in connection with her employment with the Board, including but not limited to the tenure charges, any act pertaining thereto, and discrimination/harassment claims. Brown shall specifically withdraw her appeal of the denial of her affirmative action grievance that she filed with the federal government, with prejudice. Brown's workers compensation appeal shall not be affected by this release. A reciprocal release shall be provided by the Board to Brown. The parties retain the right to institute legal action to enforce the terms of this Stipulation of Settlement.

7. The superintendent of schools agrees to recommend the terms of this Stipulation of Settlement to the Board for approval. This Stipulation of Settlement is subject to the approval of the Board, the administrative law judge and Commissioner of Education. Upon approval, the parties agree

that the tenure charges shall be dismissed with prejudice. Brown is, however, bound by the terms of this Stipulation of Settlement unless the Stipulation of Settlement is rejected by the Board, the administrative law judge and the Commissioner of Education.

8. Brown acknowledges that she has been represented by an attorney and has received legal advice prior to signing this Agreement. Furthermore, after consulting with her attorney and an appropriate health professional, Brown represents that she is not under the influence of any medication, acknowledges that she signed this Agreement as her own voluntary act and deed, and that she fully understands the duties and obligations enumerated herein.

WITNESS:

Nancy I. Oxfeld, Esq.

Dated: 5/7/02

Debbie Brown

WITNESS:

Rodney T. Hara, Esq.

Dated: 5/7/02

Dr. Benedict Tantillo
Superintendent of Schools

5/7/02

OAL DKT. NOS. EDU 1454-02 AND EDU 5343-01 (ON REMAND)
AGENCY DKT. NO. 163-6/01

IN THE MATTER OF THE TENURE	:	
HEARING OF DEBBIE BROWN,	:	COMMISSIONER OF EDUCATION
PASCACK VALLEY REGIONAL HIGH	:	DECISION ON REMAND
SCHOOL DISTRICT, BERGEN COUNTY.	:	
	:	

The record on remand, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter.* *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846; *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/27/02

Date of Mailing: 6/27/02

* Although the agreement indicates that it is subject to Board approval, the record includes a copy of the resolution passed by the Board, dated May 7, 2002, approving the settlement, in accordance with *N.J.A.C.* 6A:3-5.6(b).

254-02

EDU #5172-01
C # 388-01
EDU #8322-01
C # 254-02R
SB # 33-02

E.M.M.A., on behalf of minor children, M.A. AND H.A.,	:	STATE BOARD OF EDUCATION
PETITIONER-APPELLANT,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	
RESPONDENT-RESPONDENT.	:	

Remanded by the Commissioner of Education, October 15, 2001

Decided by the Commissioner of Education, July 26, 2002

For the Petitioner-Appellant, E.M.M.A., pro se

For the Respondent-Respondent, Lum, Danzis, Drasco, Positan & Kleinberg, L.L.C. (Joseph M. Wenzel, Esq., of Counsel)

E.M.M.A. (hereinafter "petitioner") filed a petition with the Commissioner of Education challenging the determination by the Board of Education of the Township of Union (hereinafter "Board") that his two children were not entitled to a free public education in the district. The petitioner's children had attended school in the district

from May 2 until May 9, 2001. The Board filed a counterclaim seeking tuition for the period of the children's attendance.

On August 28, 2001, an Administrative Law Judge ("ALJ") recommended dismissing the petition as a result of the petitioner's failure to appear at the hearing. He also recommended granting the Board's claim for tuition. On October 15, 2002, the Commissioner adopted the ALJ's recommendation to dismiss the petitioner's claim. However, finding that there was a factual dispute with regard to the exact dates of the petitioner's children's attendance in the district, the Commissioner remanded this matter to the Office of Administrative Law for further proceedings on the Board's counterclaim in order to calculate the amount of tuition owed. The petitioner did not file an appeal from that decision.

During the proceedings on remand, the petitioner testified that he had gone to his children's school on May 9, 2001 and told the principal that they would no longer be attending classes there. Initial Decision, slip op. at 4. His children did not attend school in the district after that date, and, in fact, the family relocated to Niskayuna, New York. Id. The Board's only witness, the district's Residency Coordinator, testified that the petitioner's children were carried on the district's rolls until May 29 "due to the fact there was a State requirement that children are not to be dropped from the rolls because of nonattendance until at least 10 school days have passed in that status. Moreover, as far as she knew, there were no records indicating that a written notice had ever been given by petitioner regarding withdrawal of the children from the school district. Thus, they were required to be kept on the rolls at least until the last school day in May." Id.

On May 10, 2002, the ALJ, citing N.J.A.C. 6:3-9.3(i),[1] concluded "that there was no act on the part of petitioner on May 9, 2001 which could constitute a circumstance tantamount to the children 'officially' leaving the school system." Id. at 5. The ALJ observed that the petitioner:

> gave no written notice then, or at any subsequent time, to confirm that his children had been withdrawn and would not be returning to the Hannah Caldwell School. Indeed, absent such notification, he was perfectly free to have them return to class at any time. Oral notice of withdrawal, even accompanied by physical withdrawal, is not enough.

Id.

The ALJ therefore recommended that the petitioner reimburse the Board for tuition in the amount of $1,278, representing his children's attendance for a period of 18 school days between May 2 and May 29, 2001.

On June 27, 2002, the Commissioner adopted the ALJ's recommendations and directed the petitioner to reimburse the Board for $1,278. In so doing, the Commissioner stressed "that his determination is based on the particular facts of this matter, and that he makes no general holding on the manner by which withdrawal from school may be effectuated." Commissioner's Decision, slip op. at 9.

The petitioner filed the instant appeal to the State Board.

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[1] N.J.A.C. 6:3-9.3, "School attendance," provides in pertinent part:

> (i) A pupil shall be recorded as either present, absent, or excused for religious observance, every day the school is in session after the pupil enters until the date the pupil is transferred to another school, transferred to an individual home instruction record, or officially leaves the school system.

After a thorough review of the record,[2] we reverse the Commissioner's determination that the petitioner is responsible for tuition through May 29, 2001. Instead, we conclude that the petitioner's responsibility for tuition is limited to the period from May 2, 2001 until May 9, 2001, when he informed the principal of his children's withdrawal.

We observe initially that the regulation relied upon by the ALJ and the Commissioner, N.J.A.C. 6:3-9.3(i), was adopted to ensure compliance with the compulsory attendance requirement, which is currently set forth in N.J.S.A. 18A:38-25 et seq.[3] It does not prescribe any requirements for withdrawing a student from a school district. Nor does it address the course of action required to "officially" leave a district.

In this case, the petitioner testified without contradiction that he had notified the principal of his children's school on May 9, 2001 that he was withdrawing them from the district. Initial Decision, slip op. at 4.[4] There is no indication in the record before us that the principal informed the petitioner that it was necessary to put his notice into writing or that he was otherwise required to take any further action in order to effectuate the withdrawal. Under these circumstances, and in the absence of a specific dictate in statute or regulation requiring that notice of withdrawal be in written form, we find that the petitioner's verbal communication to the principal on May 9, 2001 was sufficient for

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[2] Like the Commissioner, we were not provided with a copy of the transcripts from the hearing held in the Office of Administrative Law. We note, in addition, that the Board did not file an answer brief on appeal. Consequently, we have considered this matter on the basis of the record certified to us by the Commissioner, N.J.A.C. 6A:4-1.8, and the appeal brief filed by the petitioner. N.J.A.C. 6A:4-1.12(b).

[3] N.J.S.A. 18A:38-25 provides in pertinent part:

> Every parent, guardian or other person having custody and control of a child between the ages of six and 16 years shall cause such child regularly to attend the public schools of the district....

[4] It is uncontroverted that the petitioner's children did not attend school in the district after that date.

the purpose of putting the district on notice of the fact that his children were being withdrawn from the school system.

Accordingly, we conclude that the petitioner is responsible for tuition only for the period from May 2 until May 9, 2001. The record indicates that the tuition rate charged by the district was $32 per day for the petitioner's child in kindergarten and $39 per day for his child in first grade. Since the petitioner's children were enrolled in the district for six school days prior to withdrawal, tuition for each child would be $192 ($32 for six days) and $234 ($39 for six days) respectively, for a total of $426.

John A. Griffith abstained.

February 5, 2003

Date of mailing FEB 10 2003

254-02

254-02R

E.M.M.A., on behalf of minor children, M.A. and H.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

SYNOPSIS

Petitioning parent challenged the Board's residency determination. Petitioner failed to attend the administrative hearing. In light of the fact that petitioner abandoned his case, the ALJ dismissed the petition and ordered payment of tuition.

The Commissioner affirmed the ALJ's decision with regard to the residency determination. However, after petitioner contested the calculation of the amount of tuition owed, the Commissioner remanded the case to OAL for proceedings solely to determine the amount of tuition owed by petitioner to the Board.

On remand, the ALJ agreed with the Board that petitioner was required to pay tuition for the children until they "officially" left the school system. Even though petitioner physically removed his children on or about May 9, 2001, he did not officially notify the school district and, thus, the children were carried on the rolls through May 29, 2001. Therefore, petitioner's children were in attendance for 18 days and a total amount of tuition of $1,278 was owed by petitioner.

The Commissioner adopted the findings and determination in the Initial Decision and directed the payment of tuition in the amount of $1,278.

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

June 27, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8322-01
ON REMAND FROM
OAL DKT. NO. EDU 5172-01
AGENCY DKT. NO.: 104-4/01

E.M.M.A. ON BEHALF OF MINOR CHILDREN M.A. AND H.A.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,
Respondent.

E.M.M.A., petitioner, *pro se*

Joseph M. Wenzel, Esq. for respondent
(Lum, Danzis, Drasco, Positan & Kleinberg, LLC, attorneys)

Record Closed: May 3, 2002 Decided: May 10, 2002

BEFORE **STEPHEN G. WEISS**, ALJ

PROCEDURAL HISTORY

This matter is on remand following the decision of the Commissioner of Education, dated October 15, 2001, which upheld my Initial Decision finding petitioner had abandoned his appeal of the Board's assessment of tuition costs by failing to appear at an OAL hearing scheduled on August 22, 2001. However, at the Board's request, the

Commissioner went on to determine that since a fact issue continued to exist regarding the dates of attendance of petitioner's two children in the Union Township public schools in May 2001, an exact calculation of the tuition amount owed by petitioner could not be determined without further amplification on the record. Thus, the matter was remanded for the sole purpose of determining what that calculation should be. Also according to the Commissioner, the record should include school registration data documenting daily attendance pursuant to the requirements of *N.J.A.C.* 6:3-9.1 *et seq.*

A remand hearing was conducted by the undersigned on April 5, 2002. Petitioner, E.M.M.A. appeared and represented himself. Since the purpose of the remand was to give the Board an opportunity to establish by testimony and/or documentary evidence the accuracy of its tuition calculations, I directed Board counsel to present his case first.

TESTIMONY FOR THE BOARD

The Board's sole witness, April DiFrancesco, is employed by the respondent school district as Residency Coordinator. Her duties in that capacity include determination of the attendance status of new students and their assignment to a particular school. DiFrancesco maintains computerized records developed from data kept daily at each school regarding a pupil's entry, attendance and removal from the district rolls. With respect to petitioner's two children, the computerized records revealed they first were enrolled on May 1, 2001.

The witness then identified records pertaining specifically to M.A.'s attendance (Exhibits R-1, R-1(a), R-1(b)). She explained the documents identify whether a pupil is present, absent, tardy, excused early or removed from the school district. With respect to M.A., who was a first grader, the records reflect he entered school on May 1, 2001 and also was present on May 2, 3,4, 7, 8, 9 and 29. For the first two days he attended Connecticut Farms School because it was located in very close proximity to a hotel where the family was then temporarily residing while his younger sister, H.A., was being seen at Children's Specialized Hospital. However, according to DiFrancesco, since H.A., had a

disability she was assigned to the Hannah Caldwell School, a building that had only one level rather than two or three. M.A. was transferred so he could attend the same school as his sister. The computer records with respect to H.A. (Exhibits R-2, R-2(a)) reflect that she was present on May 2, 3, 4, 7, 8, 9 and 29, one day less than her brother, M.A.

The witness then identified a document generated by the school district's business office which prescribed 2000-2001 tuition rates for nonresident students. For a child enrolled in kindergarten (H.A.), the annual tuition was $5,886. For a child enrolled in first grade (M.A.), the annual tuition was $7,108. In order to obtain a "daily rate" each of those figures is divided by 180 school days. Thus, the daily rate for a child enrolled in kindergarten during the 2000-2001 school year was $32.07 (rounded to $32.00), and the tuition rate for a child enrolled in first grade was $39.49 (rounded to $39.00) (Exhibit R-3). Then, by applying that daily rate to the number of days each child was enrolled in school (not merely "present"), the Board calculated that for M.A., petitioner's son, tuition of $741 was due and owing ($39 x 19 school days) and for his daughter, H.A., tuition of $576 was owed ($32 x 18 days). On cross-examination, DiFrancesco explained the one day difference resulted from the fact that the first day of school for H.A. was recorded as May 2 since when she was first brought to the Connecticut Farms School it was determined due to her disability that she should start the following day at the Hanna Caldwell School.

TESTIMONY FOR PETITONER

Petitioner then testified on his own behalf. He explained that while he did bring both children to start school on May 1, he was told that since his daughter had a problem walking she would be transferred to another school, which she was the next day. Both children then attended for the next few school days. However, at some point during their first week, some person or group of persons came to the hotel where the family was staying temporarily and raised concerns regarding possible child abuse. Although petitioner was not present (he said this incident was related to him by the hotel manager) the visit disturbed petitioner's wife very much. Thus, he concluded that since the Board was giving him "a hard time" he would remove the children from school and the family

physically relocate out of Union. Thus, on May 9, he went to the Hanna Caldwell School where he told the principal that his children would no longer be attending classes there. Petitioner did not permit the children to go back to school in Union, and during May, the family relocated to Niskayuna, New York, a community located near Albany. No notice of this move was ever given to respondent, nor was any request received from New York for any pupil records.

Thus, according to petitioner, his children were in physical attendance in Union Township for a substantially less days then the Board claimed tuition for; namely, his son on May 1, 2, 3, 4, 7, 8 & 9 (seven days) and his daughter on May 2, 3, 4, 7, 8 & 9 (six days). With respect to DiFrancesco's testimony that the children were in actual physical attendance in the Hannah Caldwell School on May 29, 2001, petitioner vehemently disagreed since by then the family had moved from the State.

As a result of the dispute concerning whether the two children actually were present in school on May 29, 2001, at my request DiFrancesco was recalled to the stand She then produced daily attendance sheets prepared by the home room teacher and maintained at the business office which revealed, contrary to her prior testimony, that in fact they were not in attendance physically on May 29, 2001 (Exhibits R-4, R-5). DiFrancesco believed the reason the children were carried on the school district's rolls until May 29 was due to the fact there was a State requirement that children are not to be dropped from the rolls because of nonattendance until at least 10 school days have passed in that status. Moreover, as far as she knew, there were no records indicating that a written notice had ever been given by petitioner regarding withdrawal of the children from the school district. Thus, they were required to be kept on the rolls at least until the last school day in May.

DISCUSSION

The limited issue in this case, as noted, is the exact amount of tuition the Board is entitled to collect from the petitioner because of his two children's non-resident enrollment in Union Township in May 2001.

The regulation applicable to this situation is *N.J.A.C.* 6:3-9.3(i) which provides that every pupil who is on the rolls of a school district shall be recorded as either present, absent or excused for religious observance every day school is in session after the pupil enters until the pupil either transfers to another school, transfers to home instruction or "officially leaves the school system". Since both M.A. and H.A. were enrolled at the beginning of May 2001 in proper fashion and were carried on the rolls for that entire month, I must determine whether the Board is entitled to tuition reimbursement through May 29, 2001 even though petitioner physically removed his children on or about May 9, 2001.

The Board maintains, and I agree, that there was no act on the part of petitioner on May 9, 2001 which could constitute a circumstance tantamount to t[illegible] children "officially" leaving the school system. Even if I consider the testimony by E.M.M.A. to be credible, the fact is that he gave no written notice then, or at any subsequent time, to confirm that his children had been withdrawn and would not be returning to the Hannah Caldwell School. Indeed, absent such notification, he was perfectly free to have them return to class at any time. Oral notice of withdrawal, even accompanied by physical withdrawal, is not enough.

As Board counsel further points out, the fact that the district waited until the end of May before dropping the children from the official rolls is of no consequence. Indeed, if it wished, the Board possibly could have carried both children on its rolls to the end of the 2000-2001 school year in late June since it received no written communication or other official notice that they had moved from the district at all.

While petitioner's failure to officially notify the school district in writing may be attributable to his possible lack of understanding of the applicable regulation, like anyone else he is bound by them according to law. Thus, using May 2, 2001 as the entry date for both children (the position now taken by the Board), and using May 29, 2001 as the last date of enrollment (even though the Board arguably could have gone beyond that date), each child was in official attendance for 18 school days. Thus, with respect to M.A., there is due tuition reimbursement in the sum of $702 ($39 x 18). With respect to H.A., the total amount of tuition reimbursement owed is $576 ($32 x 18). The total amount of tuition reimbursement owed by petitioner, then, is $1,278.

CONCLUSION AND ORDER

Accordingly, for the reasons set forth above, I **CONCLUDE** that a total tuition reimbursement of $1,278 is due and owing to the respondent Board by the petitioner, the father of minor children, M.A. and H.A. I therefore **ORDER** that he pay that amount to the school district.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 10, 2002
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

5-15-02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 16 2002
DATE

JUDGE
OFFICE OF ADMINISTRATIVE LAW

sej

APPENDIX

Witnesses:

E.M.M.A., Petitioner

April DeFrancesco for respondent

Exhibits:

R-1 Student record of M.A.'s attendance at Connecticut Farms School

R-1a Student record of attendance of M.A. at Hannah Caldwell School

R-1b Attendance Record of M.A. at Hannah Caldwell School, May 2001.

R-2 Attendance Record of H.A. at Hannah Caldwell School

R-2a Attendance Record of M.A. at Hannah Caldwell School for May 2001

R-3 Union Township School District Tuition Rates (2000-2001 school year)

R-4 Daily Attendance Record, H.A.

R-5 Daily Attendance Record, M.A.

OAL DKT. NOS. EDU 5172-01 AND EDU 8322-01 (ON REMAND)
AGENCY DKT. NO. 104-4/01

E.M.M.A., on behalf of minor children, M.A. and H.A., PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY, RESPONDENT.	:	DECISION ON REMAND

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his full and independent review, the Commissioner concurs with the Administrative Law Judge's determination that petitioner owes the Board tuition of $702 for minor child, M.A., and $576 for minor child, H.A., for attendance in the District's schools. However, in so ruling, the Commissioner stresses that his determination is based on the particular facts of this matter, and that he makes no general holding on the manner by which withdrawal from school may be effectuated.

Accordingly, the Initial Decision of the OAL is affirmed. Petitioner is hereby directed to pay the Board a total tuition reimbursement of $1,278.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/27/02

Date of Mailing: 6/27/02

* This decision, as the Commissioner's final determination may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:2-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

255-02

IN THE MATTER OF THE TENURE	:	
HEARING OF EDWARD MATUSHEWSKY,	:	
SCHOOL DISTRICT OF THE TOWN OF	:	COMMISSIONER OF EDUCATION
WESTFIELD, UNION COUNTY.	:	DECISION
	:	

June 26, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9043-01

AGENCY DKT. NO. 342-8/01

BOARD OF EDUCATION OF WESTFIELD SCHOOL DISTRICT, UNION COUNTY,

Petitioner,

v.

EDWARD MATUSHEWSKY,

Respondent.

Lester Aron, Esq., for petitioner
(Sills, Cummis, Radin, Tischman, Epstein and Gross, attorneys)

Marc S. Klein, Esq., for respondent

Record Closed: May 14, 2002 Decided: May 20, 2002

BEFORE **ELINOR R. REINER**, ALJ:

On or about August 30, 2001, the Board of Education of Westfield school district certified charges of inefficiency, excessive absenteeism, and insubordination against respondent, Edward Matushewsky, a tenured art teacher. On September 17, 2001, respondent filed an answer denying the charges.

On October 4, 2001, the Department of Education, Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

The matter was assigned to the undersigned judge on October 9, 2001, and a telephone prehearing conference was scheduled for October 18, 2001. During the conference with counsel held on that date, the parties advised that a settlement had been reached. As a result the hearing was not scheduled.

At the request of the undersigned, the parties submitted a Negotiated Settlement Agreement and General Release on March 25, 2002. Due to an administrative error, the above-captioned matter was returned to the Department of Education as a settlement return. Such case closure was inappropriate because it did not allow for review by the Commissioner of Education. On May 14, 2002, this matter was reopened in order to allow the undersigned judge to render an Initial Decision Settlement in this matter.

The parties have agreed to settle this matter and have prepared the attached Negotiated Settlement Agreement and General Release, indicating the terms of settlement.

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

3. The settlement agreement complies with the requirements of *Cardonic v. Brooklawn Board of Education*, 193 *S.L.D.* __ (St. Bd. April 6, 1983).

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

3. The Settlement Agreement is in the public interest.

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

March 20, 2002
DATE

ELINOR R. REINER, ALJ

Receipt Acknowledged:

5-24-02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAY 29 2002
DATE

OFFICE OF ADMINISTRATIVE LAW

al

RECEIVED
STATE OF NEW JERSEY

NEGOTIATED SETTLEMENT AGREEMENT AND GENERAL RELEASE

MAR 25 11 52 AM '02

WHEREAS the Westfield Board of Education (hereinafter "Board" or "petitioner") filed tenure charges against Edward Matushewsky (herein "respondent"), 633 Vosseller Avenue, Bridgewater, P.O. Bound Brook, New Jersey 08805-1242, alleging Insubordination, Inefficiency, and Excessive Absenteeism, in an action bearing docket number EDUTH 09043-01N, and

WHEREAS, respondent and petitioner desire to reach an amicable and final resolution of all claims and disputes between respondent and petitioner, its officers, agents, representatives and employees, divisions, affiliated entities and its present and former officers, agents, representatives, employees and the agents, successors, assigns, trustees, heirs, administrators, executors, representatives and principals thereof (hereinafter "Releasees");

WHEREAS, the parties agree that it is in the public interest to enter into this Agreement in resolution of the charges to avoid the uncertainty and expense of litigation;

NOW THEREFORE, in consideration of the obligations set forth in this Negotiated Settlement Agreement and General Release (hereinafter the "Agreement and Release"), and in full settlement of all claims, petitioner and respondent agree as follows:

1. The Board will reinstate the salary increments that were withheld from respondent during the 1999-2000 and 2000-2001 school years. Respondent's salary will be revised from $72,651.00 to $74,240.00 for the 1999-2000 school year and from $72,651.00 to $76,240.00 for the 2000-2001 school year.

2. The actual money due to respondent for the two combined school years is $5,178.00 less all appropriate deductions which will be withheld.

3. Concurrent with the execution of this agreement, respondent agrees that he shall submit his letter of irrevocable retirement, effective June 30, 2001.

4. Upon the signing and approval of this Agreement by both parties, the Superintendent of Schools will withdraw the tenure charges filed by the petitioner against respondent referenced above.

5. Respondent specifically releases and discharges against petitioner and Releasees any and all claims, charges, or causes of action which he had or could have had against them from the beginning of the world up to and including the date of this release with any administrative agency, court or other forum, under any federal, state or local laws or regulations, including, but not limited to, any claim arising under the Americans with Disabilities Act, the National Labor Relations Act, the Fair Labor Standards Act, the Employee Retirement Income Security Act of 1974 ("ERISA"), Title VII of the Civil Rights Act of 1964, the Vocational Rehabilitation Act of 1973, the Age Discrimination in Employment Act of 1967, as amended, the Older Workers Benefits Protections Act, the Civil Rights Acts of 1866, 1871, and 1991, including Section 1981 of the Civil Rights Act, the Family Medical Leave Act, the new Jersey

Employer-Employee Relations Act, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Workers' Compensation Act, the New Jersey State Labor Laws, the New Jersey Wage-Hour and Wage-Payment Laws, and/or any other federal state or local human rights, civil rights, wage-hour, pension or labor law, rule, tort law, or any claim of retaliation under such laws, or any claim of breach or violation of any contract (whether express, oral, written or implied from any source), or any claim of intentional or negligent infliction of emotional distress, tortious interference with contractual relations, wrongful or abusive discharge, assault, battery, defamation, prima facie tort, fraud, negligence, loss of consortium, or any action similar thereto against petitioner and Releasees, including any claim for attorneys' fees.

6. Respondent hereby warrants and represents that he has not filed or instituted (and no person or agency has filed or instituted on his behalf) any complaints, suits, actions, charges, claims and/or proceedings against petitioner and Releasees in any forum, which are currently active. In the event that, for any reason, any complaint, suit, action, charge, claim or proceeding covered by Paragraph 5 is pending or is instituted, respondent shall immediately seek and obtain dismissal with prejudice of said complaint, suit, action, charge, claim or proceeding. Should respondent fail to seek and obtain such dismissal, this omission, at the option of petitioner and Releasees will be considered breach of the Agreement and Release. In the event of a breach, petitioner and Releasees shall retain all rights and respondent shall be required to immediately return any and all funds received pursuant to the Agreement and Release.

7. The parties further agree that the Agreement and Release will be governed by the laws of the State of New Jersey and the parties will submit to the jurisdiction of the agencies and state and/or federal courts located within the State of New Jersey for the resolution of any dispute which may arise hereunder.

8. The parties further agree that if any of the provisions, terms, clauses, waivers and releases of claims and rights contained in the Agreement and Release are declared illegal, unenforceable, or ineffective in a legal forum of competent jurisdiction, such provisions, terms, clauses, waivers and releases of claims and rights shall be modified, if possible, in order to achieve, to the extent possible, the intentions of the parties, and, if necessary, such provisions, terms, clauses, waivers and releases of claims and rights shall be deemed severable, such that all other provisions, terms, clauses, waivers and releases of claims and rights contained in the Agreement and Release shall remain valid and binding upon all parties.

9. The Agreement and Release sets forth the entire agreement between the parties and fully supersedes any and all prior agreements or understandings between them, if any, pertaining to the subject matter thereof.

10. BY SIGNING THIS AGREEMENT, PETITIONER STATES THAT:

A. HE HAS READ IT;

B. HE UNDERSTANDS IT AND KNOWS THAT HE IS GIVING UP IMPORTANT RIGHTS, INCLUDING, BUT NOT LIMITED TO, RIGHTS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, AS AMENDED INCLUDING THE OLDER WORKERS BENEFITS PROTECTION ACT AND ANY OTHER CONSTITUTIONAL, STATUTORY OR COMMON LAW RIGHTS AS MORE FULLY SET FORTH IN PARAGRAPH 5 HEREINABOVE;

C. HE AGREES WITH EVERYTHING IN IT;

D. HE HAS BEEN ADVISED TO CONSULT WITH HIS ATTORNEY PRIOR TO EXECUTING THIS AGREEMENT AND HAS IN FACT DONE SO;

E. HIS ATTORNEY NEGOTIATED THIS AGREEMENT WITH HIS KNOWLEDGE AND CONSENT;

F. HE HAS SIGNED THIS AGREEMENT KNOWINGLY AND VOLUNTARILY;

G. PETITIONER AGREES AND ACKNOWLEDGES THAT HE HAS THE RIGHT TO REFLECT UPON THIS AGREEMENT FOR A PERIOD OF TWENTY-ONE (21) DAYS BEFORE EXECUTING IT, AND WILL HAVE AN ADDITIONAL PERIOD OF SEVEN (7) DAYS AFTER EXECUTING THE AGREEMENT TO REVOKE IT UNDER THE TERMS OF THE OLDER WORKER BENEFITS PROTECTION ACT BY NOTIFYING IN WRITING VIA CERTIFIED MAIL: LESTER ARON, ESQ. OF SILLS CUMMIS RADIN TISCHMAN EPSTEIN & GROSS, P.A., ONE RIVERFRONT PLAZA NEWARK, NEW JERSEY 07102-5400. PLAINTIFF UNDERSTANDS AND ACKNOWLEDGES THAT IF HE SIGNS THIS AGREEMENT PRIOR TO THE EXPIRATION OF THE TWENTY-ONE (21) DAY REVIEW PERIOD, HE IS VOLUNTARILY AND KNOWINGLY WAIVING THE TWENTY-ONE (21) DAY REVIEW PERIOD.

11. Respondent has been advised that the Commissioner of Education has a duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

To signify their agreement to the terms of the Agreement and Release, the parties have executed the Agreement and Release on the date notarized below their signatures, which appear below. By signing this Agreement, both parties acknowledge that they have entered the Agreement with a full understanding of their rights.

EDWARD MATUSHEWSKY

Sworn and subscribed to before me on
this 2 day of [illegible], 2001

An Attorney at Law

WESTFIELD BOARD OF EDUCATION

By: [signature]

Sworn and subscribed to before me on
this 28TH day of NOVEMBER, 2001

ROBERT A. BERMAN
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 5/24/2004

OAL DKT. NO EDU 9043-01
AGENCY DKT. NO. 342-8/01

IN THE MATTER OF THE TENURE	:	
HEARING OF EDWARD MATUSHEWSKY,	:	
SCHOOL DISTRICT OF THE TOWN OF	:	COMMISSIONER OF EDUCATION
WESTFIELD, UNION COUNTY.	:	DECISION
	:	

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

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/26/02

Date of Mailing: 6/28/02

256-02

256-02

PATRICIA BUTCHER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

June 26, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7703-98

AGENCY DKT. NO. 346-7/98

PATRICIA BUTCHER,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,

Respondent.

Alfred F. Maurice, Esq., for petitioner
(Springstead & Maurice, attorneys)

Eric M. Bernstein, Esq., for respondent
(Eric Bernstein & Associates, attorneys)

Record Closed: May 14, 2002 Decided: May 20, 2002

BEFORE **ELINOR R. REINER**, ALJ:

On July 23, 1998, petitioner, Patricia Butcher, filed a verified petition of appeal with the Commissioner of Education alleging that respondent improperly charged her sick leave bank for absences due to a work-related injury. Respondent filed an answer on August 10, 1998 asserting various defenses, and on August 27, 1998, the matter

was transmitted to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13. A telephone prehearing conference was scheduled for December 9, 1998 and January 13, 1999. Thereafter, by order dated March 12, 1999, this matter was placed on the inactive list for a period of six months or until the companion case before the Division of Workers Compensation had been determined, whichever was sooner. As a result of the workers compensation action being resolved by order, the matter was relisted for a hearing first on April 3, 2001 and then December 6, 2001. Prior to the hearing of December 6, 2001, the parties requested an adjournment and subsequently, the matter was settled. A settlement agreement was received on March 22, 2002. Due to an administrative error, the matter was returned to the Department of Education as a settlement return. Such case closure was inappropriate because it did not allow for review by the Commissioner of Education. The case was reopened on May 14, 2002 for preparation of this Initial Decision Settlement.

The parties have agreed to settle this matter and have prepared the attached Settlement Agreement and Release, indication the terms of settlement.

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

DATE

ELINOR R. REINER, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAY 29 2002

DATE

OFFICE OF ADMINISTRATIVE LAW

al

CONFIDENTIAL

SETTLEMENT AGREEMENT AND RELEASE

IT IS HEREBY AGREED by and between PATRICIA BUTCHER ("Butcher") and the ENGLEWOOD BOARD OF EDUCATION ("Board") for the good and sufficient consideration set forth below, as follows:

1. The Board, as used herein, shall at all times mean the Englewood Board of Education, its subsidiaries, affiliates, predecessors, successors and assigns of any and all of them, their present and former directors, officials, officers, representatives, associates, partners, servants, employees, agents, attorneys, successors, heirs executors and administrators whether in their individual or official capacities, and all other persons, firms, corporations, associations, partnerships or any other entity connected therewith; and,

2. Butcher, as used herein, shall mean Patricia Butcher, her heirs, representatives, privies, executors, administrators, assigns, successors-in-interest and predecessors-in-interest; and,

3. Within thirty (30) business days of the Board's receipt of this Settlement Agreement and Release as amended below, executed by Butcher before a Notary Public, but no later than January 31, 2002, the Board shall pay to Butcher the sum of Six Thousand Two Hundred Eighty Four Dollars ($6,284.00). Butcher and the Board acknowledge and agree that said payment is in full and complete settlement of any and all claims that had been asserted or can be asserted or may be asserted or could be asserted which arose out of or could arise out of Butcher's Complaint against the Board, Oal Docket No. EDUR 07703-98N, Agency Ref. no. 346-7/98.

Butcher and the Board expressly understand and agree that said payment includes any and all amounts that may be claimed by Butcher or on her behalf, or by her attorneys, heirs, successors or assigns, against the Board arising out of said action. This Settlement Agreement is contingent upon the approval of the Office of Administrative Law and the New Jersey State Commissioner of Education. Further, Butcher and the Board agree and acknowledge that this Settlement Agreement and Release is also contingent on and subject to approval and ratification by the Englewood Board of Education; and.

4. (a) This settlement is intended to settle all Butcher's wage claims and Butcher hereby waives any and all claims for lost wages, income or future earnings. However, should it be determined that any payments made pursuant to paragraph 3 herein constitute gross income within the meaning of the Internal Revenue Code and its applicable amendments, or under any other federal, state or local statute or ordinance, Butcher shall be solely liable for and agrees to pay any amount that may be determined to be due and owing as taxes, interest and penalties arising out of such payments. Specifically, Butcher understands and agrees that she will be provided with a 1099 Miscellaneous form with her payment from the Board. Butcher also understands and agrees that any adjustments to her withholding or any estimated tax payments are her responsibility. Further, Butcher understands and agrees that the Board will report the payment made to Butcher to the Internal Revenue Service, the New Jersey State Division of Taxation and other pertinent agencies, but the Board will not take a position as to whether the payments are taxable; and,

(b) In any action commenced against Butcher to enforce the provisions of this paragraph, the Board, if it is the prevailing party, shall be entitled to recover its reasonable attorneys' fees, costs and disbursements incurred in prosecuting the action. In any action commenced against the Board to enforce the provisions of this paragraph, Butcher, if she is the prevailing party, shall be entitled to recover her reasonable attorneys' fees, costs and disbursements incurred in prosecuting the action.

5. Neither this Settlement Agreement and Release, nor anything contained herein, shall be construed as an admission by the Board or Butcher of any liability or unlawful conduct whatsoever. Butcher and the Board further acknowledge that the parties enter into this Settlement Agreement and Release solely to avoid further expensive, burdensome and protracted litigation. This Settlement Agreement and Release is not intended to be used and shall not be used as evidence or for any other purpose in any other action or proceeding, other than evidence of the compromise between Butcher and the Board as set forth herein or to enforce the terms of this Settlement Agreement and Release; and,

6. Butcher releases, acquits, gives up and forever discharges any and all claims and rights which she may have against the Board up to the time of the execution of this Settlement Agreement and Release relating to the action identified below. This releases all claims, including claims resulting from anything, which has happened from the date of the alleged incident to now. Butcher specifically releases the following claims:

Any and all damages, whether known or unknown at this date, arising from or relating to the incidents as set forth in the action known as Patricia Butcher v.

Englewood Board of Education, OAL Docket No. EDUOR 07703-98N, Agency Ref. No. 346-7/98, including, but not limited to, attorney fees pursuant to 42 U.S.C. §1983 and 42 U.S.C. §1988 or other applicable law.

More specifically, in consideration of the payment specified in Paragraph 3 above and the entry into this Settlement Agreement and Release by the Board, Butcher hereby releases, acquits and forever discharges the Board of and from any and all actions or causes of action, suits, debts, claims, complaints, contracts, controversies, agreements, promises, damages, cross-claims, claims for contribution and/or indemnity, claims for costs and/or attorney's fees, judgments and demands whatsoever, in law or equity arising out of the action known as Patricia Butcher v. Englewood Board of Education, OAL Docket No. EDUOR 07703-98N, Agency Ref. No. 346-7/98, which Butcher ever had, now has, or may have, as of the date of this Settlement Agreement and Release, as set forth more particularly in Paragraph 3.

7. Butcher agrees to release, acquit and forever discharge the Board from any and all claims which arose from the incidents set forth and any related thereto to the action known as Patricia Butcher v. Englewood Board of Education, OAL Docket No. EDUOR 07703-98N, Agency Ref. No. 346-7/98 that Butcher could make on her own behalf.

8. The Board affirms that, as of the date of execution of this Settlement Agreement and Release, they have no knowledge of any pending class action against it to which Butcher could be a potential class member as a result of the incidents set forth and any incidents related thereto to the action known as Patricia Butcher v. Englewood

Board of Education, OAL Docket No. EDUOR 07703-98N, Agency Ref. No. 346-7/98; and,

9. Butcher specifically acknowledges that the payment referred to in Paragraph 3 hereof constitutes any and all additional consideration not otherwise owed to her but for this Settlement Agreement and Release; and,

10. Unless directed to do so by Court Order or lawfully issued subpoena with notification to the Board at the time the lawfully issued subpoena was issued, Butcher agrees that she will not give testimony or evidence against the Board in any proceeding with respect to the incidents set forth and any incidents related thereto to the action known as Patricia Butcher v. Englewood Board of Education, OAL Docket No. EDUOR 07703-98N, Agency Ref. No. 346-7/98; and,

11. Butcher agrees that she shall not seek any further amount other than the amount set forth in Paragraph 3 from the Board; and,

12. This Settlement Agreement and Release contains the full agreement of Butcher and the Board and may not be modified, altered, changed or terminated except upon the express prior written consent of Butcher and the Board, which consent must be signed by Butcher and the Board or their duly authorized agents; and,

13. If any term, provision or condition of this Settlement Agreement and Release is held invalid or unenforceable by a court of competent jurisdiction, such holding shall be without effect upon the validity or enforceability of any other provision, term or condition of this Settlement Agreement and Release; and,

14. Butcher hereby acknowledges and agrees that she further expressly waives and assumes the risk of any and all claims or damages which exist as of this

date for which Butcher is aware or should be aware through her due diligence including those not known due to her ignorance, oversight, error, negligence, or otherwise relating to the action known as Patricia Butcher v. Englewood Board of Education, OAL Docket No. EDUOR 07703-98N, Agency Ref. No. 346-7/98and which, if known, would materially effect her decision to enter into this Settlement Agreement and Release; and,

15. Butcher represents and warrants that no other person or entity has or has had any interest in the claims, demands, obligations, or causes of action referred to in this Settlement Agreement and Release; that Butcher has not sold, assigned, transferred, conveyed or otherwise disposed of any of the claims, demands, obligations or causes of action referred to in her verbal complaint(s) and/or in this Settlement Agreement and Release; and,

16. This Settlement Agreement and Release shall be construed and interpreted in accordance with the laws of the State of New Jersey; and,

17. Butcher and the Board agree to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary or appropriate to get full force and effect of the basic terms and interest of this Settlement Agreement and Release; and,

18. This Settlement Agreement and Release shall not be executed in counterparts and shall be enforceable only if executed by Butcher and the Board; and,

19. This Settlement Agreement and Release shall become effective immediately following execution by Butcher and the Board; and,

20. Butcher and the Board shall bear all costs and expenses arising from the actions of their own counsel in connection with the Settlement Agreement and Release.

As set forth in Paragraph 3, the Board has agreed to pay the sum of Six Thousand Two Hundred Eighty Four Dollars ($6,284.00) to Butcher. As further consideration for this Settlement Agreement and Release, Butcher and her attorney agree that this sum represents all of the monies which the Board has agreed and will ever agree to pay to Butcher and her attorneys in connection with this matter and that any additional attorneys fees which may arise from the actions of Butcher's attorneys in connection with the incidents set forth and any incidents related thereto to the action known as Patricia Butcher v. Englewood Board of Education, Docket No. EDUOR 07703-98N, Agency Ref. No. 346-7/9 are to be borne by Butcher; and,

21. This Settlement Agreement and Release contains the entire Agreement between Butcher and the Board with regard to the matters set forth in it, and shall be binding upon and inure to the benefit of their officials, officers, directors, attorneys, representatives, employees, associates, partners, agents, servants, executors, administrators, personal representatives, heirs, successors and assigns of each, and all other persons, firms, corporations, associations or partnerships or any other entity or persons connected therewith, except as set forth herein or as may be agreed to in writing between the parties; and,

22. In entering into this Settlement Agreement and Release, Butcher and the Board have relied upon the legal advice of their attorneys, as to the terms of this Settlement Agreement and Release which have been completely read and explained by their attorneys and those terms are fully understood and voluntarily accepted; and,

23. All notices, demands and requests which are required and desired to be given shall be in writing and shall be sent pre-paid, registered and certified mail, return receipt requested, addressed as follows:

For BUTCHER:

Alfred F. Maurice, Esq.
Springstead & Maurice
39 Hudson Street
Hackensack, New Jersey 07601

For the ENGLEWOOD BOARD OF EDUCATION:

Eric Martin Bernstein, Esq.
ERIC M. BERNSTEIN & ASSOCIATES, L.L.C.
Two North Road
P.O. Box 4922
Warren, New Jersey 07059

24. This Settlement Agreement and Release shall become effective immediately following execution by all the following parties.

IN WITNESS WHEREOF, Butcher and the Board have hereunto set their hands.

PATRICIA BUTCHER

Alfred F. Maurice, Esq. Patricia Butcher

ENGLEWOOD BOARD OF EDUCATION

Robert Brown, Board Secretary/ Business Administrator

By: David G. Matthews, Board President

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OAL DKT. NO. EDU 7703-98
AGENCY DKT. NO. 346-7/98

PATRICIA BUTCHER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The Commissioner notes, however, that the parties' settlement sets forth terms that were to be effectuated prior to approval of the settlement by the Commissioner pursuant to *N.J.A.C.* 1:1-19.1. He, therefore, reminds the parties that they acted at their peril in so doing and cautions them, and other litigants whose controverted matters have been duly transmitted to the OAL, against effectuation of any settlement prior to its submission to, and approval by, the Commissioner.

The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/26/02

Date of Mailing: 6/28/02

257-02

JOSEPH COMBA, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

June 26, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8848-00

AGENCY DKT. NO. 350-9/00

JOSEPH COMBA,

Petitioner,

v.

BOARD OF EDUCATION OF CARTERET, MIDDLESEX COUNTY,

Respondent.

Stephen E. Klausner, Esq., for the petitioner (Klausner & Hunter, attorneys)

Elizabeth Farley Murphy, Esq., for the respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: May 20, 2002 Decided: May 20, 2002

BEFORE **BRUCE R. CAMPBELL**, ALJ:

This matter concerns the assertion of the petitioner, Joseph Comba, that the respondent, the Board of Education of Carteret, Middlesex County, violated his tenure and seniority rights when he was not offered a Supervisor of Science position. The petitioner requested a hearing and the matter was transmitted to the Office of Administrative Law (OAL) on December 7, 2000, for a hearing pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was scheduled for a hearing on March 4, 2002 and adjourned and rescheduled for April 10, 2002. On that date, the parties conferred and agreed to a settlement. The attached stipulation sets forth the terms of the settlement, and is incorporated herein.

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

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

2. The settlement fully disposes of all issues in controversy and is consistent with the law and the public policy of New Jersey encouraging settlements.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

MAY 20 2002
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

5/22/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 23 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cad

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
90 Woodbridge Center Drive
Post Office Box 10
Woodbridge, New Jersey 07095
(732) 636-8000
Attorneys for Respondent,
Carteret Board of Education

01 MAY 20 A 10:22

JOSEPH COMBA, Petitioner, v. CARTERET BOARD OF EDUCATION, MIDDLESEX COUNTY, Respondent	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY AGENCY DOCKET NO.: 350-9/00 OAL DOCKET NO.: EDU 8848-00S **STIPULATION OF SETTLEMENT AND DISMISSAL**

This Stipulation of Settlement and Dismissal (hereinafter "Stipulation") is entered into by and between the CARTERET BOARD OF EDUCATION ("Board"), having its offices at 599 Roosevelt Avenue, Carteret, New Jersey, 07008 and JOSEPH COMBA, 12 Covered Bridge Road, Neshanic Station, Township of Hillsborough, New Jersey 08853.

W I T N E S S E T H:

WHEREAS, Joseph Comba, is employed as an Industrial Arts teacher at Carteret High School; and

WHEREAS, Mr. Comba is a tenured Supervisor in the Carteret School District. Mr. Comba served as Supervisor of Industrial Arts during the 1992-1993, 1993-1994, 1994-1995 and 1995-1996 school years at Carteret High School until his position was abolished as the result of a lawful reduction in force; and

WHEREAS, On May 3, 2000, the Board took official action hiring a nontenured individual as Supervisor of Science/Consumer Science/Tech Prep K-12; and

WHEREAS, on or about September 25, 2000, Mr. Comba filed a Petition of Appeal before the Commissioner of Education, Agency Reference No. 350-9/00, alleging that his tenure rights had been violated as a result of the Board's May 3, 2000 action; and

WHEREAS, the Commissioner of Education transmitted the Petition of Appeal to the Office of Administrative Law, OAL Docket No. EDU 8848-00S, for a hearing; and

WHEREAS, prior to the hearing being held, the parties reached an amicable resolution of the issues in dispute.

NOW THEREFORE, in consideration of the agreements, covenants and conditions contained herein, the adequacy and sufficiency of which is hereby expressly acknowledged by the parties hereto, the parties agree as follows:

1. Retirement. Mr. Comba hereby retires from his employment with the Board effective June 30, 2002.

2. Compensation. The Board will pay Mr. Comba the sum of thirty thousand dollars ($30,000.00). This amount will be reflected on an IRS Form W-2 Wage and Tax Statement. Such settlement amount shall be designated "wages" and shall be subject to all applicable state, federal and local taxes and any other withholdings as are required by law. Mr. Comba agrees that, but for this Stipulation, he would not be entitled to the aforesaid payments.

3. Dismissal of Petition. Upon full execution of this Stipulation, Mr. Comba will immediately withdraw his pending Petition before the Commissioner of Education.

4. No Past Practice. The Carteret Education Association has participated in the negotiations giving rise to this Stipulation and hereby agrees that this Stipulation shall not constitute, be interpreted, construed or used as evidence of any admission of fact, law, responsibility, wrongdoing, liability, or past practice or precedent on the part of the Board and shall not be referred to in any subsequent proceeding by any other party other than to enforce the express terms of this Stipulation.

5. Release and Waiver. In consideration for the consideration provided for in this Stipulation, and except as prohibited by law, Mr. Comba, personally and for his estate and/or his heirs, waives, releases and gives up any and all claims, demands, obligations, damages, liabilities, causes of action, and rights, in law or in equity, known and

unknown, that he may have against the Board and any and all of its officers, directors, agents, representatives and employees (present and former), and their respective successors and assigns, heirs, executors and personal or legal representatives (hereinafter "releasees"), based upon any act, event, or omission occurring before the execution of this Stipulation, including, but not limited to, any events related to, arising from, or in connection with, Mr. Comba's employment and/or association with releasees.

Mr. Comba specifically waives, releases and gives up any and all claims arising from or relating to his employment and/or association with releasees based upon any act, event, or omission occurring before the execution of this Stipulation, including but not limited to, any claim that was asserted or could have been asserted under any federal and/or state statutes, regulations, and/or common law, except as prohibited by law. Mr. Comba specifically waives, releases and gives up any and all claims arising from or relating to his employment and/or other relationship and/or association with releasees, based upon any act, event, or omission occurring before the effective date of this Stipulation, including, but not limited to, any claim that was asserted or could have been asserted under any federal and/or state statutes, regulations, and/or common law, expressly including, but not limited to, any potential claims (including individual and class action claims) relating to:

- The National Labor Relations Act, as amended;
- Title VII of the Civil Rights Act of 1964, as amended;
- Sections 1981 through 1988 of Title 42 of the United States Code, as amended;
- The Employee Retirement Income Security Act of 1974, as amended;
- The Immigration Reform Control Act, as amended;
- The Americans with Disabilities Act of 1990, as amended;
- The Age Discrimination in Employment Act of 1967, as amended;
- The Fair Labor Standards Act, as amended;
- The Occupational Safety and Health Act, as amended;
- The Family and Medical Leave Act of 1993;
- The Equal Pay Act, as amended;
- The New Jersey Law Against Discrimination, as amended;
- The New Jersey Minimum Wage Law, as amended;
- The New Jersey Wage and Hour Law, as amended;
- Equal Pay Law for New Jersey, as amended;

- The New Jersey Worker Health and Safety Act, as amended;
- The New Jersey Family Leave Act, as amended;
- The New Jersey Conscientious Employee Protection Act, as amended;
- Title 34 of the New Jersey Statutes, Labor and Workers' Compensation (to the extent permitted by law);
- Any anti-retaliation provision of any statute or law including common law;
- Any other federal, state or local civil or human rights law or any other local, state or federal law, regulation or ordinance;
- Any provision of any federal or state constitution;
- Any public policy, contract, tort, or common law;
- Any losses, injuries or damages (including back pay, front pay, liquidated, compensatory or punitive damages); and
- Attorneys fees, litigation costs, all medical bills for physical or psychological treatment (paid or outstanding), and any liens of any nature, all medical bills, for psychological or physical treatment for any injuries arising out of Mr. Comba's employment with the Board.

6. No Claims Permitted/Covenant Not to Sue. Mr. Comba agrees, to the fullest extent permitted by law, not to commence, encourage, facilitate or participate in any action or proceeding for damages, reinstatement, injunctive or any other type of relief, in any state, federal or local court or before any administrative agency relating to his employment, based upon any act, event or omission occurring before the effective date of this Stipulation. Nothing in this Stipulation is intended to prevent Mr. Comba from an action to enforce the Board's obligations as set forth herein. Nothing in this Stipulation is intended to prevent Mr. Comba from contacting the Equal Employment Opportunity Commission ("EEOC"); however, if Mr. Comba signs this Stipulation, he will not be able to obtain any relief or recovery in connection with any charge filed with the EEOC. Except as prohibited by law, in the event that any such charge, complaint or action is filed by Mr. Comba, it shall be dismissed with prejudice upon presentation of this Stipulation, and Mr. Comba shall reimburse releasees for the costs, including attorneys' fees, of defending any such action.

7. No Admission of Liability. It is expressly understood that neither the execution of this Stipulation, nor any other action taken by releasees in connection with this settlement, constitutes an admission by releasees of any violation of any law, duty or obligation, or that any

decisions or actions taken in connection with Mr. Comba's employment were unwarranted, unjustified, retaliatory, discriminatory, wrongful or otherwise unlawful. The parties agree that releasees have entered into this Stipulation for reasons other than the merits of Mr. Comba's claims, including to avoid the costs of litigation, and that releasees specifically deny any liability to Mr. Comba or to any other person.

8. Entire Agreement. This Stipulation contains the sole and entire agreement among the parties hereto, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. No other promises or agreements shall be binding unless in writing, signed by the parties hereto, and expressly stated to represent an amendment to this Stipulation.

9. Counterparts and Applicable Law. This Stipulation may be executed in counterparts and shall be construed and interpreted in accordance with the laws of the State of New Jersey. The parties agree that any action to enforce or interpret this Stipulation shall only be brought in a court of competent jurisdiction of the State of New Jersey, which the parties hereby acknowledge and agree to be the Superior Court of the State of New Jersey, venued in Middlesex County. The parties further agree that this Stipulation may be specifically enforced in court, may be the subject of an action for breach, and may be used as evidence in a subsequent proceeding in which either of the parties allege a breach of this Stipulation, and that in the event that Mr. Comba breaches this Stipulation and releasees are successful in an action against him, Mr. Comba shall be liable for the attorneys' fees and costs incurred by releasees with respect to any such action.

10. Revocation. Mr. Comba will have twenty-one (21) days from his receipt of this Stipulation to consider its terms before signing it. This Stipulation shall become binding and in full force and effect seven (7) days after Mr. Comba signs it. Mr. Comba may revoke this Stipulation for a period of seven days following the day he signs it. Any revocation within this period must be submitted, in writing, to Elizabeth Farley Murphy, Esq., Wilentz, Goldman & Spitzer, P.A., 90 Woodbridge Center Drive, P.O. Box 10, Woodbridge, NJ 07095 and must state "I hereby revoke my acceptance of this Stipulation." The revocation must be personally delivered to Elizabeth Farley Murphy, or mailed to Elizabeth Farley Murphy, and postmarked within seven days of execution of the Stipulation. This Stipulation shall not become effective or enforceable until after the revocation period has expired. If the last day of the revocation period is a Saturday, Sunday, or legal holiday in New Jersey, then the revocation period

shall not expire until the next following day which is not a Saturday, Sunday, or legal holiday.

11. This Stipulation must be approved by the Board by resolution prior to being effective or final.

12. The Board has reviewed this Stipulation and finds it to be in the best interest of the Board and the taxpayers of Carteret.

IN WITNESS WHEREOF, THE PARTIES HERETO SET THEIR HANDS TO THIS AGREEMENT AS FOLLOWS:

Joseph Comba — 5/6/2002

JOSEPH COMBA — Date

STATE OF NEW JERSEY :
: ss:
COUNTY OF Somerset :

I CERTIFY that on May 6, 2002 Joseph Comba personally came before me and acknowledged under oath, to my satisfaction, that they:
(a) are named in and personally signed this document; and
(b) signed, sealed and delivered this document as their own act and deed.

Sworn and subscribed to before me this 6 day of May, 2002.

~~Notary Public, State of New Jersey~~
Attorney at Law State of New Jersey

CARTERET BOARD OF EDUCATION

SUZANNE LOUTFY
Board President

5/10/02
Date

ATTEST:

Karen Ciramella
KAREN CIRAMELLA
Interim Business Administrator / Board Secretary

05/10/02
Date

KLAUSNER & HUNTER
Attorneys for Petitioner
Joseph Comba

Stephen Klausner
Date: 5/6/02

WILENTZ, GOLDMAN & SPITZER
Attorneys for Respondent Carteret Board of Education

Elizabeth Farley Murphy
Date: 5/8/02

OAL DKT. NO. EDU 8848-00
AGENCY DKT. NO. 350-9/00

JOSEPH COMBA,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

The record, Stipulation of Settlement and Dismissal and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

Date of Decision: 6/26/02

Date of Mailing: 6/28/02

258-02

258-02

DELIZIA PANNULLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 26, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8195-00
AGENCY DKT. NO. 322-9/00

DELIZIA PANNULLO,
Petitioner,
v.
WOODBRIDGE TOWNSHIP BOARD OF EDUCATION, MIDDLESEX COUNTY,
Respondent.

Samuel R. Mechanic, Esq., for petitioner

Elizabeth Farley Murphy, Esq., for respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: May 24, 2002 Decided: May 28, 2002

BEFORE **STEVEN C. REBACK**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 24, 2000, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

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

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

5/28/02
DATE

Steven Reback, ALJ
STEVEN C. REBACK, ALJ

Receipt Acknowledged:

5-31-02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 3 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

cmo

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
90 Woodbridge Center Drive
Post Office Box 10
Woodbridge, New Jersey 07095
(732) 636-8000
Attorneys for Respondent
Woodbridge Township Board of Education

2002 MAY 24 A 9:57

DELIZIA PANNULLO, Petitioner, v. WOODBRIDGE TOWNSHIP BOARD OF EDUCATION, MIDDLESEX COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY AGENCY DOCKET NO. 322-9/00 OAL DOCKET NO. EDUOR 8195-00S **STIPULATION OF SETTLEMENT AND DISMISSAL**

This Stipulation of Settlement and Dismissal (hereinafter "Stipulation") is entered into by and between the WOODBRIDGE TOWNSHIP BOARD OF EDUCATION (sometimes "Board"), having its offices at School Street, Woodbridge, New Jersey 07095, and DELIZIA PANNULLO, 131 Greene Place, Westfield, New Jersey 07090.

W I T N E S S E T H:

WHEREAS, during the 1999-2000 school year, Delizia Pannullo was employed as a school social worker for the Board; and

WHEREAS, the Board did not offer employment to Ms. Pannullo for the 2000-2001 school year; and

WHEREAS, Ms. Pannullo filed a petition of appeal before the Commissioner of Education in which she alleged that the Board's decision not to offer her employment for the 2000-2001 school year was arbitrary, capricious, and unreasonable; and

WHEREAS, the Commissioner of Education transmitted Ms. Pannullo's petition of appeal to the Office of Administrative Law, where it was listed for a hearing, OAL Docket No. EDUOR 08195-00S; and

WHEREAS, prior to the conduct of a hearing, the parties reached an amicable resolution of the issues in dispute.

NOW, THEREFORE, in consideration of the agreements, covenants and conditions contained herein, the adequacy and sufficiency of which is hereby expressly acknowledged by the parties hereto, the parties agree as follows:

1. Compensation. Within 30 days of the full execution of this Agreement, the Board will pay Ms. Pannullo the sum of forty two thousand, five hundred dollars ($42,500.00). This amount will be reflected on an IRS Form W-2 Wage and Tax Statement. Such settlement amount shall be designated "wages" and shall be subject to all applicable state, federal and local taxes and any other withholdings as are required by law. Ms. Pannullo agrees that, but for this Stipulation, she would not receive the aforesaid payment.

2. Recommendation. The Board shall provide a letter of recommendation for Ms. Pannullo in the form annexed hereto.

3. Personnel file. The Board shall remove from Ms. Pannullo's personnel file all documents stating or otherwise suggesting that she misrepresented her employment history to the Board, including, but not limited to, any materials and documentation relating to grievances and disputes between Ms. Pannullo and the Board. Ms. Pannullo's personnel file will be reflective of only employment and job related information.

4. Dismissal of Petition. Upon full execution of this Stipulation, Ms. Pannullo will immediately withdraw her Petition before the Commissioner of Education against the Board and dismiss the matter hereinabove mentioned pending in the Office of Administrative Law.

5. Release and Waiver. In consideration of the aforesaid payment and other terms and conditions of this Stipulation, and except as prohibited by law, Ms. Pannullo, personally and for her estate and/or her heirs, waives, releases and gives up any and all claims, demands, obligations, damages, liabilities, causes of action, and rights, in law or in equity, known and unknown, that she may have against the Board and any and all of its officers, directors, agents, representatives and employees (present and former), and their respective successors and assigns, heirs, executors and personal or legal representatives (hereinafter "releasees"), based upon any act, event, or omission occurring before the execution of this Stipulation, including, but not limited to, any events related to, arising from, or in connection with, Ms. Pannullo's employment and/or association with releasees.

   To the extent permitted by law, Ms. Pannullo specifically waives, releases and gives up any and all claims arising from or relating to her employment and/or other relationship and/or association with releasees, based upon any act, event, or omission occurring before the effective date of this Stipulation, including, but not limited to, any claim that was asserted or could have been asserted under any federal and/or state statutes, regulations, and/or common law, expressly including, but not limited to, any potential claims (including individual and class action claims) relating to:

   - The National Labor Relations Act, as amended;
   - Title VII of the Civil Rights Act of 1964, as amended;
   - Sections 1981 through 1988 of Title 42 of the United States Code, as amended;

- The Employee Retirement Income Security Act of 1974, as amended;
- The Immigration Reform Control Act, as amended;
- The Americans with Disabilities Act of 1990, as amended;
- The Age Discrimination in Employment Act of 1967, as amended;
- The Fair Labor Standards Act, as amended;
- The Occupational Safety and Health Act, as amended;
- The Family and Medical Leave Act of 1993;
- The Equal Pay Act, as amended;
- The New Jersey Law Against Discrimination, as amended;
- The New Jersey Minimum Wage Law, as amended;
- The New Jersey Wage and Hour Law, as amended;
- Equal Pay Law for New Jersey, as amended;
- The New Jersey Worker Health and Safety Act, as amended;
- The New Jersey Family Leave Act, as amended;
- The New Jersey Conscientious Employee Protection Act, as amended;
- Title 34 of the New Jersey Statutes, Labor and Workers' Compensation;
- Any anti-retaliation provision of any statute or law including common law;
- Any other federal, state or local civil or human rights law or any other local, state or federal law, regulation or ordinance;
- Any provision of any federal or state constitution;
- Any public policy, contract, tort, or common law;
- Any losses, injuries or damages (including back pay, front pay, liquidated, compensatory or punitive damages); and
- Attorneys fees, litigation costs, all medical bills for physical or psychological treatment (paid or outstanding), and any liens of any nature, all medical bills, for psychological or physical treatment for any injuries arising out of Ms. Pannullo's employment with the Board.

6. No Claims Permitted/Covenant Not to Sue. Ms. Pannullo agrees, to the fullest extent permitted by law, not to commence, encourage, facilitate or participate in any action or proceeding for damages, reinstatement, injunctive or any other type of relief, in any state, federal or local court or before any administrative agency relating to her employment, based upon any act, event or omission occurring before the effective date of this Stipulation. Nothing in this Stipulation is intended to prevent Ms. Pannullo from an action to enforce the Board's obligations as set forth herein. Nothing in this Stipulation is intended to prevent Ms. Pannullo from contacting the Equal Employment Opportunity Commission ("EEOC"); however, if Ms. Pannullo signs this Stipulation, she will not be able to obtain any relief or recovery in connection with any charge filed with the EEOC. Except as prohibited by law, in the event that any such charge, complaint or action is filed by Ms. Pannullo, it shall be dismissed with prejudice upon presentation of this Stipulation, and Ms. Pannullo shall reimburse releasees for the costs, including attorneys' fees, of defending any such action.

7. No Admission of Liability. It is expressly understood that neither the execution of this Stipulation, nor any other action taken by releasees in connection with this settlement, constitutes an admission by releasees of any violation of any law, duty or obligation, or that any decisions or actions taken in connection with Ms. Pannullo's employment were unwarranted, unjustified, retaliatory, discriminatory, wrongful or otherwise unlawful. The parties agree that releasees have entered into this Stipulation to conclude a disputed claim and avoid costs and expenses attendant to litigation of this type. Releasees specifically reiterate their denial of any legal liability or obligation to Ms. Pannnullo or any other person.

8. Entire Agreement. This Stipulation contains the sole and entire agreement among the parties hereto, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. No other promises or agreements shall be binding unless in writing, signed by the parties hereto, and expressly stated to represent an amendment to this Stipulation.

9. Counterparts and Applicable Law. This Stipulation may be executed in counterparts and shall be construed and interpreted in accordance with the laws of the State of New Jersey. The parties agree that any action to enforce or interpret this Stipulation shall only be brought in a court of competent jurisdiction of the State of New Jersey, which the parties hereby acknowledge and agree to be the Superior Court of the State of New Jersey, venued in Middlesex County. The parties further agree that this Stipulation may be specifically enforced in court, may be the subject of an action for breach, and may be used as evidence in a subsequent proceeding in which either of the parties allege a breach of this Stipulation, and that in the event that Ms. Pannullo breaches this Stipulation and releasees are successful in an action against her, Ms. Pannullo shall be liable for the attorneys' fees and costs incurred by releasees with respect to any such action.

10. Revocation. Ms. Pannullo will have twenty-one (21) days from her receipt of this Stipulation to consider its terms before signing it. This Stipulation shall become binding and in full force and effect seven (7) days after Ms. Pannullo signs it. Ms. Pannullo may revoke this Stipulation for a period of seven days following the day she signs it. Any revocation within this period must be submitted, in writing, to Elizabeth Farley Murphy, Esq., Wilentz, Goldman & Spitzer, P.A., 90 Woodbridge Center Drive, P.O. Box 10, Woodbridge, NJ 07095 and must state "I hereby revoke my acceptance of this Stipulation." The revocation must be personally delivered to Elizabeth Farley Murphy, or mailed to Elizabeth Farley Murphy, and postmarked within seven days of execution of the Stipulation. This Stipulation shall not become effective or enforceable until after the revocation period has expired. If the last day of the revocation period is a Saturday, Sunday, or legal holiday in New Jersey, then the revocation period shall not expire until the next following day which is not a Saturday, Sunday, or legal holiday.

11. This Stipulation must be approved by the Board by resolution prior to being effective or final.

12. The Board has reviewed this Stipulation and finds it to be in the best interest of the Board and the taxpayers of Woodbridge Township.

IN WITNESS WHEREOF, THE PARTIES HERETO SET THEIR HANDS TO THIS AGREEMENT AS FOLLOWS:

Delizia Pannullo — 05-06-02

DELIZIA PANNULLO — Date

STATE OF NEW JERSEY :

: ss:

COUNTY OF Essex :

I CERTIFY that on April 6, , 2002 Delizia Pannullo personally came before me and acknowledged under oath, to my satisfaction, that they:

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

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

Sworn and subscribed to before me this 6th day of April, 2002.

Andrew H. Koppel
An Attorney at Law
of the State of New Jersey

WOODBRIDGE TOWNSHIP BOARD OF EDUCATION

Lewis C. Huber

LEWIS C. HUBER
Board President

5/16/02
Date:

ATTEST:

VINCENT S. SMITH
Acting Superintendent/
Business Administrator /
Board Secretary

5/16/02
Date:

THE BELOW SIGNED ATTORNEYS OF RECORD HEREBY STIPULATE AND AGREE TO THE DISMISSAL AND SETTLEMENT OF THE ABOVE MATTER WITHOUT ATTORNEYS' FEES OR COSTS.

SAMUEL MECHANIC
Attorney for Delizia Pannullo

Samuel Mechanic, Esq.

Date: 5/6/02

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
Attorneys for the Woodbridge
Township Board of Education

Elizabeth F. Murphy

Elizabeth Farley Murphy, Esq.

Date: 5/16/02

#2117605

WOODBRIDGE BOARD OF EDUCATION STATIONERY

Date

To Whom it May Concern:

The Board is advised that Delizia Pannullo is seeking potential employment relative to her School Social Work training and experience. This letter will confirm that she was employed by the Woodbridge Township Board of Education in this capacity during the 1999-2000 school year.

It is appropriate to report that she satisfactorily completed the requirements with respect to that position. Her job performance was excellent.

We would recommend her services without hesitation.

Very truly yours,

Vincent S. Smith
Acting Superintendent /
Business Administrator/
Board Secretary

#2117605

OAL DKT. NO. EDU 8195-00
AGENCY DKT. NO. 322-9/00

DELIZIA PANNULLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Upon review, the Commissioner approves the settlement of this matter, where petitioner alleged her employment was nonrenewed for retaliatory reasons and/or predicated on the lack of any valid criteria, and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/26/02

Date of Mailing: 6/28/02

260-02

C.C., on behalf of minor child, R.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIVERTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 26, 2002

OAL DKT. NO. EDU 4036-00
AGENCY DKT. NO. 161-5/00

C.C., on behalf of minor child, R.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIVERTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and advisement of petitioner's failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on May 8, 2002, providing petitioner thirteen (13) days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by petitioner, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/26/02

Date of Mailing: 7/01/02

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

259-02

259-02

CAROL ANN CHABROL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF NORTH HANOVER TOWNSHIP, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 26, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4772-01
AGENCY DKT. NO. 207-6/01

CAROL ANN CHABROL,
Petitioner,

v.

BOARD OF EDUCATION OF NORTH HANOVER TOWNSHIP, BURLINGTON COUNTY,
Respondent.

Ned P. Rogovoy, for petitioner (Waltman, Reilly & Rogovoy, attorneys)

Robert P. Martinez, for respondent

Record Closed: May 28, 2002 Decided: May 29, 2002

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 15, 2002, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

5/29/02
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

5-31-02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 3 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

cc

LAW OFFICES OF
ROBERT P. MARTINEZ
65 South Main Street, Bldg. C
Pennington, New Jersey 08534
(609) 818-0068
Attorneys for Respondent, North Hanover
Township Board of Education

2002 MAY 28 P 12:35

CAROL ANN CHABROL	:	BEFORE THE COMMISSIONER OF
	:	EDUCATION OF NEW JERSEY
Petitioner,	:	
v.	:	
	:	DOCKET NO. 207-6/01
NORTH HANOVER TOWNSHIP	:	
BOARD OF EDUCATION	:	
	:	STIPULATION
Respondent.	:	OF
	:	SETTLEMENT

Petitioner and Respondent, having conferred through their respective attorneys, and having reached an agreement under which all outstanding controversies and disputes between them shall be amicably and permanently resolved, do hereby memorialize said agreement and submit same to the Administrative Law Judge in accordance with applicable rules of administrative procedure.

In consideration of the mutual covenant and understandings Hereinafter Expressed, Petitioner Carol Ann Chabrol And Respondent North Hanover Township Board Of Education hereby represent, undertake and agree as follows:

1. Petitioner Carol Anne Chabrol hereby withdraws with prejudice her claim that Respondent's withholding of her salary increment for the 2001-2002 school year was arbitrary, capricious, and unreasonable, and in so doing, foregoes any further right of review or challenge to said withholding.

2. Respondent North Hanover Township Board of Education hereby agrees and shall forthwith and in accordance with law restore Carol Anne Chabrol to her proper step and guide at the beginning of the 2002-2003 school year, with the net effect that

Petitioner shall have lost an increment only for the 2001-2002 school year.

3. The parties stipulate and agree that this settlement is voluntary, consistent with law and fully dispositive of all issues now in contention between them, and that, upon the approval of this settlement, a order of dismissal with prejudice shall be entered in the within matter.

4. Petitioner acknowledges that she has had the advice of counsel prior to entering this settlement agreement, that counsel has reviewed the form of this agreement, that she is entering into this agreement by signing it on the date written below, while free of any undue influence or coercion.

Petitioner:

Carol Anne Chabrol

Witness as to Petitioner

Date: 4/30/02

Approved as to form only:

Ned P. Rogovoy, Esq.
Attorney For Petitioner

Respondent:

BOARD PRESIDENT

Matthew J. Ernandes, Jr.
Board Secretary

Date: 5-23-02

Approved as to form only:

Robert P. Martinez, Esq.
Attorney for North Hanover Township
Board of Education

LAW OFFICES OF
ROBERT P. MARTINEZ
65 South Main Street, Bldg. C
Pennington, New Jersey 08534
(609) 818-0068
Attorneys for Respondent, North Hanover
Township Board of Education

CAROL ANN CHABROL	:	BEFORE THE COMMISSIONER OF
	:	EDUCATION OF NEW JERSEY
Petitioner,	:	
v.	:	
	:	DOCKET NO. 207-6/01
NORTH HANOVER TOWNSHIP BOARD OF EDUCATION	:	
	:	STIPULATION
Respondent.	:	OF
	:	SETTLEMENT

Petitioner and Respondent, having conferred through their respective attorneys, and having reached an agreement under which all outstanding controversies and disputes between them shall be amicably and permanently resolved, do hereby memorialize said agreement and submit same to the Administrative Law Judge in accordance with applicable rules of administrative procedure.

In consideration of the mutual covenant and understandings Hereinafter Expressed, Petitioner Carol Ann Chabrol And Respondent North Hanover Township Board Of Education hereby represent, undertake and agree as follows:

1. Petitioner Carol Anne Chabrol hereby withdraws with prejudice her claim that Respondent's withholding of her salary increment for the 2001-2002 school year was arbitrary, capricious, and unreasonable, and in so doing, foregoes any further right of review or challenge to said withholding.

2. Respondent North Hanover Township Board of Education hereby agrees and shall forthwith and in accordance with law restore Carol Anne Chabrol to her proper step and guide at the beginning of the 2002-2003 school year, with the net effect that

Petitioner shall have lost an increment only for the 2001-2002 school year.

3. The parties stipulate and agree that this settlement is voluntary, consistent with law and fully dispositive of all issues now in contention between them, and that, upon the approval of this settlement, a order of dismissal with prejudice shall be entered in the within matter.

4. Petitioner acknowledges that she has had the advice of counsel prior to entering this settlement agreement, that counsel has reviewed the form of this agreement, that she is entering into this agreement by signing it on the date written below, while free of any undue influence or coercion.

Petitioner:

Carol Ann Chabrol

Carol Anne Chabrol

Witness as to Petitioner

Date: 4/30/02

Approved as to form only:

Ned P. Rogovoy, Esq.
Attorney For Petitioner

Respondent:

BOARD PRESIDENT

Matthew J. Ernandes, Jr.
Board Secretary

Date: 5-23-02

Approved as to form only:

Robert P. Martinez, Esq.
Attorney for North Hanover Township
Board of Education

OAL DKT. NO. EDU 4772-01
AGENCY DKT. NO. 207-6/01

CAROL ANN CHABROL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF NORTH HANOVER TOWNSHIP, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/26/02

Date of Mailing: 7/01/02

261-02

IN THE MATTER OF THE TENURE :

HEARING OF PAUL VARANO, : COMMISSIONER OF EDUCATION

SCHOOL DISTRICT OF THE TOWNSHIP : DECISION

OF IRVINGTON, ESSEX COUNTY. :

SYNOPSIS

The Board certified tenure charges of unbecoming conduct, incapacity and other just cause against respondent industrial arts teacher due to unsatisfactory evaluations and his ineffectiveness as a teacher.

The ALJ determined that overwhelming evidence showed that respondent had not been providing proper instruction to his class for a period of two years. The ALJ found that the Board had established its tenure charges of unbecoming conduct, incapacity and other just cause against respondent. The ALJ ordered respondent dismissed from his tenured teaching position.

The Commissioner affirmed the Initial Decision and directed that respondent be dismissed from his position as of the date of this decision. The Commissioner ordered the matter transmitted to the State Board of Examiners for action as it deems appropriate.

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

July 1, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3087-02
AGENCY DKT. NO. 46-2/02

IN THE MATTER OF THE TENURE HEARING OF PAUL VARANO, BOARD OF EDUCATION IRVINGTON, ESSEX COUNTY

Ronald C. Hunt, Esq., for petitioner
(Hunt, Hamlin & Ridley, attorneys)

Paul Varano, *pro se*

Record Closed: April 22, 2002 Decided: May 17, 2002

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is a teacher tenure proceeding under *N.J.S.A.* 18A:6-10 to -18. Tenured teaching staff members hold employment in the public school system "during good behavior and efficiency." Petitioner Irvington Board of Education ("Board") is seeking to remove respondent Paul Varano ("Varano") on charges of "unbecoming conduct," "incapacity" or "other just cause."

All of the charges arise out of events that occurred during the 1997-98 and 1998-99 academic years. Specifically, the Board alleges that Varano received uniformly poor performance evaluations for both years; that he "[f]ailed to provide regular educational instruction during class hours", instead allowing students "to do nothing for an entire class period;" that he was chronically late to work; that he "violat[ed] safety protocol by failing to properly supervise students using dangerous equipment;" that he failed to communicate effectively with students, parents, administrators or teachers; and that he that he committed various bizarre behaviors, such as "keeping himself barricaded behind his desk" and "mumbling to himself while ignoring the students."

Basically, the outcome of this dispute depends on an assessment of the witnesses' credibility. If any of the tenure charges is sustained, the Commissioner of Education ("Commissioner") must determine whether dismissal or some lesser penalty is warranted.

Procedural History

On or about February 20, 2002, Dr. Ernest H. Smith Jr., superintendent of schools, filed tenure charges, together with a sworn statement of supporting evidence, with the Board. After review of these papers, the Board determined that there exists probable cause to credit the supporting evidence and that the charges, if true, warrant some type of disciplinary action. Accordingly, on February 20, 2002, the Board certified the tenure charges to the Commissioner and suspended Varano without pay. Thereafter, on March 8, 2002, Varano filed an answer in which he denied all the charges.

Subsequently, on March 18, 2002, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held three days of hearing on April 17, 18, and 22, 2002. Witnesses and exhibits are listed in the appendix.

Findings of Fact

(1) Background Information

Most of the general background facts are uncontested. Paul Varano, age forty-seven, was hired by the Irvington public school district in September 1981. Throughout his entire teaching career, he has been an industrial-arts instructor teaching woodshop classes at Mount Vernon Avenue School in Irvington. He is the only shop teacher at that school. Originally he also taught the lower grades, but since 1985 he has been exclusively teaching grades seven and eight. Generally his classes consist of fifteen to eighteen students. Varano taught four periods per day, had one period of playground duty per day and one preparation period per day. Each period lasts forty-two minutes. Children in the district take woodshop for half a year and then switch to home economics for the remaining half year.

Due to various concerns that form the basis of the tenure charges, the Board relieved Varano of his duties and placed him on paid leave of absence on November 6, 1998. At that time, Varano had been teaching for approximately seventeen years. He remained on the Board's payroll for more than three years until the filing of these tenure charges.[1] Meanwhile, Varano was unwilling to agree to the Board's request that he submit to a psychiatric evaluation. Finally, the Board obtained an order, entered by Administrative Law Judge Margaret Hayden on December 22, 2000, directing that Varano undergo a psychiatric evaluation. Varano complied with this order on March 13, 2001.

For much of his service, Varano had received satisfactory evaluations of his teaching performance. A sharp decline occurred in the last two years, when the same administrators who had previously given him favorable evaluations rated him inadequate.

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[1] The Board's lengthy delay in bringing tenure charges, during which time Varano continued to collect his full salary without teaching, cannot be condoned.

(2) Ineffective Teaching During 1997-98 and 1998-99

Numerous witnesses testified about the total lack of effective teaching in Varano's classroom. Maria Parker, an educator with thirty years experience who served as assistant principal at Mount Vernon Avenue School in 1997-98, regularly visited the classrooms to evaluate teacher performance and check whether students were learning. Parker has a background in curriculum and supervision. She knows Varano well, having "worked with him every day for three years." Although Varano was supposed to submit lessons plans for her review one week in advance, he typically failed to comply with this requirement. If Varano happened to be absent, there was no lesson plan available to guide the substitute teacher. Parker stated that it was "a common occurrence" for students in Varano's classes to be "running around and throwing things." Teachers described students coming to their class from woodshop as "hyperactive" and "unruly."

Parents often complained that their children made no projects in woodshop. Insofar as Parker can recall, the only project that Varano ever had his students complete was wooden letter cutouts. In response to her inquiry of what she could do to help, Varano complained about lack of wood and other supplies. At one point, Parker personally brought him ten wooden planks from Home Depot. On another occasion, Assistant Superintendent Walter Ruzak personally delivered a carload of lumber to ensure that Varano had sufficient materials. Prior to the 1997-98 academic year, Parker made sure that Varano filled out the requisition sheet to order necessary supplies. When the school year started in September, there was wood "stacked in the back room" and the shop had new equipment, including three band saws and two circular saws.

On March 5, 1998, Parker conducted a formal observation of Varano's classroom.[2] In her written report, she rated Varano "not effective" in 17 out of 25 categories. As a result of this unfavorable evaluation, the Board voted to withhold

[2] It is district practice for the supervisor to make three formal observations per year, but only use the best one for evaluation purposes.

Varano's salary increment for the upcoming school year. Parker wrote in the narrative section that "learning activities are nonexistent" and "students are not given tasks that assess their intellect and ability." She explained that students were playing games or reading magazines in class. Some girls were putting on nail polish. The classroom floor was "strewn with magazines and papers" and work areas were "littered with scrap paper, etc."[3] While Varano sat at his desk the entire period, students worked on assignments from other classes. Parker had previously attempted to convince Varano "to get up from his chair and move around the classroom." Varano produced a lesson plan unrelated to any activity going on in the classroom. Moreover, report cards were late that term because Varano failed to submit his grades on time.

On the following day, March 6, 1998, Parker returned to Varano's classroom to observe an all-girls shop class. For the first ten minutes, no verbal exchange whatsoever took place between teacher and students. Varano did not ask any questions, provide any instruction or offer any feedback. Of the ten students in the class, only two appeared to be working on a shop-related assignment. They were tracing tools from a yellow worksheet. When Parker asked the name and uses of the tools, "neither student could answer intelligently." Other students in the classroom were engaged in tasks having nothing to do with shop. One student was using nose drops, another was cutting out an article from a newspaper, and a third was shading concentric circles. Two students were completing a mathematics assignment for a different class and three were doing word puzzles.

Other credible witnesses gave similar accounts of the chaos allowed to exist in Varano's classroom. Lorene Capers, the parent of a seventh-grader in Varano's shop class, became concerned because her son never brought home any projects. When she questioned her son about it, he told her that there was "not much going on in class." Because of her dissatisfaction with the quality of Varano's teaching, Capers arranged to have her son transferred to another class.

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[3] On one occasion, Parker stayed late with several students to clean up the mess in the shop room.

As president of the PTA in 1997-98, Capers frequently had reason to come to the school.[4] In winter of 1997, she was invited by the librarian to visit the computer lab, located in the library across the hall from the woodshop. Exiting the library, she heard a loud noise coming from the direction of the shop. She peered through the glass window and saw a number of children "running around" in the shop room. Some children were reading, others were playing jacks, still others were throwing paper or balls back and forth. Oblivious to what was going on, Varano sat at his desk, "flipping through" an open newspaper. Capers reported the situation to Assistant Principal Parker, who came downstairs to see for herself and promised to follow up.

Capers, a successful candidate for school board member in the 1998 school elections, went to the Mount Vernon Avenue School, on voting day in April. Standing outside the building, she heard a noise, looked up, and saw "kids yelling out of the windows." Varano's shop was the only classroom on that side of the building. Board president Andrea McElroy, who also witnessed the disturbance, called the central administrative office. Assistant Superintendent Walter Rusak met the two women in the parking lot and accompanied them to Varano's room. When Rusak opened the door, Capers saw Varano "just sitting there," and not doing anything to gain control of his classroom. Dr. Richard Hangee, supervisor of staff development at Irvington, also witnessed the scene. He testified that students were "talking, arguing and fighting" and that Varano, who was sitting at his desk, "looked up and went back to what he was doing."

Similarly, Rebecca Watford-Dunmore, a security guard assigned to Mount Vernon Avenue School in 1997-98, often overheard students "carrying on," "jumping around," and "making noise," while Varano simply stood by "doing nothing." Stationed at the nearby library, Officer Dunmore described Varano's students as engaged in "horseplay," which she defined as "fighting, hitting, kicking and punching." Her instructions, however, were not to intervene unless she was dispatched by an

[4] In her capacity as PTA president, Capers heard other parents express their own reservations that no work was being accomplished in Varano's class.

administrator. At least once a week, she was sent to check why Varano's students were making so much noise.

Alan Gamba, the building principal, performed Varano's formal evaluation for the following year. Employed in Irvington since 1970, Gamba holds a master's degree in administration and supervision. Gamba visited Varano's class on October 30, 1998, two months into the 1998-99 academic year. A week in advance, Gamba had notified Varano of the scheduled observation so he could prepare his lesson. On the date of the actual observation, Gamba's secretary telephoned ahead to remind Varano that the principal would be observing his second period class. Nonetheless, when Gamba entered the room "absolutely nothing was going on." This particular class was a group of twelve students enrolled in academic honors courses. They were well-behaved and self-directed. As the students filtered into the room, they sat down, opened their books and began doing homework for other classes. Several students talked about going out on a date. Varano did not take attendance or put any assignment on the blackboard. Instead, Varano quietly sat at his desk reading a newspaper or magazine and did not converse with anyone. He never turned in a lesson plan for that day. Gamba noted on the evaluation form that the teacher "does not move from the chair [in which] he is sitting" and "does not assist any student."

After watching for fifteen or twenty minutes, Gamba approached Varano and asked him what he was doing. Varano responded with words to the effect of "What do you see?" When Gamba answered that he saw "Nothing," Varano replied, "That's what I'm doing." Gamba was stunned by Varano's complacent attitude. In every other evaluation with which he was familiar, the teacher had always sought to impress the evaluator by "putting on a show." Varano appeared completely indifferent and did not even go through the motions of teaching the class. Gamba stayed for the entire forty-two minute period, but Varano remained silently seated at his desk. It was not so much that Varano's teaching style was inadequate, but rather that there was "no instruction at all." Consequently, Gamba had no choice but to rate Varano "not effective" in every category, the only time that he has ever given a totally negative evaluation.

Comparing Varano's performance to other shop teachers in the district, Gamba recalled that a teacher at another school taught his students to make trays, chairs, little wooden trains and sleds. In contrast, Varano's students never produced anything. Poignantly, Gamba felt that Varano "was cheating the students." Varano frequently complained about not having enough lumber, but Gamba avowed that there was plenty of wood in the shop. Photographs of the classroom introduced by Varano confirm the existence of large piles of lumber on the floor and on wall racks. Changing his story, Varano then complained that the lumber blocked access to cabinets and constituted a tripping hazard for his students. Gamba countered that Varano could have asked the custodial staff to rearrange the lumber. In addition, Varano alleged that his students did not have safety goggles. Gamba, however, disputed any shortage of equipment. After Varano was relieved of his duties, administrators opened the locked closets in his room and discovered "goggles, drill bits and screwdrivers."

When reports of Varano's deficiencies reached Peter Carter, superintendent of the Irvington school district, he dispatched one of his top assistants, William Calloway Jr., to make an independent appraisal of the circumstances. Unfortunately Calloway is now deceased, but he prepared a written report of his observation, which took place on November 3, 1998. Calloway's report fully supports the testimony of other professional educators. In part, that report reads:

> Upon entering the room, 11 students were seated at three desks. Three students were eating potato chips. The board had no object for the day. The classroom had the appearance of a "holding room" where no teaching and learning were taking place. All machines were covered with plastic. Mr. Varano sat at his desk the entire period. I asked Mr. Varano for his Plan Book. He stated that he did not have it. He stated that the wood was not in a safe place and and no one had moved it, and to stop playing games. I stated no one is playing games, sir. The wood was on the floor and rack and appeared safe to me.

Calloway's final conclusion was that "[n]o instruction took place during the entire period."

Other than denying the events described by the Board's witnesses, Varano offered little evidence in his defense. Varano steadfastly insisted that the evaluations were "slanted" or "untrue," although he was unable to suggest any motive for supervisors, with whom he had enjoyed cordial relations in the past, to fabricate stories about him. He blamed the inactivity in his classroom on the district's failure to provide him with adequate materials and supplies. Without safety goggles, his students could not work on wood projects, so he assigned them to do "worksheets." He denied ever having seen security guard Dunmore and supervisor Hangge before their appearance at the hearing and had no recollection of any incident where students in his class yelled out the window. Significantly, however, Varano did not call any faculty member, parent or student to commend his teaching methods. Nor did he offer into evidence an example of any project that his students had completed in woodshop.

I FIND that it was a common occurrence for students in Varano's class to be wild and disruptive, to run around the room making excessive noise and to fight, hit, kick or punch each other. Meantime, Varano would sit idly by without taking any action to restore order. On two specific occasions, his class was so out of control that parents visiting the school brought the situation to the attention of administrators. In winter 1997, students in his class were so loud that they could be heard from the library. While his students played games or tossed objects back and forth, Varano sat as his desk reading a newspaper. In April 1998, students in Varano's class yelled out the windows and created a noisy disturbance. Again, Varano sat at his desk doing nothing.

Proofs strongly demonstrate that Varano's students were not deriving educational benefit from his classes. Varano failed to prepare adequate lesson plans, failed to put assignments on the blackboard and failed to interact with his students. None of the students in his woodshop class completed any wood projects. Qualified supervisors separately evaluated Varano's teaching performance and uniformly concluded that no learning was occurring in his classroom. Typically, Varano sat immobilized at his desk, without teaching any lesson or providing proper guidance to his students. Students in his classes occupied themselves by reading books or magazines, playing games, putting on nail polish, talking to each other or working on assignments

from other teachers. Notwithstanding attempts by Varano to shift responsibility to others, the record clearly establishes that he was given adequate materials and supplies to teach his classes.

(3) Chronic Lateness

Varano's difficulties with coming to work on time date back to prior years. Since Varano's home in Monmouth County is a considerable distance from the Irvington school district, he would often encounter traffic jams and arrive at the school later than the opening bell. Such habitual tardiness created practical problems for the school administration because Varano's first period class had to be covered by a certified staff member. On June 26, 1996, Gamba wrote to Varano warning him that his absentee rate had "exceeded the 5% occasional absenteeism allotted by the state for the 1994/95 and 95/96 school year." Moreover, Gamba orally advised Varano that next year he must try harder to get to work on time and that the district "cannot continue to pay other teachers for fifteen or twenty minutes."

Nevertheless, Varano's pattern of arriving late to school continued into 1997-98. In late September 1997, Gamba sent a second letter to Varano criticizing him for lateness on September 2, 4, 8, 11, 18 and 22 and for arriving "more than half an hour late" on September 29, 1997. Gamba's letter, a copy of which was placed in Varano's personnel file, recites that Varano's response to his lateness problem was "very noncommittal." In mid-December, 1977, Gamba sent a third letter to Varano stating that his lateness record had not improved and that Varano's persistent disregard of the requirement for on-time attendance had "made it necessary for me to inform you of my concerns in writing." A fourth letter from Gamba, written in early March 1998, chastises Varano for being late on October 8 and 27, November 17, December 1 and 11, 1997. Varano admitted that he regularly arrived late to work, but sought to excuse his conduct by his long drive to work.

I FIND that Varano was habitually late to work during the 1997-98 academic year, despite prior warnings from the building principal that such behavior would no

longer be tolerated. Varano's chronic lateness set a poor example for his students and forced the Board to incur unnecessary expense to provide temporary coverage for his classes.

(4) Failure to Supervise Use of Dangerous Equipment

Not much evidence was presented to support this charge. Assistant Principal Parker mentioned that Varano remained at his desk and did not go over to help students at the band saw. But the gist of her testimony was that students in Varano's class did not work on shop projects. Indeed, when Gamba visited the class in October 1998 the band saw was still encased in plastic for summer storage. No proof was presented that anyone in Varano's class had ever been injured or required medical treatment.

I FIND that the evidence is insufficient to sustain the charge that Varano failed to supervise his students properly in the use of dangerous equipment.

(5) Lack of Communication with Students, Parents and Faculty

There has already been ample discussion of Varano's unwillingness to move about the classroom and interact meaningfully with his students. To accommodate parents who work during the day, the district holds one parent-teacher conference in the evening. While Varano attended daytime conferences with parents, he did not show up for the evening conference. When parents came to the school and the office tried to contact his classroom via the Intercom system, Varano did not respond. On one particular occasion, Parker had asked Varano to meet with a group of parents, but he left the building early and was gone when the parents arrived.

His treatment of his colleagues was not much better. Varano literally turned his back on his direct supervisor, María Parker, when he did not want to hear what she was saying. According to Parker, this act of extreme disrespect occurred not just once, but on three separate occasions. Gamba said that Varano routinely skipped mandatory

staff meetings, which were held after school. Varano refused to come to the office, so in order to see him the principal had to go to his classroom. During these interchanges, Varano "refused to listen" and Gamba described the experience as "like talking to myself." Gamba's testimony is corroborated by a letter dated March 5, 1998, in which he chided Varano for not attending staff meetings and pleaded with him to keep open "our lines of communication."

I FIND that Varano isolated himself from his students, their parents, and his fellow staff members, avoiding contact when possible. Varano did not attend the evening meeting designed for parents unable to come to school during the day. At another time, he left early on a day when parents had been invited to meet with him. He did not respond to the intercom system when a parent visited the school. Likewise, he regularly failed to attend staff meetings and refused to meet with the principal. Sometimes, when the assistant principal tried to communicate with him, he turned his back on her. When the principal sought him out for a conversation, Varano simply refused to listen.

(6) Bizarre Behaviors

As previously noted, the record contains several examples of seemingly irrational behavior by Varano, such as not attempting to teach during an observation period, ignoring disruptive students in his classroom, and turning his back while his supervisor was talking to him. Parker prepared a diagram of the classroom layout, depicting Varano's chair surrounded by three desks with a narrow entryway off to one side. Seated behind this self-imposed barricade, Varano would not let students approach any closer than the outside perimeter. Throughout the school day, Varano stayed inside his enclosure and seldom ventured into the shop to mingle with his students. During lunch, he would sit in a corner and "not move at all." While on playground duty, he would park his chair at the edge of the playground and "peer around the corner."[5]

[5] Although the Board also alleged that Varano drew a chalk line on the floor and blew a whistle if any student crossed the line, that charge was never proven. Gamba did see the red chalk line on the floor of Varano's room, but nobody testified about any whistle blowing.

Parker declared that Varano appeared "very agitated" and that students were afraid of him. Gamba agreed that "something [seemed to be] bothering him," although Varano never disclosed any personal illness or family crisis. Questioned about what was troubling him, Varano gave Gamba evasive replies, *e.g.,* "You know the big picture." Correspondence from Varano contained inappropriate comments, such as his curious claim that Parker's unfavorable evaluation was "just another attempt to keep me [in] Irvington." In a letter to the Board, Gamba accused the school administration of trying "to set me up" and compared his situation to "the sneak attack on Pearl Harbor." At the hearing, Varano brushed off the charges against him as "ridiculous" and accused his supervisors of being "jealous" of his success. Both supervisors tried to get help for Varano, Parker by asking the union president to intervene and Gamba by suggesting that he take advantage of counseling services available through the Employee Assistance Program ("EAP").[6] Varano consistently denied that anything was wrong, however, and his supervisors saw no improvement in his job performance.

As its final witness, the Board called Dr. Alexander Iofin, the medical doctor who examined Varano pursuant to administrative order. Dr. Iofin is a board-certified psychiatrist, who conducts a private practice in Manasquan, New Jersey and enjoys staff privileges at Muhlenberg Hospital in Plainfield, Trinitas Hospital in Elizabeth and Hagedorn Gero-Psychiatric Hospital in Glen Gardner. Gathering data for his evaluation, Dr. Iofin held three face-to-face interviews with Varano, reviewed Varano's performance evaluations and conferred with Varano's two immediate supervisors. Although Dr. Iofin usually interviews family members to gain a complete picture, Varano declined to give his consent.

Varano portrayed himself to Dr. Iofin as "an introvert," who "never had any close friends among the teachers that he worked with for a period of about 18 years." Characterizing Varano's behavior as "passive aggressive," Dr. Iofin commented that Varano was "very guarded in his responses." When Dr. Iofin attempted to understand

[6] EAP services are confidential, so Gamba never learned whether Varano had followed his advice.

Varano's side of the story, the only information he was able to elicit was a complete "denial of everything." Assuming the accuracy of the supervisors' version of Varano barricading himself behind his desk and not interacting with students, Dr. Iofin regarded such behavior as "highly abnormal." Unable to make a definitive diagnosis, Dr. Iofin ventured that the whole pattern of Varano's behavior "fit the criteria of schizotypal personality trait."[7] This constellation of attributes is manifested by Varano's inability to relate to students, his unwillingness to maintain open communications with parents and his avoidance of faculty meetings. Summarizing his findings, Dr. Iofin noted a "significant deterioration in [Varano's] occupational functioning since 1997" and the exhibition of "strange and eccentric" behaviors. Expressed to a reasonable degree of psychiatric certainty, Dr. Iofin rendered his opinion that Varano is "not fit for his duties as a teacher."

I FIND that Varano is incapable of performing the duties of a shop teacher in the Irvington school district. Whatever his proper psychiatric diagnosis, the record is replete with instances of maladaptive behaviors which, taken together, substantially impair his ability to teach his students, manage his classroom, plan meaningful learning activities, assess student progress and work cooperatively with his colleagues. In particular, Varano barricaded himself in his classroom, isolated himself from his students, acted with indifference or hostility toward his supervisors, and refused to accept valid criticism. Since he refuses to acknowledge that he has any problem and has rebuffed all efforts to obtain treatment, there is no likelihood of any significant improvement in the foreseeable future.

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[7] *Diagnostic Statistical Manual IV* 641 (1994), the standard reference text in the psychiatric field, lists the following criteria for "schizotypal personality disorder:"

A pervasive pattern of detachment from social relationships and a restricted range of expression of emotions in interpersonal settings, beginning by early adulthood and present in a variety of contexts, as indicated by four (or more) of the following:

(1) neither desires nor enjoys close relationships, including being part of a family.
(2) Almost always chooses solitary activities
(3) Has little, if any, interest in having sexual experiences with another person
(4) Takes pleasure in few, if any, activities
(5) Lacks close friends or confidants other than first-degree relatives
(6) Appears indifferent to the praise or criticism of others
(7) Shows emotional coldness, detachment, or flattened affectivity.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the District has sustained its tenure charges of unbecoming conduct, incapacity and other just cause against Varano and that the appropriate penalty is dismissal.

Tenure protects teachers from arbitrary dismissal for "unfounded, flimsy or political reasons." *Spiewak v. Rutherford Bd. of Educ.*, 90 *N.J.* 63, 73 (1982). It is designed to aid in the establishment of "a competent and efficient school system" by affording to teachers a measure of security in the ranks they hold after years of service. *Viemeister v. Prospect Park Bd. of Educ.*, 5 *N.J. Super.* 215, 218 (App. Div. 1949). Toward that end, N.J.S.A. 18A:6-10 provides that no tenured teacher shall be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct or other just cause."

"Unbecoming conduct" is an elastic term broadly defined to included any conduct "which has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services." *Karins v. City of Atlantic City,* 152 *N.J.* 532, 554 (1998). Behavior rising to the level of unbecoming conduct "need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. *Hartmann v. Police Dep't of Ridgewood*, 258 *N.J. Super.* 32, 40 (App. Div. 1992). In the context of a school tenure case, "the touchstone is fitness to discharge the duties and functions of one's office or position." *In re Tenure Hearing of Grossman*, 127 *N.J. Super.* 13, 29 (App. Div. 1974), *certif. den.* 65 *N.J.* 292 (1974).

"Incapacity," like "incompetency," is directly related to fitness to teach. *Grossman,* 127 N.J. at 30. *See also, Laba v. Newark Bd. of Educ.,* 23 *N.J.* 364, 385-388 (1957). Fitness to teach is not based exclusively on a teacher's classroom proficiency or the absence of misconduct, but "depends on a broad range of factors." *Grossman*, 127 *N.J. Super.* at 30. One of those factors is the teacher's impact and

effect upon his or her students. *Id.* Another is "any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system." *In re Fulcomer*, 93 *N.J. Super.* 404, 422 (App. Div. 1967).

Children in New Jersey have a constitutional right to receive a free and appropriate public education. *N.J. Const.*, art. VIII, §4, ¶ 1. Teachers who can't or won't teach are of no use to a school system. Worse yet, they deprive students of the "appropriate" education to which they are entitled. As the building principal aptly pointed out, the real victims here are the children, who were "cheated" out of their education. "It has been said that the purposes of an educational system are to further the best interest of the community at large, the teachers and *especially the school children*." (Emphasis added.) *Zimmerman v. Newark Bd. of Educ.*, 38 *N.J.* 65, 69 (1962). Schools have an individual child for a limited number of years, and the student who does not get the benefit of adequate teaching is irreparably harmed. While tenure laws are designed to protect teachers against arbitrary action or political favoritism, they were never intended to perpetuate the employment of teachers who are not properly performing their jobs.

Overwhelming evidence establishes that Varano has not been providing proper instruction to his class for a period of two years. Youngsters enrolled in an industrial arts class should be learning skills useful in later life, not reading newspapers, conversing with friends, or doing work for other classes. Woodshop is supposed to be an experiential learning opportunity, where children are encouraged to develop their practical talents. Varano's class was nothing more than a disorganized and unsupervised study hall.

What makes this case so unsettling is that Varano's abdication of responsibility appears to be the product of an underlying emotional or mental instability. A more humane approach might be to institute proceedings for an involuntary retirement rather than treating Varano's illness as reason for punishment. *See N.J.S.A.* 18A:66-110(c), which authorizes an employer to apply for an ordinary disability pension on behalf of a

teacher with ten years of service credit "who is incapacitated, either mentally or physically, and who cannot perform the regular duties of employment." *Cf. In re Grossman*, 157 *N.J. Super.* 165 (App. Div. 1978) (holding that a teacher incapacitated for tenure purposes is also incapacitated for pension purposes). Nonetheless, the inherent difficulties of applying for a pension for a person who denies any disability and does not want to retire should not be minimized. Therefore, the Board cannot be faulted for going the more traditional route of bringing tenure charges and leaving it up to the teacher, once incapacity has been proven, to make his own application for a pension. Regardless of the origin of Varano's inability to teach, the fact remains that the students in his class are not learning and Varano must be removed from the classroom.

Order

It is **ORDERED** that the tenure charges of unbecoming conduct, incapacity and other just cause are sustained.

And it is further **ORDERED** that Paul Varano is dismissed from his tenured teaching position in the Irvington public school district.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 17, 2002
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 23 2002
DATE

ACTING DIRECTOR/CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

AI

APPENDIX

List of Witnesses

1. Lorene Capers, parent and school board member

2. María Parker, former assistant principal, Irvington School District

3. Alan Gamba, principal, Irvington School District

4. Dr. Richard Hangge, former supervisor of staff development, Irvington School District

5. Rebecca Watford-Dunmore, security officer, Irvington School District

6. Alexander Iofin, M.D., psychiatric consultant

7. Paul Varano, appellant

List of Exhibits

No.	Description
R-1	Diagram of classroom drawn by María on April 17, 2002
R-2	Copy of teacher evaluation tool, dated March 5, 1998
R-3	Copy of letter to Paul Varano from Alan A. Gamba, dated June 26, 1996

R-4 Copy of letter to Paul Varano from Alan A. Gamba, dated September 29, 1997

R-5 Copy of letter to Paul Varano from Alan A. Gamba, dated December 22, 1997

R-6 Copy of letter to Paul Varano from Alan A. Gamba, dated March 5, 1998

R-7 Copy of memorandum to Peter Carter from Alan A. Gamba, dated March 6, 1998

R-8 Copy of letter to Paul Varano from Alan A. Gamba, dated April 9, 1998

R-9 Copy of teacher evaluation tool, dated October 30, 1998

R-10 Copy of addendum to teacher evaluation tool, dated November [1998}

R-11 Copy of recommendation by Belinda Scott Smiley, dated March 17, 1998

R-12 Copy of letter to Paul Varano from Peter E. Carter, dated April 3, 1998

R-13 Copy of letter to Paul Varano from Peter E. Carter, dated April 13, 1998

R-14 Copy of memorandum to P. Carter from Paul Varano, dated November 6, 1998

R-15 Copy of letter to Paul Varano from Peter E. Carter, dated November 30, 1998

R-16 Copy of letter to Paul Varano from Peter E. Carter, dated May 26, 1999

R-17 Copy of memorandum to P. Carter from Paul Varano, dated June 31, 1999

R-18 Copy of initial decision in the matter entitled Board of Education of the Township of Irvington v. Varano, OAL Dkt. No. EDU 5203-00, entered by Margaret M. Hayden, ALJ on December 22, 2000

R-19 Copy of curriculum vitae of Alexander Iofin, M.D.

R-20 Copy of psychiatric report prepared by Alexander Iofin, M.D., undated

P-1 Copy of handwritten note by Paul Varano, dated February 2, 1998

P-2 Copy of front cover of budget book for 1998-1999, dated May 20, 1998

P-3 Photograph depicting shelves with lumber

P-4 Photograph depicting shelves with lumber

P-5 Photograph depicting shelves with lumber

P-6 Photograph depicting large blue cabinets and lumber

P-7 Photograph depicting shelves with lumber

P-8 Photograph depicting students doing work

P-9 Copy of narrative section of teacher performance evaluation, dated May 1987

P-10 Copy of narrative section of teacher performance evaluation, undated

P-11 Copy of memorandum from Dominick Tarquinio, dated January 2, 1996

P-12 Copy of handwritten note to Paul from Dennis McClelland, dated January 18, 1995

P-13 Copy of page from lesson plan book, dated April 7, 1997

P-14 Copy of professional evaluation report, dated June 23, 1993

P-15 Photograph depicting lumber on shelves and stacked on floor

P-16 Copy of memorandum to Paul Varano from Walter F. Rusak, dated September 8, 1998

P-17 Photograph depicting red work bench and blue lockers

P-18 Photograph depicting large planks of lumber in front of blue cabinet

OAL DKT. NO. EDU 3087-02
AGENCY DKT. NO. 46-2/02

IN THE MATTER OF THE TENURE	:	
HEARING OF PAUL VARANO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF IRVINGTON, ESSEX COUNTY.	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions were untimely, pursuant to *N.J.A.C.* 1:1-18.4, having been filed on June 10, 2002 in response to an Initial Decision mailed on May 23, 2002. Consequently, these are not considered herein.

Upon careful and independent review, the Commissioner concurs with the Administrative Law Judge (ALJ), for the reasons detailed in the Initial Decision, that the District has sustained its charges of unbecoming conduct, incapacity and other just cause against respondent by a preponderance of the credible evidence. The Commissioner further agrees with the ALJ that, under the circumstances existing here, respondent's dismissal from his position is warranted.

Accordingly, the Commissioner affirms the Initial Decision of the OAL and hereby directs that Paul Varano be dismissed from his teaching position with the School District of Irvington as of the date of this decision. This matter shall be transmitted to the State Board of Examiners, pursuant to *N.J.A.C.* 6:11-3.6, for action, as that body deems appropriate, against respondent's certificate.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/1/02
Date of Mailing: 7/1/02

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

264-02

CAROLYN IRAGGI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BRADLEY BEACH, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner alleged that the Board violated her tenure rights by assigning her to a teaching position while retaining or hiring nontenured or less senior individuals in Learning Disability Teacher-Consultant (LDTC) positions to which petitioner asserted she had a superior right.

The ALJ concluded that the Board violated petitioner's tenure and seniority rights by assigning her to a teaching position while retaining or hiring nontenured or less senior individuals in LDTC capacities. The ALJ ordered the Board to recognize petitioner's rights to a full-time LDTC position or, in the alternative, if no full-time position exists, to whatever part-time assignments, positions or work as an LDTC might exist, along with such other assignment or position as is necessary to provide petitioner with a full-time position in recognition of her tenure status both under an instructional certificate and a special services certificate. The ALJ ordered such assignment be made immediately.

The Commissioner concurred with the ALJ's conclusion that petitioner's rights were denied. The Commissioner ordered the Board to assign petitioner any duties of an LDTC, either full-time or part-time as the District's needs warrant, along with such other assignments as may be necessary to recognize petitioner's tenure status under her instructional and educational services certificates, unless the Board were to join with one or more boards of education or State agencies to provide for basic child study team services under *N.J.S.A.* 18A:46-5.1.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 584-01

AGENCY DKT. NO. 21-1/01

CAROLYN IRAGGI,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BRADLEY BEACH,

Respondent.

Kathleen A. Naprstek, Esq., for petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Christopher B. Parton, Esq., for respondent (Kenney, Gross, Kovats & Campbell, attorneys)

Record Closed: April 2, 2002 Decided: May 22, 2002*

BEFORE **BRUCE R. CAMPBELL**, ALJ:

Carolyn Iraggi, petitioner, claims the Bradley Beach Borough Board of Education, respondent, has violated her tenure rights by assigning her to a teacher position while retaining or hiring non-tenured or less senior individuals in Learning Disability Teacher – Consultant (LDTC) positions to which Iraggi asserts she has a superior right.

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* An extension of time for issuing the decision was requested and granted pursuant to *N.J.S.A.* 52:14B-10(c).

The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case. *N.J.S.A.* 52:14F-1 through – 13. After prehearing conferences, the matter proceeds on motions for summary decision.

FACTS

The parties have stipulated the following:

1. Petitioner Carolyn Iraggi resides [in] Wayside, New Jersey.

2. Respondent Board of Education of the Borough of Bradley Beach, Monmouth County, is a public school district with administrative offices located at 515 Brinley Avenue, Bradley Beach, New Jersey.

3. Petitioner Carolyn Iraggi holds an instructional certificate issued by the New Jersey State Board of Examiners with an endorsement as an Elementary Teacher, issued in June 1969, and an endorsement as a Teacher of the Handicapped, issued in August 1976. She also holds an educational services certificate with an endorsement as a Learning Disabilities Teacher-Consultant (LDT-C), issued in August 1976 and an endorsement as a Reading Specialist issued in May 1996. Copies of these certifications are attached as J-1.

4. Petitioner commenced employment with Respondent on or about September 1, 1969 as a full-time elementary teacher under the elementary endorsement to her instructional certificate and served in that position for approximately seven (7) school years. As a consequence of said employment, Petitioner acquired tenure with Respondent under her instructional certificate.

5. After taking a one (1) year sabbatical during the 1977-78 school year, Petitioner returned to work with Respondent and transferred to the full-time position of Learning Disabilities Teacher-Consultant (LDT-C)/Reading Coordinator under her educational services certificate. She served in that position, along with the part-time position of coordinator of gifted programs, during the 1978-79 and 1979-80 school years.

6. From the 1980-81 school year through the 1989-99 school year, Petitioner served in the full-time position of LDT-C/Reading Coordinator. As a consequence of said employment, Petitioner acquired tenure with Respondent under her educational services certificate.

7. During the 1997-98 school year, Respondent also contracted with Monmouth-Ocean Educational Services Commission (MOESC) to utilize the services of Susan Frankel, a retired LDT-C from the Eatontown School District, to conduct educational assessments on ten (10) students, on a per case basis. A copy of the January 27, 1998 Bradley Beach Board of Education minutes approving this contract are attached as J-2.

8. During the 1998-99 school year, Petitioner was paid an annual salary of $67,698.00, consisting of a base salary of $64,998.00 plus a longevity payment of $2,700.00. A copy of Petitioner's contract for the 1998-99 school year is attached as J-3.

9. The job description for the position of LDT-C is attached as J-4.

10. At the conclusion of the 1998-99 school year, Respondent abolished Petitioner's full-time position of LDT-C/Reading Coordinator and reassigned her to a combination of two (2) part-time positions (half-time LDT-C and half-time inclusion teacher) for the 1999-2000 school year. In the position of LDT-C/inclusion teacher, Petitioner was paid an annual salary of $69,582.00, consisting of a base salary of $66,882.00 plus a longevity payment of $2,700.00. A copy of Petitioner's contract for the 1999-2000 school year is attached as J-5.

11. Petitioner also provided approximately 25 to 30 hours of service as an LDT-C during the summer of 2000, for which she received an additional $1,000.00 of compensation. Petitioner had performed this additional summer service, for which she received additional compensation, for more than ten (10) years.

12. In November, 2000, Respondent abolished Petitioner's half-time position as an LDT-C for reasons of economy and transferred her from the position of half-time LDT-C and half-time inclusion teacher to the full-time position of inclusion teacher. A copy of the November 21, 2000 Bradley Beach Board of Education minutes approving this transfer are attached as J-6.

13. By letter dated December 7, 2000, Petitioner was notified by Respondent that she was being reassigned to the full-time position of inclusion teacher. A copy of that letter is attached as J-7.

14. The job description for the position of inclusion teacher is attached as J-8.

15. In the position of inclusion teacher during the 2000-01 school year, petitioner was paid an annual salary of $71,120.00, consisting of a base salary of $68,420.00 plus a longevity payment of $2,700.00. A copy of Petitioner's contract for the 2000-01 school year is attached as J-9.

16. Petitioner continues in the full-time position of inclusion teacher during the 2001-02 school year.

17. During the 2000-01 school year, Respondent employed several other individuals to perform LDTC services on a part-time, per case basis. More specifically, on October 12, 2000, Respondent appointed Carol Szoke, an employee of the Stafford Township Board of Education, to conduct educational assessments on three (3) students during the month of November 2000. Respondent also employed Cari Katz, an employee of the MOESC, to conduct educational assessments on five (5) students during February 2001. Finally, at its March 20, 2001 board meeting, respondent approved the employment of Jan Sarapin, an employee of the Asbury Park School District, to conduct educational assessments on seven (7) students during the period form April 2001 through June 2001. A copy of the March 20, 2001 board minutes are attached as J-10. Ms. Sarapin continues to be employed to conduct educational assessments on students, on a part-time, per case basis, during the 2001-02 school year.

18. Respondent employed Joan Kreizman, the holder of an educational services certificate with an endorsement as a school social worker, in the position of school social worker from March 1977 through March 1998. Respondent thereafter employed Sharon Brady, the holder of an educational services certificate with an endorsement as a school psychologist (sic), in the position of school social worker from March 1998 through June 2000. Since February 2001, Respondent has employed Donna Feld, the holder of an educational services certificate with an endorsement as a school social worker, to serve as a school social worker on a per case basis.

19. Since September 1995, Respondent has employed Joanna Giuliano, the holder of an educational services certificate with an endorsement as a school psychologist, in the position of school psychologist. In November 2000, Respondent also hired Michelle Janssen, to work as school psychologist, on a per case basis, while Joanna Giuliano was on maternity leave.

20. At no time during the school years constituting the basis for this petition has Petitioner's compensation for the regular school year been reduced.

THE ARGUMENTS

The Petitioner's Arguments

The petitioner acquired tenure with the respondent Board first under the instructional certificate by way of her seven years of service as an elementary teacher and then under her educational services certificate by way of many years of service as an LDTC. Among other things, the petitioner gained protection against dismissal or reduction in compensation except for inefficiency, incapacity, unbecoming conduct or other just cause. *N.J.S.A.* 18A:28-9 permits a board of education to abolish teaching staff positions for reason of economy, but is required by law to carry out such reductions in a manner that does not violate the tenure rights of employees.

N.J.S.A. 18A:28-9, in pertinent part, authorizes a board of education to

> Reduce the number of teaching staff members employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.

A reduction in hours of employment as well as elimination of a position is considered a reduction in force. *Klinger v. Board of Education of Cranbury Township*, 190 *N.J. Super.* 354 (App. Div. 1982). A board may reduce a full-time position to a part-time position. This is viewed as an abolishment of the full-time position and creation of the new part-time position. In any reduction in force, a board is required by *N.J.S.A.* 18A:28-12 to place any tenured teaching staff member whose position is abolished as a result of a reduction in force on a preferred eligibility list, in order of seniority, for recall to employment whenever a vacancy occurs in a position for which that teaching staff member is qualified. In accord with this, when the petitioner's full-time LDTC position was abolished in the Spring of 1999 as a result of a reduction in force and she was assigned to a part-time LDTC position, she retained the right to be recalled to any other part-time or full-time LDTC position the Board created. These same rights

operated when her part-time LDTC position was abolished. She retained the right to be recalled to any other part-time or full-time LDTC position the Board created.

This did not happen. In an effort to achieve greater economics, the Board abolished the petitioner's part-time position and contracted with an employee of another school district to perform LDTC duties formerly performed by the petitioner. The petitioner urges that, although the Board transferred her to a full-time inclusion teacher position under her instructional certificate and thus saved her from salary harm, it violated her tenure rights by hiring non-tenured individuals from outside the district to perform LDTC duties.

The petitioner anticipates a Board argument that it has a right to transfer her within the scope of her certifications and endorsements and asserts that *Childs v. Board of Education of Union Township*, 1980 *S.L.D.* 1134, aff'd St. Bd., 1981 *S.L.D.* 1404, aff'd N.J. App. Div. (Jul 19, 1982) (unreported), certif. den. 91 *N.J.* 550 (1982). Following the petitioner's transfer, the Board filled the vacant guidance counselor position with another person and Childs filed her appeal. The Appellate Division held that a board of education has the authority to transfer a staff member between positions where the certification required is the same, but it could not do so when the positions require different certifications, *e.g.*, instructional as opposed to educational services. *Childs*, above, at 1461.

The petitioner says her transfer from half-time LDTC and half-time inclusion teacher to full-time inclusion teacher was a transfer between positions with different certificate requirements and thus constituted a dismissal from her LDTC position. The dismissal activated her tenure rights to any other LDTC position or work over non-tenured or less senior LDTCs. These same actions also violate *N.J.S.A.* 18A:46-5.1 and *N.J.A.C.* 6A:14-3.1(b).

N.J.S.A. 18A:46-5.1 states, in pertinent part:

> Each board of education and state operated program shall separately or jointly with one or more boards of education or State agencies provide for basic child study team services. The basic child study team shall consist of a school psychologist, a learning disability teacher consultant and a school social worker . . . .

N.J.A.C. 6A:14-3.1(b) provides:

> Child study team members shall include a school psychologist, a learning disabilities teacher-consultant and a school social worker. All child study team members shall be employees of a district board of education, have an identifiable apportioned time commitment to the local school district and shall be available during the hours students are in attendance.

The petitioner cites case law to support the argument that LDTC position duties cannot be accomplished by a contractor.

One of the more recent decisions, *Elson v. Hudson County Area Vocational-Technical Schools*, 96 *N.J.A.R.* 2d (EDU) 229, concerned a tenured school psychologist who was terminated pursuant to a reduction in force. He was to remain on a preferred eligibility list for reemployment if a vacancy arose in the position for which he was qualified. Some years after the reduction in force, the board contracted with an outside private child study team for the provision of certain services including those of the psychologist. Elson filed a petition of appeal alleging violation of his tenure rights. In concluding that the petitioner should have been offered reemployment as a psychologist, the ALJ first recognized the requirement of *N.J.A.C.* 6:28-3.1(b) (now codified at *N.J.A.C.* 6A:14-3.1(b)) that a child study team shall consist of a school psychologist, learning disabilities teacher-consultant and a school social worker and that these members shall be employees of the local board of education. The judge also noted that outside contractors are permitted only in certain limited circumstances and only to supplement services provided by existing team members.

The Appellate Division of Superior Court adopted the Elson reasoning in its decision in *Vicenzino v. The Bedminster Township Bd. of Ed.*, 312 *N.J. Super.* 243 (App. Div. 1998). In that case, the petitioner was a tenured part-time school social worker and was assigned to the district's CST when the board determined that it could save money by eliminating her position and contracting with the Hunterdon County Educational Services Commission to perform many of her duties; the balance of her duties would be reassigned to the CST director. The petitioner challenged and alleged that this action violated her tenure and seniority rights. On a motion for summary decision, the ALJ ruled in her favor, concluding that where a district chooses to

maintain its own CST, the three core members must be employees of the district and not outside contractors. The Commissioner of Education and the State Board of Education affirmed the initial decision. The Board of Education appealed to the Appellate Division, which reviewed the applicable statutes governing the provision of an education to all handicapped children, especially *N.J.A.C.* 6A:14-3.1 which specifically requires that members of the CST be employees of the district. Although the Bedminster Board of Education had not challenged the validity of *N.J.A.C.* 6A:14-3.1, it had nevertheless argued that the Supreme Court's decision in *Impey v. Board of Education of the Borough of Shrewsbury*, 142 *N.J.* 388 (1995) supported its decision to terminate the petitioner's position as a member of the CST and to subcontract her duties. *Impey* had held that a local board is permitted to terminate the speech correctionist and subcontract for those services for legitimate economic reasons. The Appellate Court noted that the decision in *Impey*, however, was based on the fact that, although serving as a member of the district CST, the speech correctionist was not one of the three specifically enumerated members of the team required by regulation to be an employee of the district. Thus, the Appellate Court stressed that in this case, the ALJ had properly relied on the Commissioner's decision in *Elson*, above, and agreed with the ALJ's conclusions, holding that "where a board establishes a CST with employees of the district, the Board may not eliminate one of those positions and contract out for those services." *Vicenzino*, 312 *N.J. Super.* At 250.

Following *Vicenzino*, the Commissioner of Education held that subcontracting LDTC services was illegal. *South Amboy Ed. Assoc. v. Bd. of Ed. of the City of South Amboy* (decided Oct. 5, 1998). The local association in *South Amboy* filed a petition for declaratory judgment alleging the district had improperly contracted with the County Educational Services Commission for services that had been performed by its LDTC prior to her taking a 1-year sabbatical leave. The Association argued that *Vicenzino* was controlling in this case, but the ALJ disagreed, and stated that in this instance, a core CST member was not terminated and replaced by a subcontractor; rather, the core CST member was on a leave and thus the district could subcontract out her duties during her absence. The Commissioner reversed, held that *Vicenzino* was controlling and held that subcontracting of LDTC services was illegal.

It is clear that core child study team members are employees of a local board of education as required by N.*J.A.C* .6A:14-3.1(b). The petitioner and Joanna Jiuliano had both acquired

tenure in their positions. Shortly after replacing the petitioner with an outside contractor, the respondent board apparently also contracted out the services of the school social worker on a per-case basis and hired a substitute school psychologist, also on a per-case basis, while its regular, tenured school psychologist was on maternity leave. Although the respondent is permitted by law to supplement services provided by its core CST members, it cannot supplant the services provided by a tenured core CST member with those provided by an outside contractor. This violates not only the tenure rights of that core CST member, but also the express requirement that the core CST members be employees of the local board of education.

The Respondent's Arguments

The Bradley Beach Board of Education asserts it acted within its legal authority and did not offend the petitioner's tenure or seniority rights, in reassigning her. It sees the essential question as being whether a public board of education may abolish part of an employee's dual position pertaining to LDTC duties and subcontract that job, on an as-needed basis, to an educational service commission or to employees of another school district.

The Board relies on *Impey*, above. In that matter, the Shrewsbury Board of Education dismissed a speech correctionist and subcontracted her work to an educational services commission on a as-needed basis for the express purpose of saving $12,000 per year. The New Jersey Supreme Court affirmed the determination of the ALJ, Commissioner, State Board and Appellate Division of Superior Court, and found that the Shrewsbury Board was within its rights when it abolished the position for economic reasons, *N.J.S.A.* 18A:28-9. The Court also said that the Shrewsbury Board's use of the educational services commission was within its rights and duties as dictated by *N.J.S.A.* 18A:46-14. In that case, the board retained a CST and did not abolish or subcontract the entire team's work.

The *Impey* Court cited the former *N.J.A.C.* 6:28-3.1 (now *N.J.A.C.* 6A:14-3.1), which provides that members of a local CST "shall be employees of the district board of education, have an identifiable, apportioned time commitment to the local school district and shall be available during the hours pupils are in attendance."

The *Impey* decision went on to exclude the speech correctionist from this definition, because the position was not a mandatory part of the CST. However, the court noted that the regulatory scheme allows districts to "separately or jointly with one or more boards of education . . . provide basic child study team services." *N.J.S.A.* 18A:46-5.1. All parties here acknowledge that the Bradley Beach Board has arranged for the provision of services by employees of other local boards of education, consistent with the terms of this statute. *See*, stipulation 17.

Thus, given the present arrangement in Bradley Beach, the issue of supplanting or abolishing the entire CST is not reached. The respondent has reached an arrangement whereby the work of the in-district CST members is supplemented on an as-needed basis by CST members from other local districts, and the LDTC work is performed by qualified individuals consistent with the controlling statutes and regulations, *N.J.S.A.* 18A:46-5.1 and *N.J.A.C.* 6A:14-3.1. *See* also *Vicenzino v. Bedminster Board of Education*, 312 *N.J. Super.* 243, 250 (App. Div. 1998), "to be sure, if the board were in good faith to eliminate CST positions for reasons of economy and instead, 'join with one or more boards of education or State agencies to provide for basic CST services,' under *N.J.S.A.* 18A:46-5.1, that would be an appropriate decision to make."

The *Vicenzino* court also held where a board elects to subcontract part of its CST work, or some, but not all, CST positions, the individuals used must be employees of a board of education. Again, as acknowledged in stipulation 17, the respondent here acted consistently with this requirement.

Moreover, a local board is always permitted to supplement its in-house CST with outside help from another district or agency such as an educational services commission. *See*, *Elson*, above, and *South Amboy*, above.

The board's action in this matter have been consistent with case law and legislation. The petitioner has experienced no loss in compensation and her tenure rights have not been affected.

The petitioner's tenure rights do not include the incidental summer employment in which petitioner engaged in certain years. Stipulation 11 determines that, subsequent to her reassignment, the petitioner performed several hours of summer work. She had performed

similar work, which in 2000 totaled between 20 and 30 hours, for the past several years, in varying amount. A similar situation is found in *Boyle v. Bayonne Bd. of Ed.,* OAL DKT. NO. EDU 11549-96 (Comm'r of Ed., Dec. 15, 1997). In that matter, a tenured guidance counselor claimed tenure rights to per diem summer employment. In affirming the ALJ's denial of the petition, the Commissioner stated:

> As correctly noted by the ALJ, petitioner suffered no loss of salary or emolument, and it is well established that there is no legal entitlement to summer employment as a matter of tenure and seniority right, notwithstanding that a district's past practice may generally have been to offer such employment to persons in certain types of positions. Slip Op. at 12.

The Board also asserts that the petitioner has suffered no damages as a result of her reassignment. No monetary damages exist because the petitioner has continued to progress in compensation, pursuant to the salary guide in the parties' collective bargaining agreement.

For the foregoing reasons, the Board asks that the petition be dismissed with prejudice.

DETERMINATION AND ORDER

Essentially for the reasons stated by the petitioner in her brief, I **FIND** and **CONCLUDE** that she was improperly denied right of first refusal when the Bradley Beach Board of Education eliminated her half-time LDTC position and purchased LDTC services from and outside source.

Preliminarily, the matter of compensation for work performed during the summer is not a genuine issue. It is black letter law that such work is accomplished under a separate contract. While it is true that some school employees work under 11-month and 12-month contracts, that is not the case here. Even if the petitioner had enjoyed a special summer contract relationship for many, many years, there is no obligation on the part of the Board to continue that relationship.

Turning to the central matter, this case is readily distinguishable from *Impey, above.* In *Impey,* the petitioner was a speech correctionist. The judge found in that matter that the speech correctionist position was not protected by *N.J.S.A.* 18A:46-5.1. Impey did not enjoy the

protection of that statute because she did not fit into the basic child study team definition expressed in the statute. Iraggi does.

It is fortunate that the petitioner has not lost compensation as a result of the abolishment of her half-time LDTC position. That plays no part in today's determination, however. The issue concerns rights to perform certain duties, not compensation.

As the petitioner correctly points out, the Appellate Division of the Superior Court in *Childs v. Board of Education of Union Township*, 1980 *S.L.D.* 1134, aff'd. St. Bd. 1981 *S.L.D.* 1404, aff'd. App. Div. 1982 *S.L.D.* 1456 (N.J. App. Div., Jul. 19, 1982, A-3603-80T1) (unreported), decided the matter 20 years ago. Although a board does have authority to transfer an individual between positions where the certification required is the same, it cannot do so when the positions require different certifications. Today's case is on all fours with *Childs*.

Therefore, the Board's transfer of Iraggi from her position as half-time LDTC and half-time inclusion teacher to a position as a full-time inclusion teacher was a transfer between positions with different certification requirements. This constituted a dismissal from her LDTC position. As the petitioner correctly observes, this triggered her tenure rights to any other LDTC position or LDTC work as opposed to a non-tenured or less senior qualified person.

The Bradley Beach Board of Education had the right to maintain its own CST or join with one or more other boards of education in creating a CST, the services of which would be shared by the cooperating boards of education. The Bradley Beach Board of Education did not do that. In a legitimate quest to save money, the Board erred and ran afoul of *Childs*, *above*. Moreover, *N.J.A.C.* 6A:14-3.1(b) commands that all child study team members shall be employees of the district board of education, have an identifiable, apportioned time commitment to the local school district and shall be available during the hours students are in attendance. It is not likely that the contracted persons the Board sought to use could meet these requirements, particularly the requirement of availability during the hours students are in attendance.

In consideration of the foregoing, I **CONCLUDE** that the Bradley Beach Borough Board of Education violated the tenure and seniority rights of Carolyn Iraggi by assigning her to a

teacher position while retaining or hiring non-tenured or less senior individuals in LDTC capacities. Iraggi's right was superior and the duties should have been offered to her first.

Therefore, it is **ORDERED** that the Bradley Beach Borough Board of Education recognize Carolyn Iraggi's tenure rights to a full-time LDTC position or, in the alternative, if no full-time LDTC position exists, to whatever part-time assignments, positions or work as an LDTC might exist, along with such other assignment or position as is necessary to provide the petitioner with a full-time position in recognition of her tenure status both under an instructional certificate and a special services certificate.

It is further **ORDERED** that the respondent Board assign the petitioner to all assignments, positions or work requiring an LDTC certification, immediately.

The petitioner's request for pre-decision and post-decision interest is denied because a legal basis for the award of interest has not been established.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

MAY 22 2002
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

5/23/02
DATE

Debbie Antanaitis /pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 24 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 584-01
AGENCY DKT. NO. 21-1/01

CAROLYN IRAGGI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BRADLEY BEACH, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review of the record, the Commissioner agrees with the conclusion of the Administrative Law Judge (ALJ) that petitioner's tenure rights acquired under her educational services certificate were denied by the Board when it retained or hired nontenured or less senior individuals as LDTCs. Consequently, for the reasons set forth in the Initial Decision, the Board is ordered to assign to petitioner any duties of an LDTC, either full-time or part-time as the District's needs warrant, along with such other assignments as may be necessary to recognize petitioner's tenure status under her instructional and educational services certificates, unless the Board were to join with one or more boards of education or State agencies to provide for basic child study team services under *N.J.S.A.* 18A:46-5.1. *Vicenzino, supra. See also Anders et al. v. Board of Education of the Township of Lakewood*, decided by the Commissioner January 2, 2001.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/03/02
Date of Mailing: 7/03/02

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

266-02

IN THE MATTER OF THE TENURE	:	
HEARING OF WAYNE SLAUGHTER,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
CITY OF BRIDGETON,	:	
CUMBERLAND COUNTY.	:	

SYNOPSIS

The Board certified tenure charges of unbecoming conduct, inefficiency and incapacity against respondent teacher. The Board alleged respondent made inappropriate comments to students, demonstrated a lack of capacity to serve students properly and, despite warnings, demonstrated that he was unfit to teach. Respondent holds certificates in the areas of Industrial Arts and Special Education.

The ALJ found that respondent did make inappropriate comments arising to sexual harassment against student M.C., did demonstrate a lack of capacity to serve students properly by reason of his inappropriate actions and remarks, and was unfit to continue to engage in the teaching profession due to inappropriate past actions with female students. The ALJ ordered respondent removed from his teaching position.

The Commissioner concurred with the ALJ and ordered respondent removed from his teaching position as of the date of this decision. The Commissioner referred the matter to the State Board of Examiners for appropriate action as that body deems necessary.

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

July 8, 2002

IN THE MATTER OF THE TENURE	:	
HEARING OF WAYNE SLAUGHTER,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
CITY OF BRIDGETON,	:	
CUMBERLAND COUNTY.	:	

SYNOPSIS

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6140-01

AGENCY REF. NO. 326-8/01

IN THE MATTER OF THE TENURE HEARING OF WAYNE SLAUGHTER, SCHOOL DISTRICT OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY,

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Paul Kienzle, Esquire, for the Bridgeton Board of Education, petitioner,
(Casarow, Kienzle and Raczenbek, attorneys)

Ned P. Rogovoy, Esquire, for respondent, Wayne Slaughter,
(Waltman, Reilly and Rogovy, attorneys)

Record Closed: April 26, 2002 Decided: May 21, 2002

BEFORE **LILLARD E. LAW, ALJ**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Board of Education of the City of Bridgeton (Board) certified tenure charges with the Commissioner of Education (Commissioner) alleging, among other things, that respondent, Wayne Slaughter, demonstrated conduct unbecoming a teaching staff member where he made comments of a sexual nature to students. The Board also charges respondent with inefficiency

and a lack of capacity to properly serve students despite prior warnings. Respondent denies the allegations.

The matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.*52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13. A telephone Prehearing Conference was held on October 2, 2001. A Prehearing Order followed, dated October 4, 2001

The hearing was held on January 2, 11, 14, 2002, March 13 and 28, 2002. Four hearing dates were adjourned due to scheduling conflicts of the parties. The parties submitted post-hearing memorandum of law, with the last submission received on April 30, 2002, which closed the hearing record.

THE TENURE CHARGES

The Board, by way of Resolution dated August 14, 2001, filed the following charges with the Commissioner against respondent:

Charge No. 1. Conduct unbecoming a teacher – has consistently made inappropriate comments of a sexual nature to students.

Charge No. 2. Respondent had demonstrated a lack of capacity to properly service students by reason of his actions and remarks

Charge No. 3. Despite prior warnings, respondent has demonstrated he is unfit to engage in the teaching of students.

BACKGROUND FACTS

Respondent, Wayne Slaughter, is a 47 year-old male, married, and a tenured teaching staff member, in the employ of the Board. He holds certification in the areas of Industrial Arts K-12, and Special Education K-12. Respondent has been in the Board's employ for the last eight years. His most recent assignments included instruction in woodworking in grades nine through twelve during the regular school day, from 7:25 a.m. until 3:00 p.m. After the regular school

day, respondent taught in the Board's Alternative School program in a self-contained classroom in addition to physical education. Respondent has also served the Board in the capacity of Home Instructor.

Respondent is the Pastor of the True Vine Pentecostal Church, Fairfield Township, New Jersey. Respondent conducts a summer camp program through the church under the Ida Robinson Community Program. The summer program has 14 employees with 250 to 300 children, between the ages of 2 ½ years to high school age of 16-17 years, attending.

On or about February 5, 1999, the Board's Supervisor of Special Education Department, located at the Bridgeton High School, was advised by two department staff members that several female pupils alleged respondent had made comments of a sexual nature to the pupils. An investigation followed with a report submitted to the Board. Subsequently, the Board required respondent to submit to a psychiatric evaluation. James L. Hewitt, M.D., submitted his psychiatric evaluation of respondent, dated May 26, 1999, where he stated in his Impressions, as follows:

> There is nothing to suggest a psychiatric diagnosis at this time. Mr. Slaughter denied the accusations made against him in terms of inappropriate behavior towards female students. He came across as truthful and straightforward. If the allegations are in fact true there is nothing in his mental status to indicate that there are extenuating psychiatric problems which would explain his behavior. (P-7, A & B).

Subsequently, the Board's Superintendent of Schools, Geraldyn O. Foster, sent respondent a letter, dated June 3, 1999, which stated, in pertinent part, as follows:

> Please be advised that the investigation into the matter that you made inappropriate sexual comments to students had been completed.
>
> I have reviewed the reports submitted by Mr. James Dunkins, Affirmative Action Officer, and my recommendation to the Bridgeton Board of Education is that you are reinstated as a Teacher of the Handicapped effective June 10, 1999.
>
> The Bridgeton Board of Education will not tolerate conduct that is

> unbecoming and/or violates the rights and safety of staff and students. Should this become a problem in the future, disciplinary action will be taken. (P-9)

SUMMARY OF THE REVEVANT TESTIMONAL AND DOCUMENTARY EVIDENCE

Sandra M. Solomon, the Board's former Interim Affirmative Action Officer, testified on behalf of the Board asserting, among other things, she was in receipt of a complaint of sexual harassment made by a pupil against respondent on March 10, 2001. Ms. Solomon was assigned to investigate the complaint with Robert Stevens, the Board's Safety and Security Coordinator. Ms. Solomon was granted expert status by this tribunal with respect to affirmative action and sexual harassment complaints.

The pupil, M. C., filed the complaint of sexual harassment against respondent in her own handwriting, dated March 10, 2001, which states, in part, as follows:

> Mr. Slaughter would say if I'm having any problems with my boyfriend he would say I'm pretty don't worry about him. I got to (sic) much to look for in life. He won't miss a good thing until it's gone. Or if I wear something tight he would say my outfit is nice. I bet what's inside is too and then he would begain (sic) to laugh. But he never said anything in front of the other students just that I'm pretty. He asked me how old was I, then he would ask me in the summertime if I would like to go to dinner because he can't take me out now because the other students might think something. He always ask me how my boyfriend and I are doing and I should have stayed with him because he have (sic) a job, car, money and can take me any where I want to go. I also told my Mom what's been going on, she said she was going to remove me from his class but never got around to. (P-13A)

The female pupil, M.C., who filed the complaint against respondent, was enrolled in the Board's middle school and alleged respondent had engaged in inappropriate comments to the pupil since September 2000. Ms. Solomon and Mr. Stevens interviewed the pupil and the pupil's parent on March 20, 2001, at the pupil's home.

Ms. Solomon testified, among other things, the pupil was interviewed first. The pupil stated respondent had make remarks to M.C., which had sexual overtones. The pupil asserted to Solomon respondent would tell M.C. respondent liked the outfit the pupil was wearing and he liked what was in the outfit. The pupil told Ms. Solomon respondent told M.C. her boyfriend could not do anything for her, however, respondent could. Respondent is alleged to have made the remarks in the presence of the pupil's boyfriend. The pupil asserted respondent had offered to take her to dinner, however, it would have to occur in the summer months, not during the school year.

Ms. Solomon testified the pupil told her mother about the alleged comments made to her by respondent. The pupil's mother was not concerned when the allegations were first made. Subsequently, M.C. asked her mother if she could stay home from school. The pupil's mother told Solomon her daughter did not have any school attendance problems. When the pupil's mother asked M.C. why she did not want to go to school, the pupil stated she did not want to face respondent. Ms. Solomon executed a handwritten document, which Solomon wrote and which the pupil's mother signed, describing the pupil's conversation with her mother (P-14).

Ms. Solomon did not interview any one other than the pupil who filed the complaint against respondent, and the pupil's mother. Mr. Stevens, moreover, did interview other pupils. Subsequently, Solomon reviewed respondent's personnel record and discovered there were two prior occasions where it had been alleged that respondent engaged in improper conduct with female pupils.

Respondent's personnel record revealed a confidential memorandum, dated December 23, 1999, written by Mr. Charlie Leyman, Supervisor of Security, concerning an incident between respondent and a 12th grade female pupil. In his confidential memorandum Mr. Leyman reported the following:

> On this date as I (Charlie Leyman) was walking to the main office I was walking by the nurse's office and Mr. Slaughter was also walking toward the main office at this time. Ms. [G], a student in the school, was also walking toward the other end of the hall. At this time Mr. Slaughter stated to Ms. [G], "How come you don't come down to see me and give me anymore "Hugs"?" Ms. [G] stated back to Mr.

> Slaughter, "Give me a dollar and I will." After Ms. [G] said this the both of them started to laugh. (P-11)

Mr. Leyman testified on behalf of the Board, stating he had generated the memorandum (P-11). Leymen testified, among other things, he believed respondent's remarks to pupil L.G. on December 23, 1999, were inappropriate for a teacher to make to a pupil. Leyman asserted respondent had said to the pupil, L.G., "Damn, if I was 17 years old, I'd bang that body up." Leyman asserted the kind of statement respondent made to the pupil are not the kind of statements a teaching staff member is to make to pupils.

Ms. Solomon also discovered reports of the incident of February 1999, where three female pupils alleged respondent engaged in inappropriate conduct. In her report, dated April 23, 2001, Ms. Solomon stated the following concerning the February 1999, alleged incident:

> In February 1999, three students alleged that W.S. [respondent] made several comments to them that were of a sexual nature. Some of the alleged comments included:
>
> - Telling students he buy them [things]
> - Telling a student that her sitting position was distracting and made people think things.
> - Telling a student he wanted to see her in a bathing suit.
> - Examples of graphic things he wanted to do them.
>
> Action taken on this incident resulted in W.S. being placed on suspension with pay, and the Board requesting a psychological. The psychological was performed and W.S. was reinstated with the caution, ". . . should this (behavior) become a problem in the future, disciplinary action will be taken. (P-20, 20A)

With respect to the March 10, 2001, complaint filed against respondent by pupil M.C., Ms. Solomon's April 23, 2001, report states, in part, that:

> As part of the investigation, Mr. Stevens and Mrs. Solomon interviewed the complainant, student witnesses, identified as having heard some of the complaints, and the complainant's

mother. Some of the reported comments allegedly made by W.S. were:

- W.S. told the student he liked her outfit but especially liked what was in the outfit
- Told student she should leave her boyfriend alone because W.S. could do much more for her, he has a job, money, a car, and could take her anywhere she wanted to go.
- Asked the student out for dinner in the summer-time he couldn't take her out until then because other students might think something.
- Made similar comments over a period of time since September – the student's boyfriend was present on a least one occasion when comments were made.

The student felt very uncomfortable when these comments were made and told her mother some of the remarks. The mother did not immediately take action, thinking the teacher just liked her daughter because she was quiet and no trouble. Sometime in February, the student called her mother to say she did not want to go to school. Her reason for wanting to stay home was she did not want to see the teacher.

The teacher denied he ever made such comments to the student or made any inappropriate remarks at all. The teacher is presently on suspension with pay pending a determination of filing tenure charges. This incident was the third report of similar charges against this teacher. . . . . (P-20)

Ms. Solomon testified she did not find any ulterior motive by M.C., the pupil who filed the charges against respondent. The pupil was truthful and told the investigators the facts. The pupil did not report respondent's conduct earlier because M.C. did not want to get anyone in trouble. Ms. Solomon examined the pupil's school attendance record and found that M.C. avoided attendance to respondent's class. The pupil even asked her mother's permission to cut respondent's class.

Ms. Solomon opined the pupil, M.C., was the object of sexual harassment by respondent. Sexual harassment, as defined, is in the eye of the receiver. Ms. Solomon asserted the pupil,

M.C., was a victim and had a valid sexual harassment complaint against respondent. Respondent was a person in authority and by his statements to the pupil, perpetrated harassment.

On cross-examination, Ms. Solomon asserted, among other things, her opinion of the commission of sexual harassment by respondent was based strictly upon the representations made to her by the pupil. Ms. Solomon did not interview the pupil's boyfriend. She asserted she had the boyfriend's written statement and believed the boyfriend's written statement was sufficient for the purpose of the investigation.

Ms. Solomon's report to the Board, dated April 23, 2001 (P-20, 20A), was not influenced by Mr. Leyman's report to the Superintendent, dated December 23, 1999 (P-11). She conceded respondent's statement to the pupil, as described by Leyman, was not sexual harassment but, rather, inappropriate comments to a pupil.

Ms. Solomon admitted, on cross-examination, that nowhere in her report to the Board (P-20, 20A) does Solomon state respondent committed sexual harassment. She admitted further, she did not read the psychological report found in respondent's personnel file, although she referred to the psychological evaluation of respondent in her report to the Board, dated April 23, 2001. Ms. Solomon asserted, even if she had read the psychological evaluation of respondent, it would not have influenced her conclusion that respondent committed sexual harassment.

Robert Stevens, the Board's Safety and Security Coordinator, testified on behalf of the Board and corroborated the testimony of Ms. Solomon with respect to the interview of pupil, M.C., and the pupil's mother. The allegations made by the pupil against respondent, as found in her complaint (P-13, 13A) were repeated to Stevens. Mr. Steven determined respondent's comments to the pupil were not criminal in nature but, rather, Affirmative Action matters.

Mr. Stevens interviewed other pupils, a teacher, and counselors connected with the Teen Center, a contract service with the South Jersey Hospital and located in the Bridgeton High School. The pupil's boyfriend, J.O., was one of the pupil's interviewed by Stevens. Pupil J.O. told Stevens respondent would place his arm on M.C. or place his arm around M.C. and escort M.C. into respondent's classroom. Pupil J.O. recalled respondent stated to M.C. respondent would take M.C. out to dinner on a Friday night. Pupil J.O. stated respondent had said improper

things to M.C., however, J.O. could not recall what was said. Pupil J.O. submitted a handwritten document to Stevens, representing his statements to Stevens (P-15).

Mr. Stevens interviewed pupil Z.B., who stated M.C. said respondent liked M.C.'s outfit, and she "looks good in that outfit." (P-15A) Pupil Z.B. is a friend of M.C., however, Z.B. was not a pupil in respondent's classroom. Nor did Z.B hear the statement respondent was alleged to have made to pupil M. C.

Mr. Stevens interviewed the counselor at the Teen Center for background information. Stevens wanted to know whether or not M.C. had reported any "touching" of the pupil to the counselors. Any touching of the pupil by respondent would have been a criminal matter. No criminal contact was reported or made.

Charles Leyman, Jr., the Board's Education Enforcement Officer and Assistant Coordinator of Safety and Security, testified on behalf of the Board. Leyman testified about his report concerning respondent and respondent's inappropriate remarks to pupil, L.G., on December 23, 1999 (P-11). Leyman asserted Mr. Stevens had directed Leyman to interview four or five pupils in the Board's Alternative School concerned with the complaint filed against respondent by pupil, M.C. Leyman was to interview pupils to determine whether or not respondent had committed inappropriate conduct with other pupils. Leyman could not recall when he interviewed the pupils. None of the pupils reported any inappropriate conduct by respondent.

Pupil M.C.'s mother, L.A.C., testified that in March 2001, her daughter, M.C. was 15 years of age. The mother asserted M.C. was a pupil who had grade averages of A, B and C. M.C. entered the Board's middle school in September 2000.

Ms. L.A.C. stated that in September 2000, everything appeared to be all right with M.C. and school. However, in October, M.C. asked her mother if M.C. could take a day off from attending school. M.C. told her mother she did not want to attend school. Pupil M.C. did not give her mother a reason for not wanting to attend school. Ms. L.A.C. denied M.C.'s request and M.C. attended school. Ms. L.A.C. thought M.C. was just afraid of the new school.

Ms. L.A.C. testified in November 2000, M.C. kept saying she did not want to attend school. Subsequently, in February or March 2001, while M.C. and her mother were watching a movie on the television screen, M.C. told her mother she did not want to go to school. M.C. started to cry and told her mother a teacher was saying things to M.C. which M.C. did not like. M.C. told her mother the teacher would comment about how nice M.C. looked and would whisper things in M.C.'s ear, such as; he wanted to take M.C. out. M.C. told her mother the teacher said, "I look nice," and also, "I would like to see inside of those jeans."

Ms. L.A.C. asserted M.C. told the mother her boyfriend would walk M.C. to respondent's classroom and respondent would pull M.C. into the classroom and slam the classroom door in her boyfriend's face. M.C. told L.A.C. respondent asked M.C. if she needed any help with her schoolwork. M.C. would tell respondent "no," and tell respondent go help the other girl in the classroom. M.C. stated to her mother respondent said he did not want to help the other girl because the other girl was not as pretty as M.C.

Ms. L.A.C. testified she provided Ms. Solomon with a statement on March 1, 2001 (P-14). L.A.C. asserted she had a conversation with M.C. on February 28, 2001, the night before M.C. filed the complaint against respondent. M.C.'s mother stated M.C. had not mentioned respondent's name until February 28, 2001. M.C. repeated she did not want to go to her 8th period class, which was taught by respondent.

Ms. L.A.C. recalled M.C. would shut herself in her room beginning in October 2000. M.C. would tell her mother M.C. had a hard day at school. M.C. stopped going to her church even though M.C. liked attending church and singing in the church choir. M.C. told her mother later, M.C. had lost her faith in the church because respondent was a preacher. M.C. is attending her church again, however, she is not participating in the church choir.

Ms. L.A.C. testified M.C. was not a discipline problem in elementary or middle school. M.C. had never been suspended from school, is easy going and gets along with others. M.C. is very respectful of others.

Lucinda Bernstein, Ninth Grade Transitional Counselor and also Coordinator of the Health Education for Risk Reduction (HERR) program, testified on behalf of the Board. Ms. Bernstein is associated with the Teen Center of the Community Health Care through the South Jersey Hospital Services. Ms. Bernstein's office is located in the Bridgeton High School.

Ms. Bernstein testified pupil M.C. was selected to be in the 9th grade transitional program, a pilot project for pupils who would benefit through encouraged and enhanced school success.

Ms. Bernstein first heard of a problem with a pupil and a teacher on February 28, 2001, from teacher, Anne Smith. Ms. Smith reported to Ms. Bernstein that an unnamed female pupil disclosed to Ms. Smith a problem with an unnamed male teacher. The pupil reported to Ms. Smith the teacher made inappropriate comments to the pupil. The pupil approached the topic by asking Ms. Smith, "what if" questions, such as "what would you do if one of your male teachers made comments to you that make you feel uncomfortable?"

Ms. Bernstein did not know the pupil who contacted Ms. Smith. However, Bernstein executed a Memorandum to her Supervisor, Mary Ann Ledden, Teen Center Coordinator, dated February 28, 2001 (P-21A, 21B). Therein, Bernstein described what had transpired and what course of action Bernstein had taken. Ms Bernstein suspected the unnamed pupil was M.C.

Subsequently, on March 1, 2001, M.C. came to Ms. Bernstein because she needed to talk with someone who made M.C. comfortable. Ms. Bernstein assured M.C. the conversation between the two would be kept confidential. M.C. then described to Bernstein the incidents with respondent which made M.C. feel uncomfortable, and which M.C. had reported to her mother. Bernstein testified M.C. was upset and nervous. M.C. did not want to get anyone in trouble. Ms. Bernstein attempted to assure M.C. that Bernstein was bound by the code of conduct, which required confidentiality. Ms. Bernstein also advised M.C. Bernstein was bound by the law. Bernstein invited M.C. to talk with Bernstein's supervisor and, later, the Board's Affirmative Action officer. Thereafter, Bernstein took M.C. to speak with the school principal.

After March 1, 2001, Bernstein attempted to meet with M.C. once per week to provide M.C. with support. Bernstein asserted M.C. was not as active as she had been before M.C. reported the behavior of respondent. A teacher had inquired of M.C. about respondent's absence from school following respondent's suspension from his teaching duties. M.C. believed that the confidentiality agreement had been violated. M.C. was concerned others would find out it was she who caused respondent's suspension.

Ann Smith, a teaching staff member assigned to the Bridgeton High School, testified on behalf of the Board. Ms. Smith testified pupil M.C. had been assigned to her Perceptually Impaired (P.I., now, Learning Disabled) classroom for the 2000-2001 school year. On February 28, 2001, M.C. remained after Ms. Smith's class had been dismissed. M.C. asserted she needed to speak with Ms. Smith concerning a male teacher who was making M.C. uncomfortable. M.C. told Smith the male teacher said things to M.C. which the pupil did not like. M.C. asserted the teacher was "too friendly." M.C. did not disclose the name of the teacher. Ms. Smith told M.C. that M.C. had to speak with someone in authority at the school. M.C. told Smith M.C. did not want to see anyone. Nor did Smith wish to break a confidence. Ms. Smith did, moreover, talk with Ms. Bernstein and explained what M.C. had revealed to Smith.

Ms. Smith prepared a written statement, dated March 6, 2001 (P-22), which summarizes her conversation with M.C. and the action Smith engaged in during and subsequent to her conversation with M.C. Ms. Smith asserted M.C. was nervous when M.C. spoke with her. Ms. Smith believed M.C. was honest with her.

Mary Ann Ledden, a mental health counselor with the Community Health Care-Teen Center, a school based program located in the Bridgeton High School, testified on behalf of the Board. Ms. Ledden had not met pupil, M.C., prior to March 1, 2001. Ms. Ledden received a telephone call from Ms. Bernstein who advised Ms. Ledden M.C. had disclosed information concerning a male teacher and Ms. Bernstein needed to follow the proper protocol with respect to the information provided to her. Ms. Bernstein introduced M.C. to Ms. Ledden where M.C. repeated the statements M.C. had provided to Bernstein. M.C. alleged respondent had made inappropriate statements, among other things, to M.C. in the classroom.

Ms. Ledden conducted a conference with M.C. who advised M.C. she had done the proper thing by reporting her concerns. Ms. Ledden was certain M.C. understood the incident had to be reported to the school authorities. Ms. Ledden left M.C. to talk with the school principal, Mr. Marshall. Ms. Ledden testified she did not follow up with M.C.

Ms. Ledden asserted she was in receipt of a telephone call from a teaching staff member approximately two or three weeks after M.C. had reported the incident to Ms. Bernstein and Ms. Ledden. The teacher who called Ledden referred to M.C. by name and asserted that M.C.'s behavior had changed. Ms. Ledden did not consider the teacher's call as a referral for M.C. Rather, Ledden had the feeling the teacher called to gain information from Ledden about the incident while the incident had been reported to the proper school authorities.

Teacher Ann Smith was recalled, subsequent to Ms. Ledden's testimony, where Ms. Smith testified she observed M.C. a few days after M.C. had filed her Affirmative Action Grievance with the Board's Interim Affirmative Action officer, Ms. Solomon, and observed M.C. to be depressed. After respondent was suspended from his teaching duties, M.C. would come to Ms. Smith's class and put her head down on her desk Ms. Smith observed M.C. outside of the classroom where M.C. walked by teachers talking together where one teacher said to the other, "Do you know who that is? She is the one who turned in Mr. Slaughter." Ms. Smith also observed other pupils make comments about M.C. and respondent, after respondent was suspended. Some of the pupils said M.C. was upset, however, she was telling the truth.

Y.G., a 17 year old pupil attending Bridgeton High School's General Educational Development (GED) program, testified on behalf of the Board. Ms. G. was previously enrolled in the Board's Alternative School for approximately two years, and attended respondent's class. Ms. G. admitted she was suspended from school because respondent had "written her up" for disciplinary reasons. The pupil admitted she cursed in respondent's classroom and walked out of his classroom when she felt like it.

Pupil Y.G. wrote a statement addressed to Charles Leyman concerning an incident, she alleged, which occurred one year prior to the date appearing on her written statement (P-18). Pupil Y.G. testified, while leaving the girl's restroom located in the high school, respondent

stated to Y.G. "Damn, only if I was 17 years old, I'll bang that body up." Pupil Y.G. reported the incident to Charles Leyman and the Alternate School Principal. Y.G. testified she did not expect respondent to say such things because respondent was a preacher. Ms. G. stated she did not tell any other pupils of respondent's remarks or of the incident.

Pupil M.C., who filed the complaint against respondent, testified she was 16 years of age and a 10th grade pupil in the Board's Bridgeton High School. When M.C. was in the 9th grade, she was assigned to respondent's woodworking class. She asserted things started out fine in respondent's class. Subsequently, sometime between September 2000 and February 2001, M.C. did not like the comments respondent made to her. M.C. asserted she sometimes would laugh-off respondent's comments and would not tell anyone about the comments. M.C. did not report respondent's conduct a first, because she did not want to hurt respondent's family. Later, M.C. asserted she told her mother she did not want to go to school. M.C. did not, at first, tell her mother why she did not want to go to school. M.C.'s mother dismissed M.C.'s complaints and would not permit M.C. to skip school.

Pupil M.C. testified, among other things, respondent would pull her into his classroom and would say to her, "Don't worry about him (her boyfriend)." M.C.'s boyfriend would walk M.C. to respondent's classroom. M.C. testified respondent wanted to take her out, however, he told M.C. he had to wait until summer, because other pupils would talk. M.C. stated respondent would say M.C. was his girlfriend now. M.C. asserted respondent did not make the inappropriate statements to M.C. in the presence of other pupils.

M.C. testified respondent asked her to visit his church. M.C. stopped attending her own church when she learned respondent was a preacher. She asserted she has gotten over it now and attends her church. M.C. read on the hearing record, the statement she wrote, dated March 1, 2001. The statement (P-13A), which is set forth hereinbefore as a part of Ms. Solomon's testimony, will not be repeated here.

M.C. asserted respondent would make comments to her every day. She stated respondent said he would like to see what was inside of her pants when she wore a jean outfit. M.C. testified she signed the compliant against respondent because she did not like the comments respondent

made to her. Respondent's continued remarks to M.C. caused her to want to stay home from school. M.C. felt uncomfortable in respondent's presence and wanted respondent to leave her alone.

M.C. testified she liked all of her teachers and she got along well with them. She liked respondent at the beginning of the school year and considered respondent to be a good teacher. M.C. contended she had no reason to lie about respondent's conduct and behavior. M.C. recalled talking with Ms. Bernstein at the Teen Center about respondent.

James A. Dunkins, a Board Affirmative Action Officer, testified concerning the allegations of respondent's sexual harassment of female pupils, in or about February, 1999. Mr. Dunkins testified extensively about his investigation and interviews of the pupils, together with the handwritten statements the pupils made concerning respondent's alleged conduct (P-1, P-1A, P-1B, P-1C and P-1 D). His testimony included reference to a "Confidential Summary," dated March 17, 1999 (P-6, P-6A, and P-6B), together with a handwritten statement of Mr. Wayne Hendricks, Department Supervisor for Special Education at the Bridgeton High School, which stated as follows:

> On Friday, February 5, 1999, I was approached by two departmental staff members (Karen Felmey - Lisa Chretien) regarding an issue brought to their attention by several female students. The students had alleged that Mr. Wayne Slaughter had made several comments to them that were of a suggestive nature. According to the staff members, the students were alleging that the comments had been made over a period of time-several weeks or more.
>
> The following period (8^{th}) on Friday, I interviewed each of the students separately to determine the nature of the complaints. One of the students mentioned that Mr. Slaughter had made remarks concerning how they were sitting in class; *i.e.,* with legs spread apart. The student alleged that Mr. Slaughter would suggest or intimate that sitting in that position was not appropriate and that it distracted or "made people think things." She asserted that his talking in that manner made her uncomfortable. (The student appeared very anxious to talk and at one time stated, "I like getting people in trouble.")
>
> A second student who was also questioned privately indicated

> that there was nothing in Mr. Slaughter's behavior or conversation with her that she felt was in appropriate. She states that he would always assist her with her project and that he did not once, in her recollection, [statement missing from the bottom of the document] (P-2) (This contradicted information that she had previously provided to the two departmental staff members.)
>
> The third student whom I questioned seemed very reluctant initially to provide any information. When I asked if she would feel more comfortable with (the first student) present, she seemed more agreeable to talking. With both students then present, the third student, mentioned that she is not a student in Mr. Slaughter's class but would occasionally visit his room after receiving permission from Mr. Ziefle. She mentioned statements that Mr. Slaughter made regarding her sitting position. She also mentioned several suggestive remarks he allegedly made about wanting to touch her chest area. At one point, it seemed that the other student might be prompting her as she would interject on occasion by saying "Go ahead, tell him, tell him." She also mentioned that Mr. Slaughter had found two photographs of her in the hallway and, despite her request for him to return them, kept them. He placed them on his bulletin board along with several other photographs.
>
> On Monday, one of the two staff members who brought this allegations to my attention, mentioned that the second student confided to her that she had kept information from me. I decided to speak with her again.
>
> The second student agreed to talk with me later that morning. Again, however, she denied any inappropriate behavior on the part of Mr. Slaughter. I requested that if she wanted to speak with either of the two departmental members later about anything that she could not recall at this time, that she do so.
>
> On Tuesday, I informed Mr. Slaughter that allegations had been made about him and that I would be providing that information to Mr. Marshall. He denied making any statements that were inappropriate or suggestive in nature. The photographs that were on his bulletin board were given to him by that student. At no time, he insisted, did she ever request their return. (P-2A, P-2B)

In his "Confidential Summary" (P-6), Mr. Dunkins summarized Mr. Hendricks handwritten statement, among other things. Mr. Dunkins observed respondent had obtained legal counsel and, therefore, Dunkins was unable to interview respondent. Mr. Dunkins was not able to release the names of the pupils who had made the allegations of respondent's conduct to

respondent's attorney due to confidentiality considerations. Respondent, moreover, denied the allegations and advised Mr. Dunkins that two of the three pupils had received "F's" for the marking period and this could have been the reason for the statements of respondent's inappropriate conduct. (P-6A)

The hearing record shows the Board reinstated respondent on June 1999, subsequent to the receipt of a Board imposed psychiatric evaluation of respondent where Dr. James L. Hewitt stated his impression of respondent, among other things, that; "There is nothing to suggest a psychiatric diagnosis at this time." (P-7A)

Irving Marshall, Bridgeton High School Principal, testified, among other things, concerning the reported allegations by pupils of respondent's inappropriate conduct. He was familiar with the statements made by pupils, S.W. (P-1), E.M. (P-1A, B, C, P-3 through P-3F), and J.S. (P-1D), with respect to respondent and his conduct towards the pupils. The information contained in the pupil statements were taken by the Assistant Principal, not Marshall. Marshall asserted the pupil's statements were in accordance with the proper procedure. Marshall did not interview or question any of the pupils. Rather, Marshall referred the matter to the Board's Affirmative Action Officer. Marshall believed the allegations were serious enough to remove respondent from the Board's school district.

Mr. Marshall asserted Mr. Layman expressed his concerns about respondent to Marshall. Upon learning of the M.C. complaint, Marshall contacted the Board's Affirmative Officer who then spoke with M.C. Marshall then filed an Affirmative Action Grievance on behalf of pupil M.C. It was not Marshall's role to interview respondent rather, pursuant to procedure, it was his role to refer the matter to Affirmative Action when the allegations were presented to him. Mr. Marshall opined, due to the seriousness of the allegations of the two incidents (1999 and 2001), Marshall had doubts as to whether or not respondent should remain a teacher in his building or the school district. Marshall recommended respondent not continue to teach in the Board's schools.

On cross-examination, Marshall stated, among other things, it was not his responsibility to determine whether or not the allegations were true or not. He asserted, however, the three

statements (P-1 through P-3F) made by the female pupils could form the basis not to employ respondent.

On re-direct examination, Marshall stated he was in receipt of a copy of the letter sent to respondent, dated June 3, 1999, from Superintendent of Schools, Dr. Geraldyn Foster. Mr. Marshall read the last sentence of the letter on the hearing record, which states:

> The Bridgeton Board of Education will not tolerate conduct that is unbecoming and/or violates the rights and safety of staff and students. Should this become a problem in the future, disciplinary action will be taken. (P-9)

Former pupil S.W. testified on behalf of the Board and asserted, among other things, she had graduated from Bridgeton High School in 1999. Ms. S.W. stated respondent was her homebound instructor during the months of January and February 1999, while S.W. was on maternity leave from school with her third child, and lived with her grandparents. Her third child was born on December 17, 1998. As of the date of the herein hearing, S.W. had four children.

Ms. S.W. testified respondent came to her home after regular school hours to provide her with homebound instruction. She stated respondent told her she had beautiful eyes and wanted to take her to dinner. Respondent asked S.W. to attend his church. He also stated to her he wanted to see S.W. in a bathing suit at his camp.

Ms. S.W. testified respondent came to her home even when he was not scheduled for homebound instruction. S.W. asserted respondent told her she had big breasts and when he reached to touch her breasts, she moved away from respondent. Respondent did not touch S.W.

Ms. S.W. asserted she never said anything to respondent about his comments. She contended respondent was not interested in her work. Rather, she stated, respondent was interested in her. S.W. testified respondent brought her candy for Valentine's Day.

Ms. S.W. told respondent she had a boyfriend. S.W. asserted respondent asked her, "What can he do for you?" S.W. felt uncomfortable about respondent's comments to her every

time respondent tutored her. S.W. testified she told Ms. Lavell about respondent's conduct after she returned to school following her maternity leave and home instruction.

Ms. S.W. testified, on cross-examination, she moved in with her grandparents in order to attend Bridgeton High School. S.W. had trouble while attending Cumberland Regional High School and attended Bridgeton High School for her junior and senior years. She stated that the home instruction provided by respondent was conducted at the kitchen table. S.W's newborn infant was with the child's father during the home instruction. The grandparents were in the house while the homebound instruction was conducted.

Ms. S.W. admitted her written statement, dated March 12, 1999, (P-1) does not mention respondent's hand motion toward her breasts. S.W.'s written statement is as follows:

> These are the statements Mr. Slaughter made to me during home instruction from 1–99 – 2-99. At first he talked about my eyes and how beautiful they were. Then about how big my chest were. He told me he was going to buy me a gift for my birthday and also V-Day. He always wanted to take me places. He even use to come by my house during the hours when there was not tutoring to be done. He asked me to work for him in the summer he wanted to see me in a bathing suit. (P-1)

Ms. S.W. testified to these alleged events, and which testimony is contained on this hearing record. Ms. S.W. asserted she wrote her statement after she had talked with a guidance counselor at the High School. Subsequently, she was called to Mr. Dunkin's office where she was questioned about respondent. S.W. then provided her written statement (P-1). S.W. did not discuss the incident with anyone after she provided Dunkin with P-1, nor did respondent attempt to contact her after she wrote P-1. S.W. asserted she did not have anything against respondent.

Respondent testified on his own behalf asserting, among other things, he has been a teacher for 20 years and has taught in the Bridgeton school district for the past eight years. During the 1998-99 school year, respondent taught woodworking in grades 9 through 12 during the regular school day from 7:45 p.m. to 3:00 p.m. He also taught in the Board's Alternative School after regular school hours between 3:00 p.m. and 6:00 p.m. The Alternative School class in which respondent taught was a self-contained classroom. In addition to the self contained

class, respondent also taught physical education in the Alternative School. During the 1998-99 school year, respondent was approved as a home instructor.

The regular school day included nine periods of which respondent taught six periods. Each of his six classes enrolled between 12 to 19 pupils. The class was composed of both regular pupils and special education pupils. There were more male pupils than female pupils in his classes.

Respondent testified pupil Ms. J.S. was assigned to his regular class during the 1998-99 school year. In reference to a written statement by pupil J.S. (P-1D), respondent asserted no one from the administration of the school district ever asked respondent whether J.S.'s written statement was true or not. Respondent testified the statement by J.S., as contained in P-1D was not true. Respondent asserted he would only have seen pupil J.S. in the school's hallway.

With respect to the written statement by pupil Ms. E. M. (P-1 through P-1C), respondent asserted he first saw the document in his present attorney's office. On cross-examination, respondent retracted this statement. Respondent testified that he had, in fact, seen the statement by E.M. in February 1999, when his former attorney shared it with respondent. Respondent contended no one had ever asked him whether the statement by E.M. was true or not. Respondent testified the statement by pupil E.M. was not true.

Respondent asserted he began his home instruction of pupil S.W. in January 1999 and continued until the end of February 1999. He would arrive at the pupil's home between 3:15 p.m. or 3:20 p.m. and provide instruction for one hour, five days per week. The home instruction of S.W. lasted approximately six weeks. Respondent asserted he tutored S.W. in her grandparent's home, either in the kitchen or dinning room. He contended there was always someone present in the home, either the grandmother or grandfather, when he conducted the home instruction of S.W.

Respondent referred to pupil S.W.'s written statement (P-1), dated March 1, 1999. Respondent denied he talked to S.W. about her eyes or her chest as alleged in P-1. Respondent

also denied he said he would by S.W. gifts or take her to dinner, as S.W. stated in her written statement.

Respondent denied he offered S.W. a job at his summer camp. He asserted that there were no paid employees in 1999. Respondent denied he placed his hands toward S.W.'s chest area, as asserted by S.W.

Respondent testified he had been suspended from his teaching duties in or about February 1999, due the alleged inappropriate conduct. Subsequently, respondent agreed to undergo a psychiatric evaluation concerning the allegations. Respondent denied he made any inappropriate remarks to any students. The psychiatrists determined there was ". . nothing to suggest a psychiatric diagnosis.." of petitioner (P-7A). Ultimately, respondent was reinstated as a teacher in the Board's employ the last week of June 1999 where he completed the school year.

Respondent returned to duty for the 2000-2001 school year as a teacher of industrial arts and consumer mathematics for special education pupils, in addition to his Alternative School assignment in health and physical education. Respondent was not assigned to a contained classroom nor did he perform any home instruction for the 2000-2001 school year.

Respondent testified he had problems with pupil M.C. in the hallway of the school. M.C.'s boyfriend would walk M.C. to respondent's classroom every day. Respondent testified he would have to separate the two pupils when the boyfriend wanted to kiss and hug M.C. Respondent would instruct M.C. to go into his classroom and order the boyfriend away. Respondent asserted he told M.C., "We don't do that here."

Respondent asserted that M.C. stopped working in his classroom and her grades began to go down. M.C. would just sit at her worktable and do nothing. Respondent advised M.C. she would receive a "zero" for the day she did not work. He asserted this advice did not move M.C. to complete her assigned classroom work. M.C. received two zeros during the third week of November 2000 (R-8). Respondent asserted pupils in his class would receive a grade of 100 when the pupil participated in class. However, the pupil would receive a zero if the pupil did not participate. Respondent referred to his eighth period grade book for the 2000-2001 school year

(R-8), and stated M.C.'s grades for November 27, 28 and December 4, 2000, indicate M.C. received zeros on those dates because she did not participate in class. M.C.'s final grades for the classroom projects are as follows: the cross project, "C"; the pencil project, "B"; the nameplate project, "B." M.C. did not do the projects identified as the coat rack and the wall plaque. Respondent denies he made any inappropriate remarks to pupil M.C.

Respondent testified pupil Y.G. attended his self-contained classroom during the 1998-99 school year. Y.G. was also a pupil in respondent's Alternative School health and physical education classes during the 2000-2001 school year. Respondent asserted pupil Y.G. was arrogant, abusive and did not respect authority. Y.G. did not want to follow the rules of the school or the classroom. Respondent asserted Y.G. would come into the classroom cursing and would not do the assigned classroom work. He contended Y.G. would get mad and throw other pupils papers on the floor. Respondent denies he ever said anything inappropriate to Y.G. Respondent admitted pupil Y.G. was a special needs pupil with specific behavioral problems.

Respondent contends none of the statements submitted by the pupils alleging his inappropriate conduct are true. He asserts he was never charged with inappropriate behavior before 1999.

On cross-examination, respondent admitted he did not call pupil M.C.'s mother or the mother of M.C.'s boyfriend to report their alleged behavior. Nor did respondent refer the matter to the principal of the school. Respondent asserted the behavior of M.C. and her boyfriend did not rise to the level where disciplinary action had to be taken even though their behavior was in violation of the school code. Respondent admitted he observed pupil M.C. cry while she gave her testimony in these proceedings.

Ms. Nordica Jones was offered as a character witness on respondent's behalf asserting, among other things, she was a member of respondent's church and attended church every Sunday. Ms. Jones is 18 yeas of age and a graduate of Cumberland Regional High School. She has been associated with respondent through his church summer camp where she volunteered as a counselor. Ms. Jones observed respondent interact with the children of the camp and asserted

he had a good reputation. Respondent had a one-to-one relationship with Jones and, she asserted, respondent never made an inappropriate comment to her.

Ms. Jones admitted she arrived at the herein hearing with respondent in the church van. She admitted, further, respondent had talked with her about the case against him.

Lanika Mathews, a 20 year-old female testified as a character witness on respondent's behalf. Ms. Mathews has a four year-old child. She graduated from Bridgeton High School in 2000 and was in respondent's class for one-half year, four or five years prior to this hearing. Respondent was also Ms. Mathews' homebound instructor for a couple of months. Ms. Mathews testified she had contact with respondent through the church summer camp where she would attend for a couple of years. She no longer attends respondent's church.

Ms. Mathews testified her mother was present in the home when respondent provided the homebound instruction. She asserted respondent did not say anything unprofessional or of a sexual nature while he provide the homebound instruction.

Ms. Zloria Williams testified as a character witness on respondent's behalf. Ms. Williams is 20 years of age with a three-year old child. She is a graduate of Bridgeton High School and attends respondent's church. Ms. Williams was assigned to respondent's woodworking class during the 1999-2000 school year. She asserted respondent never made unprofessional or sexual comments to her. Ms. Williams admitted respondent brought her to the hearing in the church van.

Ms. Anna Marie Mosley, a Bridgeton High School graduate, testified as a character witness on respondent's behalf. She is 22 years of age and presently employed by the Cumberland Manor Nursing Home. Ms. Mosley attended respondent's woodworking class for one year. She testified respondent did not make any inappropriate or sexual comments to her while she attended his class. Ms. Mosley asserted attended respondent's church a couple of times. Ms. Mosley also admitted respondent brought her to the hearing in the church van.

FINDINGS OF FACT

Based upon the testimony set forth above and the documents offered and accepted into evidence, and having given fair weight thereto, and having assessed the credibility of the witnesses, **I FIND** the following **FACTS.**

The Background Facts, set forth hereinbefore, are hereby adopted as **FINDINGS OF FACTS**. Notwithstanding that respondent was reinstated subsequent to the investigation of his alleged remarks to female pupils in 1999, I **FIND** the testimony of the pupils to be credible.

With respect to the complaint filed against respondent by pupil M.C., I **FIND** her testimony and the testimony of her mother, L.A.C. to be credible. *In re Perrone,* 5 *N.J.* 514, 522 (1950). M.C. testified that shortly after the beginning of the 2000-2001 school year, respondent began to make inappropriate remarks to the pupil; *i.e.,* respondent liked the outfit M.C. wore and intimated that what was inside of the outfit was also nice. M.C. testified, credibly, respondent invited her to dinner, however, only after school was out for the summer to be out of sight of the other pupils in the school.

M.C. confided in teaching staff member, Anne Smith concerning a problem with a male teaching staff member. M.C. did not reveal the name of the male teacher, however, M.C. advised Ms. Smith that the male teacher was "too friendly," and his behavior made M.C. uncomfortable. Ms. Smith testified M.C. posed the question to her as "what if?" M.C. asked Smith, "what would you do if your male teachers made comments to you that make you feel uncomfortable?" Ms. Smith presented credible testimony.

Respondent's conduct and behavior towards pupil M.C. was such that M.C. did not want to attend school and asked her mother for permission to stay home from school. M.C.'s mother, L.A.C., refused the pupil's request to stay out of school. However, L.A.C. testified, M.C. finally revealed to L.A.C. the reason M.C. did not want to attend school; *i.e.,* M.C. did not want to face respondent due to respondent's inappropriate conduct and behavior toward M.C.

Lucinda Bernstein presented credible testimony where she described her meeting with M.C. on March 1, 2001. M.C. came to Ms. Bernstein because M.C. needed to talk with someone about respondent's behavior and conduct. M.C. was upset and nervous and did not want to get anyone in trouble. It was Ms. Bernstein and Ms. Mary Ann Ledden who invited M.C. to talk with the school authorities and the Board's Affirmative Action Officer concerning respondent.

Sandra Solomon, the Interim Affirmative Action Officer, prepared and submitted the April 23, 2001, "W.S. Case History" to the Board following her investigation of M.C.'s allegations asserted, among other things, she did not find any ulterior on the part of M.C. in her charges against respondent. Ms. Solomon examined, among other things, M.C.'s attendance record and found M.C. avoided respondent's class when possible. Ms. Solomon opined M.C. was the object of sexual harassment by respondent.

I FIND the facts of this matter clearly demonstrates, by a preponderance of the credible evidence, that **Charge No. 1.** is true, in fact. The evidence shows that respondent engaged in a pattern and practice of making inappropriate comments of a sexual nature to pupils under his supervision and control. His conduct towards pupil M.C. is particularly egregious. Here, the pupil was so affected by respondent's conduct she did not wish to participate in respondent's classroom activities. Respondent committed sexual harassment against pupil M.C.

I FIND Charge No. 2., as stated, is also true. Respondent has demonstrated a lack of capacity to properly service pupils under his charge, by reason of his inappropriate actions and remarks.

I FIND Charge No. 3. to be true. The evidence demonstrates, by a preponderance of the credible evidence, respondent to be unfit to engage in the teaching of pupils, children of a tender age. Respondent's inappropriate past actions with female pupils give rise to his fitness to continue to engage in the teaching profession.

CONCLUSIONS

Having carefully reviewed and considered the entire record before me, **I FIND** and **CONCLUDE** the tenure charges against respondent are true, in fact.

There is a distinction between *Sexual Abuse*, a criminal act; *Sexual Harassment,* unwelcome sexually oriented conduct; and *Sexual Exploitation*, a betrayal of trust by one in authority to develop a sexual or romantic relationship with a subordinate. *Diocese of New Jersey (Episcopal) Policies and Procedures Covering Sexual Misconduct,* 1993.

Sexual Harassment, as defined in the *Policies and Procedures*, states:

> . . . .includes, but is not limited to, unwelcome sexually oriented humor or language; questions or comments about sexual behavior or preference unrelated to employment qualifications; undesired physical contact; inappropriate comments about clothing or physical appearance; or repeated requests for social engagements in a a situation where there is an employment, mentor or colleague relationship between the persons involved. *Id.* at 2.

The herein record demonstrates respondent's conduct was, in fact, sexual harassment by definition. Respondent made inappropriate remarks to pupil M.C. about her clothing and physical appearance. In addition, respondent attempted to engage M.C. in a social relationship as M.C.'s teacher and mentor.

As our Supreme Court observed in the matter of *Lehmann v. Toys 'R' Us, Inc.* 132 *N.J.* 587, 615 (1993):

> Two societal realities underlie the difference in male and female perspectives. First, women live in a world in which the possibility of sexual violence is ever-present. Given that background, women may find sexual conduct in an inappropriate setting threatening. As the *Ellison* court perceptively wrote,
>
> > because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims

> of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a women may perceive.
>
> [924 *F.*2d at 879]

The courts have attempted to establish an objective standard with respect to the words, actions and conduct upon the recipient in a sexual harassment case. To place the instant matter in proper prospective, this tribunal will paraphrase the *dicta* found in the matter of *Alicea Rosado v. Garcia Santiago*, 562 *F.*2d 114, 119 (1st Cir. 1977) as follows:

> . . . .the trier of fact must be satisfied that the . . . [school] conditions would have been so difficult or unpleasant that a reasonable person in the [pupil's] shoes would have felt compelled to [refrain from attending school].

In *Henson v. City of Dundee*, 682 *F.*2d 897, 902 (11th Cir. 1982), the court's holding is again paraphrased for the purposes of the instant matter, as follows:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the [schoolhouse] that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to [attend school] can be as demeaning and disconcerting as the harshest of racial epithets. A pattern of sexual harassment inflicted upon a [pupil] because of her sex is a pattern of behavior that inflicts disparate treatment upon a member of one sex with respect to terms, conditions or privileges of [school attendance].

I FIND and **CONCLUDE** there is no question nor doubt that respondent's words, actions and conduct constituted the creation and maintenance of a sexually offensive and hostile school environment. Respondent's words, actions and conduct were so severe or pervasive to cause pupil M.C. to believe that the school setting was a hostile or abusive environment. Enough so, that M.C. attempted to remove herself from the hostile or abusive setting. **I CONCLUDE** that respondent committed the acts of sexual harassment against pupil M.C. and the Board's three tenure charges against respondent, individually and collectively, are hereby **SUSTAINED.**

In the Matter of the Tenure Hearing of Robert Mantone, 93 *N.J.A.R.* 2d (EDU) 322, aff'd 93 *N.J.A.R.* 2d (EDU) 789.

ORDER

Accordingly, it is **ORDERED** that respondent, Wayne Slaughter, be removed from his tenured teaching position with the Board of Education of the City of Bridgeton, effective June 22, 2001.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

21 May 2002
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

5/23/02
DATE

Debbie Antanaitis /kp
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 24 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

For the Board of Education, Petitioner:

Sandra M. Solomon
Charles Leyman
Robert Stevens
M.C.
L.A.C
Lucinda Bernstein
Ann Smith
Mary Ann Ledden
Y.G.
James Dunkins
Irving Marshall
S.W.

For Respondent, Wayne Slaughter:

Wayne Slaughter
Lanika Mathews
Nordica Jones
Zloria Williams
Anna Marie Mosley

DOCUMENTS IN EVIDENCE

For the Board of Education:

P-1 Pupil,handwritten statement, March 12, 1999

P-1A through P-1C Pupil, handwritten statement, February 10, 1999

P-1D Pupil, handwritten statement, undated

P-2 through P-2B, Handwritten statement, February 1999.

P-3 through P-3F Pupil, handwritten statement, February 10, 1999

P-4 Letter, February 11, 1999, to Wayne Slaughter from Geraldyn Foster

P-5 Letter, March 3, 1999, to Wayne Slaughter from Terrell Everett

P-6 through P-6B Confidential Summary, March 17, 1999

P-7 through P-7 B Psychiatric Evaluation of Wayne Slaughter by James Hewitt, M.D.

P-8 Letter, May 28, 1999, to Wayne Slaughter from Terrell Everett

P-9 Letter, to Wayne Slaughter from Geraldyn Foster

P-10 Letter, July 22, 1999, to Wayne Slaughter from Terrell Everett

P-11 Confidential Memorandum,

P-12 Confidential Memorandum, February 7, 2000

P-13 & P-13A Discrimination/Affirmative Action Grievance Report Form A

P-14 Handwritten statement, L.A.C., March 1, 2001

P-15 & P-15A Pupil, handwritten statement, undated

P-16 &P-16A Letter, March 1, 2001, to Wayne Slaughter from Geraldyn Foster

P-17 Letter, March 8, 2001, to Wayne Slaughter from Terrell Everett

P-18 Pupil, handwritten statement, March 14, 2001

P-19 Letter, March 15, 2001, to Wayne Slaughter from Terrell Everett

P-20 & P-20A April 23, 2001, W.S. Case History

P-21A & P-21B Memorandum, February 28, 2001

P-22 Memorandum, to Ms. Williams, March 6, 2001

For Respondent:

R-7 through R-7B James L. Hewitt, M.D., May 26, 1999

R-8 through R-8B Classroom Attendance and Grade Book, Period 8

OAL DKT. NO. EDU 6140-01
AGENCY DKT. NO. 326-8/01

IN THE MATTER OF THE TENURE	:	
HEARING OF WAYNE SLAUGHTER,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
CITY OF BRIDGETON,	:	
CUMBERLAND COUNTY.	:	

The record and Initial Decision in this matter have been reviewed. The parties filed no exceptions.

Upon review of the record, the Commissioner adopts the findings and conclusion in the Initial Decision that Respondent Wayne Slaughter engaged in conduct unbecoming a teaching staff member, demonstrated a lack of capacity to properly serve students and that he is unfit to engage in teaching by virtue of his sexual harassment of students.

In this regard, the Administrative Law Judge's (ALJ) credibility determinations are entitled to the Commissioner's deference. "The reason for this rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses, and, consequently, is better qualified to judge their credibility. *In the Matter of the Tenure Hearing of Tyler*, 236 *N.J. Super.* 478, 485 (App. Div.), *certif. denied*, 121 *N.J.* 615 (1990)." *In the Matter of the Tenure Hearing of Frank Roberts*, 96 *N.J.A.R.* 2d (EDU) 549, at 550. The Appellate Division recently affirmed this principle, underscoring that "[u]nder existing law, the [reviewing agency] must recognize and give due weight to the ALJ's unique position and ability to make demeanor based judgments." *Whasun Lee v. Board of Education of the Township of Holmdel*, Docket No. A-5978-98T2 (App. Div. 2000), slip op. at 14. The Court also noted *then* pending legislation providing that "'the agency head may not reject or modify any findings of fact

on the issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent and credible evidence in the record."' (*Ibid. citing* A. 1484, 209th Leg., §10(b) (2000), later enacted as *P.L.* 2001, *c.* 5 and now codified at *N.J.S.A.* 52:14B-10(c))

In the present action, the ALJ determined that the testimony of the pupils, staff of the district and other witnesses was credible, and that of Respondent Slaughter and his proffered character witnesses was not. Based on the foregoing principles, the Commissioner adopts the ALJ's determination that respondent sexually harassed students. Likewise, the Commissioner agrees that such conduct constitutes conduct unbecoming a teaching staff member, and demonstrates incapacity and unfitness to engage in teaching students.

Finally, the Commissioner agrees with the ALJ that the appropriate penalty in this case, wherein the Board demonstrated that respondent engaged in egregious conduct involving sexual harassment of young female students on multiple occasions, is removal of respondent from his teaching position. Accordingly, respondent is removed from his position as of the date of this decision and this matter shall be transmitted to the State Board of Examiners, pursuant to *N.J.A.C.* 6:11-3.6, for action, as that body deems appropriate, against respondent's certificate.

IT IS SO ORDERED*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/8/02

Date of Mailing: 7/8/02

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* within 30 days of filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

267-02

ANNA PORUCHYNSKY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning instructional aide claimed tenure status as a teacher. She charged that the Board failed to renew her as a teacher for the 2000-2001 school year in violation of her tenure and seniority rights. She contended her employment during the 1996-97 school year as an instructional aide was sufficient for tenure acquisition purposes.

The ALJ determined that there was no Board action to appoint petitioner as a teacher, whether full-time or less, for the 1996-97 school year, pursuant to *N.J.S.A.* 18A:27-1. Also, the fact that the Board required petitioner to hold a teaching certificate did not elevate the position of aide to that of teaching staff member within the meaning of *N.J.S.A.* 18A:1-1 so as to confer tenure benefits upon her pursuant to *N.J.S.A.* 18A:28-5 based on her employment in the aide position. The ALJ determined that nothing in the record indicated an estoppel or a clear right to tenure. The ALJ found that petitioner performed the duties of an aide. The petition was dismissed.

The Commissioner adopted the determination in the Initial Decision concluding that petitioner did not acquire tenure in respondent district. The petition was dismissed.

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

July 8, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6261-00

AGENCY DKT. NO. 244-7/00

ANNA PORUCHYNSKY,

Petitioner,

v.

BOARD OF EDUCATION OF

THE TOWNSHIP OF HOLMDEL,

Respondent.

Stephen B. Hunter, Esq., for petitioner (Klausner & Hunter, attorneys)

Martin M. Barger, Esq., for respondent (Reussille, Mausner, Carotenuto, Barger & Steel, attorneys)

Record Closed: February 13, 2002 Decided: April 8, 2002*

BEFORE **BRUCE R. CAMPBELL**, ALJ:

Anna Poruchynsky, petitioner, claims tenure status and charges that the failure of the Holmdel Township Board of Education to renew her as a teacher for the 2000-2001 school year is in violation of her tenure rights or seniority rights or both. The Board denies the claim and asks that the petition be dismissed.

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* An extension of time for issuing the decision was requested and granted pursuant to *N.J.S.A.* 2:14B-10(c).

This matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law on August 7, 2000, for disposition as a contested case pursuant to *N.J.S.A.* 52:14F- through –13. The matter was heard on September 20, and December 3, 2001, at the Office of Administrative Law, Trenton. The petitioner's counsel requested and received permission to purchase transcripts. Through no fault of counsel, transcripts were delayed. Upon receipt of transcripts, counsel submitted briefs and the record closed on February 13, 2002.

BACKGROUND OF THE CASE

Anna Poruchynsky was employed by the Holmdel Township Board of Education as a full-time teacher for the 1997-1998, 1998-1999 and 1999-2000 school years. She received good evaluations in that period and throughout her employment by the Board as a permanent substitute teacher, a replacement teacher, an instructional aide and teacher.

The sole issue presented in this case is whether the petitioner's employment during the 1996-1997 school year as an instructional aide was sufficient for tenure acquisition purposes.

PAROL AND DOCUMENTARY EVIDENCE

The petitioner testified about her educational background and her certificates and endorsements. She holds an instructional certificate with home economics and preschool endorsements. She produced an employment history for pension buy-back purposes with the help of the Board clerk (P-3). It is admitted in evidence to show what the petitioner asserts, not necessarily the truth or falsity of each entry.

With regard to the 1996-1997 school year, the witness stated she was an instructional aide from September through March. She did scheduling duties, telephone coverage and open laboratory sessions. She served on the "computer tech squad" at no additional stipend. She was involved in a corporate experience project and did get additional compensation for after-hours work. For instance, she helped pupils develop the school newspaper as an extra curricular activity and she received extra pay for the activity. Another person handled the journalistic aspect and Poruchynsky was responsible for the computer publishing aspect.

Poruchynsky developed a daily computer lab schedule for 1996-1997 (P-30). She prepared a handout concerning pupil orientation during the 1996-1997 school year (P-31). As part of the District Action Plan for the same year, she prepared material concerning multimedia presentation used in the Plan (P-33). She developed a ninth grade multimedia project checklist (P-34).

Poruchynsky testified that she performed the duties on the teacher job description (P-6) in the 1996-1997 school year. However, she did not do formal pupil progress reports as required at 1d of that document.

Poruchynsky testified concerning other activities and duties she was involved with. A memorandum from Sharyn Evans to Superintendent of Schools LeGlise dated January 27, 1994 (P-11) refers to Poruchynsky as our Computer Lab Aide and commends Poruchynsky's contribution to Holmdel's selection to inclusion in a State Department of Education publication. The memorandum also suggests that the Computer Lab Aide position be redefined as a teaching position. In response to Evans' memorandum, Poruchynsky received a note from the Superintendent (P-16). In addition to printed words of thanks the superintendent hand wrote, "I know you do a great deal of teaching as an instructional aide." On March 28, 1996, LeGlise appointed Poruchynsky to the Ad Hoc Study Team for Technology (P-25). Exhibits P-39 and P-40 have to do with overpayment of Poruchynsky for the 1996-1997 school year because it was erroneously assumed she was a .2 teacher and a .8 teaching aide. She was a full-time aide for the 1996-1997 school year. The Superintendent directed that she not be required to reimburse the Board for the overpayment discovered while retro-pay was being calculated at the conclusion of union contract negotiations. Her salary reverted to "100% instructional aide beginning with the May payroll." The rationale was that Poruchynsky had done some teaching during her free time and after hours which was paid at the voluntarily stipend rate of $27.00 per hour. It is stipulated that Poruchynsky's name does not appear on a document (P-72) titled Nontenured Status as of April 15, 2000, and dealing with teaching staff members.

Poruchynsky stated she received employment contracts for the 1997-1998, 1998-1999 and 1999-2000 school years. She did not receive a teacher employment contract for the 1996-1997

school year. Her employment was covered by a letter dated April 2, 1996 (P-27) that stipulates she is to serve as an Instructional Aide and she acknowledged this arrangement by her signature on April 15, 1996.

The witness has no knowledge of any Board action to hire her as a teacher at any time in the 1996-1997 school year. Although she discussed her status with various persons, she filed no grievance or petition prior to taking action in the present case.

Patricia Bryer, a high school teacher, testified. She knows the petitioner. In 1996-1997, Poruchynsky was an instructional aide in the computer laboratory. Her functions were to instruct teachers and to assist students. She also taught computer programs to students. She was often involved in team teaching arrangements.

The witness testified about Poruchynsky's involvement in many activities, some of them instructional.

Jill Ann Cerqueira, also a high school teacher, testified. She worked with Poruchynsky in the computer laboratory. Poruchynsky was an instructional aide in the 1996-1997 school year. She worked with Cerqueira's freshman class. Pupils were assisted in producing a multimedia program project. This witness also testified as to Poruchynsky's instructional and instruction-related activities.

Alfred Longo testified. He has been a teacher and supervisor for twenty-five years in Holmdel. He met Poruchynsky first as a parent and then as a district employee. In the 1996-1997 school year, Poruchynsky served as an aide in the computer laboratory. He testified further about activities, both instructional and non-instructional.

Valerie Baker, a supervisor at the high school, testified. The witness knows the petitioner as a computer instructional aide in the 1996-1997 school year and then as a teacher. This witness also testified about what she knew of Poruchynsky's instructional and non-instructional duties.

The witness had no knowledge of any Board action concerning Poruchynsky's professional status or rate of pay in the 1996-1997 school year.

Maureen Lally, Assistant Superintendent for Curriculum and Instruction, testified for the Board. In 1996-1997, Lally was Director of Curriculum and Instruction. She was responsible for all professional staff. In that school year, Poruchynsky was an instructional aide in the high school computer lab. She was a resource to teachers and students. Her duties varied tremendously. They included direct student assistance, training of teachers, insuring the availability of software and other duties as they arose. Another aide was John Legere. He has gone on to become a technician. Other aides were employed in the high school and in the district.

In 1997-1998, Poruchynsky became a teacher and was replaced by two aides in the library/computer center.

The witness recalled that Baker had Poruchynsky take over some of Baker's duties and Poruchynsky received the coverage rate of $25.00 per hour or per period. Coverage pay is not acted upon directly by the Board of Education. No Board action was taken regarding Poruchynsky and teaching status. She was hired as an aide. Aides are evaluated by the supervisor or by the building principal. The observations and evaluations are not the same as those used for teachers. In 1996-1997, Poruchynsky was evaluated as an instructional aide, not a teacher. In 1997-1998, she was hired as a teacher although she retained some aide duties. While serving as an aide, she received monies over her salary and was the only aide to do so. This goes to the amount of work she did, however, not the character of the work.

THE ARGUMENTS

The Petitioner's Arguments

The petitioner's papers essentially recite her testimony concerning the various duties she performed. She argues that her service within the district during the 1996-1997 school year was fully creditable toward the acquisition of tenure pursuant to the requirements of *N.J.S.A.* 18A:28-

5 because she at all times functioned as a teaching staff member notwithstanding her designation as an instructional aide. She reads the Teacher Tenure Act, *N.J.S.A.* 18A:28-1 through –18 as supporting her claim. *N.J.S.A.* 18A:28-5 provides, in part

> 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, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause..., after employment in such district or by such board for.
>
> a. Three (3) consecutive calendar years, or any shorter period which may be fixed by the employing board for such purposes; or
>
> b. Three (3) consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> c. The equivalent or more than three (3) academic years within a period of any four (4) consecutive academic years....

The term "teaching staff members" is defined at *N.J.S.A.* 18A:1-1 as follows:

> "Teaching staff member" means a member of the professional staff of any district or regional board of education, or any board of education of the county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the State Board of Examiners....

An employee of a board of education is entitled to tenure, notwithstanding the particular title of the position held if (1) the individual works in a position for which the teaching certificate is required; (2) the employee holds the appropriate certificate, and (3) the employee has served the requisite period of time pursuant to the prescriptions of *N.J.S.A.* 18A:28-5. *Spiewak v.*

Rutherford Board of Education, 90 *N.J.* 63 (1982). New Jersey courts have emphasized that they will not sanction local school board conduct that attempts to circumvent the implications of the tenure statute by, for example, requiring teachers to resign several days before the end of the school year as a condition for obtaining a subsequent employment contract. This, obviously, establishes a break in service. Other devices are similarly frowned upon.

In *Spiewak*, the Supreme Court held that public school teachers who provided remedial and supplemental instruction could acquire tenure if they met all the statutory length of service qualifications of *N.J.S.A.* 18A:28-5, notwithstanding designation as non-tenurable support staff. These instructors, Title I teachers and remedial instructors whose tenure status was analyzed, were never referred to as teaching staff members by their employing boards of education, were paid only on an hourly basis, were not assigned ancillary duties required of most regular teachers such as homeroom, hall duty or playground supervision and were not even paid for scheduled instructional periods if a pupil were absent or failed to appear or whenever the school was unexpectedly closed. In addition, the employees who were the subject of the *Spiewak* decision were not compensated for any in-district time devoted to lesson preparation, record keeping or report making. Those employees never received sick leave, personal days, health insurance, holiday pay, vacations or pension benefits and their rate of pay was significantly less than that received by contract teachers.

Poruchynsky fulfilled all of the duties and responsibilities of a teacher set forth within the Board of Education's adopted job description (P-6). Contrary to the performance responsibilities of an instructional aide referred to in the Board's instructional aide job description (P-5), Poruchynsky was not, in fact, utilized during the 1996-1997 school year merely to assist classroom teachers in the delivery of an effective instructional program. Nor was she used merely to assist teachers and/or students in the implementation of "enrichment or remedial work in independent study, in undertaking laboratory activities, in accomplishing computer software activities and in other situations."

Poruchynsky and the social study teachers, Cerqueira and Bryer, testified that Poruchynsky's duties, with regard to the computer lab, 9th grade English class, and teaching of technology necessary to comply with the action plan established that Poruchynsky functioned in

all respects as a classroom teacher while Bryer and Cerqueira provided at most, minimal assistance regarding Poruchynsky's computer technology instruction.

The petitioner anticipates that the Board may argue the qualifications for an instructional aide (P-5) established only that the possession of a valid New Jersey Teacher Certificate was "preferred." The petitioner's actual possession of a teaching certificate, with duel endorsements, permitted her to teach all computer technology and computer application courses. When considered along with her actual job responsibilities, this mandates the conclusion that she satisfied the requirements of *N.J.S.A.* 18A:28-5, concerning credible teaching service for the purpose of tenure acquisition. Specifically, the petitioner worked in a particular position during the 1996-1997 school year that required a teaching certificate in order for the petitioner to fulfill the many teaching functions she did.

The petitioner recites again the duties she performed in the 1996-1997 school year. She emphasizes that during the months of March, April and May 1997, she prepared detailed lesson plans and other instructional materials in connection with the State Mandated Action Plan. She was in fact paid for approximately 8 months of the 1996-1997 school year as a .2 time period and a .8 time aide, apparently due to an administrative error. When the issue of overpayment was discovered, the Superintendent of Schools decided that Poruchynsky did not have to repay the over payments because of her involvement in teaching students in various capacities during that school year. She also insists that she was instructing students under the newspaper co-advisor position.

The petitioner's performance of computer instructional duties during the 1996-1997 school year parallel with duties she performed as a teacher of computers both during the prior (1995-1996) school year and during the 1997-2000 school years. Her duties in 1995-1996 at a middle school and in the years 1997-2000 at the high school all parallel with what she did in the 1996-1997 year. The only difference between her functions as an instructional aide in the 1996-1997 school year and her assigned teacher duties related to her obligation as a teacher to prepare specific grades for the marking period at issue. Her involvement in the grading of students was limited to the grading of the social studies multimedia projects for the ninth grade.

The Board's decision not to offer the petitioner a teaching position within the district for the 2000-2001 school year violated her tenure rights under *N.J.S.A.* 18A:28-5. Her evaluations throughout her entire employment period were exemplarily and her performance of all the duties assigned to her required the Board to grant her tenure under *N.J.S.A.* 18A:28-5(c). A decision to sustain the Board's arguments and to deny the acquisition of tenure would equal embracing a tenure-evading scheme. This would permit boards to use teaching services properly certificated teachers and deny those individuals tenured acquisition solely because of the improper designation of them as aides.

The Board's Arguments

The Board asserts that no one can be employed as a teaching staff member without a formal vote of the Board of Education. *N.J.S.A.* 18A:27-1, titled Appointment of Teaching Staff Members; vote required, provides:

> No teaching staff member shall be appointed, except by a recorded role call majority vote of the full membership of the Board of Education appointing him.

An individual cannot become a teacher by action of the Superintendent or any administrator without the affirmative vote of the board of education. That vote must be by a recorded role call majority of the full board membership. No such action was taken in this case. The petitioner did serve as a teacher in the 1997-1998, 1998-1999 and 1999-2000 school years, but was hired as an instructional aide in the 1996-1997 and 2000-2001 school years and therefore did not obtain tenure. She never met the specific requirements of *N.J.S.A.* 18A:28-5, particularly subsections (b) and (c). Because the requirements were not met, the petitioner did not and could not obtain tenure in Holmdel.

The actual work she performed reinforces the conclusion that she did not obtain tenure. She had a New Jersey Teaching Certificate with a home economics (now family and consumer science) endorsement. This permitted her to teach subjects in that area of instruction. She could also teach computer science courses because a specific certification is not required for such courses. She was not and is not certified to teach mathematics, English, science, history or any

other specific subject matter. Nevertheless, she testified that she taught history and possibly other courses without certification and without a contract from the Board of Education and obtained tenure as a result.

For these reasons she could not have taught history in 1996-1997. Second, factually, she did not teach history in that year. She was a technician who provided computer services to teachers and students. She was responsible for the technology. "The teacher taught the subject area." (Transcript I at 94). The petitioner provided a resource. She taught teachers and students how to use tools, not a subject area. (Transcript I at 100).

The petitioner did not grade the course, the teacher did. *Id.* The petitioner did not create the lesson plans. *Id.* The petitioner did not speak to parents about the subject area. *Id.* In 1996-1997, the petitioner was a librarian, a technician and a resource who provided technology assistance for teachers and students in history courses. In 1997-1998, 1998-1999 and 1999-2000, the petitioner was actually the teacher, but she was teaching computer science courses, which did not require a specific certification.

The teachers who testified confirmed that the petitioner was a resource for them. She showed them and their students how to put together a power point presentation for their history classes. That does not make her a history teacher and that does not make her a computer science teacher. The distinction was described by Valerie Baker. (Transcript II at 50-56).

The petitioner "facilitates" teachers and students and showed them how to use the hardware and software. She showed them how to put together computer presentations. She did not teach history, she did not give the overall grade, she did not meet with parents, she did not do lesson plans and she was not a teacher. She was not evaluated as a teacher in 1996-1997. She was evaluated as an instructional aide and Ms. Baker did the evaluation. (Transcript II at 56).

The petitioner was an instructional aide in 1996-1997 and nothing more. She is not entitled to a tenure status.

DETERMINATION AND ORDER

If and when the petitioner engaged in voluntary substitute teaching, she was just that: a substitute teacher. Substitute teaching is compensated separately and does not trigger any tenure or seniority benefit to the substitute who performs it. If already a tenured teacher, it brings no additional protection, credit or right. It carries a stipend over and above contract salary, but nothing more. *See, e.g., Biancardi v. Waldwick Board of Education*, 139 N.J. Super. 175 (App. Div. 1976) aff'd o.b. 73 *N.J.* 37 (1977).

The duties described were many, but did not necessarily require certification. The testimony as well as the job description (P-5) did not suggest the duties were those exclusively reserved to a certified teacher, although instruction would clearly be required. The fact that the petitioner was compensated for after hours work does not cut one way or the other. The fact that there were no grading duties and there were not parent contacts do weigh heavily, however.

Spiewak, above, is inapposite in that the instructors in that case did little but teach. And all held the requisite certification.

There was no board action to appoint Anna Poruchynsky as a teacher, whether full-time or something less, pursuant to *N.J.S.A.* 18A:27-1. Coupled with this, the fact that the Board required the petitioner to hold a teaching certificate did not elevate the position of aide to that of teaching staff member within the meaning of *N.J.S.A.* 18A:1-1 so as to confer tenure benefits upon her pursuant to *N.J.S.A.* 18A:28-5 based on her employment in the aide position. *See, Rumson-Fair Haven Education Association v. Rumson-Fair Haven Regional School District Board of Education*, State Board of Education decision, August 5, 1987, aff'd N.J. App. Div. (A-291-87T8, 1988) (unreported). "[T]o hold otherwise would allow each local board of education to define what is a teaching staff member simply through its own certification requirements." *Id.* at 8. Even if the Board had viewed and treated Poruchynsky as a member of its teaching staff, that could not act to convert what was not a teaching position under law into one that was. The requirements for tenure are statutory. *Spiewak*, above.

In short, I see nothing here that indicates either an estoppel or a clear right on the petitioner's part to a tenure contract. The petitioner performed the duties of an aide. Some of these duties had an instructional component. This does not translate automatically into a teaching position. Aides often give instruction. That does not make them teachers. I so **FIND**.

In consideration of the foregoing, I **CONCLUDE** that Anna Poruchynsky did not perform duties in the 1996-1997 school year that were in law or in fact duties that could solely be performed by a teacher. She appears to have served well and faithfully under the terms of her contract and job description as an instructional aide. This is laudable, but does not mean that the petitioner was or should have been considered a teacher in the 1996-1997 school year. Accordingly, there is no relief that can be granted to the petitioner and the petition is hereby **DISMISSED**. It is so **ORDERED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

APR 0 8 2002
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

4/9/02
DATE

Debbie Antonatos/jp
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 10 2002
DATE

Jeff S. Masin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cad

WITNESSES

For Petitioner:

Anna Poruchynsky
Patricia Bryer
Jill Ann Cerqueira
Alfred Longo
Valerie Baker

For Respondent:

Maureen Lally

EXHIBITS

For Petitioner:

P-1 A copy of resume as of September 1, 2001

P-2 A copy of petitioner's teaching certificate regarding her teacher of home economics and nursery school endorsements

P-3 Employment history for Anna Poruchynsky, dated December 12, 2000

P-4 Holmdel Township job description for substitute teacher

P-5 Holmdel Township job description for instructional aide

P-6 Holmdel Township job description for teacher

P-7 Holmdel Township Public Schools Schedule B job description for newspaper advisor

P-8 Employment Contract, dated September 24, 1992

P-9 Employment Contract, dated July 15, 1993

P-10 Observation/Evaluation form regarding Anna Poruchynsky, dated December 20, 1993

P-11 Memorandum from Sharyn Evans to Dr. Susan LeGlise, dated January 27, 1994 Regarding Computer Lab Aide vs. Technology Media Specialist Position

P-12 Letter from Mary T. Corrigan to Dr. Susan LeGlise, dated April 10, 1994

P-13 Observation/Evaluation Form regarding Anna Poruchynsky, dated December 19, 1994

P-14 April 28, 1995 letter from Dr. Susan LeGlise to Anna Poruchynsky

P-15 Employment Contract, dated April 28, 1995

P-16 Hand written note from Dr. Susan LeGlise to Anna Poruchynsky, dated May, 1995

P-17 Letter from Sharyn Evans to Anna Poruchynsky, dated June 7, 1995

P-18 Letter from Dr. Susan LeGlise to Anna Poruchynsky, dated July 21, 1995

P-19 Letter from Dr. Susan LeGlise to Anna Poruchynsky, dated August 24, 1995

P-20 Employment Contract, dated August 24, 1995

P-21 Daily Schedule for Open Lab sessions involving Anna Poruchynsky for the 1995-1996 school year

P-22 Observation/Evaluation Form for Anna Poruchynsky, dated October 5, 1995

P-23 A copy of introductory materials regarding 7th grade computer class taught by Anna Poruchynsky during the 1995-1996 school year

P-24 Observation/Evaluation Form regarding Anna Poruchynsky, dated March 19, 1996

P-25 A March 28, 1996 letter from Dr. Susan LeGlise to Anna Poruchynsky

P-26 Observation Evaluation Form regarding Anna Poruchynsky, dated March 29, 1996

P-27 An April 2, 1996 letter from Dr. Susan LeGlise to Anna Poruchynsky

P-28 A letter from Dr. Susan LeGlise to Anna Poruchynsky, dated June 14, 1996

P-29 Employment Contract, dated June 14, 1996

P-30 Document entitled Daily Computer Lab Schedule for Anna Poruchynsky for the 1996-1997 school year

P-31 A copy of a lesson handout prepared by Anna Poruchynsky with regard to orientation for students during the 1996-1997 school year

P-32 A copy of one page of the Holmdel Township Public Schools 1996 Quality Assurance Annual Report

P-33 Materials prepared by Anna Poruchynsky in implementing district action plan during the 1996-1997 school year concerning multimedia presentations used in the district action plan

P-34 A copy of a 9th grade multimedia project checklist prepared by Anna Poruchynsky in implementing the District Action Plan during the 1996-1997 school year regarding multimedia presentations

P-35 Observation/Evaluation Form regarding Anna Poruchynsky, dated December 17, 1996

P-36 A March 12, 1997 letter form Maureen Lally to Anna Poruchynsky

P-37 A letter from Sharon Goldman to Anna Poruchynsky, dated March 19, 1997

P-38 A letter from Dr. Susan LeGlise to Anna Poruchynsky, dated April 24, 1997

P-39 A memorandum from Lee Lewis to Dominic Carrea, dated May 5, 1997

P-40 A memorandum prepared by Lee Lewis, dated May 22, 1997

P-41 A letter from Dr. Susan LeGlise to Anna Poruchynsky, dated May 22, 1997

P-42 A Schedule B Evaluation for a newspaper advisor position, dated May 19, 1997

P-43 A letter from Dr. Susan LeGlise to Anna Poruchynsky, dated May 27, 1997

P-44 Employment Contract, dated May 27, 1997

P-45 A memorandum from Anna Poruchynsky and Joel Handler to Valarie Baker, dated June 2, 1997

P-46 A letter from Dr. Susan LeGlise to Anna Poruchynsky, dated July 24, 1997

P-47 Employment Contract, dated July 24, 1997

P-48 A letter from Dr. Susan LeGlise to Anna Poruchynsky, dated September 11, 1997

P-49 Employment Contract, dated September 11, 1997

P-50 Observation/Evaluation Form regarding Anna Poruchynsky, dated October 7, 1997

P-51 Memorandum from Dr. Susan LeGlise to Joel Handler, Anna Poruchynsky and Jeanne Remuzzi, dated November 3, 1997

P-52 Observation/Evaluation Form regarding Anna Poruchynsky, dated November 10, 1997

P-53 Memorandum from Valerie Baker to Anna Poruchynsky, dated March 3, 1998

P-54 Observation/Evaluation Form regarding Anna Poruchynsky, dated March 4, 1998

P-55 Memorandum from Dr. Susan LeGlise to Valarie Baker, Joel Handler, Anna Poruchynsky and Jeanne Remuzzi, dated March 9, 1998

P-56 Observation/Evaluation Form regarding Anna Poruchynsky, dated March 17, 1998

P-57 Annual Performance Report for the 1997-1998 school year regarding Anna Poruchynsky with a date of May 12, 1998

P-58 A letter from Dr. Susan LeGlise to Anna Poruchynsky, dated April 24, 1998

P-59 Employment Contract, dated April 24, 1998

P-60 A Schedule B Evaluation Form regarding Anna Poruchynsky, dated May 4, 1998

P-61 A letter from Dr. Susan LeGlise to Anna Poruchynsky, dated May 28, 1998

P-62 A letter from Dr. Susan LeGlise to Anna Poruchynsky, dated May 28, 1998

P-63 Employment Contract, dated May 27, 1998

P-64 A letter from Dr. Susan LeGlise to Anna Poruchynsky, dated June 22, 1998

P-65 Observation/Evaluation Form regarding Anna Poruchynsky, dated December 22, 1998

P-66 Observation/Evaluation Form regarding Anna Poruchynsky, dated January 28, 1999

P-67 Annual Performance Report for the 1998-1999 school year regarding Anna Poruchynsky, dated May 12, 1999

P-68 Professional Improvement Plan for Anna Poruchynsky referring to both the 1998-1999 and 1999-2000 school years

P-68A A letter from Dr. Susan LeGlise to Anna Poruchynsky, dated April 29, 1999

P-69 Memorandum from Fred Lucas to Anna Poruchynsky, dated June 1, 1999

P-70 Observation/Evaluation Form regarding Anna Poruchynsky, dated January 11, 2000

P-71 Annual Performance Report for the 1999-2000 school year regarding Anna Poruchynsky, dated June 9, 2000

P-72 A document prepared by representatives of the Holmdel Township Board of Education titled Non Tenured Status as of April 25, 2000 for year 1999/2000

P-73 A letter from Dr. Maryann Peifly to Anna Poruchynsky, dated May 25, 2000

P-74 Memorandum from Fred Lucas to Anna Poruchynsky, dated June 1, 2000

P-75 A letter from Leigh Byron, Superintendent of Schools, to Anna Poruchynsky, dated June 5, 2001

P-76 Memorandum from Ann Poruchynsky to Sharyn Evans, dated December 20, 1993

P-77 High School Computer Lab Assignment Job Description 1992-1993 school year

OAL DKT. NO. EDU 6261-00
AGENCY DKT. NO. 244-7/00

ANNA PORUCHYNSKY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

The record, Initial Decision and exceptions on behalf of petitioner, Anna Poruchynsky, have been reviewed. No reply exceptions were filed. Upon review of the record, the Commissioner determines to adopt the determination in the Initial Decision concluding that petitioner did not acquire tenure in the respondent district and hereby dismisses the petition.

This matter involves petitioner's claim to tenure status and, concomitantly, that respondent Board improperly failed to employ her as a teaching staff member for the 2001-2002 school year based on her having obtained such status. Respondent denies that petitioner obtained tenure and, thus, asserts that its determination not to offer her a teaching staff position for the 2001-2002 school year was in accordance with law.

The Administrative Law Judge (ALJ) determined that petitioner never acquired tenure, holding that the duties performed during her service as an instructional aide in the 1996-1997 school year did not constitute service as a teaching staff member so as to confer tenure

upon her when coupled with her service as a teaching staff member in 1997-1998, 1998-1999 and 1999-2000. (Initial Decision at 11) The ALJ specifically rejected petitioner's contention that her duties were akin to those of a teacher, and that respondent improperly changed her title to instructional aide in order to illegally deny her tenure. (*Id.* at 11-12) Likewise, the ALJ determined that the Board did not appoint petitioner as a teacher in 1996-1997, and the fact that it required her to hold a teaching certificate did not elevate her to the status of teaching staff member. (*Id.* at 11) Finally, the ALJ determined that nothing in the record indicated an estoppel or a clear right to tenure, concluding that petitioner performed the duties of an aide, some of which had instructional components, but that performance of some teaching duties "does not translate automatically into a teaching position." (*Id.* at 12)

Petitioner's exceptions reiterate the facts and arguments in her post-hearing brief and generally dispute the ALJ's factual and legal determinations. The Commissioner rejects those arguments for the reasons set forth in the Initial Decision.

In addition, the Commissioner rejects petitioner's remaining contentions on exception, since they fail to set forth a basis for reversing the conclusion of the ALJ that petitioner did not serve as a teacher in 1996-1997 and, thus, is not entitled to tenure in respondent's district. Specifically, the Commissioner rejects the argument that the ALJ erred because he purportedly did not consider the testimony presented to the effect that petitioner satisfied all of the requirements of the job description of the district for a teacher in the 1996-1997 school year and, thus, served as a teacher for the requisite time period and should be awarded tenure. To the contrary, the Initial Decision demonstrates that the ALJ considered all

proffered testimony but concluded, contrary to petitioner's assertion, that petitioner did not serve as a teacher in 1996-1997. Also, petitioner's factual statement in her exceptions avers that she was "team teaching" English, Math and Social Studies in 1996-1997 by helping integrate computer technology as a part of "all academic instruction." Petitioner's Exceptions, at 8, ¶13. The Commissioner concurs with the ALJ that, at most, she assisted in providing a component of courses taught by teaching staff members; *i.e.* she provided assistance with regard to the integration of computer technology as a component of academic instruction. As held by the ALJ, assisting teachers in such a manner does not constitute service as a teacher.

The Commissioner agrees with petitioner's contention that, in unique circumstances such as occurred in *Speiwak, supra*, failure to appoint a person as a teaching staff member as required by *N.J.S.A.* 18A:27-1 may not preclude a person who has in fact served in that position from acquiring tenure. However, the fact remains that petitioner herein did not serve as a teaching staff member in 1996-1997 as set forth above. Thus, petitioner's exception with regard to appointment is of no moment.

Finally, petitioner's insistence that she assisted in grading that portion of pupil assignments involving the use of technology and attended back to school nights, and that this demonstrates functioning as a teacher, does not compel rejection of the ALJ's conclusions. These proffered facts indicate that petitioner assisted teachers (as do all instructional aides), not that she served as a teacher, and they compel instead a decision adopting the determinations of the ALJ.

Based on the foregoing, while the Commissioner recognizes that petitioner was unquestionably a dedicated and competent employee, her service during the year at issue was

that of an aide. Accordingly, the Commissioner adopts the conclusions and order in the Initial Decision, and hereby dismisses the petition.

IT IS SO ORDERED*

COMMISSIONER OF EDUCATION

Date of Decision: 7/8/02

Date of Mailing: 7/9/02

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* within 30 days of filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

268-02

S.C., on behalf of minor child, I.T.,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

July 11, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9650-01
AGENCY DKT. NO. 456-11/01

S.C. ON BEHALF OF MINOR CHILD, I.T.,

Petitioner,

v.

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

Respondent.

S.C., petitioner *pro se*

Robert J. Merryman, Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: May June 3, 2002 Decided: June 4, 2002

BEFORE **MARGARET M. MONACO,** ALJ:

This matter involves an appeal by petitioner S.C. on behalf of I.T. from a residency determination by respondent Board of Education of the City of Bayonne (the Board). The Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL) where, on December 19, 2001, it was filed for a hearing and determination as a contested case. Subsequent to the assignment of the matter to the undersigned on January 11, 2002, a hearing was scheduled for February 11, 2002, which was adjourned at the Board's request. The hearing was rescheduled for March 27, 2002. On March 19, 2002, the undersigned received a motion on behalf of the Board to dismiss the matter based on petitioner's alleged failure to respond to discovery requests. A telephone conference was held on March 25, 2002 to discuss the discovery

issues. As a result of that conference and petitioner's agreement to provide certain documentation, the Board withdrew its motion and the hearing was adjourned to April 9, 2002. Petitioner and counsel for respondent appeared at the OAL on April 9, 2002 and the hearing scheduled for that date was ultimately adjourned to provide the parties additional time to address discovery matters and pursue an amicable resolution of the matter. A telephone status conference was held on May 1, 2002 and the hearing was rescheduled for May 14, 2002. Petitioner and counsel for respondent appeared at the OAL on May 14, 2001 and engaged in further settlement discussions, resulting in the adjournment of the hearing to provide the parties additional time to finalize a settlement between them. The parties reached a settlement and counsel for respondent submitted the attached Settlement Agreement indicating the terms of agreement, along with the attached Resolution adopted by the Board at a meeting held on May 16, 2002 accepting the settlement agreement, which the undersigned received on June 3, 2002.

Having reviewed the record and the terms of the settlement, I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

June 4, 2002
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Receipt Acknowledged:

6-7-02
DATE

Deborah N. Cittadino
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 11 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Settlement Agreement

S.C. on behalf of I.T. JUN 3 8:58 AM Board of Education

OAL Dkt. No. EDU-9650-01

The parties hereby agree as follows ~~to~~ in full settlement and compromise of this matter:

(1) Petitioner, Seton Connors, withdrawl his petition of appeal in this matter with prejudice;

(2) I.T. will be permitted to remain in Bayonne High School for the remainder of the 2001 - 2002 school year.

(3) Seton Connors agrees to pay to the Bayonne Board of Education the sum of $3,200.00 in full settlement of any claim for back tuition and for the remainder of the 2001 - 2002 school y

(4) The sum of $3200.00 will be paid in equal monthly installments of $100.00 on or before the 1st Day of each month with the first payment due within thirty days of the date this agreement is approved by the Commissioner of Education.

(5) In the event any payment is not received within thirty days of its due date the Board ~~with~~ has ~~leave~~ the right to demand full payment of the outstanding balance to be paid within 60 days of the date notice is provided of the default.

(6) The Board agrees to waive its claim for full fees from the date of enrollment in March, 200 ~~until the end of~~ which is approximately $12,000.

(7) The parties understand that this agreement is subject to approval by the Commissioner of Education.

The parties agree that the above terms are acceptable and will be legally bound by these terms.

Petitioner, Sekou Camara

Sekou Camara

05/15/02

Respondent, Bayonne Board of Education

By: William Lawson
Board President

RECEIVED
OFFICE OF ADMIN. LAW
JUN 3 4 58 PM '02

BOARD OF EDUCATION OF THE CITY OF BAYONNE

HUDSON COUNTY, NEW JERSEY

May 16, 2002

WHEREAS, the Board of Education has been made aware that student IT does not reside in the City of Bayonne.

AND FURTHER, that the Board of Education proceeded with litigations against the parents of IT to recover the cost of educating IT.

AND FURTHER, that the court has offered a settlement for the payment by the parents to the Board of Education for the expenses for educating IT while he was not a resident of Bayonne

NOW THEREFORE BE RESOLVED, that the Board of Education accepts the settlement agreement offered by the court and directs the Superintendent or her designate to make arrangements for the collection of the reimbursement of the cost of education as per the settlement.

TRUSTEE William Gaeta
Moved that the foregoing resolution be adopted

SECONDED BY TRUSTEE Phyllis Gardell

ADOPTED AT BOARD MEETING HELD May 16, 2002

OAL DKT. NO. EDU 9650-01
AGENCY DKT. NO. 456-11/01

S.C., on behalf of minor child, I.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/11/02

Date of Mailing: 7/11/02

269-02

CARRIER FOUNDATION-EAST MOUNTAIN SCHOOL, SOMERSET COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

July 11, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6650-01

AGENCY DKT. NO. N/A

CARRIER FOUNDATION – EAST MOUNTAIN SCHOOL,
SOMERSET COUNTY,

Petitioner,

v.

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION,
OFFICE OF COMPLIANCE,

Respondent.

Glenn D. Curving, Esq. and **David M. Steiner**, Esq., for appellant (Riker, Danzig, Scherer, Hyland & Perretti, LLP, attorneys)

Allison Colsey Eck, Deputy Attorney General, for respondent (David Samson, Attorney General of New Jersey, attorney)

Record Closed: February 27, 2002 Decided: June 5, 2002

BEFORE **KATHRYN A. CLARK**, ALJ:

Carrier Foundation (Foundation), a private, statewide, behavioral healthcare system, appealed the results of the respondent Department of Education's audit of Carrier's East Mountain School program (East Mountain) for fiscal year 1998. Cross-

motions for summary decision were filed and summary decision was granted to respondent. The Commissioner adopted the findings and determination of the Administrative Law Judge. The State Board of Education remanded for the limited purpose of establishing the basis upon which the Department of Education's Office of Compliance (DOE) made its determination that $72,132 allocated by East Mountain as indirect General and Administrative costs was disallowed. In all other respects, the State Board affirmed the decision of the Commissioner.

The parties requested oral argument which was held on January 24, 2002. Carrier's Chief Financial Officer Randy Jacobson presented an explanation of their position. The audit had disallowed certain indirect expenses, stating that those costs were already factored into direct expenses and therefore counting them as indirect expenses resulted in the costs being counted twice. Jacobson claimed that the facility-related costs (maintenance and repair, housekeeping, operation of plant) for the non-school administrative offices were not already allocated into other cost centers and were not included in the Medicare step down methodology and thus were not accounted for anywhere. These costs were for non-school facility plant operations, building maintenance and housekeeping that serviced the non-school administrative part of the facility. Jacobson claimed that these costs were not included previously anywhere. For example, he said that there is no discrete line item for electricity to any department. In the allocation process, the apportionment takes the expense of electricity and applies it against the square footage of the school, but not against the square footage of the administrative space that supports the school. Housekeeping is another example of a cost necessary to support the facility. Mr. Jacobson said that the Medicare step-down process hasn't captured the cost of electricity for the administrative space that supports the school, or of the housekeepers cleaning the administrative space that supports the school. He said there was no double-counting.

Following this presentation, the ALJ advised respondents that she would not require them to respond immediately but would allow them time to consider Carrier's

information in the new light in which it was presented, and to reconsider their positions in view of this new argument. The hearing was adjourned to allow for this reconsideration. A telephone conference was scheduled for February 4, 2002. During this telephone conference, the parties advised that they had come to a mutually agreed settlement of the issue. The parties agreed to a "Revised G&A Overhead Calculation" which depicts the parties' agreement concerning the calculation of general and administrative overhead costs in this remanded matter, taking into consideration Carrier's step-down allocations as well as the regulatory requirements for allocating overhead costs. *N.J.A.C.* 6:20-4.1(1), *N.J.A.C.* 6:20-and *N.J.A.C.* 6:20-4.4(a)10. This revised calculation of non-allowable overhead costs of $31,326 is expressed in the revised Schedules A and B, attached.

The agreement between the parties represents the parties' resolution of the dispute between Carrier and the NJDOE with respect to Finding No. 7 of the DOE's audit which was the subject of the remand. This issue dealt solely with allowable and non-allowable general and administrative costs to be allocated to the East Mountain School by Carrier. Carrier noted that it reserves all of its rights with respect to the remaining findings of the State Board of Education as set forth in its October 3, 2001 Decision and Order that were not the subject of the remand.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

June 5, 2002
DATE

Kathryn A. Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

6/17/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 18 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cmo

EXHIBITS:

FOR PETITIONER:

None

FOR RESPONDENT:

R-1 documents, 24 pages

R-2 letter, King to Maher, Notice of Final Determination, September 13, 1999

R-3 Schedule of Expenditures by Line Item

R-4 1998 Facility Fee Comparison

WITNESSES:

FOR PETITIONER:

Randy Jacobson, Chief Financial Officer, Carrier Foundation

FOR RESPONDENT:

Roger Bell, Planning Associate I, Office of Compliance, Department of Education

Schedule A

PRIVATE SCHOOLS FOR THE DISABLED
EAST MOUNTAIN SCHOOL
FISCAL MONITORING REPORT
JULY 1,1997 - JUNE 30,1998

REVISED G&A OVERHEAD CALCULATION

Total Expenses per 1997 Carrier Foundation Cost Report (Exclusive of Private School Expenses)		$31,242,648.
Less: indirect expenses		
Depreciation - Buildings/fixtures	$1,320,954.	
Depreciation - Moveable Equip,	433,238.	
Employee Benefits	3,854,756.	
Communications	551,753.	
Data Processing	518,374.	
Other G&A	3,397,152.	
Maintenance and Repairs	660,858.	
Plant	750,298.	
Housekeeping	459,904.	
Cafeteria	125,800.	
	12,073,087.	
Non-private School Direct Expenses		19,169,561.
East Mountain School Direct Expenses		1,332,164.
Total Direct Expenses		$20,501,725.
Percentage of Private School Direct Expenses to Total Direct Expenses		6.50%

PRIVATE SCHOOLS FOR THE DISABLED
EAST MOUNTAIN SCHOOL
FISCAL MONITORING REPORT
JULY 1,1997 – JUNE 30,1998

REVISED G&A OVERHEAD CALCULATION (CONTINUED)

General and Administrative Expenses for Allocation

Communications		$566,985.
Communications - Facility Cost Allocation		*7,853.**
Data Processing		583,290.
Data Processing-Facility Cost Allocation		*23,427.**
Other G&A		4,060,170.
Other G&A - Facility Cost Allocation		*512,573.**
Employee Benefits - Facility Cost Allocation		*83,932.**
		5,838,230.
Less: Non-allowable overhead expenses		
Marketing and Relations Expense	$540,843.	
Severance	399,541.	
Investment Service Fees	103,427.	
CEO Salary Exceeds Maximum	84,518.	
		1,128,329.
Revised G&A Expenses for Allocation		4,709,901.
Allocation Percentage		6.50%
Revised Private School Allowable Overhead		306,144.
Overhead Charged to the Private School		337,470.
Revised Non-allowable Overhead		$31,326

* These amounts represent additional evidential matter supplied by the Carrier Foundation as a result of the conference with Administrative Law Judge Clark on January 24, 2002.

OAL DKT. NOS. EDU 508-00 AND EDU 6650-01 (ON REMAND)
AGENCY DKT. NO. 380-12/99

CARRIER FOUNDATION-EAST MOUNTAIN SCHOOL, SOMERSET COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION ON REMAND
RESPONDENT.	:	

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

Upon such review, the Commissioner approves the settlement, which reflects a revised calculation of general and administrative overhead costs for fiscal year 1998, in accordance with the State Board of Education's decision on October 5, 2001. This agreement represents the parties' resolution of the dispute with respect to Finding 7 of the Department's audit, the sole issue on remand.

The matter is hereby forwarded to the State Board of Education, which has retained jurisdiction.

COMMISSIONER OF EDUCATION

Date of Decision: 7/11/02

Date of Mailing: 7/11/02

270-02

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
EVELYN BARNES,	:	DECISION
RESPONDENT.	:	
	:	

July 15, 2002

AGENCY DKT. NO. 31-2/02

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
EVELYN BARNES,	:	DECISION
RESPONDENT.	:	
	:	

This matter, having been brought before the Commissioner of Education by the Board of Education of the City of Clifton (Board) by way of a Petition of Appeal filed on February 7, 2002, requesting that respondent be ordered to pay the Board tuition for the period of her child's ineligible attendance in its schools, from mid-April 2001 to the end of the school year in June 2001; and

Whereas, the Board sent respondent a copy of the petition, by certified and regular mail, on January 29, 2002; and

Whereas, the Commissioner, by notice dated February 8, 2002, directed that an Answer to the petition be submitted pursuant to *N.J.A.C.* 6A:3-1.5; and

Whereas, having received no response, the Commissioner notified respondent, by regular and certified mail, on March 19, 2002, the certified copy having been acknowledged as received on March 26, 2002, that if an Answer was not submitted, each count of the petition would be deemed admitted and the matter could then be decided on a summary judgment basis pursuant to the Commissioner's authority granted by *N.J.A.C.* 6A:3-1.5(e); and

A letter, dated March 25, 2002 was received from respondent requesting an explanation of the notices she had received from the Department; and

By letter dated April 29, 2002, sent certified and regular mail, the certified copy having been acknowledged as received June 1, 2002, the Director of the Bureau of Controversies and Disputes advised respondent that this matter involved a Petition of Appeal from the Clifton Board of Education claiming that her child, J.B., was not domiciled in the District from mid-April 2001 to the end of the school year in June 2001 and, as such, the Board was seeking a judgment from the Commissioner assessing her tuition for this period of her child's ineligible attendance in its schools; and

Respondent was also advised that she had an obligation to file an Answer to this petition, presenting to the Commissioner any basis she may have in defense of the Board's claim of non-eligibility of her child's attendance in the District's schools during this period; and

Respondent was further advised that if she failed to file the required Answer within 10 days of her receipt of the April 29, 2002 letter, the Commissioner must assume that the Board's allegations are true and, upon receipt of a specific dollar amount and the basis for its calculation from the Board, the Commissioner would issue a judgment against her directing payment of the monies owed; and

Whereas, neither respondent, nor any attorney on her behalf, has filed an Answer to the allegations against her nor contested the calculation of tuition; and

Whereas, the Board has advised that respondent's son, J.B., attended school in the district from April 16 through June 27, 2001, and that the per pupil cost for such attendance was $1,534.08 (48 days @ $31.96 per day); and

Deeming the Board's allegations against respondent to be admitted in the absence of an Answer being submitted by respondent, the Commissioner finds that respondent's son was ineligible, pursuant to the provisions of *N.J.S.A.* 18A:38-1, to attend school free of charge in the Clifton School District for the period April 16 through June 27, 2001 as set forth by the Board herein; now therefore

IT IS ORDERED on this 15th day of July 2002, that summary decision shall be granted to the Board of Education of the City of Clifton and that respondent shall pay tuition in the amount of $1,534.08, as requested by the Board, for the period of time in which her son, J.B., was ineligible for a free education in the Clifton School District.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/15/02

Date of Mailing: 7/15/02

* This decision, as the Commissioner's final determination may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:2-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

271-02

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
M.F. AND N.F.,	:	DECISION
RESPONDENTS.	:	
	:	

July 15, 2002

AGENCY DKT. NO. 33-2/02

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
M.F. AND N.F.,	:	DECISION
RESPONDENTS.	:	
	:	

This matter, having been brought before the Commissioner of Education by the Board of Education of the City of Clifton (Board) by way of a Petition of Appeal filed on February 7, 2002, requesting that respondents be ordered to pay the Board tuition for the period of their children, J.F. and F.F.'s ineligible attendance in its schools during the 2000-2001 school year; and

Whereas, the Board sent respondents a copy of the petition, by certified and regular mail, on January 29, 2002; and

Whereas, the Commissioner, by notice dated February 14, 2002, directed that an Answer to the petition be submitted pursuant to *N.J.A.C.* 6A:3-1.5; and

Whereas, having received no response, the Commissioner notified respondents, by regular and certified mail, on March 14, 2002, the certified copy having been acknowledged as received on March 18, 2002, that if an Answer was not submitted, each count of the petition would be deemed admitted and the matter could then be decided on a summary judgment basis pursuant to the Commissioner's authority granted by *N.J.A.C.* 6A:3-1.5(e); and

Whereas, neither respondents, nor any attorney on their behalf, has filed an Answer to the allegations against them; and

By letter dated April 4, 2002, the Board was advised of respondents' failure to respond to the petition and informed that, in order for this matter to proceed to judgment, it was necessary for the Board to provide, pursuant to *N.J.A.C.* 6A:28-2.10(c), specific information with respect to the calculation of the total amount of tuition the Board was seeking for **each child**, and the basis for such calculation(s); and

By letter dated May 13, 2002, counsel for the Board responded to the April 4, 2002 directive and enclosed an affidavit of Karen Perkins, Business Administrator in the District, which detailed that minor child, F.F. was enrolled at Clifton High School, where the annual per pupil cost for attendance was $6,220, between September 27, 2001 and June 22, 2001, and, thus, the charge for his 166 days of attendance is $5,735.30; and

In that counsel for the Board provided no tuition calculation figure for minor child, J.F., it must be assumed that the Board has chosen to waive tuition assessment for this child; and

Whereas, respondents have not contested the Board's calculation of tuition; and

Deeming the Board's allegations against respondents to be admitted in the absence of an Answer being submitted by respondents, the Commissioner finds that respondents' child, F.F, was ineligible, pursuant to the provisions of *N.J.S.A.* 18A:38-1, to attend school free of charge in the Clifton School District for the period September 27, 2001 through June 22, 2001 as set forth by the Board herein; now therefore

IT IS ORDERED on this _____day of July 2002, that summary decision shall be granted to the Board of Education of the City of Clifton and that respondents

shall pay tuition in the amount of $5,735.30, as requested by the Board, for the period of time in which their child, F.F., was ineligible for a free education in the Clifton School District.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/15/02

Date of Mailing: 7/15/02

* This decision, as the Commissioner's final determination may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:2-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

272-02

SEC # 36-01
C # 272-02SEC
SB # 32-02

IN THE MATTER OF EDWARD VICKNER, :
EWING TOWNSHIP BOARD OF :
EDUCATION, MERCER COUNTY. :

STATE BOARD OF EDUCATION

DECISION ON MOTIONS

Decided by the School Ethics Commission, May 28, 2002

Decided by the Commissioner of Education, July 16, 2002

For the Respondent-Appellant, Edward Vickner, pro se

For the Participant School Ethics Commission, Kimberley M. Lake, Deputy Attorney General (David Samson, Attorney General of New Jersey)

In a decision rendered on May 28, 2002, the School Ethics Commission (hereinafter "Ethics Commission") concluded that Edward Vickner (hereinafter "respondent"), a member of the Board of Education of the Township of Ewing, had violated the School Ethics Act when he commented during a public budget meeting that the stipend paid to team leaders at the middle school was low. The Commission found that the respondent had a financial involvement that might reasonably be expected to impair his objectivity or independence of judgment since his wife was a team leader at the middle school. The Ethics Commission also found that the respondent had violated the Act when he sought out and disclosed confidential student information to the Ewing Board. The Commission recommended that the respondent be censured as a result of such violations. On July 16, 2002, the Commissioner of Education accepted the Ethics Commission's recommendation and directed that the respondent be censured.

The respondent filed the instant appeal to the State Board. The respondent subsequently filed a motion to compel production of documents and a motion to supplement the record on appeal with copies of the following materials: 1) the respondent's letter dated April 4, 2002 to the School Ethics Commission requesting a copy of Advisory Opinion A15-01 issued by the Commission on November 1, 2001; 2) the complainant's letter dated September 28, 2001 to the Ethics Commission seeking an advisory opinion; 3) Advisory Opinion A15-01 issued by the Ethics Commission on November 1, 2001; 4) Advisory Opinion A18-96 issued by the Ethics Commission on November 27, 1996; 5) N.J.A.C. 6A:28-1.7, "Advisory Opinions"; 6) the respondent's letter dated August 1, 2002 to the Ethics Commission requesting information concerning its investigation in this matter; 7) N.J.S.A. 18A:12-24.1, "Code of Ethics for School Board Members"; and 8) the respondent's letter dated August 14, 2002 to the Ethics Commission requesting a copy of the tape or a transcript of testimony presented at "the 7/23/02 Commission's hearing related to C11-02 and C20-02 (Consolidated)."[1]

The School Ethics Commission has filed a motion to participate in this matter.

Initially, we deny the respondent's motion to supplement the record. We find that the respondent has not demonstrated that any of the proposed exhibits are material to the issues on appeal, i.e., whether he violated the School Ethics Act and, if so, the appropriate penalty. N.J.A.C. 6A:4-1.9(b). Nor is it necessary to supplement the record with a statute and regulation. Moreover, N.J.A.C. 6A:28-1.7(d)(2) provides that "[n]o

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[1] The papers before us do not identify C11-02 and C20-02. In his brief, the respondent indicates that he had testified before the Ethics Commission on July 23, 2002, subsequent to the Commissioner's decision in this matter, and that he had filed a complaint with the Commission in June 2002 in which he "questioned [the complainant's] entitlement to Advisory opinion A15-01...." Brief in Support of Motion to Supplement, at 2.

information regarding any request for an advisory opinion shall be made public unless the information is incorporated into the advisory opinion and made public in accordance with [subsections (e) and (f) of that regulation]." N.J.S.A. 18A:12-31 provides that "[a]dvisory opinions of the commission shall not be made public, except when the commission, by a vote of at least six members, directs that the opinion be made public." See also N.J.A.C. 6A:28-1.7(f). The advisory opinion referenced in Item 3 of the respondent's motion does not indicate that it was made public by the Ethics Commission. Further, although the advisory opinion referenced in Item 4 of the motion does indicate that it was "for public release," the respondent has only provided the first page of that opinion with his motion. However, as in the case of statutes and regulations, the respondent can reference that opinion in his brief since it is a public document.

We also deny the respondent's motion to compel production of documents. A review of the respondent's motion reveals that he is not requesting the production of any existing documents, but, rather, is seeking answers from the Ethics Commission related to their investigation of the complaint filed against him. Again, we find that the respondent has not demonstrated how the information requested is material to the issues on appeal.

Finally, we grant the Ethics Commission's motion to participate in this matter.

Thelma Napoleon-Smith abstained.

December 4, 2002

Date of mailing DEC 06 2002

272-02

272-02SEC

IN THE MATTER OF EDWARD VICKNER, :

EWING TOWNSHIP BOARD OF EDUCATION, : COMMISSIONER OF EDUCATION

MERCER COUNTY. : DECISION

SYNOPSIS

The School Ethics Commission determined that respondent Board member violated the School Ethics Act when he commented in a public budget meeting that the stipend paid to team leaders was low when his wife was a team leader at the middle school. The Commission also found that respondent violated N.J.S.A. 18A:12-24.1(e) and (g) of the Act when he sought out and disclosed confidential student information to the Board.

The Commission recommended a penalty of censure to the Commissioner, who may not review the Commission's findings with respect to violation, but makes the final determination on the Commission's recommended penalty.

The Commissioner accepted the Commission's penalty recommendation and ordered that respondent be censured as a school official found to have violated the School Ethics Act.

July 16, 2002

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

IN THE MATTER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	:	
	:	**Docket No.: C36-01**
EDWARD VICKNER,	:	
EWING TWP. BD. OF EDUCATION,	:	**DECISION**
MERCER COUNTY	:	
	:	

PROCEDURAL HISTORY

This matter arises from a complaint filed by Vince Ordini alleging that Ewing Township Board of Education member Edward Vickner violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq. when, during a public budget meeting of the Board, he commented that the stipend paid to team leaders at the Fisher Middle School was low. Complainant alleges that Dr. Vickner violated N.J.S.A. 18A:12-24(c) because his wife is a team leader at the school. Complainant also alleges that Dr. Vickner violated the Act when he sought personal information regarding himself and his family and disclosed student information, including certain academic, disciplinary and attendance information, to the Board when the Superintendent advised him that the information was confidential, in violation of Code of Ethics sections N.J.S.A. 18A:12-24.1(c), (e), (f) and (g).

In his answer, Dr. Vickner asserted that when he commented on the stipend, he was merely expressing his opinion on a matter upon which the Board was not scheduled to take action. He further answered that he disclosed the aforementioned student information to Board members during a closed session Board meeting and denied that he publicly disclosed the information in violation of the Code of Ethics. Mr. Vickner denied having committed any violation of the School Ethics Act or the Code of Ethics.

At its meeting of April 2, 2002, the School Ethics Commission determined that there was no probable cause to credit the allegations that Dr. Vickner violated N.J.S.A. 18A:12-24.1(c) and (f) of the Code of Ethics for School Board Members. However, the Commission found probable cause to credit the allegations that Dr. Vickner violated N.J.S.A. 18A:12-24(c) when he commented on the team leader stipend and that he violated the Code of Ethics for School Board Members, N.J.S.A. 18A:12-24.1(e) and (g), when he disclosed student information, including academic, disciplinary and attendance information, to the Ewing Township Board of Education after the District Superintendent advised him that the information was confidential.

The Commission determined that the material facts were not in dispute regarding the allegations upon which it found probable cause. Therefore, in accordance with N.J.A.C. 6A:28-1.12(b), the Commission notified Dr. Vickner that he had 30 days from the date of the probable cause determination to submit a written statement setting forth the reasons that he should not be found in violation of the Act. Dr. Vickner requested an

extension to file his written statement and the request was granted at the Commission's meeting of April 23, 2002. The Commission received Dr. Vickner's written statement on May 17, 2002.

The Commission discussed Dr. Vickner's statement at its meeting of May 28, 2002. At its public meeting, the Commission voted to find that Dr. Vickner violated N.J.S.A. 18A:12-24(c) and N.J.S.A. 18A:12-24.1(e) and (g) of the Act. It now recommends that the Commissioner of Education impose a penalty of censure.[1]

FACTS

The Commission was able to discern the following facts based on the pleadings, documents submitted, testimony and its investigation.

Dr. Vickner was a member of the Ewing Township Board of Education for six years. Dr. Vickner's wife is a teacher at the Fisher Middle School in the Ewing Township School District. She held the position of team leader during the 2000-2001 school year, for which she received a stipend. At the Board's February 24, 2001 public budget meeting, which was conducted by the Superintendent, the middle school principal raised the issue of increasing the team leader stipend. Dr. Vickner commented that the stipend paid to team leaders was low. The Board was not scheduled to take any formal action at this meeting and therefore, it did not vote on the matter. The team leader stipend is determined by the teachers' contract. The current contract is effective from July 2000 to June 2003. The team leader is chosen by an annual election by the team.

Regarding the release of confidential student information, on September 6, 2001, Dr. Vickner sent an e-mail to the Superintendent of the District requesting certain academic, disciplinary and attendance information regarding complainant's son, who was a student in the Ewing school district during the 2000-2001 school year. In the e-mail, Dr. Vickner indicated that there was concern among some members of the Ewing community regarding the graduation of complainant's son. On September 7, 2001, the Superintendent provided Dr. Vickner with the requested information, but advised that the information was confidential. On October 9, 2001, complainant submitted a memorandum to the Board in which he asserted that the aforementioned conduct of Dr. Vickner was in violation of several ethics rules. Complainant read the memorandum publicly. In response to complainant's memorandum, on November 6, 2001, Dr. Vickner submitted a memorandum to the Board, wherein he disclosed the above-referenced information with respect to complainant's son. The information was provided to the Board and discussed in closed session.

[1] As of the date of this decision, Dr. Vickner is no longer a board member so the penalties of suspension and removal could not be imposed even if the Commission so desired.

ANALYSIS

The Commission found probable cause that Dr. Vickner violated N.J.S.A. 18A:12-24(c) when he commented in a public budget meeting that the stipend paid to team leaders was low when his wife was a team leader at the Fisher Middle School. N.J.S.A. 18A:12-24(c) provides:

> No school official shall act in his official capacity in any matter where he or a member of his immediate family has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family.

Dr. Vickner argues in his written submission in response to the probable cause finding that he was not acting in his official capacity when he made the comment. He submits that the Superintendent conducted the February 24, 2001 budget hearing and Board members were mere audience participants. The Commission disagrees with Dr. Vickner's characterization of his role as a member of the audience. The fact that the February meeting was not a regular Board meeting does not mean that members of the Board were not present in their official capacity. The only difference with the February meeting was that the Superintendent presented the budget. Thus, the Commission concludes that Dr. Vickner was acting in his official capacity as a board member when he made the statement at issue.

Dr. Vickner also argues that since the Commission recognized in its probable cause finding that the team leader stipends are determined by the teachers' contract, which currently is in effect until the end of June 2003, he only stated an opinion. He argues that any formal action by the Board was precluded by the duration of the contract and that, by the conclusion of the contract, his wife may not even be a team leader. The Commission recognized that Dr. Vickner's comment would not have an immediate impact, but nonetheless stated in its probable cause determination that an increase in the team leader stipend is a matter in which his spouse had a direct financial involvement. The Commission is not persuaded that such a financial involvement did not exist because the team leader stipend was determined by contract. The Commission reiterates from its probable cause determination that Dr. Vickner's comment could influence the preparation for budget discussions for the next fiscal year, which includes negotiating the next teachers' contract. Although Dr. Vickner argues that the contract will not expire until 2002-2003, which is the year following the next fiscal year, the Commission is aware that the contract of 2002-2003 was discussed during the fiscal year 2001-2002. Such preliminary discussions on negotiations are common, especially in Ewing Township. Dr. Vickner spoke on a matter in which he had a financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. Moreover,

he had a personal involvement with an increase in the team leader stipend that creates a benefit to the spouse. Therefore, the Commission concludes that Dr. Vickner acted in his official capacity in a matter in which he and his spouse had a direct financial involvement that might reasonably be expected to impair his objectivity and a personal involvement that creates some benefit to him and his spouse in violation of N.J.S.A. 18A:12-24(c).

Last, Dr. Vickner argues that if the Commission finds that he violated the Act merely by expressing his opinion, it is violating his First Amendment right to free speech. Dr. Vickner is welcome to express his opinion as to any matter other than the terms and conditions of his spouse's employment. The Commission does not believe that by so ruling, it is limiting Dr. Vickner's free speech beyond that which the School Ethics Act requires.

The Commission also found probable cause to credit the allegations that Dr. Vickner violated the Code of Ethics sections (e) and (g), when he sought out and disclosed student information to the Board after being advised by the Superintendent that the information was confidential. N.J.S.A. 18A:12-24.1(e) of the Code of Ethics sets forth:

> I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

Section (g) of the Code of Ethics provides:

> I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board members, interpret to the staff the aspirations of the community for its school.

In response to the probable cause finding, Dr. Vickner argues that he was essentially "set up" by complainant who accused him in a public meeting of bothering his daughter, wife, son and family business and other Board members who stated that his failure to respond to complainant's allegations was an admission that the accusations were true. Dr. Vickner states that he was compelled to write a memorandum to the Board referencing complainant's son and did not do so until after the complainant read his letter making the accusations, after the Board President wrote a letter further accusing him of using "terroristic" [sic] methods and after another Board member said that his silence was an admission. Dr. Vickner adds that when he did reference complainant's son in his memorandum, he only discussed his son's absences and credits and made no mention of his discipline record. He argues that all Board members had the same absence and credit data for all students enrolled in the alternative high school. He stresses that the discussion was held in closed session and that N.J.A.C. 6:3-6.5(c) permits the Board to discuss a pupil's record in executive session.

While Dr. Vickner has clearly explained why he sought the information and wrote the memorandum referencing complainant's son and why he brought it to the attention of Board members at the closed session meeting on November 10, 2001, his explanation does not negate the probable cause finding as he argues. The Commission believes that Dr. Vickner's actions were not vicious or in bad faith, in that he attempted to resolve a discrepancy where he believed that a board member's son was being given privileges that were not extended to other students. However, given the sensitive nature of the information, the more prudent course of action would have been to discuss the matter with the Superintendent who had provided the information in the first instance. Dr. Vickner argues that the Board reviews attendance and credit data for all students of the alternate school; however, when it does so, it does not refer to students by name. In the present case, Dr. Vickner made complainant's son the sole object of the Board's focus. This was not a discussion about record keeping problems or the awarding of class credit at the alternate school, the only concern was complainant's son. Although N.J.A.C. 6:3-6.5(c)(6) does allow a board to discuss information contained in a pupil's record in executive session, as Dr. Vickner argues, Dr. Vickner went beyond the discussion of the pupil's record to accusations that complainant's son should not have graduated. The Commission concludes that his doing so constituted taking private action that could compromise the Board in violation of N.J.S.A. 18A:12-24.1(e) and failing to hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals in violation of N.J.S.A. 18A:12-24.1(g).

DECISION

For the foregoing reasons, the Commission finds Dr. Vickner in violation of N.J.S.A. 18A:12-24(c) and N.J.S.A. 18A:12-24.1(e) and (g) of the School Ethics Act.

The Commission has considered the nature of the offenses and the fact that Dr. Vickner has suffered the ultimate penalty of not being re-elected to the Board. It now recommends that the Commissioner of Education impose a penalty of censure for the combined violations.

Paul C. Garbarini

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C36-01

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof and the testimony of the parties before it; and

Whereas, the Commission found probable cause to credit the allegations in the complaint; and

Whereas, the Commission has reviewed the written submission of Edward Vickner, Ph.D., in response to the finding of probable cause; and

Whereas, the Commission has determined that Dr. Vickner violated N.J.S.A. 18A:12-24(c) and N.J.S.A. 18A:12-24.1(e) and (g) of the School Ethics Act; and

Whereas, the Commission has directed that its staff prepare and transmit the decision; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on May 28, 2002.

Lisa James-Beavers
Executive Director

AGENCY DKT. NO. 181-6/02

IN THE MATTER OF EDWARD VICKNER,	:	
EWING TOWNSHIP BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
MERCER COUNTY.	:	DECISION

The record of this matter and the decision of the School Ethics Commission ("Commission"), including the recommended penalty of censure, have been reviewed.

This matter comes before the Commissioner to impose a sanction up Respondent Edward Vickner, former member of the Ewing Township Board of Education, based upon findings of fact and conclusions of law by the Commission that he violated *N.J.S.A.* 18A:12-24(c) of the School Ethics Act when he commented in a public budget meeting that the stipend paid to team leaders was low when his wife was a team leader at the Fisher Middle School. The Commission, additionally, found that respondent violated *N.J.S.A.* 18A:12-24.1(e) and (g) of the Act when he sought out and disclosed student information to the Board after being advised by the Superintendent that the information was confidential.

Upon issuance of the decision of the Commission, respondent was provided 13 days from the mailing of such decision to file written comments on the recommended penalty for the Commissioner's consideration. Respondent's comments contest the validity of the charges brought against him and request that the Commissioner, based upon information provided in his comment submission, dismiss the charges and, instead, make a finding of "no probable cause." Respondent further requests that this matter be returned to the School Ethics Commission for correction of what, he claims, were inaccuracies in the record.

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is **not reviewable by the Commissioner** herein. Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed based upon a finding of a violation by the Commission. Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that censure is the appropriate penalty in this matter for the reasons expressed in the Commission's decision. In so ruling, the Commissioner is satisfied that, in recommending a penalty for the violations it found, the Commission fully considered the nature of the offenses and weighed the effects of aggravating and mitigating circumstances. Therefore, the Commission's recommended penalty in this matter will not be disturbed.

Accordingly, IT IS hereby ORDERED that Edward Vickner be censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/16/02

Date of Mailing: 7/16/02

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

276-02

276-02R

K.B., on behalf of minor child, H.B.,	:	
PETITIONER,	:	
AND	:	
GLOUCESTER COUNTY INSTITUTE OF TECHNOLOGY,	:	
INTERVENOR,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RANCOCAS VALLEY REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
AND		
BOARD OF EDUCATION OF THE GLOUCESTER COUNTY INSTITUTE OF TECHNOLOGY, GLOUCESTER COUNTY,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE RANCOCAS VALLEY REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY, RESPONDENT.	:	

SYNOPSIS

In proceedings on remand directed by the State Board of Education, together with consolidated new petition, ALJ held, on summary basis, that performing arts program at Gloucester County Institute of Technology (GCIT) was not vocational within intendment of controlling statute and that GCIT had not followed proper steps for vocational program approval. ALJ concluded GCIT was therefore not entitled to tuition or transportation payments from Board for three students who attended the GCIT program.

Commissioner set aside the ALJ's findings and conclusions with respect to the characterization and approval status of the GCIT performing arts program, holding instead that it was, and is, an approved county vocational program within the intendment of applicable law. Commissioner directed Board to remit tuition and transportation costs for three students at issue.

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

July 18, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

GRANTING SUMMARY DECISION

OAL DKT. NO. EDU 2190-00

(On Remand, EDU 6974-97)

AGENCY DKT. NO. 314-9/97

K.B., ON BEHALF OF MINOR CHILD,
H.B.,

Petitioner,

and

GLOUCESTER COUNTY INSTITUTE
OF TECHNOLOGY,

Intervenor,

v.

BOARD OF EDUCATION OF THE
RANCOCAS VALLEY REGIONAL
HIGH SCHOOL DISTRICT,
BURLINGTON COUNTY,

Respondent,

And

OAL DKT. NO. EDU 6096-00
AGENCY DKT. NO. 160-5/00

GLOUCESTER COUNTY INSTITUTE OF TECHNOLOGY,

Petitioner,

v.

BOARD OF EDUCATION OF THE RANCOCAS VALLEY REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,

Respondent.

No appearance by or on behalf of petitioner, K.B. (as to OAL Dkt. No. EDU 2190-00)

Kim C. Belin, Esq., for intervenor-petitioner Gloucester County Institute of Technology (Capehart & Scatchard, attorneys)

Frank P. Cavallo, Jr., Esq., for respondent, Board of Education of the Rancocas Valley Regional High School District (Parker, McCay & Criscuolo, attorneys)

Record Closed: July 19, 2001 Decided: March 1, 2002

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

1. Procedural history

This matter was initially commenced by a petition by K.B. on behalf of a minor child, H.B., which matter was assigned OAL Dkt. No. EDU 6974-97, and has now been assigned OAL Dkt. No. EDU 2190-00 on remand. The dispute between the parties is now amended and

supplemented by a petition brought by the intervenor, Gloucester County Institute of Technology (GCIT) (I-3, Exhibits D and E), which has been assigned OAL Dkt. No. EDU 6096-00.

This matter initially involved a dispute between the parent and respondent Board of Education of the Rancocas Valley Regional High School District (RVRHSD or respondent) in which respondent refused to pay for H.B.'s transportation. The intervenor's subsequent petition involves the respondent's refusal to pay tuition for a student, H.B., who attended GCIT's Academy of Performing Arts during the school years 1997-98 and 1998-99 and from September 1999 to January 10, 2000. In this subsequent petition, GCIT claims that the respondent must reimburse it for tuition in the amount of $18,695.02 (I-3, Exhibit D). In an amended petition (I-3, Exhibit E), GCIT claims that the respondent must reimburse it for tuition and transportation costs in the total amount of $82,295 for three students, H.B., R.H. and K.W.

On September 4, 1997, petitioner, K.B., filed a petition on behalf of her minor daughter, H.B. seeking emergent relief with the Commissioner for an order to compel Rancocas Valley to provide H.B. with transportation to attend GCIT. It is to be noted that K.B.'s petition did not seek the payment of tuition. On September 5, 1997, Rancocas Valley filed an Answer and Memorandum of Law in opposition to the petition for emergent relief stating that Rancocas Valley offered a comparable program. A hearing with respect to the emergent relief application was held before ALJ Martone September 16, 1997. During oral argument counsel for Rancocas Valley argued that a performing arts program is not a vocational program requiring the local school district to provide tuition and transportation costs. Judge Martone denied the grant of emergent relief and scheduled a plenary hearing for October 22, 1997.

The order denying emergent relief was upheld by the Commissioner of Education by decision dated September 25, 1997. The Commissioner adopted the ALJ's decision in part and took judicial notice that GCIT's Performing Arts program fell within the purview of *N.J.S.A.* 18A:54-1, et seq. and removed the issue from the ALJ's consideration at the plenary hearing. Respondent filed a Notice of Appeal of the Commissioner's decision with the State Board of Education.

On October 30, 1997, GCIT's motion seeking leave to intervene in the initial matter was granted, a plenary hearing was conducted on October 31, 1997, and an initial decision was issued

on November 17, 1997 (I-3, Exhibit A), wherein it was found that respondent did not offer a program in drama that was comparable to that offered by GCIT, and ordering that Rancocas Valley pay for transportation of H.B. to GCIT. The Commissioner affirmed the initial decision and in a footnote stated that although the petition did not seek tuition, the respondent school district was responsible for tuition as well (I-3, Exhibit B),. Respondent Rancocas Valley filed an appeal of the Commissioner's decision to the State Board of Education on January 29, 1998.

The foregoing two appeals to the State Board of Education, (1) challenging the Commissioner's taking judicial notice that GCIT's Performing Arts program fell within the purview of *N.J.S.A.* 18A:54-1, et seq., and removing the issue from the ALJ's consideration at the plenary hearing, and (2) affirming the initial decision and stating that the respondent school district was responsible for tuition, were consolidated. On March 1, 2000, the State Board issued a decision (I-3, Exhibit C), in which it reversed the Commissioner's decision that inclusion of the GCIT program in the Department of Education's Directory of Verified Occupational Education Programs conclusively established that the program falls within the purview of *N.J.S.A.* 18A:54-1. The State Board also reversed the Commissioner's decision that the Board was responsible for H.B.'s transportation and remanded the matter to the Commissioner with a directive to transmit the matter to the OAL for proceedings to determine whether the GCIT performing arts program is vocational within the meaning of the statute. In addition the State Board reversed the Commissioner's determination that the Board was responsible for tuition and specifically stated that tuition was not to be considered on remand. The State Board stated:

> Since the petitioner did not make a claim against the Board for payment of H.B.'s tuition and the parties, therefore, did not litigate the Board's obligation to pay tuition, we also set aside the Commissioner's determination in a footnote that the Board was responsible for H.B.'s tuition at the Gloucester County Institute. Hence, the Commissioner's determination on remand, in the absence of proceedings to resolve the tuition issue, must necessarily be limited to the petitioner's request for transportation.

On April 28, 2000, intervenor, GCIT, filed a petition (I-3, Exhibit D), seeking payment of tuition and nonresident fees totaling $18,695. On May 8, 2000, an amended petition was filed to include tuition and transportation fees for three additional students who are residents of respondent's school district and attending the GCIT Program (I-3, Exhibit E). The tuition and

nonresident fees for these three students total $82,295. Respondent filed an answer to this petition, asserting in part that the petition was untimely. This matter was transmitted to the OAL and was assigned OAL Dkt. No. EDU 6096-00 with the recommendation that it be consolidated with OAL Dkt. No. EDU 2190-00.

The matter was assigned to the undersigned administrative law judge on March 24, 2000. A telephone prehearing conference was scheduled for April 27, 2000, and hearing dates were scheduled for September 11 and 13, 2000. The September 11 and 13, 2000 hearing dates were adjourned at the request of all parties based upon possible consolidation with other pending similar matters. At the scheduled telephone prehearing conference on April 27, 2000, petitioner failed to appear, failed to make known her whereabouts, and otherwise failed to participate in this matter despite being notified of this requirement.

The matter was rescheduled for telephone conference on May 15, 2001. The matter was rescheduled for an in-person prehearing conference on July 19, 2001, and on that date it was determined that the parties had submitted all necessary briefs, with respect to the resolution of this matter, and the record closed on that date. Because of my extensive caseload with a heavy hearing schedule, my handling of a number of other complex completed cases with earlier deadlines, and because of the complex factual disputes in this matter, orders of extension were entered which extended the time limit for filing an initial decision until March 1, 2002.

2. Summary of the Pending Motions and Issues to be Decided

By Notice of Motion for Summary Judgment[1] filed on September 14, 2000 (R-1, R-2), respondent Rancocas Valley Regional Board of Education seeks the entry of an order dismissing the petition (I-3, Exhibits D and E) filed against respondent by GCIT which is the intervenor in OAL Dkt. No. EDU 2190-00 and is the petitioner in OAL Dkt. No. EDU 6096-00, seeking the payment of tuition and transportation costs (OAL Dkt. No. EDU 6096-00). In support this motion, respondent argues in its Brief (R-2) that GCIT's claim for tuition is untimely and must be dismissed pursuant to *N.J.A.C.* 6:24-1.2(c)[2]. It contends that in the original matter (OAL Dkt. No. EDU 6974-97), both K.B. and GCIT had adequate notice of respondent's denial of tuition

[1] Even though the parties have referred to their motions as motions for summary judgment, they should more properly be referred to as motions for summary decision. *N.J.A.C.* 1:1-12.5.
[2] Now *N.J.A.C.* 6A:3-1.3(d).

payment in October 1997 and at the latest had adequate notice of respondent's absolute refusal to accept any responsibility for H.B. in December 1998, and that since there is no compelling reason for relaxing the 90-day rule and because the action is barred is by the entire controversy doctrine, the matter should be dismissed. By another Notice of Motion for Summary Judgment filed on September 14, 2000, in OAL Dkt. No. EDU 6096-00 (R-4), respondent likewise seeks the dismissal of the petition filed against respondent for the same reasons.

In its opposition to respondent's motion (I-4), intervenor-petitioner GCIT contends that its petition for tuition was filed within the time limits set by the State Board of Education in *N.J.A.C.* 6A:3-1.3(d). It further argues that relaxation of the 90-day rule is warranted where there is a compelling interest or a continuing violation, and that the action is not barred by the entire controversy doctrine (I-4).

By Notice of Motion for Summary Judgment filed on September 18, 2000, (I-1), intervenor-petitioner GCIT (intervenor in OAL Dkt. No. EDU 2190-00 and petitioner in OAL Dkt. No. EDU 6096-00), seeks an order requiring respondent to pay transportation costs and tuition to intervenor-petitioner. In its Brief in support of this motion (I-3), intervenor-petitioner contends that the Southern New Jersey Academy of the Performing Arts at GCIT is an approved vocational program and as such, GCIT is entitled to charge tuition and non-resident fees for non-residents pursuant to *N.J.S.A.* 18A:54-20.1(c) and is entitled to transportation costs pursuant to *N.J.S.A.* 18A:39-1.

In respondent's Brief in Opposition to Petitioner's Motion for Summary Judgment filed on October 6, 2000 (R-7), respondent takes the position that petitioner-intervenor's Motion for Summary Judgment should be denied because the Academy at GCIT is not a county vocational school and the program at the Academy does not constitute vocational education under New Jersey law. In addition, it contends that GCIT did not comply with the approval procedure set forth in *N.J.A.C.* 6:43-8.2(a) for vocational programs and/or courses. Finally, it contends that respondent is not required to pay tuition even if the program is considered to be vocational because the characteristics of the program at the Academy at GCIT suggests that it is a private vocational school rather than a county vocational school, and is not vocational at all, but has more similarity to the school choice program. Finally, respondent contends that the claim is untimely and is also barred by the entire controversy doctrine.

Based upon the contents of the foregoing motions and briefs, the issues to be decided in this matter are as follows:

1. Whether the Southern New Jersey Academy of the Performing Arts of intervenor-petitioner GCIT is an approved vocational program and, if so, whether GCIT is entitled to charge tuition and non-resident fees for non-residents pursuant to *N.J.S.A.* 18A:54-20.1(c) and is entitled to transportation costs pursuant to *N.J.S.A.* 18A:39-1?

   A. Whether GCIT complied with the approval procedure set forth in *N.J.A.C.* 6:43-8.2(a) for vocational programs and/or courses?

   B. Whether respondent is not required to pay tuition even if the program is considered to be vocational because the characteristics of the program at the Academy at GCIT suggests that it is a private vocational school rather than a county vocational school, and is not vocational at all, but has more similarity to the school choice program?

2. Whether GCIT's claims for tuition (I-3, Exhibits D and E) are untimely and must be dismissed pursuant to the 90-day rule?

   A. If GCIT's claims for tuition are timely and must be dismissed, is there a compelling reason for relaxing the 90-day rule?

   B. If GCIT's claim for tuition is untimely, whether GCIT's claim for tuition should not be dismissed pursuant to the 90-day rule because there is a continuing violation?

3. Are GCIT's claims for tuition barred by the entire controversy doctrine, and therefore subject to dismissal?

3. Discussion with respect to whether the performing arts program of intervenor-petitioner GCIT is an approved vocational program and, if so, whether GCIT is entitled to charge tuition and non-resident fees for non-residents pursuant to N.J.S.A. 18A:54-20.1(c) and is entitled to transportation costs pursuant to N.J.S.A. 18A:39-1?

The March 1, 2000 decision of the State Board of Education stated that the first issue to be decided is whether the GCIT performing arts program was vocational within the intendment of *N.J.S.A.* 18A:54-1 et seq. during the period relevant to this matter. Thus, I must deal with the following in order to decide this matter:

1. Whether the Southern New Jersey Academy of the Performing Arts of intervenor-petitioner GCIT is an approved vocational program and, if so, whether GCIT is entitled to charge tuition and non-resident fees for non-residents pursuant to *N.J.S.A.* 18A:54-20.1(c) and is entitled to transportation costs pursuant to *N.J.S.A.* 18A:39-1?

   A. Whether GCIT complied with the approval procedure set forth in *N.J.A.C.* 6:43-8.2(a) for vocational programs and/or courses?

   B. Whether respondent is not required to pay tuition even if the program is considered to be vocational because the characteristics of the program at the Academy at GCIT suggests that it is a private vocational school rather than a county vocational school, and is not vocational at all, but has more similarity to the school choice program?

If its program is an approved vocational program GCIT is entitled to charge tuition and nonresident fees for nonresidents pursuant to *N.J.S.A.* 18A:54-20.1(c) which provides:

> The board of education of a county vocational school district shall receive such funds as may be appropriated by the county pursuant to *N.J.S.A.* 18A:54-29:2 and shall be entitled to collect and receive from the sending districts in which each pupil attending the vocational school resides, for the tuition of that pupil, ... a sum not to exceed the actual cost per pupil as determined for each vocational program classification, according to rules prescribed by the commissioner and approved by the State Board. Whenever funds have been appropriated by the county, the county vocational school district may charge a fee in addition to tuition for any pupils who are not residents of the county. The fee shall not exceed the amount of the county's per pupil appropriation to the county vocational school district.

If it is an approved vocational program GCIT would also be entitled to transportation costs pursuant to *N.J.S.A.* 18A:39-1. This statute provides in relevant part:

> When any school district provides any transportation for public school pupils to and from school pursuant to this section, transportation shall be supplied to school pupils residing in such school district in going to and from any remote school other than a public school, not operated for profit in whole or in part, located within the State not more than 20 miles from the residence of the pupil.

Respondent argues that GCIT's Academy is not consistent with a "vocational education " program as contemplated by the relevant statutes and regulations. It relies on *N.J.S.A.* 18A:54-1 which defines "vocational education" as "any education the controlling purpose of which is: (a) to fit for profitable employment; (b) to provide training which is supplemental to the daily employment; or (c) to fit for homemaking, according to the state plan for vocational education adopted by the state board." It also relies on the definition of the term "vocational education" found in *N.J.A.C.* 6:43-1.2[3] as:

> organized educational programs offering a sequence of courses which are directly related to the preparation of individuals for paid or unpaid employment in current or emerging occupations in such fields as agriculture/business, business occupations, health occupations, home economics, marketing occupations, technical occupations, and trade and industrial occupations or for additional preparation for a career in such fields and in other occupations requiring less than a baccalaureate or advanced degree. Vocational education programs include competency-based applied learning which contributes to a pupil's academic knowledge, higher-order reasoning and problem-solving skills, work attitudes, general employability skills, and the occupationally-specific skills necessary for economic independence as a productive and contributing member of society. Vocational student organization activities are an integral part of the program.[4]

The major vocational education program areas listed in the regulations are: (1) agriculture/agribusiness education, (2) business education, (3) health occupations education, (4) home economic related occupations education, (5) marketing education, (6) technical education,

[3] It is to be noted that this matter is governed by Chapter 43 of Title 6 of the New Jersey Administrative Code which was in effect at the time. Chapter 43 of Title 6 was subsequently readopted, effective November 20, 2001, and recodified as *N.J.A.C.* 6A:19 by R.2001, d.473.

[4] Compare with *N.J.A.C.* 6A:19-1.2, definition of "Vocational-technical education".

and (7) trade and industrial education. *See N.J.A.C.* 6:43-3.13.[5] Respondent notes that there is no reference to dance or drama occupations in *N.J.A.C.* 6:43-1.2, as well as in the Federal Regulations, 20 *U.S.C.A.* Section 2302(29)(A).

Respondent argues that the State of New Jersey's Plan for Vocational and Technical Education, which is referred to in the regulations, provides that "programs delivered at the local level may include the following educational disciplines: "(1) Agriculture; (2) Business/Office; (3) Health Occupations; (4) Family and Consumer Sciences; (5) Technical Communications; (6) Trade and Industrial; and (7) Other: Education, Law and Legal, and Parks, Recreation and Leisure." (Referring to the State Plan at p. 25.) Respondent once again notes that any reference to dance or drama-related training is conspicuously absent, and that the program offered by GCIT does not fit within any of these categories.

N.J.A.C. 6:43-3.1 provides:

> Vocational instruction shall be designed to: prepare individuals for paid or unpaid employment, as semi skilled or skilled workers or technicians or semiprofessionals in recognized occupations and in new or emerging occupations; prepare individuals for enrollment in advanced or highly skilled vocational and technical education programs; assist individuals in the making of informed and meaningful occupational choices; or achieve any combination of the above objectives.[6]

According to *N.J.A.C.* 6:43-3.2:

> (a) Vocational education for paid or unpaid employment includes:
> 1. Instruction related to paid or unpaid employment in the occupation or the occupations for which the pupils are being trained;
> 2. Classroom related academic and technical instruction, field, shop, laboratory, cooperative vocational education, apprenticeship or other occupational experiences;
> 3. Instruction provided for entry level employment or instruction designed to upgrade or update workers in occupational skills and knowledge in order to enhance stability or upward mobility in employment; and

[5] See, *N.J.A.C.* 6A:19-6.9 and *N.J.A.C.* 6A:19-6.5(a).
[6] Compare with *N.J.A.C.* 6A:19-6.1(c).

> 4. Remedial or other instruction designed to correct educational deficiencies or handicaps which prevent pupils from benefiting from instruction designed to teach competence in occupations.[7]

Vocational education is primarily geared towards preparing individuals for employment in a specific occupation or for enrollment in highly skilled post-secondary vocational and/or technical education programs. *See N.J.A.C.* 6:43-3.3(a). The regulations dealing with vocational education are geared towards the more technical, less subjective fields.

I agree with respondent that a program in dance and performing arts is not consistent with the definitions of vocational education since it is difficult to classify training in acting, dance or music as education "with the controlling purpose of which is to fit for profitable employment." Such training does not qualify an individual to perform a trade or profession for which there are many readily available jobs, and it is not a field or "vocation" which is known to offer steady employment for those trained. It is also difficult to classify training in performing arts as including "competency based applied learning which contributes to a pupil's academic knowledge, higher-order reasoning and problem-solving skills, work attitudes, general employability skills, and the occupationally-specific skills necessary for economic independence as a productive and contributing member of society", as required by the regulations. *See, N.J.A.C.* 6:43-1.2.

The regulations also provide for competency tests within the vocational programs. *N.J.A.C.* 6:43-3.13.[8] A competency test in performing arts which would accurately depict one's employability would appear to be difficult or impossible to create. In fact, at this point, it does not seem that such a test exists.

The regulations also require the Commissioner to establish annual minimum job placement standards for district boards whose pupils are being trained for paid employment. If a district reports placement rates below the standards for two consecutive years, the board must submit a two-year program improvement program, including competency assessment data. The district then has two years following approval of the plan by the Commissioner to overcome

[7] Compare with *N.J.A.C.* 6A:19-6.2(a).
[8] Compare with *N.J.A.C.* 6A:19-6.9.

program deficiencies. *N.J.A.C.* 6:43-7.3(a).[9] This requirement reaffirms the idea that the main purpose of the program is to train for employment in a specific field, something that will most likely not be achieved by the same majority of students completing GCIT's program, as with the more technical programs.

Based upon the goals of the vocational education program and the standards established to monitor the programs, I **FIND** that a performing arts program such as the one offered at the Academy at GCIT, is not consistent with the other programs offered. As GCIT admitted in its own application, the fields for which its program offers training, dance and drama related occupations, are not listed on the NJOIC labor demand list. (See, I-3, Exhibit H). I **FIND** that the definition of vocational education cannot be construed to include dance or drama programs. Therefore, I **CONCLUDE** that the program offered by the Academy at GCIT is inconsistent with the definition of "vocational education" as defined by New Jersey law, and that respondent is entitled to summary decision on this issue.

It must next be determined whether GCIT complied with the approval procedure set forth in *N.J.A.C.* 6:43-8.2(a) for vocational programs and/or courses?

County vocational schools are created by either the board of freeholders or by the voters in counties with populations of fewer than 100,000 inhabitants. *N.J.S.A.* 18A:54-12; 18A:54-13; 18A:54-14. The course of study for county vocational schools is subject to approval by the Commissioner and State Board. *N.J.S.A.* 18A:54-24. Course or program approval is a five-step process that is outlined in *N.J.A.C.* 6:43-8.2(a).[10] District boards of education seeking to establish a new vocational program or courses are directed to do the following:

1. The district board of education seeking to establish new vocational courses or programs must first request planning recommendations from the Workforce Investment Board to eliminate unnecessary duplication of programs and to foster a unified delivery system in the labor market" (*N.J.A.C.* 6:43-8.2(a)(1));

2. After verification of the program need and recommendation from the Workforce

[9] Compare with *N.J.A.C.* 6A:19-6.12(a).
[10] Now repealed; Compare with *N.J.A.C.* 6A:8-2.2(b)5.

Investment Board, the district board must submit its request to the county superintendent of schools (*N.J.A.C.* 6:43-8.2(a)(2)).

3. The county superintendent of schools must then review the request and the verification and recommendations of the Workforce Investment Board and submit a recommendation to the Vocational Education Program review Panel within 30 days of receipt of the request (*N.J.A.C.* 6:43-8.2(a)(3));

4. The Vocational Education Program Review Panel (VERP) shall review the county superintendent's recommendation based upon a review of the occupational supply and demand needs and local or regional availability of the proposed courses or programs. The panel must then, within *45* days of receipt of the county superintendent's recommendation, recommend approval or disapproval and submit its recommendation to the Director of the Office of School-to Career and College Initiatives (*N.J.A.C.* 6:43-8.2(a)(4)); and

5. The Director of the Office of School-to-Career and College Initiatives must then review the panel's recommendation and approve or disapprove the request, notifying the Workforce Investment Board and the VERP within 10 days (*N.J.A.C.* 6:43-8.2(a)(5)).

Respondent contends that GCIT did not comply with this approval procedure and has provided no evidence that it complied with *N.J.A.C.* 6:43-8.2(a).

In response, GCIT relies on certain undisputed facts. It is undisputed that on October 2, 1996, Victor Morella, the Superintendent of GCIT submitted a letter to the County Superintendent, Dr. John E. Sherry, requesting approval to create a full-time performing arts program. (I-3, Exhibit F). On October 16, 1996, the County Superintendent confirmed that GCIT had followed all the procedures to create such a program. (I-3, Exhibit G). Before a new occupational program can be offered, an application for approval must be submitted. *N.J.S.A.* 18A:54-24. GCIT submitted such an application for the dance/drama/theatre arts program. (I-3, Exhibit H - GCIT Occupational Approval Application.) based upon the August 17, 1999 letter from Thomas Henry of the Department of Education, GCIT asserts that approvals for the performing arts program were received from the Workforce Investment Board on June 1, 1994,

and September 1, 1994 from the Director, Office of School-to-Careers. (I-3, Exhibit I) Accordingly, GCIT contends that the Academy was an approved vocational program as of September 1, 1994.

Based upon the foregoing, respondent contends that GCIT did not comply with the approval procedure set forth in *N.J.A.C.* 6:43-8.2(a) for vocational programs and/or courses. Respondent contends that there is no evidence that GCIT ever sought planning recommendations from the Workforce Investment Board or that it considered the need for a program of this type. After seeking a recommendation from the Workforce Investment Board, GCIT was required to submit a request to the county superintendent. See *N.J.A.C.* 6:43-8.2(a)(2). Instead, it appears GCIT took it upon itself to conclude there was a need for the program and it simply notified the county of its intentions. The letter from County Superintendent, John Sherry (*Petitioner's Brief,* Exhibit G), is proof that the process was not followed. The letter in response to a request for the procedure to be followed indicates that notification to the County office was sufficient, when more is required under the regulations.

Respondent contends that there is no evidence that GCIT ever requested planning recommendations from the Workforce Investment Board or that such recommendations were submitted to County Superintendent Sherry. In fact, GCIT was told by County Superintendent Sherry that notification was sufficient. Respondent further contends that there is no evidence that the Gloucester County Superintendent Sherry reviewed a request or recommendations of the Workforce Investment Board, and submitted a recommendation to VERP; no evidence that VERP reviewed the Superintendent's recommendation based upon a review of the occupational supply and demand needs and local or regional availability of the proposed courses or program, nor that the panel recommended approval or disapproval of the recommendation; and no evidence that the director, Office of School to Career and College Initiatives reviewed VERP's recommendations.

Respondent further argues that there is no evidence that anyone ever fully considered the need for this type of program, taking into consideration the occupational supply and demand and availability in the region, as was required by the relevant regulations or that any of the necessary recommendations were made.

In this matter, GCIT submitted a letter which its superintendent sent to the County Superintendent, notifying the County of its intent to start the program, and a letter from the Director of the Office of School to Career. However, there is no evidence in the record that GCIT ever sought planning recommendations from the Workforce Investment Board or that the Board considered the need for a program of this type. After seeking a recommendation from the Workforce Investment Board, GCIT was required to submit a request to the county superintendent. *See N.J.A.C.* 6:43-8.2(a)(2). Instead, it appears that GCIT simply concluded that there was a need for the program and it notified the county superintendent of its intentions. The letter from County Superintendent, John Sherry (I-3, Exhibit C), establishes that the process was not followed. The letter in response to a request for the procedure to be followed indicates that notification to the County office was sufficient, when much more is required under the regulations.

N.J.A.C. 1:1-12.5(b) of the regulation applicable to a motion for summary decision provides in relevant part:

> The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary judgment is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate shall be entered.

A contested matter can be summarily disposed of without a plenary hearing in instances where the undisputed material facts, as developed on motion or otherwise, indicate that a particular disposition is required as a matter of law. *Matter of Robros Recycling Corp.*, 226 *N.J. Super.* 343, 350 (App. Div. 1988), *certif. den.* 113 *N.J.* 638 (1988).

Based upon the foregoing language of the regulation, it is clear that when a motion for summary decision is made and supported, an adverse party must respond with specific facts showing that there is a genuine dispute. Thus, the burden in this matter is on GCIT to show by affidavit or documentary evidence that the requirements set forth in the approval procedure in

N.J.A.C. 6:43-8.2(a) have been complied with. I **FIND** that there is no evidence that GCIT ever requested planning recommendations from the Workforce Investment Board or that such recommendations were submitted to County Superintendent, Dr. John M. Sherry (in fact GCIT was told notification was sufficient); I **FIND** that there is no evidence that Gloucester County Superintendent Sherry reviewed a request or recommendations of the Workforce Investment Board, and submitted a recommendation to VERP; I **FIND** that there is no evidence that VERP reviewed the Superintendent's recommendation based upon a review of the occupational supply and demand needs and local or regional availability of the proposed courses or program, nor that the panel recommended approval or disapproval of the recommendation; and I **FIND** that there is no evidence that the director, Office of School to Career and College Initiatives reviewed VERP's recommendations.

In fact, I **FIND** that there is no evidence that anyone ever fully considered the need for this type of program, taking into consideration the occupational supply and demand and availability in the region, as was required by the relevant regulations or that any of the necessary recommendations were made. Therefore, I **CONCLUDE** that there is clearly insufficient proof that GCIT complied with the procedures set forth in *N.J.A.C.* 6:43-8.2(a), and that the program is in fact an approved county vocational school. Accordingly, Respondent is entitled to summary decision as to this issue.

Additional issues raised by respondent and related to the foregoing are whether it is not required to pay tuition even if the program is considered to be vocational because the characteristics of the program at the GCIT Academy suggests that it is a private vocational school rather than a county vocational school, and because it is not a vocational program at all, but has more similarity to the school choice program? However, since I have determined that the GCIT program is neither a vocational program nor is it approved, I **CONCLUDE** that it is unnecessary to address these additional issues.

4. Discussion with respect to respondent's motion that the petition of intervenor-petitioner GCIT was untimely, and is subject to the entire controversy doctrine.

My determination that the GCIT program is neither a vocational program nor is it approved, would ordinarily obviate dealing with the timeliness issue and the entire controversy

doctrine issue. However, I recognize that this is a hotly contested matter and that it is unlikely that my initial decision will be the final word. Thus, to avoid the possibility of a remand at least with respect to the remaining issues, I believe it to be prudent to deal with the timeliness issue and the entire controversy doctrine issue.

It must first be decided whether GCIT's claims for tuition and nonresident fees for H.B. and for tuition, nonresident fees and transportation for R.H. and K.W. (I-3, Exhibits D and E) are untimely and should be dismissed?

A close examination of the submissions of the parties reveals that the facts are undisputed with respect to this issue and the question of the applicability of the entire controversy doctrine. These undisputed facts are as set forth in the three paragraphs which follow.

In April 1997, H.B., a resident of respondent's school district, was accepted into the GCIT performing arts program for the 1997-1998 school year (I-5, Exhibit A). On May 9, 1997, GCIT Superintendent of Schools, Victor Morella sent a letter to Dr. Henry Cram, Superintendent of Schools for the Rancocas Valley Regional High School District advising him that H.B. had been accepted to GCIT for the school year beginning in September 1997 and that Rancocas Valley would be responsible for transportation. (R-3, Exhibit A). This letter did not specifically mention tuition. On July 31, 1997, H.B.'s mother was informed that her resident district would be responsible for transportation costs (I-5, Exhibit B). On July 31, 1997, Mr. Morella also sent a letter to Dr. Cram stating that according to a recent decision of the Commissioner of Education Leo Klagholz resident high schools were obligated to provide transportation services and tuition for students attending regional career academies. (R-3, Exhibit B). On September 26, 1997, GCIT's School Business Administrator sent Robert Sapp, the Assistant Superintendent for Business Administration at Rancocas Valley a letter informing him that one student, H.B., would be attending GCIT and requesting a tuition payment of $7,600 by July 1, 1998 or in monthly installments commencing on November 1, 1997. A Tuition Contract Agreement was enclosed for his signature. (I-5, Exhibit C; R-3, Exhibit C). GCIT's Business Administrator sent Mr. Sapp another letter on February 5, 1998 informing him of the tuition rate for the 1998-99 school year and stating that no payment had been received for tuition for the 1997-98 school year or for transportation. (I-5, Exhibit E; R-3, Exhibit D). On June 3, 1998, GCIT sent a letter to Dr. Cram

informing him that GCIT's last day of school would be June 12, 1998 and that transportation would need to be provided up to that date. (R-3, Exhibit E).

On July 6, 1998, Mr. Morella sent Dr. Cram another letter advising him that H.B. and a second student, K.W., would be attending GCIT in September 1998. (R-3, Exhibit F). On August 21, 1998, GCIT's Business Administrator sent Mr. Sapp a letter informing him of the transportation costs for the two students and of the fact that they had not received payment for tuition or transportation costs for H.B. and K.W. for the 1997-98 school year. (I-5, Exhibit G; R-3, Exhibit G). On August 31, 1998, a letter was sent to Mr. Sapp by GCIT enclosing a Tuition Contract Agreement for H.B. and K.W. to be signed by Mr. Sapp and informing him of the tuition rate. (I-5, Exhibit H; R-3, Exhibit H). GCIT's Business Administrator called and spoke to Mr. Sapp in or about December 1998 and asked whether they were planning on paying tuition or whether the Board had deposited any money into a fund in the event that the Board was eventually ordered to do so. Mr. Sapp informed GCIT's Business Administrator, Daniel T. Greene that they would not be paying tuition and that no money had been set aside for that purpose. He gave Mr. Greene the name of the Board's auditor so that he could confirm that the Board had not set aside any money for payment to GCIT. (R-3, Certification of Robert L. Sapp).

On July 30, 1999, Mr. Morella sent a letter to Dr. Cram advising him that H.B., and two other students, R.H. and K.W., had been accepted to GCIT for the 1999-2000 school year. (I-5, Exhibit I; R-3, Exhibit I). Assistant Superintendent, Vincent J. Green, sent a letter to Dr. Cram on August 25, 1999 informing him of the three students' attendance at GCIT and enclosing a calendar. (R-3, Exhibit J). On January 24, 2000, Mr. Sapp received a letter from Daniel T. Greene, enclosing a Tuition Agreement for two students, K.W. and R.H. (I-5, Exhibit K; R-3, Exhibit K). Finally, on January 27, 2000 GCIT sent an invoice for tuition for the school years 1997-98, 1998-99, and 1999-00. (I-5, Exhibit L; R-3, Exhibit L). Respondent did not execute or return any of the Tuition Contracts that GCIT sent to it and did not make any payments for either tuition or transportation. (R-3, Certification of Robert L. Sapp).

Respondent contends that at the latest, both the petitioner and GCIT must be said to have had adequate notice at the time that GCIT intervened in the case on October 30, 1997, that respondent was refusing to pay any costs relating to H.B.'s attendance. The respondent had responded to the original petition, claiming that it had a comparable program and disputing

GCIT's classification as having a "vocational" program within the meaning of the statute. In addition, Mr. Sapp informed GCIT in December of 1998 that not only was the Board refusing to pay, it had also not budgeted or set money aside for those purposes. (R-3)

GCIT points out that the Commissioner has interpreted *N.J.A.C.* 6A:3-1.3(d) to apply when the petitioner has notice of the action which is the subject of the controversy, not the date when the complained of action occurred. *Baptist v. Trachtenberg*, 1991 *S.L.D.* 1266. It argues that it has complied with this regulation.

GCIT argues that it did not have adequate notice that respondent would not pay tuition for H.B. or any other student until the State Board decision on March 1, 2000. Thus, GCIT contends that its petition demanding tuition was filed well within the 90 day time limit established in state regulations. It contends that the State Board's decision rendered on March 1, 2000, was the date GCIT received notice that respondent was not going to remit tuition payments, and that its petition seeking tuition for H.B. was filed on April 27, 2000, well within the 90 day time limit. The Amended Petition seeking tuition for additional of respondents' students was filed on May 8, 2000, which it also contends was within the 90 day time limit.

GCIT argues that, contrary to respondent's assertions, it did not have notice on October 30, 1997 of respondent's refusal to remit tuition. Rather, on that date, GCIT had notice that respondent would not pay transportation costs and, therefore, it filed for intervenor status seeking reimbursement for transportation costs incurred for transporting H.B. to GCIT.

GCIT contends that prior to the March 1, 2000 State Board decision, it had no notice that respondent would not pay tuition. GCIT continuously sent numerous requests for payment to respondent, and it contends that respondent failed to take any action that could be construed as final action with regard to paying tuition. GCIT points out, in addition, that in his December 29, 1997 decision, the Commissioner ordered respondent to pay not only transportation, but also tuition costs. It contends that as of that date, there was no reason to believe that GCIT would not receive tuition payments from respondent. However, on March 1, 2000, the State Board reversed the Commissioner and absolved respondent of the obligation to pay tuition and transportation fees. GCIT contends that this State Board decision marks the date that GCIT's cause of action for tuition arose, and that the petition was filed within time.

The New Jersey Administrative Code sets forth the relevant statute of limitations for filing petitions. Specifically, *N.J.A.C.* 6A:3-1.3(d) provides:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. * * * .

As noted above in the argument of GCIT, the Commissioner has interpreted this regulation to apply when the petitioner has notice of the action which is the subject of the controversy, not the date when the complained of action occurred. See, *Baptist v. Trachtenberg, supra,* 1991 *S.L.D.* 1266. The limitations period begins to run when a party has "adequate notice" of a decision or action by a board of education. *Kaprow v. Bd. of Educ. of Berkeley Tp.,* 131 *N.J.* 572, 587 (1993). Notice is considered "adequate" even if it is informal, as long as it is sufficient to inform an individual of some fact he or she has a right to know and that the communicating party has a duty to communicate. *Id. at* 587-88.

The critical factual issue is the date on which petitioner, K.B. and intervenor GCIT had adequate notice of respondent's decision not to pay tuition for H.B. There is no dispute that GCIT sent repeated requests for payment of tuition and transportation costs beginning in 1997. It is also undisputed that respondent took no action to make or deny any payment or to acknowledge any of these requests until December 1998.

In September 1997, H.B.'s mother filed a petition for emergent relief because of respondent's denial to pay for transportation to GCIT. The respondent filed an answer alleging that it had a comparable program and disputing that GCIT qualified as a vocational program requiring any payment. GCIT filed a motion to intervene, which was granted on October 30, 1997. I **FIND** that, at that time, being aware of respondent's argument and refusal to pay transportation costs, GCIT had notice of the respondent's refusal to accept GCIT's program as a vocational program within the meaning of the statute as well as its refusal to accept responsibility to make any transportation payments on behalf of students from respondent's school district attending GCIT's program. However, I **FIND** that this does not amount to

adequate notice to GCIT that respondent had denied any claim for the payment of tuition for H.B.'s attendance at GCIT. In addition, I **FIND** that as a result of the December 29, 1997 decision of the Commissioner of Education ordering respondent to pay not only transportation, but also tuition costs, GCIT was led to believe that it would receive unpaid tuition from respondent

The first notification to GCIT that its claim for payment of tuition for H.B. as well as for another student, K.W., was denied did not occur until December 1998 when it was notified that respondent not only refused to pay any amounts it was claiming, but also had not budgeted any funds or put any funds aside for that purpose. The Affidavit of Robert Sapp, filed with respondent's Motion for Summary Judgment (R-3), indicates that GCIT's Business Administrator, Daniel T. Greene, called and spoke to Mr. Sapp in or about December 1998 and asked whether respondent was planning on paying tuition or whether it had deposited any money into a fund in the event it was eventually ordered to do so. Mr. Sapp states that he informed Mr. Greene that respondent would not be paying tuition and that no money had been set aside for that purpose. He also gave Mr. Greene the name of the Board's auditor so that he could confirm that no money had been set aside for payment to GCIT. These assertions are not disputed by GCIT. This notice would have been adequate even though it was informal, since it was sufficient to inform GCIT of a fact that it has a right to know and that the communicating party has a duty to communicate. *Kaprow v. Bd. of Educ. of Berkeley Tp., supra,* 131 *N.J.* at 587-88. However, I **FIND** that this notice occurred during a time period when the Commissioner's decision requiring the payment of tuition to GCIT was in effect and had not been reversed, although it was under appeal to the State Board of Education.

Under these circumstances, I **FIND** that until March 1, 2000, there was no reason for GCIT to believe that it would not receive tuition payments from respondent. I **FIND** that it was not until the March 1, 2000 State Board of Education reversal of the Commissioner's decision absolving respondent of the obligation to pay tuition and transportation fees that GCIT's cause of action for tuition arose. Therefore, I **FIND** that the petition was filed within time.

In addition, I **FIND** that there is nothing in the record in this matter to establish that GCIT had any notice, no matter how informal, that respondent was denying the payment of

tuition or transportation costs with respect to the attendance of student R.H. The pending action before the OAL and the Department of Education dealt only with H.B.'s transportation costs.

Since I have concluded that GCIT's claims for tuition are timely, I would normally not need to decide if there a compelling reason for relaxing the ninety-day rule. However, I will also address this issue for reasons of prudence.

GCIT maintains that strict adherence to the 90 day rule and dismissing GCIT's petition would compound the injustice GCIT has already suffered. It argues that the Commissioner has permitted relaxation where a substantial constitutional issue was presented, where judicial review was sought of an informal administrative determination, and where a matter of significant public interest is involved.

GCIT's contends that its pursuit of reimbursement for tuition and transportation fits within the parameter of fundamental public interest beyond the parties' interests because the issue of tuition and transportation payment is not exclusive to these parties, but involves potentially all county vocational schools in the state. Thus, it contends that strict adherence to the 90-day rule would "place form over substance" if the petition is dismissed, relying on *Bey v. Newark Bd. of Educ.,* 93 *N.J.A.R.2d* (EDU) 288, 295; *Shokey v. Bd. of Educ. of Tp. of Cinnaminson,* 1978 *S.L.D.* 919 It asserts that such a result would potentially deprive a significant number of students of the opportunity to take advantage of a vocational education. For example, in school year 1998-99, there were 51 nonresident students enrolled in GCIT. (I-5, Exhibit N - 1998-99 Non-resident enrollment.) Accordingly, it contends that the greater public interest in this matter lies with relaxing the 90- day rule.

Respondent argues that there are no compelling circumstances here that would justify relaxation of the ninety-day rule to keep GCIT's petition from being dismissed. It contends that this case involves "the mere payment for services" relying on *Morris-Union Jointure Comm. v. Bd. of Educ. of the Borough of South River,,* 92 *N.J.A.R. 2d* (EDU) 453 at 455. Respondent contends that there is no substantial constitutional issue or issue affecting the public interest in this case. Respondent takes the position that there is no compelling reason to relax the 90-day rule in this case.

The ninety-day rule is mandatory and may be relaxed only where there is some compelling reason for the same, such as the presence of a substantial constitutional or other issue of fundamental public interest beyond that of concern only to the parties themselves. The rule is to be relaxed only "where strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." *Morris-Union Jointure Comm. v. Bd. of Educ. of the Boro. of South River,* 92 *N.J.A.R.2d* (EDU) 453. Moreover, the fact that application of the rule may result in the dismissal of a meritorious claim does not warrant relaxation of the rule.

Ordinarily, because this matter involves the mere payment for services, there would be no reason to relax the 90-day rule. *Morris-Union Jointure Comm. v. Bd. of Educ. of the Boro. of South River, supra,* 92 *N.J.A.R.2d* (EDU) at 455. However, I have previously found that respondent did not provide adequate notice to GCIT of its refusal to pay tuition until December 1998. Based on my prior finding that as a result of the December 29, 1997 Commissioner's decision ordering respondent to pay tuition, I **FIND** that GCIT was led to believe that it would receive unpaid tuition, and that filing a petition for such payment was unnecessary. Therefore, I **CONCLUDE** that this is a compelling circumstance that would justify relaxation of the ninety-day rule to keep GCIT's petition from being dismissed.

Finally, it must be decided that if GCIT's claim for tuition is timely, whether GCIT's claim for tuition is barred by the entire controversy doctrine, and therefore subject to dismissal?

Respondent contends that the entire controversy doctrine clearly precludes a party from litigating a related claim, which is known to it at the first hearing in a separate action. *Cogdell v. Hospital Center at Orange,* 116 *N.J.* 7, 15 (1989). The doctrine requires that all parties involved bring all of their claims and defenses that are related to the underlying controversy. The purpose is to encourage comprehensive and conclusive litigation determinations, to avoid fragmentation of litigation, and to promote party fairness and judicial economy and efficiency.

GCIT argues that the New Jersey Supreme Court has ruled that the entire controversy doctrine does not apply to bar component claims that are unknown, unraised, or unaccrued at the time of the original action, citing, *Circle Chevrolet v. Giordano Halleran & Ciesla,* 142 *N.J.* 280, 294 (1995). GCIT continues to assert that its cause of action for tuition did not accrue until the State Board's decision on March 1, 2000. Prior to that date, the Commissioner had ordered

respondent to pay tuition and transportation to GCIT, and GCIT had no reason to believe that tuition would not be received. Thus, GCIT argues that the entire controversy doctrine does not apply in this case to bar GCIT's claim for tuition.

In *City of Hackensack v. Winner, 82 N.J.* 1, 31-32 (1980), the New Jersey Supreme Court determined that certain court-made procedural tools such as the entire controversy doctrine may have application in the administrative setting. The Court acknowledged that administrative agencies are separate from the courts, but stated that,

> [The Supreme Court] has nevertheless recognized that there are important goals to be achieved from the prudent and selective application in administrative proceedings of such doctrines as res judicata, collateral estoppel, and the single controversy rule.
> *Id, citing, Hinfey v. Matawan Reg. Bd. of Ed.,* 77 *N.J.* 514, 532 (1978).

The Court went on to indicate that it is consistent with this constitutional philosophy to apply to administrative agencies, in appropriate situations, judicial rules conducive to the ends of intergovernmental compatibility and harmony, such as res judicata, collateral estoppel, the single controversy doctrine and the like; and that decisions have stressed the policy considerations which support these judicial doctrines, namely, finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expenses; elimination of conflicts, confusion and uncertainty; and basic fairness - have an important place in the administrative field.

In *Boles v. Bergen County Vocational Schools Bd. of Educ.,* 92 *N.J.A.R. 2d* (EDU) 554, an ALJ determined that a claim was precluded by the entire controversy doctrine where the claim was known at the time of the first hearing and was related to the same transactional circumstances. The ALJ determined that the claim was barred by the 90-day rule, but also determined that it should be dismissed under the alternative basis of the entire controversy doctrine. This determination and reasoning was adopted by the Commissioner. *Id.* at 558.

The entire controversy doctrine, which is set forth in Court Rule *R.* 4:30A, requires that multiple claims involving the same transactional circumstances be brought together in one action. The doctrine clearly precludes a party from litigating a related claim, which is known to

him at the first hearing in a separate action. *Cogdell v. Hospital Center at Orange,* 116 *N.J.* 7, 15 (1989). The doctrine requires that all parties involved bring "all of their claims and defenses that are related to the underlying controversy." The purpose is "to encourage comprehensive and conclusive litigation determinations, to avoid fragmentation of litigation, and to promote party fairness and judicial economy and efficiency." *R.* 4:30A Comment. Application of the rule, however, is discretionary and clarification of the limits of the doctrine is best left to case-by-case determination. *Circle Chevrolet v. Giordano Halleran & Ciesla,* supra, 142 *N.J.* 290, citing *Cogdell v. Hospital Center at Orange,* 116 *N.J.* 7, 15. It is clear based on *City of Hackensack v. Winner, supra,* and *Boles v. Bergen County Vocational Schools Bd. of Educ., supra,* that the entire controversy doctrine has applicability in an administrative proceeding.

However, as argued by GCIT, the entire controversy doctrine does not apply to bar "component claims that are unknown, unarisen, or unaccrued at the time of the original action." *Circle Chevrolet v. Giordano Halleran & Ciesla, supra,* 142 *N.J.* at 294. In this regard, I have previously determined that GCIT's cause of action for tuition did not accrue until the State Board's decision on March 1, 2000. Prior to that date, the Commissioner had ordered respondent to pay tuition and transportation to GCIT, and GCIT had no reason to believe that tuition would not be paid. Thus, I **FIND** that under these circumstances, the entire controversy doctrine does not apply in this case to bar GCIT's claim for tuition since it cannot apply to bar a claim that is unknown, unarisen or unaccrued. Therefore, I **CONCLUDE** that the claims of petitioner-intervenor GCIT set forth in its petition and amended petition, would not be barred by the entire controversy doctrine.

DECISION AND ORDER

Based on my determination that the performing arts program offered at the Academy at GCIT, is not consistent with the definition of vocational education as defined by New Jersey law, and such definition cannot be construed to include dance or drama programs, it is hereby **ORDERED** that summary decision as to this issue is hereby **GRANTED** to respondent.

Based on my conclusion that there is clearly insufficient proof that GCIT complied with the procedures set forth in *N.J.A.C.* 6:43-8.2(a), and that the program is in fact an approved county vocational school, it is further **ORDERED** that summary decision as to this issue is hereby **GRANTED** to respondent.

Based on my conclusion that until the March 1, 2000 State Board of Education reversal of the Commissioner's decision absolving respondent of the obligation to pay tuition and transportation fees, there was no reason for GCIT to believe that it would not receive tuition payments from respondent, and that it was not until that date that GCIT's cause of action for tuition arose; and my determination that the petition of intervenor-petitioner GCIT was filed within time; and based upon my further conclusion that there is nothing in the record to establish that GCIT had any adequate notice that respondent was denying the payment of tuition or transportation costs with respect to the attendance of student R.H.; it is hereby **ORDERED** that intervenor-petitioner GCIT would be entitled to summary decision as to this issue, but for the granting of summary decision to respondent that the GCIT program is neither a vocational program nor is it approved.

Based upon my determination that there a compelling reason for relaxing the ninety-day rule, it is hereby **ORDERED** that intervenor-petitioner GCIT would be entitled to summary decision as to this issue, but for the granting of summary decision to respondent that the GCIT program is neither a vocational program nor is it approved.

Finally, based on my conclusion that the claims of petitioner-intervenor GCIT set forth in its petition and amended petition, would not be barred by the entire controversy doctrine, it is hereby **ORDERED** that intervenor-petitioner GCIT would be entitled to summary decision as to

this issue, but for the granting of summary decision to respondent that the GCIT program is neither a vocational program nor is it approved.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 1, 2002
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

3/4/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 5 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

APPENDIX

LIST OF EXHIBITS:

For petitioner:

None

For intervenor-petitioner GCIT:

I-1 Notice of Motion for Summary Judgment [sic]

I-2 Affidavit of Victor C. Morella, dated September 12, 2000 in support of Notice of Motion for Summary Judgment (I-1)

I-3 Brief dated September 15, 2000, in support of Notice of Motion for Summary Judgment (I-1) with the following exhibits attached:

- A. Initial Decision, dated November 12, 1997
- B. Commissioner's Decision, dated December 29, 1997
- C. State Board of Education Decision, dated March 3, 2000
- D. Petition of GCIT for tuition for H.B., dated April 27, 2000, filed April 28, 2000
- E. Amended Petition of GCIT for tuition and transportation fees for H.B., K.W. and R.H., dated May 8, 2000
- F. Superintendent Morella (GCIT) letter, dated October 2, 1996
- G. County Superintendent Sherry's letter of October 16, 1996
- H. Occupational Program Approval Procedure
- I. Department of Education letter of August 17, 1999

I-4 Letter Brief of Intervenor GCIT in opposition to respondent RVRHSD's Motion for Summary Judgment

I-5 Affidavit of Victor Morella, Superintendent for Intervenor GCIT dated September 25, 2000, in opposition to respondent RVRHSD's Motion for Summary Judgment with the following exhibits attached:

- A. GCIT letter to H. B., dated April 22, 1997
- B. GCIT letter to K.B., dated July 31, 1997
- C. GCIT letter, dated September 26, 1997 to RVRHSD re: H.B.

D. GCIT letter, dated November 7, 1997 to RVRHSD re: H.B.

E. GCIT letter, dated February 5, 1998 to RVRHSD re: H.B.

F. GCIT letter, dated August 25, 1998 to RVRHSD re: H.B. and K.W.

G. GCIT letter, dated August 21, 1998 to RVRHSD re: H.B. and K.W.

H. GCIT letter, dated August 31, 1998 to RVRHSD re: H.B. and K.W.

I. GCIT letter, dated July 30, 1999 to RVRHSD re: H.B., R.H. and K.W.

J. GCIT letter, dated March 10, 1999 to R.H., GCIT letter, dated April 26, 1999 re: R.H.; GCIT letter, dated July 12, 2000 to RVRHSD

K. GCIT letter, dated January 24, 2000 to RVRHSD re: R.H. and K.W.

L. GCIT Invoice to RVRHSD, dated January 27, 2000; status screen; GCIT letter to RVRHSD, dated July 12, 2000

M. Statement to RVFHSD

N. 1998/99 Out of County Tuition Listing

O. GCIT letter, dated August 23, 2000 to RVRHSD re: R.H. and K.W.

For respondent Rancocas Valley Regional High School District (RVRHSD):

R-1 Respondent, Board of Education of RVRHSD, Notice of Motion for Summary Judgment [sic], dated September 14, 2000

R-2 Respondent, Board of Education of RVRHSD, Brief in Support of Motion for Summary Judgment

R-3 Certification of Robert L. Sapp, dated September 14, 2000, in Support of Motion for Summary Decision (R-1) with the following exhibits attached:

A. Superintendent Morella (GCIT) letter, dated May 9, 1997 to RVRHSD

B. Superintendent Morella letter, dated July 31, 1997

C. GCIT letter to RVRHSSD, dated September 26, 1997 re: H.B.

D. GCIT letter to RVRHSD, dated February 5, 1998 re: H.B.

E. GCIT letter to RVRHSD, dated June 3, 1998 re: H.B.

F. GCIT letter to RVRHSD, dated July 6, 1998 re: H.B. and K.W.

G. GCIT letter to RVRHSD, dated August 21, 1998 re: H.B. and K.W.

H. GCIT letter to RVRHSD, dated August 31, 1998 re: H.B. and K.W.

I. GCIT letter to RVRHSD, dated July 30, 1999

J. GCIT letter to RVRHSD, dated August 25, 1999 re: R.H., K.W. & H.B.

K. GCIT letter to RVRHSD, dated January 24, 2000 re: R.H. and K.W.

L. GCIT letter to RVRHSD, dated January 27, 2000

R-4 Notice of Motion for Summary Judgment [sic], dated September 14, 2000

R-5 Certification of Robert L. Sapp, dated September 14, 2000 in support of Notice of Motion for Summary Judgment (R-4), with the following exhibits attached:

A. GCIT letter to RVRHSD, dated July 6, 1998 re: H.B. and K.W.

B. GCIT letter to RVRHSD, dated August 21, 1998 re: H.B. and K.W.

C. GCIT letter to RVRHSD, dated August 31, 1998 re: H.B. and K.W.

D. GCIT letter to RVRHSD, dated July 30, 1999

E. GCIT letter to RVRHSD, dated August 25, 1999 re: R.H., K.W. and H.B.

F. GCIT letter to RVRHSD, dated January 24, 2000 re: R.H. and K.W.

G. GCIT letter to RVRHSD, dated January 27, 2000

R-6 Respondent Board of Education of RVRHSD Brief in Support of Motion for Summary Judgment

R-7 Respondent, Board of Education of RVRHSD, Brief in Opposition to petitioner's Motion for Summary Decision

OAL DKT. NO. EDU 2190-00 (EDU 6974-97 on remand)
AGENCY DKT. NO. 314-9/97
OAL DKT. NO. EDU 6096-00
AGENCY DKT. NO. 160-5/00

K.B., on behalf of minor child, H.B.,	:	
PETITIONER,	:	
AND	:	
GLOUCESTER COUNTY INSTITUTE OF TECHNOLOGY,	:	
INTERVENOR,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RANCOCAS VALLEY REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
AND	:	
BOARD OF EDUCATION OF THE GLOUCESTER COUNTY INSTITUTE OF TECHNOLOGY, GLOUCESTER COUNTY,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE RANCOCAS VALLEY REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

The record of this consolidated matter and the Initial Decision of the Office of Administrative Law have been reviewed. In accordance with *N.J.A.C.* 1:1-18.4, the

Commissioner has considered exceptions to the Initial Decision filed by Intervenor-Petitioner Gloucester County Institute of Technology ("GCIT") and replies thereto by Respondent Board of Education ("Board"), as well as the Board's primary exceptions to those portions of the Initial Decision dealing with the timeliness of the GCIT's appeal and the entire controversy doctrine.

In its exceptions, GCIT challenges the major holdings of the Initial Decision on both substantive and procedural grounds. Substantively, on the threshold issue of whether GCIT's performing arts program is "vocational" within the intendment of applicable law, GCIT objects to

> ***the Administrative Law Judge's subjective impression, with no facts in the record to substantiate the claim, that training in the performing arts has not resulted in a majority of students in general and GCIT graduates in particular obtaining steady, gainful employment. Rather than a fluid, expansive, open minded vision of vocational education that is consistent with the State Plan on Vocational and Technical Education (*citation omitted*), [the ALJ] has adopted a stagnate, inert, narrow minded view from the 1950's era reminiscent of the stereotypical vocational student who is an academic underachiever that only works on automobile engines***. Rather than treating vocational education as "continually evolving," [the ALJ] construed the concept as limited solely to the areas specifically mentioned in statutory language that was never meant to be an all-inclusive list. Rather than recognizing the real world in which fully endorsed and approved vocational programs across the State (*footnote omitted*) have already trained hundreds if not thousands of students in dance, drama, music and theater within the vocational education model, [the ALJ] simply dismisses the entire field of the performing arts as an occupation worthy of vocational education. In so doing, the ALJ has not only ignored the thousands of members in screen actor guilds and technical stage employee unions across the state and country who are engaged in gainful employment in the performing arts field, but has also reduced the efforts of the scores of professionals who have devoted their lives to preparing students for either careers in the performing arts or post secondary school studies to a "hobby" level similar to a high school chess club advisor.
>
> More importantly, [the ALJ's] conclusion that instruction in the performing arts is incompatible with vocational education is contrary to the long standing official policy of the New Jersey Department of Education and the U.S. Department of Education that performing arts is indeed part of the vocational education matrix. (*citations omitted*) (Intervenor-Petitioner's Brief in Support of Exceptions at 1-3)

GCIT further objects to the ALJ's "draconian requirements of documentary proof of internal steps in an approval process undergone eight (8) years ago from county and state agencies within the New Jersey Department of Education, in the face of unrefuted proof that the initial and final stages of the process were fulfilled." (*Id.* at 4-5) Because the ALJ did not "see the work," he simply assumed that the required reviews were not undertaken and that the final approvals from the Office of School to Career were invalid as a result. *(Ibid.)*

Procedurally, GCIT urges that if the ALJ was not satisfied with its proofs on motion for summary decision, the appropriate action would have been for him to deny the motion and proceed to plenary hearing, rather than outright granting summary decision to the Board based on its opposition to GCIT's motion. (*Id.* at 5) Had this occurred, GCIT avers, it might have brought forth additional elaboration and evidence, including but not limited to a number of documents it appends to its exceptions and asks the Commissioner to consider under authority of *N.J.A.C.* 1:1-15.2(a) and (b) and *N.J.R.* Evidence Rule 201. *(Ibid.)*

In response to GCIT's substantive objections, the Board essentially reiterates arguments which were largely adopted by the ALJ. (Respondent's Reply to Intervenor-Petitioner's Exceptions at 2-6) Procedurally, it strenuously objects to any consideration by the Commissioner of documents submitted as appendices to GCIT's exceptions, citing *N.J.A.C.* 1:1-18.4(c). (*Id.* at 1) Finally, the Board urges the Commissioner, if he does not adopt the Initial Decision, either to reverse the ALJ and hold that GCIT's appeal must be dismissed as filed out of time and precluded by the entire controversy doctrine, or to remand the matter for an initial ruling on the Board's position, not addressed since the ALJ resolved the matter on a different basis, that the Board is not responsible for tuition or transportation costs because GCIT is more akin to a private vocational school than to a county vocational program, or alternatively, because

GCIT is not a vocational school at all but rather a program of interdistrict public school choice. (*Id.* at 7-9)

Upon review of the Initial Decision, supporting record and arguments of the parties on exception, the Commissioner determines to affirm in part, and reverse in part, the Initial Decision of the ALJ.

As a threshold matter, the Commissioner affirms, for the reasons expressed in the Initial Decision, the ALJ's conclusion that GCIT's appeal was timely filed and not precluded by the entire controversy doctrine.

However, for the reasons expressed below, the Commissioner sets aside the ALJ's findings and conclusions with respect to the characterization and approval status of the GCIT performing arts program, holding instead that it was during the period at issue, and remains, an approved vocational program within the intendment of law.

The State Board of Education, in remanding this matter for further proceedings, rejected the Commissioner's prior reliance on inclusion of GCIT's performing arts program in the Department of Education's Directory of Verified Occupational Educational Programs (Directory) as "conclusive proof that the program satisfied the requirements of N.J.S.A. 18A:54-1 et seq." Instead, the State Board held that "[t]he record [was] devoid of any information regarding the procedure for inclusion of a program in the Directory during the period relevant to this matter," and that there was "[no] indication of the basis for the determination to include the GCIT performing arts program or the standard applied in determining to include that program" in the Directory, so as to enable the State Board to review "factfinding or legal analysis concerning whether the program was vocational within the intendment of the statute." (Slip Opinion at 8-9)

The ALJ sought to fulfill the State Board's remand directive through a two-prong analysis, the first prong being a review of then-applicable statute and rule so as to identify the criteria against which GCIT's program should be measured for purposes of ascertaining whether it was "vocational" in nature, and the second being an inquiry as to whether GCIT complied with the approval procedure set forth in then-applicable rule so as to qualify as an "approved" vocational program.

Turning to the first prong of the ALJ's analysis, the Commissioner does not take issue with the ALJ's selection of rules and identification of criteria to be applied, as set forth in the Initial Decision at 9-12. However, the Commissioner must concur with GCIT that the ALJ, in his findings and conclusions on this issue, Initial Decision at 11-12, substituted unsupported, generalized perceptions about the performing arts and occupations related to them for the analysis envisioned by the State Board. Indeed, the ALJ framed his discussion in terms that applied not only to the GCIT program, but also to performing arts programs in general, thereby raising statewide implications. (*Ibid.*)

At the outset, the Commissioner rejects, as a matter of both educational policy and law, any suggestion that a program in the performing arts *cannot*, by its very nature, be "vocational" within the intendment of law. Rather, he finds the appropriate analysis to be whether a particular performing arts program meets the specific criteria established for vocational, as opposed to comprehensive secondary, education programs.

According to regulation in effect at the time,[1] adopted by the State Board of Education to implement the State's system of vocational and technical education pursuant to *N.J.S.A.* 18A:54-1 *et seq.* and other applicable State and federal law, "vocational education" means:

[1] Although recodified as *N.J.A.C.* 6A:19-1.2, identical language remains in current regulation.

> organized educational programs offering a sequence of courses which are directly related to the preparation of individuals for paid or unpaid employment in current or emerging occupations in such fields as agriculture/agribusiness, business occupations, health occupations, home economics, marketing occupations, technical occupations, and trade and industrial occupations or for additional preparation for a career in such fields and in other occupations requiring less than a baccalaureate or advanced degree. Vocational education programs include competency-based applied learning which contributes to a pupil's academic knowledge, higher-order reasoning and problem-solving skills, work attitudes, general employability skills and the occupationally-specific skills necessary for economic independence as a productive and contributing member of society. Vocational student organization activities are an integral part of the programs. (*N.J.A.C.* 6:43-1.2)

The ALJ correctly found that, in order to be considered "vocational," the GCIT program must be designed to "prepare individuals for paid or unpaid employment, as semi-skilled or skilled workers or technicians or semiprofessionals in recognized occupations and in new or emerging occupations; prepare individuals for enrollment in advanced or highly skilled vocational and technical education programs; assist individuals in the making of informed and meaningful occupational choices; or achieve any combination of the above objectives." (Initial Decision at 10, citing *N.J.A.C.* 6:43-3.1) The program must also include: instruction related to paid or unpaid employment in the occupation or the occupations for which the pupils are being trained; classroom-related academic and technical instruction, field, shop, laboratory, cooperative vocational education, apprenticeship or other occupational experiences; instruction provided for entry level employment or instruction designed to upgrade or update workers in occupational skills and knowledge in order to enhance stability or upward mobility in employment; and remedial or other instruction designed to correct educational deficiencies or handicaps which prevent pupils from benefiting from instruction designed to teach competence in occupations. (Initial Decision at 10-11, citing *N.J.A.C.* 6:43-3.2) Its instruction must be primarily designed to prepare individuals for employment in a specific occupation or for

enrollment in highly skilled post-secondary vocational and/or technical education programs, (Initial Decision at 11, citing *N.J.A.C.* 6:43-3.3(a)), and must meet the content requirements of *N.J.A.C.* 6:43-3.12, including currency, sufficiency, development in consultation with employers and other suitable advisory entities, and delivery by appropriately certified instructors.

With respect to whether GCIT's performing arts program meets these criteria, the Commissioner finds the record clear and persuasive. Included within it are documents[2] and the transcript of uncontroverted testimony[3] unequivocally establishing that the program is *in every respect* designed to prepare students for professional careers in the performing arts, directly upon graduation, or after further college-level preparation, or both, and that it amply meets the specific regulatory requirements for vocational education set forth above. Indeed, in his Initial Decision in EDU 6974-97 (Commissioner Decision #660-97), the underlying contested matter remanded by the State Board, the same ALJ as decided the within matter on remand found as follows based upon the referenced testimony and evidence:

> I **FIND** that the GCIT Academy of the Performing Arts offers a completely integrated program of specialized training in the area of drama, speech, dance and the performing arts leading to advance preparation for either employment or college level courses. I **FIND** that GCIT is a full-time career academy and it is a school within a school which teaches students who are focused in a particular area of the performing arts. There is extensive training in dance and drama courses and the traditional academic courses are integrated into, focused on and applied towards various aspects of the performing arts. I **FIND** that this program of studies prepares individuals for future employment and occupations in the performing arts, and specifically prepares students for entering into the career fields of dance, drama and radio and television production. Of the 157 credits required for graduation from the Academy (as compared to the State requirement of 110 credits for graduation from high school) 60 credits of courses in the performing arts are required for graduation. All of the teachers are fully vocational certified which requires seven years of work in a particular career field, visiting professional artists are brought in on a regular basis to teach in specialized areas, and the Academy has a paid consultant, with extensive

[2] Most notably, the *Program of Studies* booklet for the 1997-98 school year, Exhibit I-1.
[3] Testimony of Meredith Flynn, Assistant Superintendent at GCIT, Transcript of Hearing of October 31, 1997 at 24-58. Summarized in Initial Decision EDU 6974-97 at 4-7.

> experience in the performing arts, and an advisory committee made up of professionals in the field of the performing arts. I **FIND** that the Academy provides both career and personal counseling. (Initial Decision EDU 6974-97 at 15)

There is no doubt that the facts underlying this assessment, which was affirmed by the Commissioner, are not in dispute. Indeed, in excepting to this Initial Decision at the time of its issuance, the Board at no time impugned these findings, or the factual recitation underlying them. Rather, the Board excepted only to the ALJ's "comparable program" analysis vis-à-vis the Board's own offerings in fine and performing arts. (Board's Exceptions to Initial Decision EDU 6974-97, dated December 1, 1997)

Neither can the two other "deficits" cited by the ALJ serve to alter the fundamental nature of the GCIT program. With regard to the absence of a Department-developed competency test for the performing arts during the period at issue, such absence does not mean that vocational programs in this area could not exist or that competencies could not be developed to assess students preparing for careers in the performing arts. While the then-effective rule cited by the ALJ (*N.J.A.C.* 6:43-3.13) required the Department to establish competencies in the specified "major vocational education program areas," it certainly did not preclude, directly or by implication, the existence of approved, or approvable, program areas beyond those listed. Indeed, this section of rule remained limited in scope until 2001, when it was expanded to require that industry-endorsed occupational standards be developed for the entire list of career clusters recognized by the U.S. Department of Education, including "arts and communication services." (*N.J.A.C.* 6A:19-6.9, referencing 6A:19-6.5)

With regard to job placement standards, the ALJ concluded that the existence of such standards, found at *N.J.A.C.* 6:43-7.3(a), "reaffirms the idea that the main purpose of [a vocational] program is to train for employment in a specific field, something that will most likely

not be achieved by the same majority of students completing GCIT's program, as with the more technical programs." (Initial Decision at 12) The Commissioner can find no basis in the record for such speculation, and, indeed, even the Board recognizes that the GCIT performing arts program is too new to have accumulated any meaningful placement data by which to evaluate its program in the manner envisioned by the rule. (Respondent's Reply to Intervenor-Petitioner's Exceptions at 4)

Turning to the second prong of the ALJ's analysis, the question of whether GCIT complied with the approval procedure set forth in the then-applicable rule so as to qualify as an "approved" vocational program, the Commissioner once again cannot concur with the conclusions reached in the Initial Decision.

In its remand, the State Board sought development of a record on the procedures and standards by which the GCIT program came to be included in the Directory, rather than accepting such inclusion, as did the Commissioner, as a *per se* indication of approved vocational program status. (Slip Opinion at 8-9) In response, the ALJ set forth in detail the regulatory process leading to such inclusion and effectively placed upon GCIT the burden of demonstrating compliance with each step. Initial Decision at 12-15. In so doing, the ALJ concluded:

> I FIND that there is no evidence that GCIT ever requested planning recommendations from the Workforce Investment Board or that such recommendations were submitted to County Superintendent, Dr. John M. Sherry (in fact GCIT was told notification was sufficient); I **FIND** that there is no evidence that Gloucester County Superintendent Sherry reviewed a request or recommendations of the Workforce Investment Board, and submitted a recommendation to VERP; I **FIND** that there is no evidence that VERP reviewed the Superintendent's recommendation based upon a review of the occupational supply and demand needs and local or regional availability of the proposed courses or program, nor that the panel recommended approval or disapproval of the recommendation; and I **FIND** that there is no evidence that the director, Office of School to Career and College Initiatives reviewed VERP's recommendations.

> In fact, I **FIND** that there is no evidence that anyone ever fully considered the need for this type of program, taking into consideration the occupational supply and demand and availability in the region, as was required by the relevant regulations or that any of the necessary recommendations were made. Therefore, I **CONCLUDE** that there is clearly insufficient proof that GCIT complied with the procedures set forth in *N.J.A.C.* 6:43-8.2(a), and that the program is in fact an approved county vocational school.*** (Initial Decision at 16)

The record, however, demonstrates otherwise. In response to GCIT's request to the Department for information about the Department's approval of the program at issue, Dr. Thomas Henry, the Director of the Office of School-to-Career and College Initiatives stated:

> [W]e have reviewed our files and found the following information:
>
> - Four applications for program approval were submitted to the department on June 29, 1994. The applications were for programs in: Dance/Drama; Electronic Media Technology; Technical Theater; and Wellness and Fitness Technology.[4]
>
> - The applications included an endorsement of the programs by the Gloucester County WIB dated June 1, 1994.
>
> - A letter from the Office of School-to-Career and College Initiatives granting approval for the Dance/Drama application was mailed to you on September 1, 1994. This approval was based on a new program title, Dance and Performing Arts, with an assigned CIP number of 50.0301.
>
> - A letter from the Office of School-to-Career and College Initiatives granting approval for the Technical Theater/Theater Design program with an assigned CIP number of 50.0502 was mailed to you on September 7, 1994.
>
> Please note that this information has been extracted from our summary files. When the department was relocated to our present location, space considerations made it necessary for us to reduce our file capacity by approximately 50 percent. Since federal and state regulations require the maintenance of grant program records, the bulk of our records on program approvals and routine correspondence was destroyed. Aside from the summary information listed above, we do not have any additional records pertaining to your program requests.

[4] Intervenor-Petitioner's Brief in Support of Motion for Summary Judgment includes a copy of the Dance/Drama application as Exhibit H, the form of which provides an indication of the criteria considered in review of such applications.

> The Dance and Performing Arts Program and the Technical Theater/Theater Design Program are approved occupational programs in accordance with N.J.A.C. 6:43. Should you have any additional questions, please contact me. (Intervenor-Petitioner's Brief in Support of Motion for Summary Judgment, Exhibit I; *footnote supplied*)

Additionally, Meredith Flynn testified in the prior OAL proceeding as to the process of development undertaken by GCIT for its performing arts programs, and although she was not testifying for the purpose of demonstrating compliance with program approval rules,[5] one can ascertain even from her brief remarks that GCIT engaged in the local level planning and discussion vis-à-vis the labor market and program duplication envisioned by rule prior to submitting an approval request to the Department. (Transcript of Hearing of October 31, 1997 at 26-28)

Moreover, the Commissioner does not agree that the 1996 letters to and from then-County Superintendent John Sherry, submitted as Exhibits F and G with Intervenor-Petitioner's Brief in Support of Motion for Summary Judgment, constitute proof that the regulatory process was not followed because they show that GCIT simply concluded its proposed programs were necessary and both GCIT and the County Superintendent behaved as though mere notification of GCIT's intentions was all that was required. Rather, it is clear that the Department, in implementing its own rules, did not view the expansion of an already-approved shared-time program to full-time as a "new" course or program requiring repetition of the approval process previously undertaken, so that notification was all that was deemed necessary under the circumstances. While the Board may not agree with this view, neither GCIT nor the County Superintendent can be said to have acted contrary to the rules as interpreted and implemented by the regulating agency.

[5] Testimony was being elicited for the purpose of describing the program so as to assess its comparability to that offered by the respondent Board.

Finally, the ALJ concludes that there is no evidence that "internal" steps were followed between the time GCIT submitted its application to the Department and the Department's final approval. Here, the Commissioner agrees with GCIT that, in the absence of records which GCIT attempted in good faith to obtain from the Department and discovered no longer exist, it would be difficult, if not impossible, for GCIT to "prove" that its application was reviewed internally by the Department in 1994 in strict accordance with the process set out in rule. Certainly, the Board has brought forward no affirmative evidence to show that it was not, and GCIT was entitled to rely on the Department's final approval once given in September 1994.

Thus, the Commissioner finds, with respect to the second prong of the ALJ's inquiry, that GCIT substantively complied with its responsibilities under the regulatory approval process, and there is no evidence on record to suggest that the Department did not. Under these circumstances, the Commissioner cannot agree with the ALJ that GCIT's performing arts program is not an "approved" vocational program notwithstanding its inclusion in the Directory. Rather, the Commissioner finds that the program was, indeed, approved during the period at issue, and has been so since September 1, 1994.[6]

Having found that the GCIT performing arts program is vocational within the intendment of the law and that it was approved by the Department through the process established for that purpose, the Commissioner must now turn to the Board's arguments that GCIT should not be entitled to collect tuition or transportation costs for its performing arts program because, if the program is considered "vocational," then the school is a "private vocational school" to which districts are not obliged to pay to send accepted students; or if it is not considered "vocational," then it is a "choice" program subject to the laws and funding

[6] There is no allegation that the original approval was ever at any time rescinded by the Department.

arrangements governing such schools. Although not addressed by the ALJ, the Commissioner believes these arguments can be disposed of without further proceedings.

The latter argument is, on its face, defeated by the Commissioner's holding that the disputed program is, in fact, vocational in nature. The former argument is based on the Board's contention that GCIT fits the regulatory description of a private vocational school in that it is "a business enterprise operated either for profit or not-for-profit which maintains a place of business within the State of New Jersey and which (1) Solicits students from the general public; (2) Charges tuition and/or other fees; (3) Offers instruction to a group of four or more pupils at one time; and (4) Offers preparatory instruction to pupils for entry level employment or for upgrading in a specific occupational field..." *N.J.A.C.* 6:43-1.2. (Respondent's Reply to Intervenor-Petitioner's Exceptions at 7-8, reiterating arguments made in its Brief in Opposition to Petitioner's Motion for Summary Judgment)

The Board argues that GCIT solicits students from the general public by advertisement and uses an audition process to accept students, taking those that are most talented rather than accommodating all interested Gloucester County students before considering students from out of county. Thus, GCIT is acting like a private vocational school, but taking advantage of the benefits accorded to county vocational schools by State law. The Board asserts that GCIT charges excessive tuition, passing its costs on to local school districts while advertising itself to parents and students as "free." (*Ibid.*)

The Commissioner rejects this argument as meritless. GCIT is clearly not a business soliciting students from the general public on a tuition basis. Like other approved county vocational programs, it is a public education program operating within the parameters established by statute and rule, drawing students from school districts in the county and

surrounding region based upon their demonstrated interest in, and ability to benefit from, the particular program it offers. Like all public education, it is supported by public funds; and like all public education, it is "free" to the individual students entitled to its benefits by law. The Commissioner finds no basis in this argument to conclude that local district boards of education should not be responsible for paying GCIT in accordance with statute for district students attending its programs.

Finally, there remains the question of any extent to which the former rule at *N.J.A.C.* 6:43-3.11(a),[7] which established a "tiered" system limiting access to county vocational education based on availability of a comparable program within a student's resident district, might still be considered applicable in light of the State Board of Education's recent decision finding that rule to be an improper implementation of its authorizing statute. *Board of Education of the Ramapo-Indian Hills Regional School District, Bergen County, v. Board of Education of the Bergen County Vocational Technical School District, Bergen County,* decided February 6, 2002 In this regard, the Commissioner observes that, in the December 29, 1997 decision in this matter, it was already determined that the Board does not offer a program comparable to that of GCIT, and the Commissioner reaffirms that conclusion herein based on his re-review of the record in accordance with the State Board's directive on remand.

Accordingly, for the reasons expressed herein, the Commissioner affirms in part and reverses in part the Initial Decision of the Office of Administrative Law. The Commissioner holds that the performing arts program of the Gloucester County Institute of Technology is, and was during the period at issue herein, an approved county vocational program within the intendment of law, and he consequently directs the Rancocas Valley Regional Board of

[7] In effect during the period at issue, this rule was repealed in December 2001 as part of the State Board's revision of its Administrative Code governing vocational education. *N.J.A.C.* 6A:19-1 *et seq.*

Education to remit to GCIT the sum of $82,295.02 in payment for the tuition and transportation costs of students H.B., K.W. and R.H. as set forth in GCIT's amended petition.[8] [9]

This matter is hereby forwarded to the State Board of Education, which has retained jurisdiction.

IT IS SO ORDERED.[10]

COMMISSIONER OF EDUCATION

Date of Decision: 7/18/02

Date of Mailing: 7/19/02

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[8] It is noted that the Board did not dispute the *amount* of tuition calculated by GCIT for the students in question.

[9] In rendering the within decision, the Commissioner did not consider, or in any way rely upon, the documents appended to GCIT's Exceptions except to the extent that they had already been submitted to the record before the ALJ. (Contrary to the Board's assertion, not all of the documents appended to GCIT's exceptions were new submissions.)

[10] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

278-02

278-02

G.M., on behalf of minor children, B.M. and T.M.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF HILLSIDE, UNION COUNTY,	:	
RESPONDENT.	:	
	:	

July 19, 2002

AGENCY DKT. NO. 127-5/02

G.M., on behalf of minor children, B.M. and T.M.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF HILLSIDE, UNION COUNTY,	:	
RESPONDENT.	:	
	:	

For Petitioner: Geoffrey Mitchem, *Pro Se*

For Respondent: Board Secretary, Hillside Township Board of Education

This matter having been opened before the Commissioner of Education by way of Petition of Appeal filed on May 1, 2002, challenging respondent's residency determination; and

The Commissioner having directed respondent by notices dated May 2, 2002, May 28, 2002 and June 14, 2002 to file an Answer to the petition against it; and

On June 3, 2002, the Department having faxed a copy of the petition to respondent's Board Secretary; and

On June 19, 2002, Maria Cruz having signed a certified mail receipt on behalf of respondent acknowledging receipt of the June 14, 2002 notice; and

As of this date, neither respondent, nor any attorney on its behalf, having filed an Answer to the petition against it, so that all allegations in the petition against respondent are deemed admitted pursuant to *N.J.A.C.* 6A:3-1.5(e); now therefore

IT IS ORDERED on this 19th day of July 2002 that summary decision shall be granted in favor of petitioner and it is hereby declared that petitioner's children, B.M. and T.M., were eligible to attend school in respondent's District at the time the District declared them ineligible on April 11, 2002.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/19/02

Date of Mailing: 7/22/02

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

280-02

EDU # 5290-01
C # 280-02L
SB # 35-02

BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY,	:	STATE BOARD OF EDUCATION
PETITIONER-RESPONDENT,	:	DECISION ON MOTION
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF BOONTON, MORRIS COUNTY,	:	
RESPONDENT-APPELLANT.	:	

Decision on motion by the Commissioner of Education, July 25, 2002

For the Respondent-Appellant, Riker, Danzig, Scherer, Hyland & Perretti, L.L.P. (Lance J. Kalik, Esq., of Counsel)

For the Petitioner-Respondent, Porzio, Bromberg & Newman, P.C. (Vito A. Gagliardi, Jr., Esq., of Counsel)

The Board of Education of the Township of Boonton (hereinafter "Boonton Township") has been sending its high school students to be educated by the Board of Education of the Borough of Mountain Lakes (hereinafter "Mountain Lakes") since 1992. In May 2001, Mountain Lakes filed a petition with the Commissioner seeking to sever the sending-receiving relationship. On August 13, 2001, Boonton Township filed a motion for summary decision contending that Mountain Lakes' failure to designate an

alternative district to which Boonton Township could send its students if its sending-receiving relationship was terminated was fatal to Mountain Lakes' petition.

On July 3, 2002, an Administrative Law Judge ("ALJ") denied Boonton Township's motion for summary decision, finding that N.J.S.A. 18A:38-13 did not require a receiving district to designate an educational alternative for the sending district before termination of a sending-receiving relationship could be granted. In doing so, the ALJ stressed that although the case law required a sending district to designate an educational alternative for its students when it petitioned the Commissioner to sever a sending-receiving relationship, it did not place such an obligation on receiving districts. The ALJ also found that because N.J.S.A. 18A:38-11 requires every district lacking high school facilities to designate a high school outside the district for the attendance of its students, it is solely the prerogative of the sending district to choose where its students should be educated. Consequently, requiring the receiving district to name an educational alternative for the sender would permit a sender to argue that the receiver had "overstepped its bounds by trying to force the sending district to send its students to [a] particular school." Order denying summary decision, slip op. at 7. The ALJ therefore concluded that Mountain Lakes was not required to identify an educational alternative for Boonton Township's students. The ALJ further concluded that once the receiving district submitted a feasibility study addressing the statutory criteria, the burden at hearing would shift to the sender to establish that there is no feasible educational alternative. Id.

Boonton Township then sought interlocutory review of the ALJ's determination from the Commissioner. On July 25, 2002, the Commissioner exercised his discretion

under N.J.A.C. 1:1-14.10 and determined not to grant the request for interlocutory review.

Boonton Township now is requesting that the State Board grant interlocutory review of the ALJ's determination, and urges us to hold that a receiving district's petition to terminate a sending-receiving relationship must be dismissed if it does not identify an alternative district that is willing to accept the sending district's students. In support of its position, Boonton points to the State Board's decision in Board of Education of the City of Absecon v. Board of Education of the City of Pleasantville, decided by the State Board, October 5, 1988, and the Commissioner's decision in Board of Education of the Borough of Belmar v Board of Education of the City of Asbury Park, decided by the Commissioner, June 20, 1989, both of which held that a sending district's failure to identify an educational alternative for its students is fatal to an application to terminate pursuant to N.J.S.A. 18A:38-13.

Upon our review of the papers filed, we grant Boonton's request for interlocutory review. After careful consideration, we affirm the ALJ's determination of the issue that has been presented for the reasons expressed in his order. As the ALJ correctly pointed out, it is the sending district, not the receiving district, that is authorized to determine where its students are to be educated. That being the case, no legal significance can be placed on any educational alternative identified by the receiver. In addition, the sending district, not the receiving district, is the district that is in a position to ascertain the educational needs of its students as well as to assess the practicalities attached to choosing any particular alternative. Hence, any requirement that the

receiving district identify an educational alternative for the sending district would have no meaning.

However, as we emphasized in Absecon, supra, it is the obligation of the State Board of Education to ensure that the students from a sending district will have an educational alternative before we direct termination of a sending-receiving relationship. As the ALJ determined, in cases where termination of a sending-receiving relationship is sought by the receiver rather than the sender, issues relating to the availability of an educational alternative for the sender's students are appropriately resolved at hearing, and we agree that the sender bears the initial burden of demonstrating that there is no feasible educational alternative available to it. Once the sending district has met that burden, the receiving district must be given the opportunity in rebuttal to show that a feasible educational alternative does in fact exist. In this respect, we again stress that neither the Commissioner nor the State Board would approve termination of a sending-receiving relationship when it has been established that no feasible educational alternative exists. Moreover, it is axiomatic that the lack of an educational alternative for a sender's students would indicate that the sending district would experience a significant negative impact within the meaning of N.J.S.A. 18A:38-13 should a given sending-receiving relationship be terminated.

October 2, 2002

Date of mailing OCT 04 2002

161-02

C #161-02L
SB # 25-02

BOARD OF EDUCATION OF THE RANCOCAS VALLEY REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	
PETITIONER-APPELLANT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
WILLIAM L. LIBRERA AND WALTER KEISS, BURLINGTON COUNTY SUPERINTENDENT OF SCHOOLS,	:	
RESPONDENTS-RESPONDENTS.	:	

Decided by the Commissioner of Education, April 12, 2002

Decision on motion by the Commissioner of Education, July 22, 2002

For the Petitioner-Appellant, Parker, McCay & Criscuolo, P.A. (Stephen J. Mushinski, Esq., of Counsel)

For the Respondents-Respondents, Kevin M. Dowd, Deputy Attorney General (David Samson, Attorney General of New Jersey)

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

Samuel J. Podietz recused himself from the deliberations on this matter.

August 7, 2002

Date of mailing AUG 09 2002

283-02

BERLINDA LOVE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner claimed entitlement to a vice principal position.

The ALJ concluded that petitioner was required to file her claim with the Commissioner that she was entitled to a vice principal position within the 90-day period following notice of the reduction in force when she knew she was not placed on a preferred eligibility list for the position or, at the very least, within the 90 days following the appointment of the first nontenured individual to a vice principal position. Although the ALJ concluded that the petition should be dismissed as untimely, she nevertheless determined that the positions of assistant principal and vice principal are specifically enumerated in statute as separately tenurable positions; therefore, achieving tenure in the position of assistant principal did not entitle petitioner to the position of vice principal over incumbent vice principals who had not yet acquired tenure in that position.

The Commissioner adopted the findings and determination in the Initial Decision as his own.

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

July 26, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 60-01

AGENCY DKT. NO. 408-11/00

BERLINDA LOVE,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

Respondent.

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

Richard E. Golden, Esq., for respondent (Sumners & George, attorneys)

Record closed: May 2, 2002 Decided: June 6, 2002

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter commenced on November 17, 2000, when Berlinda Love (hereinafter petitioner) filed a petition of appeal with the Commissioner of Education seeking an order that the Board of Education of the City of Trenton (hereinafter respondent) had violated her tenure/seniority rights by failing to assign her to a vice principal position in the district. An answer on behalf of respondent was filed on December 21, 2000, and on January 8, 2001, the

matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to –13.

A prehearing conference was conducted on May 1, 2001, at which time the following were identified as the issues for determination at hearing:

1. Did respondent violate petitioner's tenure and seniority rights by assigning non-tenured or less senior personnel to the position Vice-Principal?

2. If the answer to the foregoing question is yes, what are the appropriate remedies?

3. Was the petition of appeal timely filed pursuant to *N.J.A.C.* 6A:3-1.3*

The prehearing order which was entered on May 3, 2001, provided that cross-motions for summary decision would be filed on or before July 16, 2001, and that replies would be filed on or before August 1, 2001. The prehearing order also scheduled a hearing to take place on September 19, 2001, in the event that the cross-motions for summary decision were denied or were not filed. No motions having been filed, the parties appeared on September 19, 2001. At that time, however, they merely agreed upon a stipulation of facts, which were read into the record. A new schedule for submission of cross-motions for summary decision was established. Again, no motions were filed within the designated time period. After follow-up telephone calls from the secretary to the undersigned, respondent filed a letter brief in support of a motion for summary decision, together with the supporting affidavit of Clarence L. Guthrie, Ph. D., on December 19, 2001. A response to the motion, which petitioner later requested be considered as a cross-motion, was filed on January 29, 2002, and respondent filed a reply on February 7, 2002. Thereafter, oral argument on the cross-motions took place on April 3, 2002, during which the undersigned requested that respondent provide a supplemental affidavit/certification clarifying additional relevant facts. The April 22, 2002 affidavit of Fougere Aupont was received by facsimile transmission on April 23, 2002. No response having been filed by petitioner within the time period allocated, the record closed on May 2, 2002.

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* *N.J.A.C.* 6:24-1 was readopted and recodified at 6A:3-1.3, effective April 3, 2000.

FINDINGS OF FACT

On September 19, 2001, the parties placed upon the record the following stipulation of facts:

1. Petitioner, Berlinda Love, is an employee of respondent Trenton Board of Education and has been employed by respondent since September 1980.

2. Petitioner received her principal/supervisor's endorsement in 1993.

3. Petitioner served as assistant principal at the Joyce Kilmer Elementary School between April and October 1994, and at the Grace A. Dunn Middle School between October 1994 and July 1996. Accordingly, petitioner obtained tenure in the position assistant principal in April 1996.

4. In June 1996, respondent adopted an administrative reorganization plan abolishing the position of assistant principal, effective July 1, 1996.

5. Since July 1, 1996 and up to the present, the Trenton Board of Education has appointed individual employees to the position vice principal in order to fill vacancies left by transfer, resignation, or retirement.

6. Some of the individuals appointed to the vice principal position since July 1, 1996 have no service as a supervisor, administrator, or assistant principal with the Trenton Board of Education.

7. Since 1998 petitioner has applied for a number of vice principal vacancies, but has not been appointed.

8. Petitioner is presently employed as a teacher/disciplinarian at the Jefferson Elementary School.

In addition to the foregoing, the following relevant facts which appear from the affidavits submitted by respondent are not in dispute, and I therefore **FIND** the following as uncontested facts.

At the time of the reorganization/reduction in force, which occurred in June 1996, the Trenton Board of Education employed three assistant principals and seven vice principals. Although the qualifications required to hold the position were the same for each position, *i.e.,* a valid New Jersey principal's endorsement on the administrative certificate and a minimum of five years teaching and/or administrative experience, the job duties set forth on separate job descriptions differed. The job duties for vice-principal were listed as follows:

1. Assists the principal in the formal evaluation process of personnel.

2. Assists the principal with staff selection and assignments.

3. Supervises curriculum planning and instruction.

4. Assists the principal with the preparation of reports and records required or appropriate to the efficient operation of the school.

5. Assists the principal with the preparation of the schools' budgetary requests and monitoring the expenditure of funds.

6. Supervises curriculum planning and instruction for the school.

7. Coordinates the school-wide testing programs.

8. Assumes responsibility for the school insurance drive.

9. Participates in school and community projects and communicates with the public about the programs and services of the school.

10. Performs such tasks and assumes such responsibilities as the principal may assign.

The job duties for assistant principal were listed as follows:

1. Assists in supervising and evaluating certified and classified personnel.

2. Administers school rules regarding attendance.

3. Supervises the reporting and monitoring of student attendance.

4. Completes special reports for State and Federal agencies.

5. Maintains attendance files for each student in the school.

6. Consults with staff on cases involving court referrals and prepares same.

7. Performs such other tasks and assumes such other duties as assigned by the principal.

The position vice principal was a 12-month position. The position assistant principal was a 10-month position, and the salary range for assistant principal was accordingly approximately $9,000 lower than that for vice principal. After the position assistant principal was abolished, the job duties previously performed by those in the position were assumed by other employees. Some additional vice principal positions have been created over the years up to the present. The Trenton Board of Education currently employs 13 vice principals who perform the duties listed in the job description for vice principal, including those duties previously handled by assistant principals.

APPLICABLE LAW AND DISCUSSION

The once classic statement of the standard for granting or denying summary judgment set forth in *Judson v. Peoples Bank and Trust Co. of Westfield*, 17 *N.J.* 67 (1954), was modified in *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520 (1995). Therein the Court held that the standard to be applied is now the same as the standard for determining motions for involuntary dismissal under *R.* 4:37-2(b) and for determining motions for judgment under *R.* 4:40-1 and *R.*

4:40-2. Trial courts considering motions for summary judgment are now required to engage in the same type of evaluation, analysis or sifting of evidential materials in light of the burden of persuasion that applies if the matter goes to trial. The Court explained:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine where there is a genuine issue for trial.". . . . Credibility determinations will continue to be made by a jury and not a judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of *Rule* 4:46-2. . . . The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law, ..., the trial court should not hesitate to grant summary judgment. (citations omitted) *Id.* at 540.

The Court noted that to send a case to trial knowing that a rational decision-maker could reach but one conclusion was indeed "worthless" and would "serve no useful purpose." The purpose of this new standard, the decision explained, was to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves.

In the present matter, although petitioner's motion papers contain statements which could be interpreted as allegations of bad faith on the part of the Trenton Board of Education, the material facts, as opposed to any conclusions which may be drawn from them, are not in dispute, and accordingly, this matter is ripe for summary decision.

Preliminarily, I note that neither party has addressed the timeliness of the petition of appeal in the motion papers. Although the issue was raised in the Board's answer and is enumerated in the prehearing order, I too neglected to raise the issue during oral argument.

Nevertheless, it appears fairly clear that the petition of appeal was untimely pursuant to *N.J.A.C.* 6A:3-1.3(d). That regulation provides:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. . . .

Petitioner claims that her tenure/seniority rights entitled her to any number of vice principal positions which have become available in the district over the years commencing with 1998. The basis for petitioner's claim herein is that although the position titles differed, in fact the duties and responsibilities of the positions assistant principal and vice principal are substantially similar and the accrual of tenure in one position should lead to the conclusion that tenure is also achieved in the other. Petitioner also alleges that in fact she performed the duties of vice principal during the time she was employed as an assistant principal and thereby *de facto* obtained tenure in the position vice principal. The merits of those arguments notwithstanding, if she had obtained tenure as a vice principal, then she would have been a tenured vice principal in June 1996 at the time of the reorganization/reduction in force. Accordingly, I **CONCLUDE** that petitioner was required to file her claim with the Commissioner that she was entitled to a vice principal's position within the 90-day period following notice of the reduction-in-force when she knew that she was not placed upon a preferred eligibility list for the position vice principal or at the very latest within 90 days following the appointment of the first non-tenured individual to a vice principal's position. Petitioner herself acknowledges in her petition of appeal that the first such appointment occurred during 1998; the findings of fact recited in *Lynn Schweber v. Board of Education of the City of Trenton, Mercer County*, EDU 6469-96, initial decision (May 1, 1998), final decision June 10, 1998, State Board Decision, October 7, 1998 <http://lawlibrary.rutgers.edu/oal/search.html>, in fact indicate that as of July 1, 1996, directly after the reduction in force, there were two non-tenured teaching staff members serving in the position of vice principal. Petitioner nevertheless waited until November 17, 2000, to file her petition of appeal without offering any explanation for the delay. The Commissioner and the State Board of Education and the courts have read the provisions of *N.J.A.C.* 6A:3-1.3 very

strictly and have applied it almost without exception. Relaxation of the rule is reserved for very limited situations where a compelling reason can be demonstrated for expanding the limitation period. No such compelling reason being present in the within matter, I **CONCLUDE** that the petition of appeal should be dismissed as untimely.

Even if the petition were to be considered on the merits, however, the facts and the law would require the entry of summary decision in favor of respondent. The very same claims made by petitioner were addressed by Judge Harned in *Schweber v. Board of Education of the City of Trenton, supra.* That case dealt with the very same position titles and, in fact, the very same reduction-in-force which affected petitioner in the within matter. Noting that the positions vice principal and assistant principal were separately enumerated in *N.J.S.A.* 18A:28-5, the statutory provision providing for the acquisition of tenure, and noting that the 1996 amendments to *N.J.S.A.* 18A:28-5 made clear that tenure in any of the enumerated administrative or supervisory positions may accrue only by employment in that administrative or supervisory position and that tenure so accrued does not extend to any other administrative or supervisory position, Judge Harned also considered the argument of the petitioners therein that the duties of vice principal and assistant principal were essentially the same and, therefore, the titles were interchangeable. She rejected that argument, explaining:

> Firstly, the argument is contrary to the clear and specific language of the statute which separately enumerates the two positions. Secondly, the duties of the vice principal position are quite different from those of the assistant principal position. The vice principal has responsibility for, *inter alia*, staff selection and assignments, curriculum planning, preparation of school budgets, monitoring of expenditures, coordinating school-wide testing programs and communication with the public. The assistant principal's duties are not as extensive and concern assisting the principal in supervising and evaluating certified and classified staff, administration over attendance issues, preparing special reports and consultation on court referrals and preparation of same. Moreover, the vice principal position is a twelve-month position while the assistant principal position is a ten-month position and there is approximately a $9000.00 difference in salary ranges for the two positions. Nor do I find petitioner's reliance on the seniority regulation, *N.J.A.C.* 6:3-5.1, convincing. While it is true that the regulation lists "vice principal or assistant principal" as a category within which seniority is accrued and determined, this

> case does not involve the issue of seniority and there is no support for the proposition that the regulation could or was ever intended to obviate the clear and unambiguous language of the statute.

Both the Commissioner and the State Board of Education adopted Judge Harned's decision and reasoning. Petitioner herein has offered no argument to warrant departing from the precedent established in *Schweber*.

For all of the foregoing reasons, I **CONCLUDE** that petitioner is not entitled to the relief which she seeks. It is therefore **ORDERED** that summary decision be granted to respondent Board of Education of the City of Trenton and that the petition in this matter be **DISMISSED WITH PREJUDICE.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 6, 2002
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

6/11/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 12 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

OAL DKT. NO. EDU 60-01
AGENCY DKT. NO. 408-11/00

BERLINDA LOVE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge that this matter is properly dismissed. Accordingly, the Initial Decision is affirmed for the reasons set forth in the Initial Decision.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/26/02

Date of Mailing: 7/29/02

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

284-02

AXEL JOHNSON, III,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the Board's determination denying his request to alter his retirement date for a second time, asserting that Board policy and principles of contract law compelled acceptance of his request. Petitioner sought reinstatement to his position retroactive to September 1, 2001, the date his retirement became effective. Respondent argued that it was not legally required to acquiesce to petitioner's second request to alter his retirement date, and sought dismissal of the petition.

The ALJ rejected petitioner's arguments, concluding that petitioner, without coercion, requested a retirement date that was accepted by the Board and that, pursuant to past practice, the Board permitted petitioner, on one occasion, to rescind his retirement date and select an alternate date. The ALJ determined that the Board was not required, either by law or past practice, to grant petitioner's second request to alter his retirement date.

The Commissioner affirmed the decision of the ALJ, with clarification. The Commissioner determined that, contrary to petitioner's argument, his initial request to retire was not nullified after TPAF voided the clause in his collective bargaining agreement permitting use of accumulated sick time to increase base salary in the final years of employment, since his retirement request was not made subject to gaining the benefits of that clause. The Commissioner also determined that the Board complied with past practice by awarding one rescission of petitioner's retirement date, and was not bound by Board policy or principles of contract law to allow petitioner future rescissions of his retirement date. The petition was dismissed.

July 26, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6142-01

AGENCY REF. NO. 313-8/01

AXEL JOHNSON, III,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,

Respondent.

Wayne J. Oppito, Esquire, for petitioner,
(New Jersey Principals and Supervisors Association)

Frank P. Cavallo, Jr., Esquire, for respondent
(Parker, McCay and Crisculo, attorneys)

Record Closed: May 23, 2002 Decided: June 6, 2002

BEFORE **LILLARD E. LAW**, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals from an action by the City of Vineland Board of Education (Board), which refused to rescind petitioner's request of his retirement from the Board's employ. Petitioner alleges the Board's action was arbitrary, capricious and unreasonable. The Board

denies the allegations asserting, among other things, it provided petitioner with an extension of his original retirement request and its refusal to extend petitioner's retirement date a second time is in accordance with the law.

The matter was transmitted from the Commissioner of Education (Commissioner) to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13. The hearing was held on March 25, 2002, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey. The parties were granted leave to submit post-hearing briefs of law. The last submission was received on May 23, 2002, which constitutes the closing of the hearing record.

SUMMARY OF THE RELEVANT TESTIMONY

The parties submitted eighteen documents which were marked into evidence as joint exhibits, J-1 through J-18. Petitioner was the only witness to testify in these proceedings

Petitioner is currently retired from the teaching profession. He had been employed with the Board from 1965 until September 1, 2001, a total of 36 years and two months. While employed by the Board, petitioner served as an assistant principal and a building principal. His last assignment was as the principal of the Board's Dane Barse School.

On November 6, 1997, petitioner wrote a letter to the Board's then Superintendent of Schools, Gerald Kohn, wherein petitioner expressed his desire to retire from the Board's employ as of September 1, 2000 (J-1).

On the same date, November 6, 1997, petitioner wrote the Superintendent a second letter, which states, in pertinent part, as follows:

> This letter is to express my desire to exercise Article IX Section B of the Vineland Administrators and Supervisors Association contract with the Vineland Board of Education.
>
> It is my intent to fully exercise provision number 3 which will allow a twelve per cent (12%) increase over the final

two years of employment. This would encompass the school years 1998-1999 and 1999-2000 (J-2).

On December 19, 1997, the Board accepted petitioner's retirement, effective September 1, 2000(J-3). On December 11, 1997, the Board's Personnel Director addressed a letter to petitioner and acknowledged the Board's action to accept petitioner's retirement, effective September 1, 2000 (J-5).

On August 11, 1998, Thomas A. Thayer, was in receipt of a letter from Regina M. Trauner, Secretary of the Board of Trustees, Teachers' Pension and Annuity Fund (TPAF), New Jersey Division of Pensions and Benefits, concerning the Agreement between the Vineland Administrators and Supervisors Association and the Board. Therein, Ms. Trauner stated the TPAF Board of Trustees had reviewed and considered Article IX (Retirement Allowance) of the Agreement and determined to deny sick pay conversion in the use of credible salary for retirement purposes. It opined that accrued compensation, which represents unused accumulated leave, is additional compensation above the base salary and not pension. The Board of Trustees cited *N.J.S.A.* 18A:66-2(d), which excludes salary adjustment granted in anticipation of retirement in the calculation of base salary. It also cited the regulation at *N.J.A.C.* 17:3-4.1(d)6., which prohibits payment of terminal accumulated sick leave or vacation time as pensionable compensation. See *Donald G. Wilson v. Board of Trustees of the Police and Firemen's Retirement System,* N. A-002123-96T2, (App. Div. February 20, 1998). (J-6)

Petitioner was made aware the Board of Trustees of TPAF would not allow the use of accumulated leave to be converted to salary for pension purposes. Petitioner admitted on this hearing record he did not advise nor request of the Superintendent to rescind his retirement request. Petitioner asserted he believed his retirement date had somehow been rescinded. Subsequently, on February 29, 2000, petitioner wrote to the Superintendent to request his retirement date of September 1, 2000, be rescinded (J-7). Petitioner testified Superintendent Kohn asserted the Board's legal counsel would be advised of petitioner's request to rescind his retirement date.

On March 21, 2000, petitioner again wrote to the Superintendent, as follows:

> This is a follow up to my letter of February 29, 2000.
>
> On November 6, 1997 I expressed my desire to exercise Article IX section B of the Vineland Administrators and Supervisors Association Contract with the Vineland Board of Education.
>
> Accordingly, I was required to request a planned retirement date to activate this Article. My announced date was 9/1/2000.
>
> However, this Article was voided by a ruling from the Pension Division of the State of New Jersey. Due to the fact that this Article was never implemented on my behalf, I have been counseled that my requested retirement date would not remain active.
>
> If necessary, I am formally requesting that my retirement date be delayed until 9/1/2001 with the understanding that I may request additional delays in the future. . .(J-8)

The Minutes of the Board, dated June 14, 2000, reflect that petitioner's request to rescind his retirement date from September 1, 2000, was approved by the Board (J-9). The Board's action to rescind petitioner's retirement was confirmed by way of letter to petitioner, dated June 13, 2000, over the signature of the Board's Director of Human Resources (J-10). The letter (J-10), was sent to petitioner's home address. However, petitioner testified he first saw J-10 on the date of the herein hearing, March 25, 2002.

On April 25, 2001, petitioner addressed a Memo to Dr. Gerardi, the Acting Superintendent of Schools, wherein petitioner requested his projected retirement date be adjusted from September 1, 2001, to be effective September 1, 2002. Petitioner also requested he be provided the option for future consideration, if appropriate (J-11). Petitioner testified he was not in receipt of a written response to his Memo (J-11). However, petitioner testified, Acting Superintendent Gerardi advised petitioner the Board would not support the change as requested by petitioner.

Petitioner testified he had a meeting with the Acting Superintendent in May 2001, on a date not set forth on the hearing record. There was a short discussion at which the Acting Superintendent advised petitioner the Board would not approve his request for a change of his retirement date.

On May 14, 2001, petitioner addressed a letter to Mr. Frank Giordano, President of the Board, to request the Board rescind petitioner's projected retirement date of September 1, 2001 (J-12). Petitioner requested the request to rescind be placed on the Board's agenda for the next Board meeting. On May 15, 2001, petitioner met with the Acting Superintendent and the Board's negotiating legal counsel where it was promised the request would appear on the Board's next agenda for discussion.

On June 20, 2001, the Acting Superintendent addressed the following letter:

> Dear Dane Barse School Staff Members,
>
> It has come to my attention that rumors are flying regarding Axel Johnson's status.
>
> As valued staff member, I want you to know that Mr. Johnson had requested an additional one-year extension of his retirement date. A second one-year extension is unprecedented in the City of Vineland, and on that basis, I chose not to recommend it. My decision in no way reflects on Mr. Johnson's performance.
>
> Since his previous one-year extension was for the period through September 1, 2001, I have posted his position so that it can be filled expeditiously.
>
> Thank you in advance for your understanding in this matter. (J-13)

Petitioner testified Superintendent Gerardi did not discuss this letter to the school's staff prior to its publication. Petitioner had a discussion about J-13 later in June 2001.

On June 21, 2001, petitioner wrote to Superintendent Gerardi, Board attorneys Robert DeSanto and Frank DiDomenico, and all of the Board members, where among other things,

petitioner admitted he was confused with respect to his supposed retirement date. Petitioner contended it was his belief that he had no legally binding retirement date in place (J-14). By way of explanation, petitioner enclosed a copy of Article IX of the Agreement and observed, among other things, the portion of the Agreement which stated any changes or modifications of the terms and conditions by the State of New Jersey, that portion of the Agreement becomes null and void, with no further effect. Petitioner questioned why his retirement date, submitted in accordance with the provisions of Article IX, should remain in effect and, why his request for an extension of his retirement was not honored by the Board (J-14).

Petitioner averred his original request of an extension of his retirement to September 1, 2001, was neither proper nor binding. In the alternative, in the event the Board and its legal counsel were of the opinion the retirement date of September 1, 2001, was binding, then petitioner believed his request for an extension of his retirement date to September 1, 2002, would be his first request for an extension. Therefore, petitioner requested to be continued in his present employment position for an additional year in accordance with the past practice by the Board to extend the retirement dates of employees for an additional year. (J-14)

On June 25, 2001, petitioner addressed a letter to Dr. Gerardi and the Board (J-15) with Dr. Gerardi's June 20, 2001 letter to staff members attached (J-13). Petitioner testified he felt it was necessary to correct the Superintendent's statements set forth in J-13, among other things. This was followed with a letter from petitioner to the Superintendent, dated August 14, 2001, wherein petitioner requested the Superintendent propose a resolution to the Board which would allow petitioner to return as principal of the Dane Barse School for a minimum of one year from September 1, 2001. (J-16)

The herein record shows a portion of the Superintendent's Report to the Board, dated August 22, 2001, where, under Item 3. the Superintendent recommended:

> The Board deny the request of Axel J. Johnson, 3rd to extend his retirement date until September 1, 2002, as per Resolution provided and on file with the Secretary of the Board. (J-17)

The Board Resolution referenced in J-17, is set forth in its entirety as follows:

RESOLUTION

WHEREAS, AXEL J. JOHNSON, 3rd., is an employee of the VINELAND BOARD OF EDUCATION, serving as Principal of Dane Barse Elementary School; and

WHEREAS, by way of letter dated November 6, 1997, Axel J. Johnson, 3rd, requested to retire from his employment with the Vineland Board of Education as of September 1, 2000; and

WHEREAS, the Vineland Board of Education accepted by Resolution the retirement of Axel J. Johnson 3rd, effective September 1, 2000; and

WHEREAS, by way of letter dated March 21, 2000, Axel J. Johnson 3rd, requested that the Board of Education rescind his retirement date of September 1, 2000, and delay his retirement until September 1, 2001, and

WHEREAS, the Board of Education accepted the revised retirement date by Resolution on June 14, 2000; and

WHEREAS, by way of memo dated April 25, 2001, Axel J. Johnson, 3rd, requested his retirement date be delayed until September 1, 2002, with the option for future extensions.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF EDUCATION OF THE CITY OF VINELAND that Axel J. Johnson, 3rd.'s request to extend his retirement date Until September 1, 2002, is denied. (J-18)

Petitioner has been retired from the Board's employ, effective September 1, 2001.

FINDINGS OF FACT

Having carefully reviewed and considered the testimony and documents offered as joint exhibits in evidence, **I ADOPT** the above as my **FINDINGS OF FACT** in this matter.

LEGAL ARGUMENTS OF THE PARTIES

Petitioner's Position

POINT I

RESPONDENT'S FAILURE TO ACCEPT PETITIONER'S REQUEST TO RESCIND HIS RETIREMENT DATE WAS ARBITRARY, UNREASONABLE AND/OR CAPRICIOUS AND/OR IN VIOLATION OF SCHOOL AND CONTRACT LAW

Respondent's failure to accept petitioner's request to rescind his retirement date was arbitrary, unreasonable and/or capricious and in violation of school and contract law. The case relied upon by respondent in its brief clearly supports petitioner's argument. Respondent cites Cutler v. Parsippany-Troy Hills BOE, 1990 S.L.D. 725 as being analogous to the facts in this matter. Petitioner agrees that the facts in Cutler are very similar. However, respondent's reliance on the Administrative Law Judge's determination in Cutler is misplaced. Although both the Commissioner of Education and the State Board affirmed the Initial Decision, the Appellate Division reversed in an unreported decision, Docket No. A-1464-90T3. (Attached as Appendix A).

In Cutler, supra., four teachers appealed the decision of the Parsippany-Troy Hills Board of Education which refused to allow them to rescind their retirement date after the Board of Education had accepted them. Underlying the controversy, like here, was a provision in a collective bargaining agreement providing for terminal leave pay upon retirement. As the Court noted in Cutler, the effect of the agreement was to modify the statutory requirement, N.J.S.A. 18A:28-8, of 60 days notice of intention to relinquish a tenured position, by requiring a longer notice period. The Court remarked that the longer notice provision allowed the school district to accumulate the necessary funds and make the terminal leave payments during the last years of employment. (Slip Opinion at p.3).

In Cutler, each teacher submitted their individual notices eighteen months in advance of their retirement date. The contents of their letters were very similar to petitioner's in this matter. The Court stated:

> In the letter accompanying her notice, Cutler said, "However, as we (Cutler and Arthur Milder, Director of Employee Relations for respondent's district) also discussed, if the situation should change, this notice of retirement could be rescinded." In his notice Goin said, "I will probably retire in June 1989. . . But, if my health is still good at that time, I would like to continue through June of 1990." In her notice Swotinsky said, "if my personal circumstances change in the next 18 months, and I decide to postpone retirement, I would sincerely appreciate it if you would allow me to continue." Appellant Bates gave notice prior to January 1, 1989 of an intention to retire approximately April 1, 1990 "Barring any unforeseen 'happening', personally or with my family." All the retirements were duly approved by the Board. (Slip opinion at pp. 3 and 4)

When the Parsippany-Troy Hill Board of Education denied their request to rescind their notices of retirement, the teachers filed petitioner with the Commissioner. The Administrative Law Judge found that the denial of the request by the board of education was within its discretion and not arbitrary or capricious. The Commissioner and State Board affirmed, relying on the State Board's decision in Anne Hall v. Jefferson Twp. BOE which was reversed by the Supreme Court at 125 N.J. 299 (1991).

As noted by the Appellate Division in Cutler, (Slip Opinion at p. 5) and respondent in its brief, the matter sub judice is one or ordinary contract law. The Court in Cutler stated:

> At each stage of this litigation, plaintiffs have contended that the Board's acceptance of their conditional notices of intention to retire preserved to them the right to rescind. We are persuaded that as a matter of ordinary contract law plaintiffs are correct. Plaintiffs' offers could only be accepted in accordance with their terms. See Johnson & Johnson

> v. Charmley Drug Co., 11 N.J. 526, 538 (1953);
> 1 Restatement Contracts, 2d., §58 (1981);
> 1 Williston on Contracts, Third Ed. §73 (1957).
> The Administrative Law Judge's conclusion that "petitioners wish to leave themselves free to resign or not, as they felt their own personal circumstances warranted, regardless of the expense and effort to which they had committed the Board" and the Board's position before the Commissioner that the collective bargaining agreement makes no reference to a "notice of possible retirement' and that a conditional notice would frustrate the very purpose of the notice beg the question. There is no contention that the Board was required to accept plaintiffs' conditional notices. We have no doubt that the Board could have properly rejected the notices as failing to comply with the terms of the collective bargaining agreement. The ALJ's perceived inequity of plaintiffs' position and the Board's recognition that undecided retirement plans would frustrate the "terminal leave pay" arrangement may have justified a refusal to accept the tendered advices. However, they could not permit a unilateral change in that offer, without notice to the plaintiffs, to one of an unconditional nature which then, when accepted by the Board, could bind plaintiffs. The conclusion in the Commissioner's decision, adopted by the State Board, that plaintiffs' arguments in this regard were fully addressed by the ALJ is neither supported by the record nor by law. (Slip opinion at pp. 5 and 6)

In the instant matter, petitioner wished to avail himself of a contractual provision of converting sick leave pay to salary (J-4) and gave respondent almost three (3) years notice (J-1 and J-2). When the conversion provision was disallowed by the TPAF Board of Trustees (J-6), respondent could not honor the terms of the contract and respondent could not bind petitioner to his offer to retire. Subsequently, petitioner made another offer to retire which read:

> If necessary, I am formally requesting that my retirement date be delayed until 9/1/2001 with the understanding that I may request additional delays in the future. (J-8)
> (emphasis supplied)

Petitioner made a conditional offer. Respondent could have properly rejected the conditions. It did not. Petitioner testified that he was offering a "fluid date for retirement" and this was conveyed to Dr. Kohn, the superintendent, who was in agreement with him.

The instant matter is substantially the same as the factual situation in Cutler, supra. As the Court determined in Cutler, supra, the board of education could not unilaterally change the offer. In this matter, when the Vineland Board of Education denied petitioner's request to rescind his retirement date, its denial was arbitrary, unreasonable and/or capricious and violated school law and contract law.

POINT II

RESPONDENT'S FAILURE TO ACCEPT PETITIONER'S REQUEST TO EXTEND HIS RETIREMENT DATE FROM SEPTEMBER 1, 2001 TO SEPTEMBER 1, 2002 IS ARBITRARY, UNREASONABLE AND/OR CAPRICIOUS AND VIOLATE OF THE SCHOOL DISTRICT'S PAST PRACTICE

Respondent's failure to accept petitioner's request to extend his retirement date from September 1, 2001 to September 1, 2002 is arbitrary, unreasonable and/or capricious and violative of the school district's past practice. In furtherance of petitioner's argument are the events which occurred in the spring or 2001. On or about April 25, 2001, petitioner requested his "projected retirement date be adjusted to September 1, 2002 with the option for future consideration, if appropriate." (J-11) Apparently as a result of petitioner's memorandum (J-11), a controversy developed in the school district. The acting superintendent, Robert Gerardi, sent a letter to the staff members at petitioner's school. (J-13). In the letter, Dr. Geradi states:

> As valued staff member, I want you to know that Mr. Johnson had requested an additional one-year extension of his retirement date. A second one-year extension is unprecedented in the City of Vineland, and on that basis I chose not to recommend it. My decision in no way reflects on Mr. Johnson's performance.

Dr. Gerardi is stating that the past practice in the Vineland School District is to grant first time request to extend a previously submitted retirement date. Since the past practice in the Vineland School District is to grant a first time request for and extension of a previously submitted retirement date, as Dr. Gerardi indicates in his letter (J-13), then respondent is also in violation of its past practice.

When petitioner requested a change in retirement from 2000 to 2001, this was the first time in which he was seeking an extension. The Board of Trustee, TPAF made it clear that the Vineland School District could not convert sick pay into salary. (J-6) Respondent knew or should have known that Article IX, B. could be problematic because it included paragraph 4 which indicated that if the system was changed or modified, the "provision shall become null and void and shall have no further effect." Simply stated, since respondent could not fulfill its obligation under the contract, there was no extension given to petitioner. Petitioner testified that Dr. Kohn informed him after he submitted J-7 without any further retirement date, that the Board Attorney indicated a date was required. Petitioner then sent J-8 with a date of September 1, 2001, but which also included the conditions for possible additional delays in the future. Assuming arguendo that September 1, 2001 was a set date for petitioner's retirement, his request to change that date to September 1, 2002 (J-11) was his first request and should have been granted in accordance with the past practice indicated by Dr. Gerardi in J-13.

The Vineland Board of Education could not fulfill its obligation because of a regulatory decision by the Division of Pensions. Therefore, petitioner's offer to retire conditioned on receiving the conversion benefit could not be satisfied. Thus, the offer was null and void. The subsequent offer to retire was a conditional offer, which is set forth in Point I of this Argument. However, this subsequent offer cannot be construed as a second request to extend petitioner's retirement. The initial notice of retirement was voided by a regulatory decision. The subsequent offer to retire on September 1, 2001, in effect, was petitioner's first retirement date and his request to extend that date to September 1, 2002 was his first request for an extension. As his first request, it should have been granted based upon the past practice in the Vineland School District to grant one extension.

Although Hall, supra. involved a different issue, one issue that is pertinent is that a Board of Education cannot change past practice without justification. The Supreme Court determined in Hall:

> We hold only that where an ambiguous contractual provision and a consistent, longstanding practice of permitting modification of an intended retirement date are involved, the Board cannot impose a new condition without any justification and in conflict with past practice. (at 125 N.J. 306

In this matter, since the original change in petitioner's retirement date was dictated by a determination of the Board of Trustees, TPAF, the only extension requested by petitioner would have been from 2001 to 2002 (J-11) and since the past practice in the Vineland School District is to grant one year extensions (J-13), the denial by respondent of petitioner's request to extend his retirement date to 2002 was violative of the past practice and arbitrary, unreasonable and/or capricious.

As a remedy, petitioner seeks an order issued by the Commissioner to employ petitioner as a principal in the Board's school district, with all salary, benefits and emoluments retroactive to September 1, 2001.

The Board's Position

Prior to the opening of the herein hearing record, the Board propounded a Motion In Limine for Dismissal of the Petition of Appeal together with a Brief in Support of its Motion. The Board's Brief also serves as its Trial Brief in the instant matter. The Board's motion was held in abeyance and to be considered at the close of the proceedings.

(a) PRINCIPLES OF CONTRACT LAW MUST BE APPLIED IN THIS MATTER.

It is well established in School Law that "in the absence of statutory provisions dealing with the effect of resignations and their rescission, principles of contract law are applicable." Cutro v. Hazlet Township BOE., 94 N.J.A.R. 2d. (EDU) 402, Supplemented by

State Board of Education, 97 N.J.A.R. 2d. (EDU) 557. The Administrative Law Judge in Curto, supra., went on to hold that:

> rescission is an equitable remedy and is only available in limited circumstances; contracts may only be rescinded when there is original invalidity, fraud, failure to consideration or a material breach or default. Hilton Hotels Corp. v. Piper Co. 214 N.J. Super. 328, 336 (Chancery Div. 1986) at 404.

There is no reason why this Court should not, respectfully, apply principles of contract law to the facts outlined above.

II. APPLICATION OF THE CONTRACT PRINCIPLES TO PETITIONER'S PETITION OF APPEAL REQUIRES THE DISMISSAL OF THAT PETITION

The uncontraverted facts in this matter fail to establish the Petitioner would be entitled to a rescission of his contract with the Board of Education. There are neither factual contentions nor allegations that the contract was invalid, tainted by fraud, lacking in consideration or that there had been a material breach or default.

In fact, the Petitioner was permitted to rescind his original contract with the Board of Education because of a "failure of consideration," i.e. invalidation of the enhanced sick leave buyback provisions of the Collective Bargaining Agreement.

Absence on of the equitable reasons for a rescission, the Board of Education was not obligated, under contract principles, to approve Petitioner's request to rescind the parties' contract. Accordingly, it is respectfully submitted that the Petition of Appeal in this matter must be dismissed.

THE ACCEPTANCE OF PETTIONER'S LETTER OF RETIREMENT BY THE BOARD OF EDUCATION SERVES AS A BAR TO THE RELIEF REQUESTED BY THE PETITIONER IN THE PETITION OF APPEAL.

The provisions of N.J.S.A. 18A:28-8 require a tenured teaching staff member desiring to relinquish their position to give the employing Board of Education written notice of their intent to resign. It is well established in school law that upon acceptance of that letter or resignation by the Board of Education that the teaching staff member has not automatic right to rescind the resignation. See, e.g. F. Rupert Belles vs. Wayne Township BOE, 1938 SLD 556; Kozak vs. Waterford Township BOE, 1976 SLD 633; Austin vs. Mahwah BOE, 1955 SLD 98, and Cutler vs. Board of Education of the Township of Parsippany-Troy Hills, 1990 SLD 725. In fact, the Administrative Law Judge in the Cutler matter concluded based upon facts and analogous to the facts contained in this matter that the refusal of the Board of Education to approve the rescission of Petitioner's resignation was neither arbitrary nor capricious. Cutler, supra at 745.

It is also a well established principle in school law that a resignation of an employee is effective upon its acceptance by the Board of Education. Cutro, supra at 404.

Finally, in the matter of Fisher vs. Board of Education, 1988 SLD 31, an Administrative Law Judge faced with a similar fact pattern as presented in this matter concluded that an employee's resignation was effective to serve appropriate notice to a Board of Education under N.J.S.A. 18A: 28-8 of an intention to resign; that the resignation was a voluntary relinquishment of position; and that after acceptance by the Board of Education was no longer subject to rescission or unilateral modification of the terms thereof by the resignee (employee). Fisher, supra at 35.

Based upon the foregoing case law and statutory law, it is respectfully submitted that the Petition of Appeal in this matter must be dismissed.

The Board's Reply to Petitioner's Brief

The Board, by way of a Letter Brief, is in reply to petitioner's brief and states the following:

The petitioner's sole reliance upon the unreported opinion of the Appellate Division in Cutler vs., Parsippany-Troy Hills Board of Education ignores the case law cited on behalf of the Respondent in its original trial brief. That body of case law was developed after the unreported Appellate decision in Cutro, supra. Specifically, Cutro **vs.** Hazlet Township Board of Education, 94 N.J.A.R. 2nd (EDU) 402 (supp. By State Board of Education 97 N.J.A.R. 2nd 557). As cited in the Respondent's trial brief, the holding in Cutro was that:

> "rescission is an equitable remedy and is only available in limited circumstances; contracts may only be rescinded when there is original invalidity, fraud, failure of consideration or immaterial breach or default." Hilton Hotels Corp. supra.

There was no testimony induced at the time of the hearing that would demonstrate that any of the equitable principles set forth above were applicable to the facts in this matter. There was no invalidity, fraud, failure of consideration or immaterial breach or default. Consequently, the attempt by the petitioner to rescind this contract (a/k/a/ letter or retirement) must, respectfully be viewed as invalid.

In addition petitioner relies upon alleged "past practice" that existed in the respondent's school district regarding rescissions or retirement dates. There was no credible evidence presented at the time of the hearing that:

(a) a past practice existed in the City of Vineland School District; and
(b) that the City of Vineland Board of Education violated that past practice.

It is the burden of the petitioner to demonstrate that the past practice existed. It is Respectfully submitted that there is no credible evidence to establish a past practice, which permitted rescission of a retirement date of at lease once. However, assuming arguendo, that such a past practice existed, the petitioner rescinded his first retirement date and then attempted to rescind his second retirement date. The Board of Education, therefore, complied with this

alleged past practice. Petitioner attempts to argue that the second request was, in fact, only his first request for rescission of the retirement date since the provision of the collective bargaining agreement, under which he retired was declared null and void by the Board of Trustees of the TPAF pension system. It is significant, however, to note that the Board of Trustees of the TPAF pension system determined that individuals such as Mr. Johnson could not use the sick leave conversion portion of the collective bargaining agreement to increase their salary for pension purposes by letter dated August 11, 1998. Yet, Mr. Johnson waited nearly two years after that date to rescind his first retirement date of September 1, 2000. It is somewhat incredulous to argue that petitioner rescinded his retirement date solely based upon the August 11, 1998 decision of the Board of Trustees of the TPAF pension system. Clearly, there are other factors involved or the petitioner would not have waited so long after that decision to formerly request rescission of his retirement date.

No matter what the reason for the rescission of his first retirement date, the fact remains that the Petitioner was able to rescind that retirement date. If, in fact, as petitioner argues a past practice existed then he was given the benefit of that past practice by being able to rescind the original retirement date. The second request to rescind that retirement date would fall outside of the past practice that petitioner alleges to exist although said past practice was not proven by the petitioner and the respondent denies that same existed.

In conclusion, it is the position of the Respondent City of Vineland Board of Education that for the reasons expressed herein as well as the reasons expressed in case law cited in the trail brief submitted on it behalf that the Petition of Appeal filed on behalf of Axel J. Johnson, 3rd, should be dismissed and the relief therein denied.

CONCLUSIONS

The facts of this matter clearly demonstrates that on November 6, 1997, petitioner addressed a letter to the then Superintendent of Schools, Gerald Kohn, to express his desire to retire from the Board's employ, effective September 1, 2000 (J-1). In a second letter addressed to the Superintendent, dated November 6, 1997, petitioner asserted his desire to exercise Article IX, §B of the collective bargaining agreement between the Board and the Administrators and

Supervisors Association (J-4) (Association). Article IX, §B. 2. a. provided, among other things, for the conversion of unused accumulated sick leave to salary credit for pension purposes (J-2). Exhibit J-2 was not made a part of petitioner's original letter to the Superintendent in J-1.

The Board, at its regular monthly meeting held on December 10, 1997, approved and accepted petitioner's retirement, effective September 1, 2000 (J-3). Petitioner was given notice of the Board's action by way of letter, dated December 11, 1997, from the Board's Personnel Director, Frank Lindsey (J-5).

Subsequently, petitioner was advised the Board of Trustees of the TPAF had learned, through an article in the *Atlantic City Press*, of the Agreement between the Board and the Association concerning the conversion of accumulated unused sick pay to increase base salary to enhance retirement benefits (J-6). The Board of Trustees of the TPAF, after a thorough review of issues, denied the conversion of unused accumulated sick leave to enhance petitioner's base salary for retirement purposes. In arriving at its determination, the TPAF Board of Trustees relied upon, among other things, the statute found at N.J.S.A. 18A:66-2.d., which provides:

> "Compensation" means the contractual salary, for services as a teacher as defined in this article, which is in accordance with established salary policies of the member's employer for all employees in the same position but shall not include individual salary adjustments which are granted primarily in anticipation of the member's retirement or additional remuneration for performing temporary or extracurricular duties beyond the regular school day or the regular school year.

In its letter, dated August 11, 1998, The TPAF Board of Trustees also cited the regulations, found at N.J.A.C. 17:4.1, which provides, in part, as follows:

> **Credible salary**
>
> (a) Only member's base or contractual salary shall be subject to pension. . . .
>
> (b) Where it is evident from the record that a salary reported for benefits includes extra compensation, such extra compensation shall be considered not creditable for benefits. . . . .

Subsequent to receipt of the information and advice from the TPAF Board of Trustees, petitioner did nothing until February 29, 2000, at which time petitioner addressed a letter to Superintendent Kohn to request his retirement scheduled for September 1, 2000, be rescinded (J-7). On March 21, 2000, petitioner wrote a second letter to the Superintendent, where among other things, her stated:

> If necessary, I am formally requesting that my retirement date be delayed until 9/1/2001 with the understanding that I may request additional delays in the future (J-8).

On June 14, 2000, the Board accepted petitioner's request to rescind his September 1, 2000, retirement date to September 1, 2001 (J-9). Petitioner was given notice of the Board's action by letter, dated June 13, 2000, from Rusty Phillips, the Board's Director of Human Resources (J-10).

The Board accommodated petitioner and, pursuant to its alleged past practice, allowed petitioner to withdraw his original retirement date of September 1, 2000, and it approved his subsequent retirement date of September 1, 2001.

Thereafter, petitioner requested a second adjustment of his retirement date from September 1, 2001 to September 1, 2002 (J-11). Even here, petitioner wished to keep open to him the option for future consideration concerning his retirement from the Board's employ. Petitioner was advised, by the Superintendent, a second rescission would not be recommended nor granted. Subsequently, petitioner engaged in a letter writing campaign to the President of the Board (J-12), the Superintendent, the Board's legal counsel, and all members of the Board (J-14) (J-15), wherein, among other things, petitioner insisted that his original request of a retirement date of September 1, 2000, was not proper nor binding, notwithstanding the Board having taken official action to grant petitioner's request to retire on September l, 2000 (J-1) and, subsequently, having taken official action for a rescission of his retirement request (J-9). The record demonstrates petitioner submitted a memorandum to the Superintendent, dated April 25, 2001, seeking his second request to delay his retirement from September 1, 2001 to September 1, 2002 (J-11). The Board took official action to deny petitioner's second request to modify his retirement date to September 1, 2002 (J-17). Accordingly, the Board's official records

demonstrate petitioner's retirement date, as amended and modified, to be September 1, 2001. I so **FIND and CONCLUDE.**

As Administrative Law Judge Edith Klinger observed in Cutler, supra.,

> N.J.S.A. 18A:28-8 provides that a tenured teaching staff member desiring to relinquish his position shall give the employing Board of Education written notice of his intention to resign. The teacher must have the intent to terminate employment when offering his resignation. Koszak v. Waterford Twp. BOE, 1976 S.L.D. 633, 638 (citing 78 C.J.S. 1101, 1102). The form in which notice of intent to retire is conveyed to the Board must only be in writing to satisfy the statute. . . . .

The record clearly demonstrates petitioner submitted his intent to retire to the Board by his own free will. See, Evaul v. Camden Bd. of Education, 65 N.J. Super. 68 (App. Div. 1961). There is no allegation petitioner was "forced" to submit a request to retire from the Board's employ. Petitioner's submission to the Board was voluntary where he relinquished his tenured position, effective September 1, 2001, upon the approval by the Board. 78 C.J.S. 1102, provides, in part, as follows:

> The resignation may be withdrawn at any time before it is accepted, but after the resignation has been accepted it is effective as against a subsequent attempt to withdraw or offer to serve, even though the teacher attempts to withdraw before the effective date of his resignation. . .

Here, petitioner withdrew his resignation on the first occasion and the Board accommodated petitioner subsequent to its action to accept his retirement date of September 1, 2000. However, **I CONCLUDE** the Board was under no duty to accommodate petitioner's second request for an extension of his resignation until September 1, 2002.

I CONCLUDE, therefore, that the action by the Board to refuse to accept or accommodate petitioner's second request for an extension of his offered resignation and retirement, effective September 1, 2001, was proper and in accordance with the law.

ORDER

Accordingly, it is **ORDERED** that the herein Petition of Appeal be and is hereby **DISMISSED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6 June 2002
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

6/11/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 12 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

For Petitioner:

Axel J. Johnson, 3rd.

For Respondent:

None

DOCUMENTS IN EVIDENCE

Joint Exhibits by the Parties

J-1 Letter, November 6, 1997 to Dr. Gerald Kohn from Axel J. Johnson, 3rd

J-2 Letter, November 6, 1997 to Dr. Gerald Kohn from Axel J. Johnson, 3rd

J-3 Board of Education Meeting, December 10, 1997 (2 pages)

J-4 VASA Contract 1995-1998 (3 pages)

J-5 Letter, December 11, 1997 to Axel J. Johnson, 3rd from Frank Lindsey

J-6 Letter, August 11, 1998 to Thomas A. Thayer from Regina M. Trauner (3 pages)

J-7 Letter, February 29, 2000 to Dr. Kohn from Axel J. Johnson, 3rd

J-8 Letter, March 21, 2000 to Dr, Kohn from Axel J. Johnson, 3rd

J-9 Board of Education Meeting, June 14, 2000

J-10 Letter, June 12, 2000 to Axel Johnson from Rusty Phillips

J-11 Memo, 4/25/01 to Dr. Gerardi from A. Johnson

J-12 Letter, to Frank Giordano, President Vineland Board of Education from Axel J. Johnson, 3rd June 14, 2001

J-13 Letter, To Dane Barse School Staff Members, June 20, 2001, from Dr. Robert J. Gerardi

J-14 Letter, to Dr. Gerardi, Robert DeSanto, Esq., Frank DiDomenico, Esq. and all Vineland Public Board of Education Members, June 21, 2001 from Axel J. Johnson, 3rd

J-15 Letter, June 25, 2001, to Dr. Gerardi and the Members of the Vineland Board Of Education with attachment from Axel J. Johnson, 3rd (3 pages)

J-16 Letter, August 14, 2001 to Dr. Gerardi from Axel J. Johnson, 3rd

J-17 Report to the Board – August 22, 2001, signed Robert J. Gerardi

J-18 Resolution

OAL DKT. NO. EDU 6142-01
AGENCY DKT. NO. 313-8/01

AXEL JOHNSON, III,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	
RESPONDENT.	:	

The record, Initial Decision, petitioner's exceptions and the Board's response thereto have been reviewed. Upon such review, the Commissioner adopts, with clarification, the determination of the Administrative Law Judge (ALJ) recommending dismissal of the petition and denying petitioner's request for rescission of his retirement and reemployment by the Board retroactive to September 1, 2001.

Petitioner's exceptions and respondent's reply summarize and incorporate the parties' positions and will not be reiterated in their entirety. The operative facts and arguments are as follows.

Petitioner, on November 6, 1997, wrote the superintendent of respondent's schools setting forth his desire to retire effective September 1, 2000. (*See*, J-1 In Evidence.) In a separate letter of the same date, petitioner wrote the superintendent and advised that he would be exercising his rights under the collective bargaining agreement allowing him to increase his salary through his final two years of his employment by utilizing unused sick pay to increase his salary. (*See*, J-2 In Evidence.) Petitioner's retirement request was accepted by the Board on December 10, 1997. (*See*, J-3 In Evidence.) Some eight months later, the Board of Trustees of

the Teachers Pension and Annuity Fund (TPAF) determined that the clause of the collective bargaining agreement invoked by petitioner to increase his salary was invalid, with the result that petitioner and others similarly situated would be unable to utilize the clause to increase their final two years' salary. (*See*, J-6 In Evidence.)

Petitioner was made aware of the determination of TPAF. (Initial Decision at 3) However, petitioner did not seek to rescind his retirement until a year and a half later, on February 29, 2000, when he wrote the superintendent of respondent's schools, stating that,

> I am requesting that my retirement date of 9/1/00 be rescinded.
>
> On several occasions, during the past months, individual and collective groups of Dana Bare (sic) School staff members have asked me to reconsider this retirement date.
>
> I have tried to carefully examine all factors and have concluded that it is currently in the best interest of the students of Dane Barse School that I ask for my retirement date to be rescinded.
>
> Serious consideration was given to many factors, some of which I will share for your information. Dane Barse School is currently investigating and implementing new methods to present instruction to assure greater student success. We are currently establishing and refining special afterschool (sic) programs at all grade levels. In addition, we are adding several new dimensions to our literacy program both during the school day and during extended hours. Dane Barse School has elected to partner with Coalition of Essential Schools and will be moving into this whole school reform beginning in September 2000. Also, we have a newly formed SMT and will construct Dane Barse's first true school based budget in October and November of 2000.
>
> I should also mention that several parents, after becoming aware of my possible retirement, has (sic) asked and encouraged me to remain.
>
> Thank you for your consideration and I will anxiously wait for your response as we begin making plans for the coming school year.
> (J-7 In Evidence)

By separate letter dated March 21, 2000, petitioner wrote the superintendent stating that, because he could not exercise his rights under the voided provision of the collective bargaining agreement, he believed his retirement request was no longer active, but that, if it were active, he was requesting to delay it so that his retirement date would be changed to September 1, 2001. (*See*, J-8 In Evidence.)

The Board responded to petitioner's February 29, 2000 request by taking formal action expressly *rescinding* petitioner's initial retirement request at its June 14, 2000 meeting and making petitioner's retirement effective September 1, 2001. (*See*, J-9 and J-10 In Evidence.) Petitioner raised no objection to the Board's action, nor did he file any challenge based on his belief that a rescission was, in fact, unnecessary.

By memorandum of April 25, 2001 and letter of June 14, 2001, petitioner *again* sought to change his retirement date, to September 1, 2002, subject to further requests for change. (*See*, J-11 and J-12 In Evidence.) However, petitioner's request to change his retirement date to September 1, 2002 was denied by the Board at its August 22, 2001 meeting. (*See*, J-17 In Evidence)

Petitioner, in his exceptions and brief below, argues that, because his initial retirement request was made in reliance upon his obtaining the benefits of a subsequently voided provision of the collective bargaining agreement, such request was void *ab initio*, and therefore, his first request to retire was his March 21, 2000 request. (*See*, J-8 In Evidence.) As such, petitioner contends that, pursuant to the purported policy of the Board, his subsequent request to extend his retirement date to September 1, 2002, subject to additional requests for change, was his first request for an extension and should have been granted by the Board based on past practice.

Petitioner also argues that, because his requests for retirement were contingent on exercising his rights pursuant to the collective bargaining agreement, or upon his changing his mind in the future, the Board's acceptance of the requests indicated an acceptance of the contingent nature of same, and imposed a requirement on the Board to permit petitioner to alter his requests. As such, petitioner asserts that he is entitled to reemployment by the Board retroactive to September 1, 2001.

Upon review of the record, Initial Decision and exceptions, while the Commissioner agrees with and adopts the ALJ's determination to dismiss the petition of appeal, he provides the following clarification. First, as to petitioner's assertion that his initial request to retire was of no effect after TPAF voided the provision in the collective bargaining agreement he had exercised, and that Board policy thus compelled the Board to accept his April 25, 2001 request to rescind and change his retirement date as an initial request, the Commissioner does not agree. Petitioner's initial request for retirement (J-1 In Evidence) was not contingent. It stated in clear terms that petitioner wished to retire effective September 1, 2000. The letter reads as follows:

> This letter is to express my desire to retire from the Vineland Public Schools as of September 1, 2000.
>
> It will have been my pleasure to have been a member of the educational community for forty years as of that date. Thirty six of these years would have been spent as a member of the Vineland Public School's Staff.
>
> If you should need or require any additional information, please contact me.
> (J-1 In Evidence)

By separate letter (J-2 In Evidence) petitioner also expressed a desire to exercise his right under the collective bargaining agreement to increase his salary through unused sick

time. That petitioner did not link his request for an increased base salary as a necessary condition precedent to his retirement is confirmed by his letter, which reads as follows:

> This is to express my desire to exercise Article IX section B of the Vineland Administrators and Supervisors Association contract with the Vineland Board of Education.
>
> It is my intent to fully exercise provision number 3 which will allow a twelve per cent (*sic*) (12%) increase over the final two years of employment. This would encompass the school years 1998-1999 and 1999-2000.
>
> If any additional information is needed or required, please contact me.
> (J-2 In Evidence)

Therefore, the Commissioner rejects petitioner's argument that his first request for retirement became of no force and effect after TPAF voided the provision of the collective bargaining agreement he sought to exercise by separate letter, since his request for retirement was not made contingent on his seeking and obtaining the benefits of this provision of the collective bargaining agreement.

Additionally, petitioner's February 29, 2000 letter seeking to rescind his September 1, 2000 retirement date states that "I am requesting that my retirement date of 9/1/00 be rescinded," and lists reasons for the request including requests of school staff, and the implementation of a whole school reform model and school based budgeting at his school. (*See*, J-7 In Evidence.) By separate letter one month later, petitioner notes that he has been counseled that his previous retirement request is not active because the article of the collective bargaining agreement he invoked two years earlier was voided by TPAF, and requests "if necessary," a delay in his retirement date to September 1, 2001, "with the understanding that [petitioner] may request additional delays in the future." (*See*, J-8 In Evidence.) This letter reflects petitioner's position that his retirement was void and that his request for a

September 1, 2001 retirement date was, in effect, his initial request to retire. Subsequently, the Board, at its June 14, 2000 meeting, "rescinded [petitioner's] retirement [as requested in his February 29, 2000 letter], from September 1, 2000 to September 1, 2001." (J-10 In Evidence, *See, also* J-9 In Evidence.)

The record clearly reflects that the Board did not accept petitioner's assertion that his initial request to retire was no longer active after TPAF voided the section of the collective bargaining agreement invoked by petitioner in 1997. (*See*, J-9 and J-10) If it had, it would not have *rescinded* petitioner's September 1, 2000 retirement date, but rather, it would have *accepted* his retirement request effective September 1, 2001. The significance of the Board's rescission of petitioner's prior request, rather than an acceptance of September 1, 2001 as an initial retirement date, should have been understood by petitioner, especially considering that, as he stated in his March 21, 2000 letter, he was receiving counsel with regard to the matter. As such, petitioner cannot have reasonably construed, and cannot now construe, his second request to rescind and change his retirement date, by memorandum of April 25, 2001 and letter of June 14, 2001, as a first-time request required by policy and practice to be accepted by the Board.

In addition, the Commissioner finds that principles of contract law do not compel a determination that petitioner's initial request for retirement was void because respondent could no longer satisfy the terms of the retirement request. Petitioner's unilateral request specified no conditions or contingencies. Further, petitioner did not seek to rescind his retirement request for almost two years after the clause in the collective bargaining agreement was voided, suggesting that the TPAF action was not the impetus for the request to rescind. Therefore, the Commissioner concludes that petitioner's February 29, 2000 and March 21, 2000 communications, rescinding and changing to September 1, 2001 his retirement date, constituted

his first request to alter his retirement date, so that this is the only request the Board could be held bound by prior policy to honor.

Petitioner relies heavily on an unreported decision of the Appellate Division in *Cutler v. Board of Education of the Township of Parsippany-Troy Hills, Morris County*, Docket No. A-1464-90T3 (January 27, 1992) in support of his argument. In *Cutler*, the Appellate Division held that, as a matter of ordinary contract law, acceptance by a board of a conditional notice of intention to retire preserved petitioner's right to rescind, as such offers could only be accepted in accordance with their explicit terms. (Slip Opinion at 5) Because his requests for retirement were contingent, petitioner herein argues, he was entitled by their terms to rescind the offers and continue his employment in the district effective September 1, 2001. However, the Commissioner finds that, while the Appellate Division's decision in *Cutler, supra*, can be read as standing for the proposition that, unless modified, the terms of offers of retirement accepted by a board must be honored, petitioner's first request to retire contained no contingency or provision for further delays, and was accepted by the Board in accordance with its terms.

As to petitioner's February 29 and March 21, 2000 requests to change his retirement date by rescinding his request for September 1, 2000 and changing it to September 1, 2001, with no indicia in its June 13, 2000 letter to petitioner (see J-9 In Evidence) that it accepted his statement that it was "[understood] that [petitioner] may request additional delays in the future," (*see*, J-8 In Evidence), the Board cannot be deemed bound by the principle set forth in *Cutler* to permit petitioner additional rescissions of his retirement date at his discretion. In fact, the offer that was set forth as being accepted by the Board in the June 13, 2000 letter from the district to petitioner was that it "rescinded [petitioner's retirement] from September 1, 2000 to September 1, 2001." (*See*, J-10 In Evidence.) Nowhere in its letter

does the Board indicate an acceptance of, and agreement with, the proposition in petitioner's second letter seeking to rescind his retirement date and entitle him to request future delays. The failure to mention this condition in the Board's letter must be construed as an acceptance by the Board of the unconditional rescission offered in petitioner's February 29, 2000 letter, rather than the conditions imposed in the March 21, 2000 letter. This determination comports with petitioner's assertion that the Board has a policy and practice of accepting *one* change in retirement date by its employees. Under such policy and practice, the Board would have accepted only the requested change, and would not have agreed to permit petitioner future alterations of his retirement date, since doing so would contravene Board policy.

Accordingly, for the reasons expressed in the Initial Decision and herein, the Commissioner affirms the decision of the ALJ and dismisses the petition with prejudice.

IT IS SO ORDERED*

COMMISSIONER OF EDUCATION

Date of Decision: 7/26/02

Date of Mailing: 7/29/02

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* within 30 days of filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

285-02

IN THE MATTER OF THE TENURE	:	
HEARING OF LAWRENCE P. KEMMET,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
BERGEN COUNTY VOCATIONAL-	:	DECISION
TECHNICAL SCHOOL DISTRICT,	:	
BERGEN COUNTY.	:	
	:	

July 29, 2002

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO: EDU 3194-01
AGENCY DKT. NO: 81-3/01

BERGEN COUNTY BOARD OF EDUCATION,

Petitioner,

v.

LAWRENCE P. KEMMET,

Respondent.

William C. Soukas, Esq., for petitioner
(Nowell Amoroso Klein Bierman, P.A., attorneys)

Harold Springstead, Esq., for respondent
(Springstead and Maurice, attorneys)

Record Closed: May 27, 2002 Decided: June 6, 2002

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

This matter was transmitted to the Office of Administrative Law (OAL) on April 9, 2001, for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Settlement Agreement, letter of resignation and Resolution.

Having reviewed the contents of the attached Settlement Agreement, letter of resignation and Resolution, **I FIND** (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached Settlement Agreement, letter of resignation and Resolution meet the requirements of *N.J.A.C. 1:1-19.1.1* and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with their contents and that these proceedings be (and are hereby) **TERMINATED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

6/6/02
DATE

JEFFREY A. GERSON,
Administrative Law Judge

Receipt Acknowledged:

6/12/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 13 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/g

SPRINGSTEAD & MAURICE, ESQS.
39 Hudson Street
Hackensack, New Jersey 07061
201-343-0003
Attorneys for Petitioner

BERGEN COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, BERGEN COUNTY,

Vs.

LAWRENCE P. KEMMET,

BEFORE THE COMMISSIONER OF EDUCATION

OAL Docket No. EDUOR 01589-01N
Agency Ref. No. 31/2/01

SETTLEMENT AGREEMENT

The parties in the above-captioned matter having resolved their dispute, agree as follows, subject to the approval of this Stipulation of Settlement by the Commissioner of Education:

1. As evidenced by the letter annexed hereto as Exhibit A, the respondent, Lawrence P. Kemmet ("Mr. Kemmet") has submitted an irrevocable letter of resignation from all employment with the petitioner, Bergen County Vocational-Technical School District ("Board") effective at the close of business of June 30, 2003. The Board will, by separate Resolution, accept Mr. Kemmet's resignation at a public meeting.

2. The Board will grant Mr. Kemmet a leave of absence with pay and continued health insurance coverage and appropriate pension contributions to June 30, 2003.

3. The Board will continue Mr. Kemmet's annual salary for the balance of 2001-2002 school year at the annual base salary of $54,700.00 with $3,550.00 Shop differential for a total of $58,250.00.

4. For the 2002-2003 school year the Board will restore Mr. Kemmet's increment previously withheld and pay him a base salary of $59,825.00 plus a Shop differential of $3,750.00 for a total of $63,575.00.

5. The Board will restore the salary withheld from Mr. Kemmet for 120 days during the period in which he was suspended without pay in accordance with N.J.S.A. 18A:6-11, pro-rated based upon an annual salary of $58,250.00. The amount payable for this time is $19,159.50 and the Board will make appropriate deductions for taxes and pension contributions and remit a lump sum to Mr. Kemmet for the balance.

Rationale For Settlement

A. On March 16, 2000 Mr. Kemmet was administratively suspended with pay as a result of an incident which took place at the Teterboro Campus on March 15, 2000. The administrative suspension was approved and continued by Resolution of the Board of Education on or about March 21, 2000. Mr. Kemmet was required to undergo and did undergo psychiatric examinations by two Board appointed psychiatrist.

B. On July 6, 2000 the Board voted to withhold Mr. Kemmet's increment for the 2000-2001 school year.

C. Both Board psychiatrists concluded that Mr. Kemmet was able to return to his culinary arts teaching duties.

D. On April 9, 2001 the Board filed tenure charges against Mr. Kemmet alleging unbecoming conduct as a result of the March 15, 2000 incident. Specifically, the Board alleged that Mr. Kemmet "placed the health and well-being of students and school staff in immediate harm;" stated "I have to get out of here before I kill someone"; caused extensive damage "to school property i.e., lockers, while in the presence or general vicinity of students in his class"; "raising his voice and acting out, on the aforesaid date to the students in his

class and cause various culinary equipment to crash to the floor in the presence of students in his class"; and "unilaterally vacating the school premises, and his class, during the course of the school day and, specifically, the class that he was teaching."

E. Mr. Kemmet has denied the charges and at a hearing the Board would have to rely largely upon the testimony of the students in his culinary arts class. While the students have given statements, their recollections and memories may be somewhat faded by the fact that the incident in question occurred over two years ago. In addition, a great deal of time and expenses would be incurred in preparing and trying the within matter.

6. While the charges are serious and warranted the action of the Board, the Board understands that the charges, even if proven true, may not result in the dismissal of Mr. Kemmet. The Board is also aware of the fact that Mr. Kemmet received full salary increments for the nine years he was employed by the Board with the exception of the present incident and has had favorable evaluations.

7. The parties agree that based upon and subject to the terms and conditions of this agreement, the Board shall withdraw the tenure charges and will not appeal the Commissioner's Decision dismissing the tenure charges.

8. The parties recognize that Mr. Kemmet has claims and certain rights, including status as a tenured teacher arising from his employment by the Board. In exchange for the foregoing promise made by the Board, Mr. Kemmet hereby releases the Board, its members, offices, agents, servants, employees, attorneys and representatives from all claims, liabilities or expenses which it or they may be subject to arising from his employment with the Board. However, nothing in this agreement or the General Release given by Mr. Kemmet shall preclude either party from bringing an action to enforce performance of any of the terms of this agreement should there be a default in performance.

9. The Board agrees that should any reference for employment be requested by Mr. Kemmet, that a neutral recommendation should be given stating the number of years worked in the District and last position held with no mention of increment withholding or tenure charges.

10. If Mr. Kemmet obtains employment during the term of this agreement with any public entity that makes contributions to the TPAF or any other public pension system on Mr. Kemmet's behalf, any payments by the Board due to Mr. Kemmet pursuant to this agreement shall immediately terminate as of the effective date of Mr. Kemmet's employment with the other public entity.

11. This Stipulation of Settlement incorporates the complete financial obligation of the Board with respect to Mr. Kemmet's employment relationship and separation of employment from the Board. Mr. Kemmet will not make any claim to or receive any additional monies or benefits which may be provided to teachers in the Bergen County Vocational-Technical School District pursuant to any Collective Bargaining Agreement or Board policy including but not limited to any claim for payment for unused sick days or other adjustments and compensation.

12. All terms of this agreement are deemed material. This document constitutes the entire understanding of the parties and may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties. Duly executed copies of this agreement shall be deemed original.

13. This Stipulation of Settlement and the actions required hereby shall be subject to the approval to the Commissioner of Education and shall not be binding upon the parties until (A) Mr. Kemmet has caused to be delivered to the Board a duly executed Letter of Resignation as required by the this Agreement; (B) a duly executed copy of this Agreement;

(C) the Board has approved this Stipulation of Settlement; and (D) the Board has duly accepted Mr. Kemmet's resignation a public meeting.

14. Mr. Kemmet acknowledges that he has been represented by counsel, that he understands the terms and conditions of this Stipulation of Settlement, and that he enters into this Agreement voluntarily. In addition, Mr. Kemmet acknowledges that he has been advised that the Commissioner of Education has a duty to refer tenure terminations to the State Board of Examiners for possible revocation of his Certificate.

IN WITNESS WHEREOF, the parties have set their hands and seals as of the date first above written.

ATTEST:

WITNESS

BERGEN COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT BOARD OF EDUCATION

BY Robert W. Hilo ~~President~~ Board Sec'y / Business Administ

LAWRENCE P. KEMMET

LAWRENCE P. KEMMET
8 NELSON AVENUE
HAWTHORNE, NEW JERSEY 07506

April 22, 2002

Dr. John Grieco, Superintendent of Schools
Bergen County Technical School District
East 64 Midland Avenue
Paramus, New Jersey 07652

Dear Dr. Grieco:

Please accept my resignation for personal reasons effective June 30, 2003.

Very truly yours,

Lawrence P. Kemmet

02-A-105T APPROVAL OF SETTLEMENT—LAWRENCE KEMMET

RESOLUTION

WHEREAS Lawrence Kemmet is employed as Commercial Foods Instructor by the Board; and

WHEREAS the Board is a party to a certain matter bearing the caption "Bergen County Vocational-Technical School District, Bergen County v. Lawrence Kemmet" which has been referred by the Commissioner of Education to the Office of Administrative Law ("OAL") and bears OAL Docket No. EDUTH 03194-01N in which the Board requested a hearing for the removal/dismissal of Mr. Kemmet from his tenured teaching position; and

WHEREAS the Board is desirous of avoiding any further costs associated with the continued prosecution of such matter including, but not limited to, counsel fees and other hearing expenses as well as other extraneous costs associated with defending such matters; and

WHEREAS, a settlement Agreement has been negotiated between the parties, a copy of which has been annexed hereto and made a part of the record, and the Board has reviewed said Agreement and believes same to be fair and reasonable under the circumstances; and

WHEREAS, in satisfaction of a provision of the Settlement Agreement, Mr. Kemmet has submitted a letter indicating his intention to resign his employment with the Board effective June 30, 2003,

NOW, THEREFORE, BE IT RESOLVED that Settlement Agreement negotiated by the Board Attorney on behalf of the Board be and hereby is approved and ratified, and the Superintendent directed to implement the terms and conditions set forth therein; and

BE IT FURTHER RESOLVED that the resignation of Lawrence Kemmet be and hereby is approved, to be effective June 30, 2003; and

BE IT FURTHER RESOLVED that the Board Secretary be and hereby is directed to execute, and the Board Attorney to deliver, all documents necessary to implement this Resolution.

AN/cec
Source of Funds: 11.310.100.101.TT

02-A-106T APPOINTMENT—504/AMERICANS WITH DISABILITIES ACT OFFICER

RESOLUTION

WHEREAS the district is required to appoint a 504/Americans With Disabilities Act Officer in order to assure compliance with educational code and statutes

BE IT RESOLVED the Board of Education authorizes the Superintendent to appoint Susan Meklune to serve in this capacity and to perform all duties associated with this role.

SM/jls
Source of Funds: n/a

02-P-147T APPROVAL—UNPAID LEAVES OF ABSENCE

RESOLUTION

BE IT RESOLVED that Beverly Jones-DiSabatino, Teacher of English, Bergen County Academies, Hackensack, be granted an unpaid leave of absence for the period September 1, 2002, through June 30, 2003, with no benefits.

BE IT FURTHER RESOLVED that Shiela Urso, Teacher of the Handicapped, Bergen County Technical High School, Teterboro, be granted an unpaid leave of absence for the period May 1, 2002, through June 30, 2002, (8 weeks). The cost of health benefits-family coverage during the family leave period, not to exceed twelve (12) weeks, to be paid by the Board of Education as statutorily required.

BE IT FURTHER RESOLVED that the Board Secretary shall give notice to the above-named individual as soon as is practicable.

02-P-148T APPROVAL—RESIGNATIONS

RESOLUTION

WHEREAS, the administration has reviewed the notices of resignation and has concluded that there is no need for further administrative review, and

BE IT FURTHER RESOLVED that the following resignations be accepted as per the effective date indicated:

Kemmet, Lawrence	Teacher of Culinary Arts	Effective: 07/01/03
Lee, Roxanne	Broker/Teacher Assistant	Effective: 04/08/02
Nina, Iris	Teacher of ESL	Effective: 04/11/02
Park Christie, Mary	Teacher of Mathematics	Effective: 07/01/02
Van Teyens, Roy	Construction Manager	Effective: 06/01/02

IN THE MATTER OF THE TENURE	:	
HEARING OF LAWRENCE P. KEMMET,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
BERGEN COUNTY VOCATIONAL-	:	DECISION
TECHNICAL SCHOOL DISTRICT,	:	
BERGEN COUNTY.	:	
	:	

OAL DKT. NO EDU 3194-01
AGENCY DKT. NO. 81-3/01

IN THE MATTER OF THE TENURE	:	
HEARING OF LAWRENCE P. KEMMET,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
BERGEN COUNTY VOCATIONAL-	:	DECISION
TECHNICAL SCHOOL DISTRICT,	:	
BERGEN COUNTY.	:	
	:	

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

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/29/2002

Date of Mailing: 7/30/2002

287-02

AGENCY DKT. NO. 147-5/02

L.A.M., on behalf of minor child, I.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

July 30, 2002

AGENCY DKT. NO. 147-5/02

L.A.M., on behalf of minor child, I.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

For petitioner, L.A.M., *Pro Se*

This matter having been opened before the Commissioner of Education on May 16, 2002 through the filing of a letter Petition of Appeal, pursuant to *N.J.A.C.* 6A:3-8.1 *et seq.*,[1] challenging the Board's refusal to admit I.M. into its district on the basis of non-residency, pursuant to *N.J.S.A.* 18A:38-1 *et seq.*; and

The Commissioner having directed respondent by two notices dated May 16, 2002 and June 11, 2002[2] to file an Answer to the petition; and

As of this date, neither respondent nor any attorney on its behalf having filed an Answer to the Petition of Appeal; now therefore

IT IS ORDERED this 30th day of July, 2002 that summary decision shall be granted to petitioner, thus entitling I.M. to attend school within respondent's district free of charge, in accordance with *N.J.S.A.* 18A:38-1 *et seq.* and its implementing rules.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 7/30/02

Date of Mailing: 7/30/02

[1] Pursuant to his discretion under *N.J.A.C.* 6A:3-1.16, the Commissioner finds that relaxation of the rule requiring that a *pro se* residency appeal include a signed attestation, *N.J.A.C.* 6A:3-1.8(a)iv, is warranted, under these circumstances.

[2] The return receipt indicates that the second notice was received on June 12, 2002.

[3] This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

286-02

M.P. AND D.P., on behalf of minor child, B.J.P.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

July 29, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1600-02
AGENCY DKT. NO. 503-12/01

M.P. and D.P. ON BEHALF OF MINOR CHILD, B.J.P.,

Petitioners,

v.

BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,

Respondent.

M.P. and D.P., *pro se*

Mariann Crincoli, Esq., for respondent
(Schenck, Price, Smith & King, attorneys)

Record Closed: June 6, 2002 Decided: June 7, 2002

BEFORE **RICHARD McGILL,** ALJ:

M.P. and D.P. filed a petition with the Commissioner of Education challenging a residency determination by the Board of Education of the Morris Hills Regional School District

in regard to B.J.P. Respondent counterclaimed for tuition reimbursement for an alleged period of ineligible attendance.

Prior to hearing, the parties agreed to an amicable resolution of the matter and submitted a written Stipulation of Settlement and Mutual Dismissal of the Petition and Counterclaim. Having reviewed the record and the settlement terms, I **FIND:**

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

June 7, 2002
DATE

Richard McGill
RICHARD MCGILL, ALJ

Receipt Acknowledged:

6/12/02
DATE

Debbie Mastrangelo
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 13 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cml

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

JUN 6 3 34 PM '02

SCHENCK, PRICE, SMITH & KING, LLP
10 Washington Street
P.O. Box 905
Morristown, New Jersey 07963-0905
(973) 539-1000
Attorneys for Morris Hills Regional School District Board of Education

M.P. & D.P. ON BEHALF OF B.J.K., **Petitioner,** **v.** **MORRIS HILLS REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION,** **Respondent/Counterclaimant.**	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DKT NO. EDUOS 01600-02N** **Agency Ref. No. 503-12/01** **STIPULATION OF SETTLEMENT AND MUTUAL DISMISSAL OF PETITION AND COUNTERCLAIM**

Petitioners David and Mira Peck and Respondent/Counterclaimant Morris Hills Regional School District Board of Education, herein stipulate as follows:

1. This settlement is being made without any admission of liability or wrongdoing on the part of any party and is for the purpose of amicably resolving this dispute. The parties specifically deny any wrongdoing or liability relating to any other party's claim.

2. The pupil B.J.K. will continue in District schools through the end of the 2001-2002 school year. B.J.K shall not be eligible to attend District schools at any time in the future unless he satisfies the administration of the Board of Education that he meets the requirements of N.J.S.A. 18A:38-1.

3. The Petitioners will pay to the Morris Hills Regional School District Board of Education four thousand dollars ($4,000.00) in full and final settlement of this matter. This payment represents the compromised amount of tuition to be paid for the 2001-2002 school year when B.J.K. was attending school in the District although he was not properly eligible for such education in accordance with N.J.S.A. 18A:38-1. Payment shall be made within forty-five (45) days from the execution of this Agreement.

4. The parties waive any and all claims which were or could have been asserted in the within action, and any and all claims arising out of or related to these claims, including

attorneys fees and damages pursuant to any federal or State constitutional or civil rights claim including 42 U.S.C. 1983, and specifically release the other parties from any and all claims which were or could have been asserted in the within action and any claims arising out of or related to these claims.

5. As a result of the foregoing, Petitioners David and Mira Peck hereby withdraw the Petition filed pursuant to N.J.S.A. 18A:38-1, with prejudice, and Respondent/Counterclaimant Board hereby withdraws its Counterclaim pursuant to N.J.S.A. 18A:38-1, with prejudice.

D. Peck

DAVID PECK, Petitioner

MORRIS HILLS REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION

MRPeck

MIRA PECK, Petitioner

By: Manuel E. Deus

OAL DKT. NO. EDU 1600-02
AGENCY DKT. NO. 503-12/01

M.P. AND D.P., on behalf of minor child, B.J.P.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7/29/02

Date of Mailing: 7/30/02

* The Commissioner clarifies that he reads paragraph 2 of the settlement as requiring compliance with law only, not compliance with any higher standard "to the satisfaction of the administration."

288-02

ANNE MARIE PIZZULLO,

PETITIONER,

V.

BOARD OF EDUCATION OF THE MERCER COUNTY SPECIAL SERVICES SCHOOL DISTRICT, MERCER COUNTY,

RESPONDENT

COMMISSIONER OF EDUCATION

DECISION

July 31, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6103-01
AGENCY DKT. NO. 285-7/01

ANNE MARIE PIZZULLO,
Petitioner,
v.
MERCER COUNTY SPECIAL SERVICES SCHOOL DISTRICT, MERCER COUNTY,
Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Fagella & Nowak, attorneys)

Dennis M. DeSantis, Esq., for respondent (Destribats, Campbell, DeSantis & Magee, attorneys)

Record Closed: June 11, 2002 Decided: June 13, 2002

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 7, 2001, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

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

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

June 13, 2002
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

6/17/02
DATE

Lelfri Antonaitis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 18 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

Destribats, Campbell, DeSantis & Magee
247 White Horse Avenue
Trenton, NJ 08610
Tel: (609) 585-2443
Attorney For Respondent

2002 JUN 11 A 11:18

ANNE MARIE PIZZULLO,	: BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
	: BUREAU OF CONTROVERSIES AND DISPUTES
Petitioner,	:
v.	: **Agency Docket No.: 285-7/01**
	: **OAL Docket No.: EDUCT 06103-01S**
MERCER COUNTY SPECIAL SERVICES SCHOOL DISTRICT, MERCER COUNTY	:
	: **STIPULATION OF SETTLEMENT**
Respondents.	:

Petitioner and Respondent by way of settlement in this matter agree as follows:

1) The Petitioner shall continue to receive her annual salary inclusive of longevity of $63,188.00 for the school year from July 1, 2001 to June 30, 2002.

2) Commencing July 1, 2002, Petitioner's salary shall be red-lined at $63,188.00 until such time as Petitioner is entitled to an increase in salary pursuant to the applicable Collective Bargaining Agreement.

3) The parties agree that the Petitioner's assignment for 2001-2002 and 2002-2003 school years shall not constitute the agreement by the Petitioner to remain at that assignment

DESTRIBATS, CAMPBELL, DESANTIS & MAGEE
COUNSELLORS AT LAW
247 WHITE HORSE AVENUE
TRENTON, NEW JERSEY 08610

3C

indefinitely nor shall it obligate the Respondent to offer th Petitioner another assignment. Any requests for transfer by Petitioner will be treated by Respondent under the same standard as for all other employees and without retaliation.

4) The parties agree that this settlement applies only to the claims asserted in the matters before the Commissioner of Education, Docket No. 285-7/01 and PERC, Docket No. TI-2002-2.

5) The Petitioner withdraws with prejudice all other claims for relief in the within matter including the pending matter before the State of New Jersey Public Employment Relations Commission, Docket No.: TI-2002-2.

M. Kathleen Duncan

M. Kathleen Duncan, O.A.L.J.

Consent is hereby given to the form and entry of the foregoing Stipulation of Settlement.

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN, ESQS.

By: _____
Richard A. Friedman, Esq.

Dated : 5/22/02

DESTRIBATS, CAMPBELL, DeSANTIS & MAGEE, ESQS.

By: _____
Dennis M. DeSantis, Esq.

Dated : 6/3/02

DESTRIBATS, CAMPBELL, DESANTIS & MAGEE
COUNSELLORS AT LAW
247 WHITE HORSE AVENUE
TRENTON, NEW JERSEY 08610

OAL DKT. NO. EDU 6103-01
AGENCY DKT. NO. 285-7/01

ANNE MARIE PIZZULLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MERCER COUNTY SPECIAL SERVICES SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

Date of Decision: 7/31/02

Date of Mailing: 7/31/02

289-02

D.M.L., on behalf of minor child,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UPPER TOWNSHIP SCHOOL DISTRICT, CAPE MAY COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

July 30, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF

OAL DKT. NO. EDU 4641-02
AGENCY REF. NO. 207-7/02

D.M.L. ON BEHALF OF MINOR CHILD,
Petitioner,

v.

BOARD OF EDUCATION OF THE UPPER TOWNSHIP SCHOOL DISTRICT CAPE MAY,
Respondent.

D.M.L., parent, for petitioner, *pro se*

Louis Greco, Esq. for respondent

BEFORE **EDGAR R. HOLMES,** ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner filed a petition for Emergency Relief with the Commissioner of Education (Commissioner) on or about July 12, 2002 pursuant to *N.J.A.C.* 1:1-12.6. The matter was transmitted to the Office of Administrative Law (OAL) to be heard as a contested case pursuant to the Administrative Procedures Act *N.J.S.A.* 52:14B-1 to -15, and the act creating the OAL *N.J.S.A.* 52:14F-1 to -13.

SUMMARY OF THE RELEVANT FACTS

The Upper Township Board of Education (Board) has authorized a French Immersion program beginning in kindergarten and to continue through the eighth grade. Access to the program was determined by lottery. The petitioner alleges that the lottery was conducted contrary to school law and without notice to her. She was unable to learn the proccdure followed by the Board in establishing the lottery.

The Board denies that the lottery was conducted contrary to school law and that the petitioner's child is not irreparably harmed because it is not denied access to the core curriculum. The Principal who conducted the lottery is no longer employed by the District and is an Assistant Commissioner of Education and was not available for the return day of the Motion for Emergent Relief.

Because the facts are not availablc on the conduct of the lottery or the notice provided by the Board, this case cannot be decided fairly at this time.

I, therefore, **DENY the Application for Emergent Relief and ORDER an EXPEDITED HEARING.**

This matter is now scheduled for a **plenary hearing on August 8, 2002, at 9:00 a.m. at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey 08401.**

A companion case will be filed shortly. The parties agree it should be consolidated with this case.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

7/26/02
DATE

EDGAR R. HOLMES, ALJ

lmh

OAL DKT. NO. EDU. 4641-02
AGENCY DKT. NO. 207-7/02

D.M.L., on behalf of minor child,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UPPER TOWNSHIP SCHOOL DISTRICT, CAPE MAY COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The Order of the Administrative Law Judge (ALJ) in this emergent matter has been reviewed. Upon such review, the Commissioner affirms the Order denying emergent relief, as he concurs with the ALJ's determination that, because the facts on the conduct of the lottery at issue or the notice provided by the Board are not yet available, petitioner cannot satisfy the requirements necessary, pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), for the granting of the extraordinary relief sought herein.

Accordingly, petitioner's application for emergent relief is denied. As contemplated by the ALJ, this matter shall proceed to an expedited plenary hearing at the Office of Administrative Law on August 8, 2002.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/30/02

Date of Mailing: 7/30/02

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

290-02

L.McN., on behalf of minor children, D.M. AND D.Y.,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning parent challenged Board's residency determination that her children were not eligible for free public education in the Union Schools during September and October 2001.

The ALJ found that petitioner proved that, due to the events of September 11, she experienced problems with her house closing. She tried to explain this to the Board but, without a hearing, her children were removed from school. The ALJ reprimanded the Board for violating *N.J.S.A.* 18A:38-1b(2). In light of documentary and testimonial evidence, the ALJ concluded that petitioner and her children were domiciled in the District since September 14, 2001 and, thus, the children were entitled to a free public education in the District.

The Commissioner concurred that petitioner demonstrated that her children were entitled to a free public education, pursuant to *N.J.S.A.* 18A:38-1a. The Commissioner adopted the Initial Decision as his own.

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

August 1, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8106-01
AGENCY DKT. NO. 444-10/01

L.McN. ON BEHALF OF MINOR CHILDREN, D.M. AND D.Y.,
Petitioner,
v.
BOARD OF EDUCATION OF UNION TOWNSHIP, UNION COUNTY,
Respondent.

L.McN., petitioner, *pro se*

Joseph M. Wenzel, Esq., for respondent (Lum, Danzis, Drasco, Positan & Kleinberg, attorneys)

Record Closed: May 10, 2002 Decided: June 13, 2002

BEFORE **LESLIE Z. CELENTANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, L.McN., challenges the residency determination made by the Union Township Board of Education (the "Board"). The Board has counterclaimed for tuition.

The matter was transmitted to the Office of Administrative Law (OAL) on November 16, 2001, for resolution as a contested case pursuant to *N.J.S.A.* 52:14B-1

to -15 and *N.J.S.A.* 52:14F-1 to -13. A hearing was held on May 10, 2002, at the OAL in Newark, New Jersey, and the record was closed on that date.

FACTUAL DISCUSSION

Based upon the testimony and other evidence adduced at the hearing and having given fair weight thereto, and having assessed the credibility of the witnesses, I **FIND** the following **FACTS** in this matter:

On August 21, 2001, L.McN. entered into a contract of sale to purchase from the Estate of Joseph Manzella the home located at 1179 Erhardt Street, Union, New Jersey (hereinafter "the property") (J-1), which was vacant at the time. Although L.McN.'s lease in Jersey City was ending in August, her landlord indicated that L.McN. could remain beyond the end of her lease term until she moved into the property.

On September 5, 2001, a letter of mortgage commitment was issued to L.McN. by Abemort, Inc., confirming that L.McN. had been approved for a mortgage (J-2). The closing of title was scheduled for September 12, 2001.

In anticipation of this move, on September 6, 2001, L.McN. enrolled her children in school in Union Township, D.M. at the Livingston School, and D.Y. at Union High School.

The investors for the mortgage lender, Abemort, Inc., were located in the World Trade Center in New York. As a result of the events of September 11, 2001, the lender was unable to close the loan the next day, September 12, 2001, as had originally been scheduled.

L.McN. telephoned the Board to advise the Board of the circumstances surrounding the delay in her closing taking place and spoke to April DeFrancesco, the residency coordinator for the Board. L.McN. was asked for and provided a copy of her contract of sale (J-1), a copy of her mortgage commitment (J-2), and a check for the September 2001 tuition for both children in the amount of $1,566.70 (J-11). L.McN.

was advised by Ms. DeFrancesco that the check would be voided and returned to L.McN. upon verification of residency.

L.McN. immediately found another mortgage company, Allied Mortgage, located in Jersey City, which issued a mortgage commitment to L.McN.

L.McN. then received permission to move with her children into the premises at 1179 Erhardt Street in Union. This permission was granted by Theresa Lipp, the realtor handling the transaction, who is also the niece of the deceased owner of the property, Joseph Manzella. Ms. Lipp was also assisting the executor of the estate, who lived out of the area.

On September 14, 2001, Ms. Lipp was at the property waiting for L.McN., who was due to arrive momentarily and was in the process of moving into the home (J-17). L.McN. was moving in on the condition that she not move any major appliances or large furniture in until the repairs that had been planned were completed, since the property had been in a state of disrepair. While Ms. Lipp was waiting for L.McN., an investigator from the Board arrived at the property, introducing himself as such and indicating to Ms. Lipp that he was there to verify the residence of L.McN.'s children. Ms. Lipp confirmed for the investigator that L.McN. was in the process of moving in and that she was expected there momentarily so that Ms. Lipp could turn over the keys to the home. The investigator left after a short time, and L.McN. heard nothing further relative to the residency issue and assumed that the Board was satisfied that L.McN. and her children were, in fact, residents of Union Township.

L.McN. and her children moved into the home on that day, bringing with them only clothes and personal items. Painting and other repairs were under way, and L.McN., as instructed by Ms. Lipp, brought in no furniture or large appliances at that time. L.McN. did, however, transfer all of the utilities and the telephone into her name. The heat was fully operable, as was the telephone. L.McN. also changed the mailing address to the property address on her driver's license, insurance policies, and all of her other accounts.

L.McN. testified that she and her children slept on the floor at the property because they were not permitted to move in their beds. There were some nights when L.McN. and her children stayed in the apartment in Jersey City because L.McN. had either finished work too late to drive to Union or because L.McN. had no child care available in Union. L.McN. is a single mother who works full time in Jersey City and is completing a master's degree in social work at Rutgers University in New Brunswick. Logistics sometimes prevented her from being able to return to the property in the evening; however, the children were driven to school in Union each morning.

Following the investigator's visit on September 14, 2001, L.McN. waited for the check to be voided and returned to her, as had been promised by Ms. DeFrancesco; however, the voided check was not forthcoming. Accordingly, on October 19, 2001, more than one month after the investigator's visit, L.McN. executed a stop payment order (J-12) on the check she had written to the Board on September 6, 2001 (J-11).

On October 19, 2001, L.McN.'s children, D.M. and D.Y., were pulled out of their respective classes and told that unless and until L.McN. paid tuition totaling $3,100, or provided a deed to her house, D.M. and D.Y. would not be permitted back in school. Moreover, the schools refused to provide the children with pending school work, so that they would not fall behind in their studies. In each case, L.McN. was called and told to come and pick up her child.

Also on October 19, 2001, L.McN. wrote a letter to the superintendent, Theodore Jakubowski (J-14), outlining all of the circumstances relative to the delay in closing title. L.McN. also attached copies of her most recent bank statements and bills to that letter and advised that the closing was imminent. She received no reply from Mr. Jakubowski.

The information provided to the Board either as enclosures to the letter to Mr. Jakubowski (J-14) or previously includes:

1. Trust Company Bank statement dated October 5, 2001, covering transactions during the month of September 2001, mailed to L.McN. at 1179 Erhardt Street, Union, NJ 07083 (J-4).

2. State of New Jersey insurance identification card dated as of October 1, 2001, showing L.McN.'s address as 1179 Erhardt Street, Union, NJ 07083 (J-5).

3. Sprint telephone bill mailed to L.McN. at 1179 Erhardt Street, Union, NJ 07083, for the billing period ending October 6, 2001, and covering charges of $191.70 for September 2001 (J-6).

4. Verizon telephone bill sent to L.McN. at 1179 Erhardt Street, Union, NJ 07083, for the billing period ending October 14, 2001, in the amount of $88.00 (J-7).

L.McN. testified that on October 19, 2001, she offered the following items to the Board as required by the Residency Verification Form (J-10): from Category I she offered her mortgage commitment and the representation that she was awaiting the final survey and that closing was imminent; from Category II she provided her cell phone bill and her home telephone bill; and from Category III she offered her car insurance policy. L.McN. testified that the Board refused to accept these items, together with the contract of sale and mortgage commitment, as proof of residency.

The closing of title took place on October 24, 2001. L.McN. took her entire closing file from her attorney's office and brought it to the Board on October 26, 2001. Photocopies were made from her file, which now included the deed transferring title to L.McN. from the Estate. Still L.McN. was told by the Board that the children would not be permitted back into their respective schools, now more than a week after they were removed from their classes, without a check for $3,100. L.McN. was incredulous and insisted that the superintendent be contacted. After L.McN. waited for over two hours, the superintendent was reached and instructed the Board to permit the children to go back to class.

On October 26 and 27, 2001, L.McN. moved all of the rest of her furniture, furnishings and other belongings into the property.

L.McN. testified that she heard nothing further after this incident and assumed that, because the children had been permitted back to school, the Board was now finally satisfied that she did indeed live in Union and would not be seeking tuition from her. It was only after learning that the fair hearing she had initially requested was still pending that L.McN. became aware that the Board was pursuing its counterclaim for tuition for September and October 2001.

The Board relied on the Residency Verification Form (J-10) in asserting its claim for tuition. While acknowledging that L.McN. provided documents from both Category II and Category III, the Board asserts that the contract of sale and the mortgage commitment do not meet the requirements of Category I and, accordingly, sufficient proof that D.M. and D.Y. were domiciled within the district has not been provided. The Board also asserts that an investigator went to the property on October 16, 2001, and issued a report (J-13) that the property was vacant. The testimony of the investigator was not offered.

LEGAL DISCUSSION AND CONCLUSION

The Board has asserted that L.McN., D.M. and D.Y. were not domiciled within the district during the months of September and October 2001 and, consequently, D.M. and D.Y. are not entitled to a public education in Union for those months.

N.J.S.A. 18A:38-1 provides that the public schools of a district are free to persons domiciled within the district who are over five and under twenty years of age. The issue to be resolved, therefore, is whether or not D.M. and D.Y. were domiciled within the Union Township school district.

Domicile is the place of a person's abode, where he or she has the present intention of remaining and to which, if absent, he or she intends to return. *Mercadante v. City of Paterson*, 111 *N.J. Super.* 35, 39 (Ch. Div. 1970), *aff'd*, 58 *N.J.* 112 (1971). A person may have more than one residence but only one domicile, which is that place that the person regards as his or her true and permanent home. *Board of Educ. of Middle, Cape May County v. K.K.*, 93 *N.J.A.R.*2d (EDU) 461.

In the matter of *R.A. ex rel Her Minor Children, S.H. and D.A. v. Board of Education of Ewing Township, Mercer County*, 95 *N.J.A.R.*2d (EDU) 49, the items submitted by R.A. included her driver's license, vehicle registration, water bill and telephone bill. These were deemed to be not only objective indicia of domicile, but subjective indications of domiciliary intent, and entitled the children to a free public education.

In this matter, L.McN. provided a telephone bill, a cell phone bill, a bank statement, an automobile insurance card, and copies of her contract of sale and mortgage commitment. All of the bills provided were dated in October and reflected charges incurred in September. Furthermore, there is the testimony of L.McN., which I **FIND** to be credible, that she and her children moved into the property on September 14, 2001, with the permission of the seller. L.McN. did not extend her lease in Jersey City, but rather was permitted by the landlord to leave her furniture and large appliances there pending the completion of the repairs at the property. I **FIND** that L.McN. and her children were tenants in the property effective September 14, 2001, and I further **FIND** that the requisite intent is easily established given the totality of the circumstances. The testimony of L.McN. was fully corroborated by the notarized letter provided by Theresa Lipp, representing the Estate.

It is crystal clear from the documentary and testimonial evidence that L.McN. and her children have been domiciled within the district continuously since September 14, 2001, and I do so **FIND**. I therefore **CONCLUDE** that since D.M. and D.Y. are domiciled within the Union Township school district, since September 14, 2001, they are entitled to attend the Union Township public schools free of charge.

The conduct of the Board and of the district require further comment in two respects. *N.J.S.A.* 18A:38-1(b)(2) provides in salient part:

> If the superintendent or administrative principal of a school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district . . . the superintendent or administrative principal may apply to the board of education for the removal of the child. The parent or guardian shall be entitled to a

> hearing before the board and if in the judgment of the board the parent or guardian is not domiciled within the district . . . the board may order the transfer or removal of the child from school. The parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. The board of education shall, at the time of its decision, notify the parent or guardian in writing of his right to contest the decision within 21 days. No child shall be removed from school during the 21-day period in which the parent may contest the board's decision or during the pendency of the proceedings before the commissioner.
>
> [Emphasis added.]

In the within matter, D.M. and D.Y. were, without any advance notice and without any opportunity for hearing, unceremoniously removed from their respective classes on October 19, 2001, in front of their classmates, in violation of the unambiguous language of the statute. When L.McN. asked for their school work so that they would not fall behind, her request was refused and the children missed over a week of school. It is incredible to the undersigned that the district would conduct itself in this manner, in flagrant violation of the statute.

Moreover, the fact that the Board continued to pursue this matter and seek reimbursement from L.McN. for this tuition is even more incredible. The closing was originally scheduled to occur on September 12, 2001. But for the events of September 11, 2001, the closing would, in all likelihood, have occurred on September 12. The delay was occasioned by one thing only, and that was the events of September 11, and yet this was not reason enough for the Board to give L.McN. extra time within which to locate a new mortgage lender and complete the transaction. Indeed, it is amazing that she was able to locate a new lender as expeditiously as she did and close title five weeks later. For the Board to seek tuition from L.McN., under these circumstances, is unconscionable.

ORDER

It is, therefore, **ORDERED** that the determination denying domicile (residence) eligibility to the minor children be and hereby is **REVERSED**. The children are entitled to a free public education in Union Township.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 13, 2002
DATE

LESLIE Z. CELENTANO, ALJ

Receipt Acknowledged:

6/18/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 24 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

md

APPENDIX

Witnesses

For Petitioner:

L.McN.

For Respondent:

None

Exhibits

Joint:

J-1 Contract for the Sale of Real Estate, August 21, 2001
J-2 Letter of Mortgage Commitment, September 5, 2001
J-3 Deed, October 24, 2001
J-4 Statement, October 5, 2001
J-5 Insurance Identification Card, effective October 1, 2001
J-6 Sprint invoice, October 8, 2001
J-7 Verizon invoice, October 14, 2001
J-8 Student Master File (D.M.)
J-9 Registration Form (D.M.), September 2001
J-10 Residency Verification Form
J-11 Check, September 6, 2001
J-12 Stop Payment Order, October 19, 2001
J-13 Investigator's Report, October 16/18, 2001
J-14 Letter, petitioner to respondent, October 19, 2001
J-15 Letter, petitioner to N.J. State Education Department, October 24, 2001
J-16 Letter, petitioner to Livingston School, Union, October 26, 2002
J-17 Letter from Ms. Lipp, May 9, 2002
J-18 Tuition Rates, 2001-2002 Year
J-19 School Year 2001-2002 calendar schedule

OAL DKT. NO. EDU 8106-01
AGENCY DKT. NO. 444-10/01

L.McN., on behalf of minor children, D.M. AND D.Y.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, and based on the Administrative Law Judge's (ALJ) credibility determinations, the Commissioner concurs that petitioner has demonstrated that her children were entitled to attend school in the Board's District, free of charge, pursuant to *N.J.S.A.* 18A:38-1a.

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/1/02

Date of Mailing: 8/1/02

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

291-02

P.G., on behalf of minor child, J.B.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,

RESPONDENT.

: COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning uncle challenged the Board's residency determination that his nephew from Ecuador was not entitled to a free public education in the Clifton School District.

The ALJ concluded that petitioner carried the burden of proof by a preponderance of the evidence in regard to confirmation of domicile in the District and the existence of family and economic hardship pursuant to *N.J.S.A.* 18A:38-1b(1). The ALJ concluded that petitioner's nephew was an affidavit pupil and had the right to a free education in the public schools of Clifton.

The Commissioner adopted the findings and determination in the Initial Decision as his own.

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

August 1, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 09655-01
AGENCY DKT. NO. 378-9/01

P. G. on behalf of Minor Child, J.B.,
Petitioner,

v.

Board of Education Of The City Of Clifton, Passaic County,
Respondent.

P.G., Petitioner, *pro* se

Anthony V. D'Elia, Esq. representing Respondent

Sol Villon, AOC approved Interpreter

Record Closed: May 9, 2002 **Decided**: June 14, 2002

BEFORE **SANDRA ANN ROBINSON**, ALJ:

STATEMENT OF THE CASE

This appeal challenges the decision of the Board of Education of the City of Clifton, Passaic County, which denied eligibility for free public school admission, by "Nephew" Petitioners' relative, because of not meeting the requirements of the New Jersey Statute regarding domicile and family or economic hardship.

PROCEDURAL HISTORY

On September 26, 2001 Respondent Clifton Board of Education denied Petitioner's September 20, 2001 residency application. Petitioner was provided notice of his right to appeal the decision within 21 days of receiving the decision. On September 26, 2001 Petitioner appealed Respondents' decision by filing with the Commissioner of Education New Jersey State Department of Education. On November 26, 2001 Respondent's answer and counterclaim to the Petition was received by the Commissioner. On December 19, 2001 the Commission transmitted this matter to the Office of Administrative Law (OAL) for a determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et. seq. After notice to all parties, a hearing was scheduled for March 28 and April 1, 2002 at the Office of Administrative Law 185 Washington Street, Newark, New Jersey. Petitioner did not appear on March 28th or April 1st but did timely contacted OAL to request another hearing date. The matter was rescheduled and heard on May 9, 2002. Exhibits are listed in the Appendix. At the conclusion of testimony the record was closed.

STATEMENT OF THE ISSUES

Has Petitioner provided adequate information to support a finding that a family or economic hardship exists, so as to qualify for free public schooling as per *N.J.S.A.* 18A: 38-1?

FACTUAL DISCUSSION

Since September 26, 2001, Petitioner's nephew (Nephew) has attended Clifton High School. Nephew was born in Ecuador in June 1985 and lived there with his grandparents and mother. The whereabouts of Nephew's father is unknown.

When Nephew's mother remarried he lived with her and his stepfather in Ecuador until the living arrangement became impossible due to friction with the stepfather. Nephew became depressed and stopped functioning with the family. There

were five people including two new children, ages 5 and 3 years, living in a two-bedroom apartment and dependent on the stepfather's income of $1,000.00 per year. Nephew's mother is a college graduate who is out of work and if she found work now she will be unable to afford child-care, Mother has never had any money to provide for her son's (Nephew's) needs.

In July 2001, Nephew came to the United States to live with the grandparents. The grandparents moved to Petitioner's home in the United States in July 2000.

Petitioner and grandparents (who are now in their 70's), always provided for Nephew's needs by sending money, clothes and daily living essential to mother in Ecuador. Nephew's hospital or clinic medical bills are paid for through Charity Care. Petitioner 's family income is approximately $42,000.00 gross per year. Petitioner has a monthly mortgage payment ($2,039), a monthly bank loan payment ($700), average monthly utility bills ($200), taxes and normal living costs (food, clothing, transportation, education supplies, household furnishings and supplies, entertainment). Petitioner has not claimed his Nephew on tax returns.

FINDINGS OF FACT

Based on the testimonial and documentary evidence presented, and having had the opportunity to observe the demeanor of the witnesses and to assess their credibility, I **FIND** the following **FACTS**:

1. Nephew is the son of Petitioner's sister who resides in Ecuador.

2. Petitioner's sister is without financial means and is not capable of caring or supporting her son. Even while Nephew lived with mother, Petitioner provided mother with finances to support Nephew.

3. Petitioner has supported his Nephew gratis, since Nephew arrived from Ecuador in July 2001. Petitioner intends to continue supporting his Nephew gratuitously throughout his high school education.

4. Petitioner holds a mortgage on his two-family home and has income from his sister and parents who occupy the other half of the house.

5. Petitioner is domiciled within the Clifton School District.

6. Petitioner is able to economically and physically support his family including his Nephew.

LEGAL DISCUSSION

The affidavit statue, *N.J.S.A.* 18A: 38-1(b), requires that the school pupil be kept in the home of another person domiciled within the school district. Petitioner has at all times been domiciled within the district. In *Rabinowitz v. New Jersey State Board of Education*, 550 *F. Supp.* 481 (1982), the court held as follows: "The question of domicile is one of fact, and each case must be evaluated and determined by its own facts an circumstances." See also, *Lea v. Lea* 18 *N.J.* 1 (1955). The statute also demands that an affiant must support the pupils' being kept gratis, as if the pupil were the affiant's own child. Petitioner has testified and demonstrated his intent to meet all personal obligations relative to school requirements and to keep and support his Nephew gratuitously throughout his high school education.

For purposes of the statute governing education for out-of-district students based on hardship, the domicile of an unemancipated child is the domicile of the parent, custodian, or guardian. *P.B.K. v Board of Education of the Borough of Tenafly,* 343 *N.J. Super.* 419, 778 A.2d 1124 (A.D. 2001). In the *P.B.K.* case, the student was entitled to a free public education in the city school district, based on a hardship. The student had been educated at an international school in another country, but the father's loss of income made payments for continuation of international school impossible. The student was an American citizen and there was no other practicable place to attend school than in a city in the United States were his uncle and legal guardian lived.

CONCLUSIONS OF LAW

I have considered case law, testimonial and documentary evidence, as well as the applicable state statute and I **CONCLUDE** that Petitioner has carried the burden of proof by a proponderance of the evidence in regard to confirmation of domicile in the School District and the existence of a family and economic hardship, as per *N.J.S.A.* 18A: 38-1. The extent of the family hardship and economic instability was apparent from the testimony of Petitioner and his wife when they described the lifestyle and living arrangements of Nephew's mother.

I therefore **CONCLUDE** that Petitioner's Nephew is an Affidavit pupil and has the right to a free public education in the public schools of Clifton New Jersey.

ORDER

Accordingly, it is hereby **ORDERED** that the decision of the Board of Education of the City of Clifton, Passaic County be **REVERSED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 14, 2002
DATE

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

Receipt Acknowledged:

6/18/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 24 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cml

APPENDIX

LIST OF WITNESSES

For Petitioner:

N.G., Petitioner's wife

P.G., Petitioner

For Respondent:

Anthony V. D'Elia, Esq.

LIST OF EXHIBITS

For Petitioner:

P-1	Petitioner's Appeal of District Decision dated 9-26-01	

For Respondent:

R-1	Application By Clifton Resident - Part I	dated 9-20-01
R-2	Application By Clifton Resident Part I, page 2	
R-3	Affidavit of Applicant (Clifton Resident) - Part II	dated 9-20-01
R-4	Clifton Public School admission denial letter	dated 9-25-01
R-5	Clifton Public School admission denial letter, page 2	
R-6	Answer to Petition with Counterclaim	dated 11-20-01
	(Received By Controversies and Disputes 11-26-02)	
R-7	Answer to Petition with Counterclaim, page 2	

OAL DKT. NO. EDU 9655-01
AGENCY DKT. NO. 378-9/01

P.G., on behalf of minor child, J.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, the Commissioner concurs that petitioners have demonstrated that J.B. is entitled to attend school in the Board's district, free of charge, pursuant to *N.J.S.A.* 18A:38-1b(1).

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/1/02

Date of Mailing: 8/1/02

* This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

296-02

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, ON ITS OWN BEHALF AND *IN LOCO PARENTIS* FOR MARC TAYLOR, AND MARC TAYLOR,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning school district and student challenged the determination of the New Jersey State Interscholastic Athletic Association (NJSIAA) denying the student a waiver of the NJSIAA's rules limiting eligibility for any interscholastic sport to eight semesters from initial participation. The student sought the waiver to enable him to play football during his senior year notwithstanding his participation in high school football as a rising eighth-grader in preseason practice and one game, during which he was injured. Petitioners alleged that NJSIAA misconstrued and misapplied its rules, was unfair in its disproportionate penalizing of the student for an action about which school officials failed to properly advise him, and acted arbitrarily by ignoring a prior precedent where another student had been permitted to play during his senior year under circumstances similar to those of the petitioning student herein.

The Commissioner determined that NJSIAA's decision was, in itself, fully in accordance with rules and guidelines as consistently interpreted and applied over the years, and that the one purported exception to precedent was, in fact, distinguished by NJSIAA through reasonable exercise of its lawful discretionary judgment. *However,* the Commissioner also found that, under the particular circumstances of this case, NJSIAA's deferral until Spring 2002 of the student's September 2000 request for waiver acted to deny due process and effectively foreclose any possibility of remedy with respect to the student's desire to play football in his senior year, not only within NJSIAA member schools, but also apart from them. The Commissioner found that, under the circumstances, this delay so prejudiced the student that NJSIAA's denial of his request for waiver rose to the level of arbitrariness and was, therefore, not sustainable on appeal. The Commissioner ordered that the student be granted a waiver to play football for all but the first two games during 2002-2003.

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

August 8, 2002

AGENCY DOCKET NO. 185-6/02

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, ON ITS OWN BEHALF AND *IN LOCO PARENTIS* FOR MARC TAYLOR, AND MARC TAYLOR,	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION
V.	:	
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	
RESPONDENT.	:	

For Petitioner, Asbury Park Board of Education, Nicholas Celso, III, Esq. (Schwartz, Simon, Edelstein, Celso & Kessler)

For Petitioner, Marc Taylor, Timothy E. Shanley, Esq. (St. John & Wayne)

For Respondent, Michael J. Herbert, Esq. (Herbert, Van Ness, Cayci & Goodell)

PROCEDURAL HISTORY

This matter came before the Commissioner of Education on June 21, 2002 through the filing of an appeal by the Board of Education of the City of Asbury Park, on its own behalf and that of pupil Marc Taylor (petitioners). Petitioners sought review of the June 14, 2002 determination of the Eligibility Appeals Committee (EAC) of the New Jersey State Interscholastic Athletic Association (NJSIAA), wherein Marc Taylor was denied a waiver to participate in football in the 2002-2003 school year on grounds that he had utilized all four years of his eligibility pursuant to the "eight semester rule" and did not meet the NJSIAA's established criteria for grant of a waiver. Petitioners initially sought emergent relief permitting

Marc Taylor to participate in practices beginning in June 2002 and in an August training camp, and to participate in football during the 2002-2003 school year. However, the application was submitted too late for the Commissioner to address the request as it related to practices in June 2002, and, as was clarified in correspondence between the parties at the behest of the Commissioner, Marc Taylor was, in fact, permitted by NJSIAA's rules and its decision in this matter to practice with the football team and attend August training camp.[1] Consequently, petitioners' application for emergent relief was withdrawn, and their requests to permit Marc Taylor to practice with the team and to participate in August training camp became moot. The only issue remaining before the Commissioner on appeal, therefore, is petitioners' request that Marc Taylor be allowed to participate in football games during the 2002-2003 football season, beginning with Asbury Park's first scrimmage on August 24, 2002.[2]

THE UNDERLYING DECISION OF THE NJSIAA

The EAC's June 14, 2002 decision set forth the following as its findings of fact in this matter:

> 1. Asbury Park is one of the 30 "special needs" districts in New Jersey, as a result of the *Abbott v. Burke* decision. That district has two elementary, one middle school and one high school, which is a member of the NJSIAA.
>
> 2. Marc Taylor was born on September 10, 1983 and was a student in the seventh grade in the spring of 1998.
>
> 3. In the late spring of 1998, Marc Taylor was encouraged to join the Asbury Park freshman football team and eventually presented a permission slip to the freshman football coach, Leroy Hayes.

[1] *See*, Respondent's Brief in Response to Asbury Park's Application for Emergent Relief, at 15; letter of the Acting Director of Controversies and Disputes dated July 9, 2002; and letter of Asbury Park Board of Education dated July 10, 2002.

[2] Although the appeal on Marc Taylor's behalf was filed by Asbury Park, on July 19, 2002, an appearance was entered, and a brief filed, by counsel representing Taylor individually.

4. Coach Hayes accepted the permission slip and assumed that Marc Taylor was eligible and had met all the requirements of the district. He authorized the issuance of a uniform to Marc Taylor, who then participated in practice throughout the pre-season for the freshman football team.

5. There was no evidence that anyone from the school district advised Marc Taylor that he could not participate on the freshman team as an eighth grader or that he might lose one year of eligibility if he did so.

6. At the first freshman football game against Toms River South, Marc Taylor participated throughout the first half and was injured. Although he participated for a few plays in the second half, an injury to his leg prevented him from any further participation.

7. In September 1999, Marc Taylor entered Asbury Park High School. He thereafter participated in football, basketball and baseball for the next three years, as well as golf in the spring of 2002.

8. Marc Taylor is an outstanding athlete and was the starting quarterback for the Asbury Park football team for the last two seasons. Several colleges have expressed interest in his playing football with the possibility of an athletic scholarship.

9. In addition to the errors made in allowing Marc Taylor to play football on the Asbury Park freshman team as a seventh grader (sic), several other errors were made by the District administration relating to additional football players in 1998, which required the school to forfeit its entire season as well as qualification for a state sectional football championship in that year.
(Appendix of Asbury Park, Item Number 3.)

Conclusions and legal determinations were made by the EAC as follows: First, the EAC noted that its Interpretative Guidelines specifically provide that failure of school staff to properly advise student athletes does not constitute grounds for waiver of eligibility regulations, (*id.* at 5), and that Asbury Park's status as an "*Abbott*" district is no reason to treat its students in a manner different from others. Next, the EAC cited Article V, Section 4.I of the NJSIAA Bylaws, and noted that "[it] expressly provides that students below the ninth grade 'who play on

ninth grade or so called freshman or sophomore, junior varsity and varsity teams will be ineligible at the conclusion of eight semesters of such participation.'" *Ibid.* The EAC then concluded that, because Marc Taylor participated in a full practice schedule as a rising eighth grader and played in one-half of one game, this constituted participation for a full season in accordance with Article V, Section 4.I of the NJSIAA Bylaws. *Id.* at 6.

The EAC also noted that, while its rules permit, with the acquisition of a waiver, the participation of pre-high school students in high school athletics, the purpose of this rule is to benefit handicapped students who attain the age of fifteen or above in eighth grade and who, without a waiver, would be precluded from participating in high school athletics for four full years because students over 19 years of age may not participate in high school athletics. *Ibid.*

The EAC went on to specifically reject the contention that Marc Taylor's participation in football while in eighth grade was "*de minimis,*" stressing that even minimal participation implicates a student's eligibility for one full season under the rules of the NJSIAA. *Id.* at 7. The EAC also rejected the notion that Taylor's participation in football was necessary to his acquiring a scholarship to attend college, noting that other athletes who lose a year of eligibility have acquired athletic scholarships and that granting waivers on this basis would favor superior athletes over less skilled ones, something the EAC would never countenance because it is contrary to the fundamental purpose of high school athletics. *Ibid.*

Finally, the EAC noted that Marc Taylor had only been denied a waiver to participate in football, and that he was still free to participate in all other sports, since he had not yet exhausted his four years of eligibility in any sport other than football. *Ibid.*

ARGUMENTS OF THE PARTIES ON APPEAL

Initially, it is noted that petitioners do not dispute the material facts of this matter as found by the EAC and set forth above. Rather, the parties disagree on the meaning and application of the rules invoked by NJSIAA to determine Marc Taylor's eligibility status and deny his request for a waiver.

In support of its appeal, Asbury Park first argues that the controlling rule invoked by NJSIAA to find Taylor ineligible does not, in fact, apply to him. According to Asbury Park, Article V, Section 4.J of the NJSIAA Bylaws specifically provides that "[n]o student shall be eligible for high school athletics after the expiration of eight consecutive semesters *following his/her entrance into the 9th grade.*" NJSIAA 2001-2002 Handbook at 51 (*emphasis supplied*) Thus, the argument proceeds, because the plain language of this rule renders it applicable only *after* a pupil enters 9th grade, Marc Taylor's eight semesters of eligibility did not begin until he entered 9th grade and, having had only six semesters of eligibility since that time, he is entitled to participate in football in his senior year. Brief of Asbury Park at 5.

Asbury Park dismisses as irrelevant Article V, Section 4.I of the NJSIAA Bylaws, which provides that "***[s]tudents in any 6th 7th, or 8th grades of any school (Jr. High or Sr. High) who play on the 9th grade or so-called freshman or sophomore, junior varsity and varsity teams will be ineligible at the conclusion of eight consecutive semesters of such participation. ***" Asbury Park contends that the history of this rule shows it to have been originally intended to prohibit pre-high school students from playing high school sports, but then adjusted, as an accommodation to classified students, to permit 8th graders age 15 and over the opportunity to participate in four years of sports through grant of a waiver. Thus, the argument proceeds, the rule does not apply to students such at Marc Taylor, and it may not be read *in pari materia* with

other rules so as to suggest that the eight semesters of normal eligibility begin to run whenever a student begins to participate in a sport, rather than in 9th grade. *Id.* at 7-8.

Asbury Park also argues that Marc Taylor's participation in football as an eighth-grader was *de minimis*, since he was injured in his first game, and that fundamental fairness compels the reversal of so disproportionate a penalty as denial of eligibility for the entire 2002-2003 season. Asbury Park suggests that, rather than imposing the maximum penalty, NJSIAA should have chosen one more appropriate to Marc Taylor's participation in practices and one-half of one game in 8th grade. *Id.* at 11, 15-16.

A waiver is additionally appropriate, Asbury Park contends, because Marc Taylor is a child in an "*Abbott*" district, lacking a nourishing family environment to protect him from inappropriate judgment calls of school staff and now finding himself penalized because he relied on erroneous advice of staff of the district. *Id.* at 18-19

Finally, Asbury Park asserts that, based on the outcome of a prior instance of student eligibility, the EAC's decision is arbitrary and capricious. The prior student was permitted by NJSIAA to play high school football for four years after participating, as an eleven-year old about to enter 7th grade, in a full scrimmage with the high school football team coached by his father; whereas Marc Taylor was denied a waiver to participate in four years of high school football based on his participation in practices and one-half of one game when he was in 8th grade. *Id.* at 12. Asbury Park asserts that there can be no basis for this inconsistency, since Marc Taylor gained by his participation neither an athletic experience advantage, in that he played a different position in 8th grade (offensive line, rather than quarterback), nor a physical advantage, in that he is the same age as other high school seniors. Thus, there was no reason to

deny Taylor a waiver while permitting the prior student to play, and NJSIAA's failure to follow its own precedent was inherently arbitrary and capricious. *Ibid.*

Petitioner Marc Taylor's individual arguments essentially mirror those of the Asbury Park Board, stressing that the plain language of the rules compels a determination that eight semesters of eligibility for Taylor did not begin until he entered 9th grade, that the "penalty" imposed on Taylor was both disproportionate and unfair, because it entails the loss of his ability to attend college for a minor infraction caused by the actions of others through no fault of his own, and, finally, that NJSIAA's treatment of the other student cited by Asbury Park, who was allowed to play four years of high school football although he participated in a scrimmage when eleven years old, compels a conclusion that the decision of the EAC was arbitrary and capricious. In the latter regard, Marc Taylor asserts that the arbitrariness of the EAC's decision is further demonstrated by quotations from counsel for NJSIAA, in a news account attached to Taylor's brief, indicating that the two cases are not comparable in that the prior student was not increasing his skills or being prepared for anything, whereas Marc Taylor was involved for weeks and participated in an athletic contest. Brief of Marc Taylor, Attachment A at 3. These comments, it is asserted, demonstrate that NJSIAA makes subjective determinations about what constitutes participation as a threshold matter prior to rigid application of its eligibility rules, including the eight-semester rule at issue herein.

In light of the similarity of the two petitioners' arguments, NJSIAA filed, as directed, a single response addressing both petitioners' briefs. Initially, NJSIAA contends that "petitioners embark on an elaborate exegesis designed to show that NJSIAA eligibility rules do not mean what they say." Brief of NJSIAA at 3 NJSIAA argues that the plain language of Article V, Section 4.I of its Bylaws counters petitioners' assertion that Article V, Section 4.J of

NJSIAA Bylaws must be read as mandating that, for students such as Marc Taylor, the eight-semester rule does not begin to run until they enter 9th grade, since they are not eligible for a waiver to play in 6th, 7th or 8th grade. NJSIAA posits that Article V, Section 4.I clearly and unequivocally states that students in 6th, 7th or 8th grade who play on freshman, sophomore, junior varsity or varsity teams will be ineligible at the conclusion of eight semesters from the time they begin such participation. It cautions that concluding otherwise would give schools free license to engage students at a younger age so as to unfairly increase a team's advantage in varsity competition, and students an easy means of extending their high school athletic experience beyond four years. *Id.* at 3-4

NJSIAA next argues that Marc Taylor's ability to obtain a scholarship is not a relevant factor in deciding this matter, both because such argument is largely speculative and because it misconstrues entirely the purpose of high school athletics. NJSIAA notes that it serves approximately 200,000 students each year in 31 separate sports, and that the majority of these students do not have the outstanding physical gifts and skill levels that might lead to an athletic scholarship. Those that do, NJSIAA argues, deserve no preferential treatment in eligibility determinations, since such preference would subordinate the educational mission of schools to the interests of the sports marketplace. *Id.* at 7-8.

NJSIAA contends that granting Marc Taylor more than four years of eligibility would create a dangerous precedent, constituting the only exception to an otherwise absolute rule. *Id.* at 9 NJSIAA stresses that it did *not* impose a penalty on Taylor, as petitioners continually assert. First, Taylor was accorded the same four years of eligibility that all other students enjoy. Second, the NJSIAA did not "punish" him for participating in football while in 8th grade; it denied his request for a waiver from normal eligibility rules based upon

circumstances which did not meet NJSIAA's established criteria for such a waiver. *Id.* at 9. NJSIAA cites to its Interpretive Guidelines relating to the eight-semester rule, wherein it is expressly stated that:

> ***Since the NJSIAA carefully regulates practice and scrimmages and is most concerned over the possibility of "red shirting," "participation" in any sports season will begin on the very first day that a Student-Athlete participates in or attends practice in a particular sport.
> (NJSIAA 2001-2002 Handbook at 72, Brief of NJSIAA at 10)

Again citing its Interpretative Guidelines, NJSIAA notes that it never considers the actions of school district personnel as grounds for granting a waiver, even though such actions may be beyond the control of a student athlete:

> ***Misinterpretation of NJSIAA eligibility regulations or the failure by the school's staff to properly advise a Student-Athlete will not be considered grounds for waiver of the eligibility regulations.
> (NJSIAA 2002-2002 Handbook at 69, NJSIAA Brief at 11)

Permitting the result sought by Taylor would countenance something NJSIAA cannot permit: the effective rewarding of schools and officials not doing their jobs by allowing them to benefit from the participation of athletes who have obtained an unfair advantage over their peers in skill and experience. *Id.* at 11

In response to petitioners' arguments claiming that a prior student's eligibility determination demonstrates that Marc Taylor was denied fairness and equal protection, NJSIAA contends that it has decided over 546 eligibility cases since its establishment in 1983, granting waivers in about a third of them, but that it has *never once* granted a waiver permitting a student to participate for more than four seasons in any one sport. Brief of NJSIAA at 13. Additionally, NJSIAA notes, 43 decisions have issued from the Commissioner and courts during this same time, at least half of which have involved the eight-semester rule. Rather than looking to this

body of precedent, which is entirely consistent with NJSIAA's determination in the instant matter, according to NJSIAA, petitioners instead rely on one anomalous situation arising out of a matter involving the unsportsmanlike conduct and subsequent discipline of a coach. *Id.* at 13-14

NJSIAA acknowledges that the student in question, the coach's son, C.O., participated by his father's arrangement in a single simulated drill in 1995 while 11 years old,[3] and subsequently was permitted to play high school football for four seasons. However, NJSIAA differentiates C.O.'s situation from that of Marc Taylor, stressing that C.O. was not actually, nor intended to be, a member of the team, was not issued a uniform other than a helmet and jersey, did not practice, and played only in one exhibition; whereas Marc Taylor participated as a team member in a full preseason of practice and an actual interscholastic contest. *Id.* at 13-14. NJSIAA also notes that Marc Taylor was age appropriate to participate in high school football, whereas C.O. was only 11 years old, and that Taylor had the benefit of a month of practice, whereas C.O. played in an exhibition with no possibility of skill enhancement. *Id.* at 14. In effect, NJSIAA argues that C.O. did not "participate" in football so as to cause his eligibility to begin prior to 9th grade; thus, he had no need of a waiver to play for four years, as Marc Taylor did.

DETERMINATION

The NJSIAA is a voluntary association. The Commissioner's scope of review in matters involving the NJSIAA is appellate. *See N.J.S.A.* 18A:11-3; *N.J.A.C.* 6A:3-7.4; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.*2d (EDU)182, 188. The Commissioner may not overturn an action by the NJSIAA in applying eligibility rules absent a finding that the Association applied the rules in a patently arbitrary, capricious or unreasonable manner. *B.C. v.*

[3] The coach was disciplined by NJSIAA for this and other infractions, in a determination later upheld by the Commissioner.

Cumberland Regional School District, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987). As codified to provide notice of this standard to the public and regulated parties:[4]

> 1. If the NJSIAA has granted a petitioner due process and its decision is supported by sufficient credible evidence in the record as a whole, the Commissioner shall not substitute his *** judgment for that of the NJSIAA, even if the Commissioner might judge otherwise in a *de novo* review.
>
> 2. The Commissioner shall not overturn NJSIAA's application of its own rules absent a demonstration by the petitioner that such rules were applied in an arbitrary, capricious, or unreasonable manner. *N.J.A.C.* 6A:3-7.4(a).

The burden of proof that an action was thus deficient rests with the person challenging the decision. *Kopera v. West Orange Bd. of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960). It is well established that,

> In the law, "arbitrary" and "capricious" means having no rational basis. *** Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached. *** (citations omitted) *Bayshore Sew. Co. v. Dep't. of Env., N.J.*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974).

Upon careful consideration of this matter, and mindful of the applicable standard of review, for the reasons set forth below, the Commissioner determines to reverse the decision of the NJSIAA and permit Marc Taylor to participate in football during the 2002-2003 season.

Initially, the Commissioner stresses that the EAC decision itself, and NJSIAA's arguments on appeal, correctly identify and construe the controlling rules in this matter, and apply them reasonably, consistent with over two decades of decisional precedent. In this latter

[4] *See*, 31 *N.J.R.* 4173(a) and 32 *N.J.R.* 1177(a).

regard, the Commissioner specifically finds rationally based and supported by undisputed facts the NJSIAA's proffered basis for distinguishing the one instance petitioners cite as evidence that NJSIAA enforces its eligibility rules selectively and inconsistently.[5] The Commissioner also concurs with NJSIAA's observation that Marc Taylor's inability to participate in extra semesters of football resulted from even-handed application of NJSIAA eligibility rules, not from a determination to "penalize" the student for an earlier "infraction."

However, notwithstanding the above, the Commissioner's careful review of the entire record, including the parties' submissions in support of Marc Taylor's request for emergent relief, reveals an infirmity in the manner in which Taylor's request for waiver was addressed by NJSIAA that resulted in a denial of "due process" to Marc Taylor as contemplated by *N.J.A.C.* 6A:3-7.4(a). The record shows that there was a nearly two-year delay from the time school officials, recognizing Taylor's problem at the beginning of his sophomore year, first sought a waiver of the eight-semester rule to the time NJSIAA agreed to entertain his application. In all likelihood, given that the decision presently on appeal is entirely consistent with NJSIAA rules and past precedent, the outcome of any earlier eligibility hearing would have been no different than that of the EAC determination herein. ***But,*** by deferring consideration of Taylor's request for waiver until the end of his junior year, NJSIAA effectively foreclosed the student not only from playing for one of its member schools, but also from *any* possibility of meaningful relief related to his desire to play football as a high school senior.

[5] The Commissioner notes that, even if he had found NJSIAA's basis for distinction between C.O. and Marc Taylor questionable, such a conclusion would not necessarily compel a determination that NJSIAA had acted arbitrarily or unlawfully in the matter herein. NJSIAA's rules limit eligibility in any sport to eight semesters. Assuming, *arguendo*, that a case could be identified where a student athlete *was* provided more than eight semesters of eligibility on a basis arguably inconsistent with prior precedent, that single anomaly would not demand that NJSIAA's established rules and two decades of their consistent application by NJSIAA, the Commissioner and the courts, be disregarded in all future cases.

Therefore, although NJSIAA provided sufficient proceedings and opportunity for petitioners to present arguments in support of the request for a waiver, the inordinate delay in hearing the request rendered the process provided of limited value. Due process, as contemplated by the standard of review in cases such as this, mandates both that sufficient proceedings and procedures be accorded the affected individual and that such proceedings be meaningful when conducted; in other words, that such proceedings be conducted at a time when they are capable of producing a meaningful result. That did not occur in this case.

Had the NJSIAA acted upon petitioners' September 13, 2000 application (Appendix to Asbury Park's Brief at 9), rather than replying that the appropriate time for submission of such an application was the Spring of Taylor's junior year, when his eligibility would be exhausted (Appendix to Asbury Park's Brief at 10), Taylor would have had available to him options that could have minimized or eliminated the effect of any EAC decision denying him a waiver. As set forth in the undisputed Affidavit of Joseph Stinson:

> (5) Alternatively, I attempted to locate a private school which would accept Marc for his senior year in lieu of attending Asbury Park High School. After receiving the oral decision on June 6, 2002, by the Association declining Marc's request for a waiver of the eight semester rule, I contacted Milford Academy, Salisbury Prep, Blair Academy and Pennington, all secondary schools in the tri-state area which are not member schools affiliated with the Association or similar rules and regulations. I was advised by each of these schools that their athletic recruitment for senior year had already been completed and that they designated quarterbacks for their varsity teams. They also indicated that the scholarship program for senior level secondary schooling had been completed and there were no funds available that they could apply towards Marc. In fact, these schools indicated that they had already sent out acceptances for applications for enrollment in the senior year in general.
>
> (6) As a result of the Association's choice to postpone a decision on the waiver application of Marc Taylor, the final appeal of the waiver was not heard until June 5, 2002. The decision was

> rendered on June 6, 2002 and a written decision was dated and received June 14, 2002. The unnecessary and undue delay in rendering this decision has resulted in irreparable harm to Marc Taylor, in that he will be unable to participate in football either within Asbury Park or at a private school and thus either lose or substantially reduce his chances of receiving a college scholarship.
> (Brief of Asbury Park in Support of Application for Emergent Relief, Appendix A at 3-4)

NJSIAA's failure to act on petitioners' earlier request for a waiver, therefore, prejudiced Marc Taylor to such an extent that its denial of his request for continued eligibility at the end of his junior year rises to the level of arbitrariness and a denial of due process, notwithstanding that the EAC decision *itself* is, in every respect, rationally based and consistent with law.

The Commissioner fully supports NJSIAA in its desire to enforce its rules so as to ensure, to the greatest extent possible, fair, equal and consistent treatment of student athletes statewide. However, implementation of this objective must not entirely disregard the needs of individual students. The Commissioner can ascertain no basis for what appears to be a policy or practice on NJSIAA's part of deferring applications for waiver of eligibility rules until a student's eligibility has been nearly exhausted. Such policies and practices can, under particular factual circumstances, as occurred herein, have the *effect* of punishing students, which, as vigorously and persuasively argued by NJSIAA, is not the purpose or intent of eligibility rules. Therefore, to the extent that NJSIAA does not address applications for waiver of its eligibility rules, when the circumstances of an application make such consideration appropriate, prior to the impending expiration of a student's eligibility, the Commissioner cautions NJSIAA that deferral of earlier applications may render its subsequent eligibility determinations susceptible on appeal.

That said, the Commissioner also cannot ignore the fact that Marc Taylor did participate in football as a rising 8th grade student. As such, under the particular circumstances

detailed herein, the Commissioner determines that a waiver must be granted to Marc Taylor permitting him to participate in football during his senior year. Notwithstanding this finding, the Commissioner recognizes that Marc Taylor *did* participate in football while a rising 8th grade student and further recognizes that a measure of responsibility must fall on students and their parents or guardians to become cognizant of rules governing their participation in extracurricular activities which, it is well-established, is not an entitlement, but rather, a privilege. As such, the Commissioner directs that Marc Taylor may not participate in the first two games of the 2002 football season for the Asbury Park High School.

Accordingly, for the reasons set forth herein, the decision of the NJISAA is reversed, and Marc Taylor is granted a waiver to participate in football during his senior year, excluding the first two games of the 2002 season for the Asbury Park High School football team.

IT IS SO ORDERED.[6] [7]

COMMISSIONER OF EDUCATION

Date of Decision: 8/08/02

Date of Mailing: 8/08/02

[6] On July 31, 2002 counsel for NJSIAA wrote to the Commissioner asking for a delay in consideration of the instant matter, on grounds that NJSIAA had been presented through the press with anonymously submitted information, including a videotape, purporting to show that Marc Taylor had, in fact, participated in more than part of one game as a member of the Freshman football team. Immediately thereafter, counsel for the Asbury Park Board of Education filed an objection to such request. The Commissioner has not considered NJSIAA's request, nor the Board's objection to it, because the question of how many games Marc Taylor may, or may not, have played is immaterial to the Commissioner's determination herein, which is based entirely on other grounds.

[7] Pursuant to *N.J.S.A.* 18A:11-3, this decision shall constitute the final decision of the State administrative agency and may be appealed to the Superior Court. *N.J.A.C.* 6A:3-7.5.

292-02

D.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

August 1, 2002

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO: EDU 3664-02
AGENCY DKT. NO: 118-4/01

D.T.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGN COUNTY,

Respondent.

Aron M. Schwartz, Esq., for petitioner
(Greenbaum Rowe Smith Ravin Davis & Himmel, LLP, attorneys)

Paul Green, Esq., for respondent
(Schwartz Simon Edelstein Celso & Kessler, attorneys)

Record Closed: June 11, 2002 Decided: June 14, 2002

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

This matter was transmitted to the Office of Administrative Law (OAL) on April 29, 2002, for resolution as a contested case pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Settlement Agreement.

Having reviewed the contents of the attached Settlement Agreement, **I FIND** (a) that they are consistent with the law, (b) that they fully dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Accordingly, I **CONCLUDE** that the attached Settlement Agreement, meets the requirements of *N.J.A.C. 1:1-19.1.1* and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings be (and are hereby) **TERMINATED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

6/18/02
DATE

JEFFREY A. GERSON,
Administrative Law Judge

Receipt Acknowledged:

6/21/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 1 - 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/g

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLP
Ten James Street
Florham Park, New Jersey 07932
(973) 301-0001
Attorneys for Respondent

D.T., *Petitioner*, -v.- Board of Education of Borough of Fair Lawn, Bergen County, *Respondent.*	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY/ OFFICE OF ADMINISTRATIVE LAW AGENCY DOCKET NO. OAL DOCKET NO. EDU, 3664-02 ADMINISTRATIVE ACTION **STIPULATION OF SETTLEMENT**

The parties in the above-captioned action, having deemed it in their best interests to settle this matter on the terms set forth herein, hereby agree as follows:

1. The Board agrees to grant petitioner's request to substitute a grade of "P" for the grade of "A" previously issued to him for the 9th and 10th grade Band courses. As a result of this substitution, petitioner's cumulative grade point average at the end of the eighth semester will make petitioner eligible for co-valedictorian status for the Fair Lawn High School Class of 2002.

2. Petitioner shall be entitled to share equally in the recognition accorded to the class valedictorians to the extent possible as of this date, including but not limited to designation as co-valedictorian at the graduation ceremony. It is understood, however, that the District has not as of this date determined the identity of any speakers at the graduation ceremony or the amount of time to be allotted to any speakers.

2 cc

3. Petitioner and his parents, in executing this Stipulation, do hereby release and hold the respondent harmless from any and all claims which were or could have been asserted in this matter or in any way arising from the circumstances of this controversy, including but not limited to claims for compensatory or punitive damages or attorneys' fees.

4. The Parties hereto represent and acknowledge that, in executing this Stipulation, they have not relied upon any representation or statement, written or oral, made by any of the parties' agents, attorneys or representatives with regard to the subject matter, basis or effect of this Agreement or otherwise, except those specifically stated in this Stipulation.

5. The parties hereto acknowledge that they were represented by competent counsel, that they understand the contents of this Stipulation of Settlement and that this Agreement is entered into voluntarily. This Stipulation of Settlement constitutes the entire Agreement and understandings between the parties and constitutes full and final Settlement as to all issues which were or could have been raised in these proceedings to date.

Petitioner

David Tetelbaum

Parents:

David Tetelbaum

Ellen Tetelbaum

Dated: 5/15/02

Respondent Fair Lawn Board of Education

By: Dan

By: Raymond R Jacobs

Dated: 5/23/02

OAL DKT. NO. EDU 3664-02
AGENCY DKT. NO. 118-4/01

D.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/1/02

Date of Mailing: 8/1/02

297-02

297-02

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	
PETITIONER,	
V.	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	DECISION
RESPONDENT.	

August 9, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5900-01

AGENCY DKT. NO. 232-6/01

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

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT
OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq., for petitioner

Michael Lombardi, Deputy Attorney General, for respondent,
(David Samson, Attorney General of New Jersey, attorney)

Record Closed: June 13, 2002 Decided: June 20, 2002

BEFORE **ELINOR R. REINER**, ALJ:

On June 22, 2001, petitioner, Board of Education of the City of Elizabeth, filed a Verified Petition of Appeal with the Commissioner of Education appealing the May 30, 2001 decision of the Division of Early Childhood Education and the Division of Finance of the Department of Education, denying and inadequately funding numerous

components of the District's Early Childhood Program Aid One Year Operational Plan for Fiscal Year 2001-2002. On July 16, 2001, respondent filed an answer denying that the approval of the identified components in the district's 2001-2002 plan is required by the *Abbott* decisions and the Department of Education's regulation and requesting that the petition of appeal be dismissed.

On July 25, 2001, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13. The matter was assigned to the undersigned judge on August 27, 2001, and a telephone prehearing conference was held on September 10, 2001. At that time, 39 issues were set forth, and the matter was scheduled for hearing on November 26 through November 30, 2001 at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey 07102. As the result of settlement conferences held between the parties, a settlement was reached, and the hearing was not held.

The parties have agreed to settle this matter and have prepared the attached Consent Order of Settlement, indicating the terms of settlement.

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

June 25, 2002
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

6-26-02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 1 - 2002
DATE

OFFICE OF ADMINISTRATIVE LAW

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RECEIVED
STATE OF NEW JERSEY
OFFICE OF
JUN 18 1 18 PM '02

DAVID SAMSON
Attorney General of New Jersey
Attorney for Respondent
New Jersey Department of Education
R. J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625

By: Michael Lombardi
Deputy Attorney General
(609) 943-5949

BOARD OF EDUCATION OF CITY OF ELIZABETH [Early Childhood] [Supplemental Funding] Petitioner, NEW JERSEY DEPARTMENT OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OAL DOCKET NOs. EDUOT 5900-01N EDUOT 07435-01N Civil Action CONSENT ORDER OF SETTLEMENT

WHEREAS, Petitioner, Board of Education of the City of Elizabeth ("Petitioner"), through its Attorney, Richard Shapiro, Esq., brought the above captioned matter before the Commissioner of Education by the filing of a petition on or about July 26, 2001, which appealed the Department of Education's decision on Petitioner's Early Childhood Plan and award of Supplemental Abbott v. Burke state funding ("Supplemental Funding") to the Petitioner and sought to appeal other issues as well; and

WHEREAS, Respondent, New Jersey Department of Education ("Department"), through its attorney, the Honorable David Samson,

Attorney General of the State of New Jersey by Michael Lombardi, Deputy Attorney General; and

WHEREAS, the parties agreed to amicably resolve this matter in the public interest;

THEREFORE, the Petitioner and the Department hereby stipulate to the following terms of settlement:

1. The final amount of Supplemental Funding that will be awarded Petitioner for the 2001-2002 school year is $17,348,990, which constitutes a net reduction of $5,468,512 from the original $22,817,502 initially awarded Petitioner. The Supplemental Funding Award is subject to any adjustments mandated by P.L. 2001, c. 130, and subject to the appropriations in the FY 2003 Appropriations Act, the terms of this settlement and applicable law.

2. Petitioner agrees that the Department may reduce the remaining Supplemental Funding payments to Petitioner for the 2001-2002 school year by $5,468,512.

3. Petitioner agrees to adjust and resubmit the district wide budget for the 2001-2002 school year and to reduce the amount of additional Abbott v. Burke State aid accordingly to $17,348,990. The Department agrees that the amount of funding required for the programs and services restored to Petitioner's School-Based Budget and Early Childhood Plan totals $2,431,488, and should be reflected in the resubmitted budget.

4. This settlement does not waive any of the review requirements and mandated adjustments pursuant to P.L. 2001, c. 130, including reallocation of the district's undesignated general fund balance in excess of two percent. In the event that any portion of the additional Abbott v. Burke state aid awarded pursuant to this settlement is not expended during the current fiscal year ending June 30, 2002, that portion of the additional funding must be used to support programs and services approved by the Department of Education during the 2002-2003 school year.

5. In the event Petitioner experiences cash flow shortages during the 2001-2002 school year, the Department shall provide expeditious assistance to Petitioner to resolve such cash flow difficulties. Such assistance may include, but not be limited to, the provision of an accelerated payment schedule of Petitioner's 2001-2002 state aid.

6. Petitioner agrees to dismissal with prejudice of Petitioner's above captioned matters, **OAL DOCKET NO. EDUOT 5900-01N; EDUOT 07435-01N** which are currently pending before the Office of Administrative Law and the Commissioner of Education.

7. This Consent Order does not preclude Petitioner from applying for additional Abbott v. Burke state aid pursuant to N.J.A.C. 6A:24-7.1(f).

8. Resolution of this matter on the terms set forth herein shall not be construed as precedent in other pending or future litigation.

For the Petitioner,
Board of Education of the City of Elizabeth,

Dated: 6/20/02

Richard E. Shapiro, Esq.

For the New Jersey Department of Education:

DAVID SAMSON
Attorney General of New Jersey

Dated: June 13, 2002

Michael Lombardi
Deputy Attorney General

SO ORDERED THIS 20th DAY OF June 2002.

HONORABLE ELINOR REINER

OAL DKT. NO. EDU 5900-01
AGENCY DKT. NO. 232-6/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and settlement transmitted by the Office of Administrative Law have been reviewed. Because this agency is a party to the present case, the settlement, pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), is deemed to be the final decision in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/9/02

Date of Mailing: 8/9/02

298-02

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

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

August 9, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7435-01

AGENCY DKT. NO. 297-7/01

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

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT
OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq., for petitioner

Michael Lombardi, Deputy Attorney General, for respondent,
(David Samson, Attorney General of New Jersey, attorney)

Record Closed: June 13, 2002 Decided: June 20, 2002

BEFORE **ELINOR R. REINER**, ALJ:

On July 26, 2001, petitioner, Board of Education of the City of Elizabeth, filed a Verified Petition of Appeal with the Commissioner of Education, appealing the decision of the Department of Education, communicated by letter dated June 26, 2001, denying $203,561,895.00 of the Elizabeth school district's request for $226,379,397.00 in

supplemental state funding for the 2001-2002 school year. On August 13, 2001, respondent filed an answer both admitting and denying certain of the allegations, and requesting that the petition be dismissed. On August 27, 2001, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

The matter was assigned to the undersigned judge on August 29, 2001. A telephone prehearing conference was held on September 20, 2001, during which the issues were isolated, and the hearing scheduled for December 24, 26, 27 and 28, 2001 at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey 07102. As the result of settlement conferences held between the parties, a settlement was reached and the hearing was not held.

The parties have agreed to settle this matter and have prepared the attached Consent Order of Settlement indicating the terms of settlement.

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

June 20, 2002
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

6-26-02
DATE

Division of Controversies & Disputes
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 1 - 2002
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
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DAVID SAMSON
Attorney General of New Jersey
Attorney for Respondent
New Jersey Department of Education
R. J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625

By: Michael Lombardi
Deputy Attorney General
(609) 943-5949

BOARD OF EDUCATION OF CITY OF ELIZABETH [Early Childhood] [Supplemental Funding] Petitioner, NEW JERSEY DEPARTMENT OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OAL DOCKET NOs. EDUOT 5900-01N EDUOT 07435-01N Civil Action CONSENT ORDER OF SETTLEMENT

WHEREAS, Petitioner, Board of Education of the City of Elizabeth ("Petitioner"), through its Attorney, Richard Shapiro, Esq., brought the above captioned matter before the Commissioner of Education by the filing of a petition on or about July 26, 2001, which appealed the Department of Education's decision on Petitioner's Early Childhood Plan and award of Supplemental Abbott v. Burke state funding ("Supplemental Funding") to the Petitioner and sought to appeal other issues as well; and

WHEREAS, Respondent, New Jersey Department of Education ("Department"), through its attorney, the Honorable David Samson,

Attorney General of the State of New Jersey by Michael Lombardi, Deputy Attorney General; and

WHEREAS, the parties agreed to amicably resolve this matter in the public interest;

THEREFORE, the Petitioner and the Department hereby stipulate to the following terms of settlement:

1. The final amount of Supplemental Funding that will be awarded Petitioner for the 2001-2002 school year is $17,348,990, which constitutes a net reduction of $5,468,512 from the original $22,817,502 initially awarded Petitioner. The Supplemental Funding Award is subject to any adjustments mandated by P.L. 2001, c. 130, and subject to the appropriations in the FY 2003 Appropriations Act, the terms of this settlement and applicable law.

2. Petitioner agrees that the Department may reduce the remaining Supplemental Funding payments to Petitioner for the 2001-2002 school year by $5,468,512.

3. Petitioner agrees to adjust and resubmit the district wide budget for the 2001-2002 school year and to reduce the amount of additional Abbott v. Burke State aid accordingly to $17,348,990. The Department agrees that the amount of funding required for the programs and services restored to Petitioner's School-Based Budget and Early Childhood Plan totals $2,431,488, and should be reflected in the resubmitted budget.

4. This settlement does not waive any of the review requirements and mandated adjustments pursuant to P.L. 2001, c. 130, including reallocation of the district's undesignated general fund balance in excess of two percent. In the event that any portion of the additional Abbott v. Burke state aid awarded pursuant to this settlement is not expended during the current fiscal year ending June 30, 2002, that portion of the additional funding must be used to support programs and services approved by the Department of Education during the 2002-2003 school year.

5. In the event Petitioner experiences cash flow shortages during the 2001-2002 school year, the Department shall provide expeditious assistance to Petitioner to resolve such cash flow difficulties. Such assistance may include, but not be limited to, the provision of an accelerated payment schedule of Petitioner's 2001-2002 state aid.

6. Petitioner agrees to dismissal with prejudice of Petitioner's above captioned matters, **OAL DOCKET NO. EDUOT 5900-01N; EDUOT 07435-01N** which are currently pending before the Office of Administrative Law and the Commissioner of Education.

7. This Consent Order does not preclude Petitioner from applying for additional Abbott v. Burke state aid pursuant to N.J.A.C. 6A:24-7.1(f).

8. Resolution of this matter on the terms set forth herein shall not be construed as precedent in other pending or future litigation.

For the Petitioner,
Board of Education of the City of Elizabeth,

Dated: 6/20/02

Richard E. Shapiro, Esq.

For the New Jersey Department of Education:

DAVID SAMSON
Attorney General of New Jersey

Dated: June 13, 2002

Michael Lombardi
Deputy Attorney General

SO ORDERED THIS 20th DAY OF June 2002.

HONORABLE ELINOR REINER

OAL DKT. NO. EDU 7435-01
AGENCY DKT. NO. 297-7/01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and settlement transmitted by the Office of Administrative Law have been reviewed. Because this agency is a party to the present case, the settlement, pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), is deemed to be the final decision in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/9/02

Date of Mailing: 8/9/02

299-02

C.D.M., on behalf of minor child, R.M.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE FLEMINGTON-RARITAN REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

August 12, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 2138-02

AGENCY DKT. NO. 29-2/02

C.D.M., O/B/O R.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE FLEMINGTON-RARITAN REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY,

Respondent.

C.D.M., petitioner, *pro se*

Joan Kane Josephson, Esq., for respondent (Parker, McCay & Criscuolo, attorneys)

Record Closed: June 25, 2002 Decided: June 25, 2002

BEFORE **BERNARD GOLDBERG**, ALJ:

This application for emergent relief was transmitted to the Office of Administrative Law (OAL) on April 3, 2002, by the Bureau of Controversies and Disputes, New Jersey Department of Education, pursuant to *N.J.A.C.* 1:1-12.6. The appeal was filed on February 4, 2002, by C.D.M. on behalf of her 13-year-old son, R.M.

The hearing was held on April 10, 2002, at the OAL, Mercerville, New Jersey. After oral argument concluded, the hearing record was closed.

On April 11, 2002, an Order was issued dismissing the within appeal based upon acceptance of the Board of Education's actions, while preserving her due process rights.

On June 3, 2002, a letter was sent to the parties in an effort to ascertain the necessity for a due process hearing. A response was received from counsel for the Board of Education advising she believed there was no need for a hearing. No response was received from petitioner. Thereafter, on two separate occasions, my secretary contacting the petitioner to determine if the matter would need to proceed. Messages were left on an answering machine. No response was received.

On June 17, 2002, another letter was sent to the parties advising that if petitioner failed to contact the judge's chambers by or before June 24, 2002, the matter would be dismissed. As of the date of this Initial Decision, June 25, 2002, no contact has been received from petitioner.

Based on the foregoing, it is my conclusion that petitioner no longer wishes to proceed and it is **ORDERED** that this Petition be **DISMISSED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 25, 2002
DATE

BERNARD GOLDBERG, ALJ

Receipt Acknowledged:

6-26-02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 27 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/lam

OAL DKT. NO. EDU 2138-02
AGENCY DKT. NO. 29-2/02

C.D.M., on behalf of minor child, R.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE FLEMINGTON-RARITAN REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) has been reviewed. The parties filed no exceptions.

Upon his full review, the Commissioner concurs with the determination of the Administrative Law Judge that the within petition is appropriately dismissed.

Accordingly, the Initial Decision of the OAL is affirmed and this matter is dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/12/02

Date of Mailing: 8/12/02

* This decision, as the Commissioner's final determination may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

300-02

IN THE MATTER OF THE TENURE	:	
HEARING OF CHARLES GREGG, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF ATLANTIC	:	DECISION
CITY, ATLANTIC COUNTY.	:	
	:	

August 12, 2002

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 00489-02
ON REMAND EDU 10289-96
AGENCY REF. NO. 500-10/96

IN THE MATTER OF THE TENURE HEARING OF CHARLES GREGG, SCHOOL DISTRICT OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY

Eric Bernstein, Esquire, for the Atlantic City Board of Education

Charles Gregg, respondent, *pro se*

Record Closed: June 20, 2002 Decided: June 25, 2002

BEFORE **LILLARD E. LAW,** ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter is on remand to the Office of Administrative Law (OAL) from the Commissioner of Education (Commissioner) wherein the Commissioner declined to approve the withdrawal of the tenure matter by way of Resolution executed by the Atlantic City Board of Education (Board). In his Decision, the Commissioner stated the following:

> The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. Upon

> such review, the Commissioner declines to approve the withdrawal.
>
> The record here indicates that, by letter dated February 7, 2001, the Board attorney advised the Administrative Law Judge (ALJ) assigned to this matter that the Board had adopted a Resolution withdrawing it charges against respondent. On December 20, 2001, this matter was returned to the Department of Education as a withdrawal. The parties are hereby reminded that, pursuant to *N.J.A.C.* 6A:3-5.6, once tenure charges have been certified to the Commissioner, these charges may be withdrawn or settled only with the approval of the Commissioner. Any proposed withdrawal or settlement of such charges, whether submitted to the Commissioner prior to transmittal of the case to the OAL, or to the ALJ subsequent to transmittal, shall address the requisite standard established in *In re Cardonick*, State Board decision of April 6, 1983, 1990 *S.L.D.* 842, 846, necessary to the consideration of a withdrawal or settlement request.
>
> Accordingly, this matter is being returned to the OAL for further proceedings requisite to the resolution of the concerns Expressed herein.
>
> (Commissioner of Education Decision)

FINDINGS OF FACT

Subsequent to the Commissioner's Remand, dated February 5, 2002, this administrative tribunal was in receipt of a letter from respondent's attorney of record, Allen S. Zeller, Esquire, dated February 28, 2002, who asserted he no longer represented respondent. Thereafter, on April 11, 2002, this tribunal conducted a Prehearing Conference where respondent appeared *pro se*, and the Board was represented by George G. Frino, Esquire.

The issue agreed upon by the parties, as set froth in the Prehearing Order, dated April 18, 2002, where the issue to be determined mirrors the Commissioner's rejection of the settlement and withdrawal of the tenure charges; *i.e.,* whether the requisite standard for withdrawal or settlement of teacher tenure matter have been met pursuant to *In re Cardonick,* State Board decision April 6, 1983, 1990 *S.L.D.* 842, 846?

The Prehearing Order provided, among other things, for a plenary hearing to convene on June 20, 2002, at 9:00 a.m. at the Atlantic City OAL, Atlantic County Civil Courthouse. In the meantime, the ~~City~~ Board changed its legal counsel, with Eric Bernstein, Esquire, appearing.

Subsequent to waiting the requisite one-half hour for respondent to appear for the hearing, this tribunal opened the hearing record to conduct an *ex parte* proceeding.

Eric Bernstein, Esquire, appearing for the Board, represented to this tribunal that respondent, Charles Gregg, is no longer employed with the Board. Rather, respondent retired from the Board's employ in or about June or July 2001, under the provisions of the Teachers' Pension and Annuity Fund (TPAF).

Board Attorney Bernstein represented, on the *ex parte hearing* record, that he made a concerted and diligent effort to contact respondent to remind respondent of the *Cardonick* hearing scheduled for June 20, 2002, however, without success. Correspondence was addressed and sent to respondent's last known address. All possible attempts were made to contact respondent. Respondent did not respond to any of the Board's attempted contacts. The Board's attorney asserted respondent cannot be located.

CONCLUSIONS

Having considered the entire record before me, **I CONCLUDE** that respondent is no longer in the Board's employ and, consequently, it no longer has any control over him. The hearing record demonstrates petitioner has retired from the teaching profession, under the provisions of the TPAF.

I CONCLUDE, inasmuch as respondent is no longer a teaching staff member, subject to tenure or any other disciplinary charges which might be brought against him by the Board, this matter is, therefore, **MOOT**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

25 June 2002
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

7/1/02
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 3 2002
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

For the Board:

None

For Respondent:

None

DOCUMENTS IN EVIDENCE

For the Board:

None

For Respondent:

None

OAL DKT. NO. EDU 0489-02
AGENCY DKT. NO. 500-10/96

IN THE MATTER OF THE TENURE	:	
HEARING OF CHARLES GREGG, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF ATLANTIC	:	DECISION
CITY, ATLANTIC COUNTY.	:	
	:	

The record and Initial Decision recommending dismissal of this matter as moot have been reviewed. No exceptions were filed by the parties.

Upon such review, the Commissioner determines that, in light of Mr. Gregg's retirement from the District in 2001, there is no basis upon which I can order this matter to proceed and it is, therefore, dismissed as moot. However, in light of the charges against respondent, the Commissioner will refer the case to the New Jersey State Board of Examiners for action against respondent's teaching certificate(s) as it deems appropriate.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/12/02

Date of Mailing: 8/12/02

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* within 30 days of filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.