1-01

L.B., PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RUMSON-FAIR HAVEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning senior high school student appealed the Board's determination denying her eligibility for consideration for admission to the National Honor Society (NHS).

The ALJ found that the Board, since at least 1996-97, had articulated and enforced a policy for scholarship eligibility into the NHS which required that a student maintain at least a 3.5 Grade Point Average (GPA). The ALJ concluded that petitioner should have been aware of this policy. Moreover, the ALJ concluded that petitioner, who had a 3.49 GPA, failed to demonstrate by a preponderance of relevant credible evidence that the Board's determination not to round-off a GPA from anything below 3.5 for purposes of eligibility to membership in NHS was arbitrary, capricious and unreasonable. It is the Board's prerogative to establish a 3.5 GPA as the cut-off for invitation to apply to the local NHS chapter. Petition was dismissed.

The Commissioner adopted the findings and determination in the Initial Decision as his own.

January 16, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8599-00

AGENCY DKT. NO. 406-11/00

L.B.,

Petitioner,

v.

BOARD OF EDUCATION OF THE RUMMSON-FAIR HAVEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,

Respondent.

Michael I. Halfacre, Esq., for petitioner

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

Record Closed: November 29, 2000 Decided: December 1, 2000

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner, L.B., is an 18-year-old senior attending high school within respondent Rumson-Fair Haven Regional School District (hereinafter "Rumson" or "District"). She has appealed the determination by respondent denying her threshold eligibility to be considered as a member of the District's chapter of the National Honor Society (NHS) based upon its view that her grade point average, 3.49, representing her average through the first 6 of her 8 semesters of

high school, fails to quality her for the District promulgated 3.5 grade point average necessary for admission to the NHS.

The matter was brought before the Commissioner of Education, by way of a request for emergency relief, on or about November 16, 2000. On November 17th the Office of the Commissioner of Education transmitted the matter for oral argument on petitioner's request for emergent relief pursuant to *N.J.S.A.* 52:14B-1 to -15and *N.J.S.A.* 52:14F-1 to -13.

On that date I met in chambers with counsel and it was agreed that the primary issue in the case-whether L.B. scholastically qualified for consideration for eligibility to the NHS was one which would require a plenary disposition and that the emergent relief request was directed more to an effort to postpone the induction ceremony to the NHS to be held on November 28, 2000. Since her major concern was a decision on eligibility, so that she could incorporate that determination, if she prevailed, in her application for early admission to college, the parties waived the emergent aspect of the case and agreed that the plenary proceedings would proceed on November 29, 2000 and a decision would issue from my office expeditiously. The matter was heard on that date and following closing oral argument the record closed.

ISSUE AND BURDEN OF PROOF

The fundamental issue to be determined in these proceedings is whether the District's decision to deny the petitioner's eligibility for consideration for admission to the National Honor Society, based upon her grade point average, was proper and, assuming *arguendo* that the decision was substantively proper, was the petitioner properly notified of the standard to be employed in assessing her grade point average?

The burden of proof rests solely and exclusively upon the petitioner: she must establish by a preponderance of the relevant credible evidence that the actions of Rumson, in denying her scholastic qualifications for eligibility to the NHS, were unreasonable, arbitrary or capricious. As was noted on the record this is not a *de novo* review of the actions of Rumson. I, as an Administrative Law Judge, will confine my review to determine whether the Board had a reasonable basis for its decision and I will not substitute my judgment for Rumson's even if I

disagree with it. This standard was explicitly explained to all the parties on the record, during the course of the hearing, and there was no disagreement by either side.

FACTS AND ANALYSIS

The petitioner, L.B., is an 18-year-old senior at the Rumson-Fair Haven Regional High School. Based upon her current official transcript, which is inclusive of her grades through her junior year, her academic grade point average is 3.49. L.B. is an outstanding student. She is a member of the varsity and swimming teams; was selected as an All-State athlete in tennis; she has considerable extracurricular activity involvement and is clearly an articulate, intelligent young woman.

After her first semester in her senior year her grade point average exceeded 3.5. As a consequence she applied for admission to her District's chapter of the National Honor Society. The requirements for admission to the society in Rumson are essentially identical to those promulgated by the national chapter but for the minimum grade point average requirement. In Rumson the overall GPA required is "3.5 or better." (P-2) The national chapter requires a minimum grade point average of 3.0; however, it confers discretion on local districts to maintain higher standards. Thus, there is no issue in respect to the authority of Rumson to have a GPA requirement for eligibility of 3.5.

Although L.B. qualified for eligibility, in respect to her GPA in the Spring of 2000, she was rejected from the NHS based upon what was ascribed as a lack of "leadership qualifications." She was advised to improve these qualifications and reapply for membership in the NHS in the Fall 2000 semester. Petitioner made efforts to improve her leadership qualifications. For example, she achieved a position of Photography Editor of the school year book; has become an active member of the Peer Mediation and Peer Education Program and has become a participant in a variety of other extracurricular and leadership activities. Presumably, as a reward for her participation for her attendance at a presidential classroom in Washington, D.C., she has been invited and plans to attend the presidential inauguration in Washington in January 2001. Whether it was as a result of her commitment to leadership qualifications, and the time entailed in improving them, or whether it was entirely unrelated, in any event, the

petitioner's grade point average fell below 3.5 following the grades that she received in her second junior semester. After counseling, and successfully changing a grade in one of her courses, her final GPA beginning in her senior year was, and is, 3.49. About this there is no factual dispute. [1]

L.B. testified that she first learned that her GPA was problematic, for purposes of NHS eligibility, in conversations, which she had with her guidance counselor in the early Fall semester of 2000. Following conversations with the counselor, and a representative of the National Honor Society in District, she was ultimately told that "rounding off" a GPA from anything less than a 3.5 was impermissible. Thus L.B. came as close as is reasonably possible to come to qualify for NHS eligibility scholastically but ostensibly failed by 1/100th of a percentile to meet the District's minimum eligibility standard.

L.B. and her mother testified, and both indicated that they believed, that during the course of the last four years there may have been one, or, at most, two students who were admitted to the NHS whose GPA was statistically slightly lower than the 3.5 requirement. No competent proof, however, was provided that this was the case. In addition, the Superintendent of Schools for the District, Mr. Robert Smith, indicates that he has no knowledge of anyone *ever* having been found eligible scholastically for NHS consideration in Rumson with less than a 3.5 GPA. This engenders not only the time during his tenure as Superintendent, which began in 1997, but any time prior to that as well.

In addition, Superintendent Smith notes that even if, hypothetically, 1 or 2 students, over the course of years and presumably hundreds of eligibility decisions, were admitted with less than a GPA of 3.5, those instances were clearly mistakes not to be repeated and should not be utilized as in any way to justify L.B.'s eligibility today.

---

[1] Apparently, based upon the petitioner's grades in her first semester of her senior year, her GPA will have reached or exceeded 3.5; however, pursuant to the Rumson policy 6145.5 and thereafter memorialized into an administrative rule, calculation of the GPA for a senior is based exclusively on the preceding 6 semesters of work and does not, and cannot, include the 7th semester. It is my view that the petitioner has not made the argument that such criterion is, in any way, related to her eligibility.

It should be noted that I advised counsel for L.B., on the record during the course of his closing argument, that, in my view, there was no competent legal evidence to support a finding of fact that Rumson had, at any time, allowed for student scholastic eligibility for NHS where the GPA was less than 3.5. That would include any student who hypothetically could have had a GPA of 3.4999 to infinity.

Superintendent Smith addressed the issue of "rounding." He indicated that such procedure, under his administration and previous administrations within Rumson, is entirely inappropriate and inapplicable to the National Honor Society and that to his knowledge no exception has ever been made to the 3.5 requirement. He noted that the National Honor Society's requirements are stringent and while he certainly is sympathetic to L.B.'s position, requirements always are difficult to apply to those who just minimally fall below them. Only 33 students were inducted into the National Honor Society this year at Rumson.

ANALYSIS

The National Honor Society is an organization dedicated to the promotion and encouragement of "the fundamental virtues of character, leadership, scholarship, and service, the attainment of those four virtues being requisite for individual membership." Tiffany v. Board of Educ. of the Township of Cinnaminson, 1974 S.L.D. 91, 92 (quoting, Handbook of the National Honor Society, 12-13).

> Consistent with the Society's constitution[], the election of members is made by a "***chapter council, consisting of the principle and members of the faculty***" (Constitution, Art. III, Section 1) based on the applicant's scholarship, service, leadership, and character. (Constitution, Art. II, Section 1). ... In its consideration of each applicant for membership, the Council utilizes its own guidelines for rating each applicant against the four criteria requisite for societal membership.
>
> [Moore v. Board of Educ. of the City of Vineland and Vineland High School Chapter of the National Honor Society, Cumberland County, 1975 S.L.D. 290, 294]

Petitioner's argument that Rumson's decision to deny her eligibility for consideration to the National Honor Society, based on scholarship, is based on two fundamental propositions (1)

She was never adequately notified at the appropriate time that the policy of the District required a minimum of 3.5 and would not round-off a 3.49 or any other presumably lower average through a 3.45; and (2) The policy of not rounding-off a 3.49 to a 3.5 is in, and of itself, an arbitrary and capricious way of approaching what is necessary to meet the scholarship requirement. I shall address each of the arguments separately and begin with the issue of alleged lack of notice.

It is my view that as a matter of fact, and of law, the petitioner was, or at least should have been, aware of the District's GPA policy in respect to eligibility for the NHS such that she cannot rely on an assertion of ignorance as a basis for overcoming the District's position. It is clear that as early as Spring 2000 L.B. knew of the scholastic requirement for eligibility when she was then rejected from NHS-not based on scholarship but rather on leadership qualities. She clearly was on notice at that time that the requirement imposed by the District for eligibility was a 3.5 GPA. She indeed acknowledged this in her testimony as well. In addition, she acknowledged that at no time did any representative of Rumson misinform her that the 3.5 qualification would be met by rounding-off a lower GPA.

In addition, the various student handbooks, which are distributed to students has, since at least 1996-1997, specifically spelled out the requirement that "students at Rumson-Fair Haven are eligible for membership on attaining GPA of 3.5 or better [in the National Honor Society]. See R-1 at 79; see R-2 at 59. It should also be noted that, as of the 2000-2001 school year, the calendar which is distributed to students as well also explicitly provides that "juniors and seniors at [District High School] are eligible for membership in the National Honor Society on attaining a GPA of 3.5 or better." R-3 Academic Information IV preceding January 2001 calendar.

There is no indication that the Board used "hidden" criteria in determining what the GPA standard was regarding the NHS. The information was readily available to all students at all times, and any inquiries could have been made without hindrance. Petitioner does suggest that the fact that where Policy 6145.5 AR was promulgated effective August 4, 2000, altering certain criteria regarding actual admission to the NHS, that she was not given proper notice of the change. However, Petitioner misses the actual effect of Policy 6145.5 AR in regard to her case. The criteria changes established by that Policy did not affect the threshold GPA required for

invitation to admission, but rather the rating system applied upon admission. This Policy does not affect the GPA standards in issue.

Furthermore, it appears that Policy 6145.5 AR merely codified earlier procedures memorialized in the student handbooks since 1997. Therefore, the standards were written and available to the student body prior to the promulgation of the official policy, in accord with the NHS directives. A case may be colorable had the Petitioner acquired the requisite GPA and was held to the new rating system to her detriment, but that is not the issue here. Petitioner can claim no notice violation in this instance.

Thus it is my judgment that the District was neither arbitrary nor capricious in apprising its students of the scholarship requirements for eligibility to the NHS. The petitioner's mother, who also testified and is obviously and understandably upset about the fact that her daughter was denied eligibility because of 1/100 of a percent, was explicitly told after a conversation with the petitioner's guidance counselor that having spoken with the school principal there would not be any rounding-off of numbers. It is unclear when this conversation took place. In addition, she then spoke with the principal who also told her that he followed-up that conversation with the counselor with a conversation with the Superintendent of Schools and it was reiterated that the policy of Rumson has never been to round-off grades that are below 3.5 for purposes of National Honor Society scholarship eligibility.

Thus I explicitly **CONCLUDE** that the petitioner has failed to establish, by a preponderance of the relevant credible evidence, that the notice provided by Rumson, in respect to the GPA scholarship eligibility requirement for NHS, was arbitrary, whimsical or capricious.

The second issue, presented by the petitioner, is her assertion that the policy of not "rounding-off" grades-in particular her grade of 3.49 to 3.5-is wholly arbitrary and should be invalidated allowing her grade point average to be rounded-off the additional 1/100 of a percent, thus meeting the 3.5 eligibility requirement.

It is well settled in New Jersey that decisions of local boards of education are entitled to a presumption of correctness and are to stand undisturbed unless shown to be "patently arbitrary,

without rational basis or induced by improper motives." 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; R. A. M. and C. A. M. v. Board of Educ. of the Township of tabernacle, 94 N.J.A.R.2d (EDU) 573, 576 (citing, Kopera v. West Orange Bd. of Educ., 60 N.J.Super. 288 (App. Div. 1960)). See, Boult v. Board of Educ. of Passaic City, 136 N.J.L. 521 (E. & A. 1948); Fraser v. State Bd. of Educ., 133 N.J.L. 15 (Sup. Ct. 1945); Offhouse v. State Bd. of Educ., 131 N.J.L. 391 (Sup. Ct. 1944); Greenway v. Board of Educ. of the City of Camden, 129 N.J.L. 461 (E. & A. 1943). Petitioner bears the burden of proving, by a preponderance of the evidence, that the Respondent's action was "arbitrary, capricious or unreasonable." J.M., supra, 96 N..J.A.R.2d, at 419. Petitioner has failed to meet this burden in the present case.

All of the testimony that was presented in this matter, both documentary and testimonial, indicates that Rumson, since at least 1996-1997, has articulated and enforced a policy for scholarship eligibility into the NHS which required that a student maintain at least a 3.5 GPA. The hearsay assertions that perhaps 1 or 2 students over several years had been admitted to the NHS and found eligible with lower GPA's is not competent proof which would, in any way, justify setting aside Rumson's policy. Even if *arguendo* competent proof were offered to establish that 1 or 2 students had "slipped through the cracks" the District has acknowledged that, if that were the case, it would clearly have been in error. Courts are reluctant to require public entities to compound errors if errors are found by compelling them to do so prospectively. In addition, there was absolutely no evidence presented which would, in any way, suggest that the District singled the petitioner out for unfair treatment. On the contrary the impression that I was left with was that the Superintendent and the District were quite proud of L.B.'s accomplishments and, on a personal level, regretted that she would be ineligible for admission to NHS.

It appears that it is general practice that the GPA is always carried to the hundredth decimal, and nothing indicated that anything referring to the GPA does not refer to the GPA as a whole. "The grading system is the prerogative of the local school boards and need not be formally codified; although it must be reasonable and nondiscriminating." M. M. v. Daniel Demers, Et Al., 92 N.J.A.R.2d (EDU) 525, 526 (citing, Dooner v. Board of Educ. of Toms River,

1976 S.L.D. 619; Tarlarsky v. Edison Township Board of Educ., 1977 S.L.D. 862). As such, it is reasonable for the Board to consider the GPA *in toto* as the criterion to establish invitation for admission to the NHS.

Furthermore, no testimony was presented to establish that rounding to the first decimal place is an actual practice used by the Board in any capacity. The fact that no proof established any such practice of the Board points to the conclusion that the absence of rounding to the tenth in this situation was an action clearly not arbitrary, capricious or unreasonable. As a result, the Petitioner failed to meet her burden.

It was further argued that the Boards published standard was ambiguous in presenting the cut-off for invitation as a 3.5 rather than a 3.50. The argument also leads to the same result.

In Gorsky v. Board of Educ. of the Township of Monroe, Glouster County, 94 N.J.A.R.2d (EDU) 551, the A.L.J. was faced with a petition by a student's father contesting the grading system for the high school. For 30 years, it was the established practice of that Board to report a student's grades by a letter which corresponded to a set of numbers. The grading scheme was as follows:

93-100 = A (Superior)
85-92 = B (Above Average)
77-84 = C (Average)
70-76 = D (Below Average)
Below 69 = F (Failure)

As a result, the student's report cards did not reflect where on the scale the student's actual grade was found. The actual numeric grade was available to any student or parent with an inquiry, however.

Mr. Gorsky challenged this system as arbitrary, capricious or unreasonable particularly where, as were the facts of that case, a student could receive four "A"s in the four marking periods of the year in two different classes, yet receive an "A" as a final grade in one class and a

"B" as a final grade in another class, where the final exam is used to calculate the final grade. The reason for the discrepancy, and the basis for the claim of arbitrary, capricious or unreasonable action reside in the fact that the letter grades do not accurately represent where on the numerical grade scale the previous grades lie. Therefore, the student "is deprived of valuable information upon which a decision can be made whether to study harder for one subject or another." Id. at 552.

This argument was dismissed by the A.L.J. with the conclusion that

> [i]t can be argued that for the sake of clarity, the report card should have the actual grade point average in addition to a letter grade; however, there is no administrative regulation or statute requiring that this information be disclosed. Nor is it the prerogative of this tribunal to dictate policy to the school board where the grading practice does not constitute a violation of any law, rule or regulation.
>
> [Id. at 553.]

The same conclusion should be reached in the instant case. It is the prerogative of the Rumson-Fair Haven School Board to establish a 3.5 GPA as the cut-off for invitation to apply to the local NHS chapter. It is further the prerogative of the Board to calculate student's GPAs to the second decimal place. Again, there is no basis for compelling the Board to "round" GPAs for the purposes of determining NHS invitees. No action of the Board in this matter can be considered arbitrary, capricious or unreasonable, nor can any of the Board's practices in this area be considered a violation of any law, rule or regulation. "While the guidelines may be considered stringent, there has been no showing that they are improper." Moore, supra, 1975 S.L.D. at 295 (upholding local guideline regarding "scholarship" component that provided "[a]ny student dropping a subject shall be ineligible in the National Honor Society.")

To fully support the reasonableness of the decision, one finds oneself almost inevitably seeking analogies outside of the academic world. There are minimum requirements for much of what one wishes to do in life. Obviously sports is a clear illustration. If Sammy Sousa were to hit a baseball 700 feet that was 1 centimeter foul, the umpire would not "round off" the centimeter to make it a home run because the ball was hit. It is foul whether its 1 centimeter foul or 1 mile foul. This proposition is true in all aspects of life. There is always someone who is

going to be the first person not admitted to something because of a limitation. There is always someone who fails to get into a concert because he, or she, failed to purchase the ticket for the last seat or standing room area. There is always going to be someone who was the last person on a college admission waiting list who did not get in. Of course it is to that last person that the injustice of a minimum requirement, which cannot be rounded-off, is the most painful. That is life. It's been my experience, however, that in the end these kinds of rejections or defeats have a tendency, by themselves, of being "rounded-off." People often (not necessarily always) will just as often get in "under the wire" as they will just fail to get in. Certainly one would hope, and expect, that this would be true for the petitioner, particularly in respect to her accomplishments at college. As I indicated to L.B., at the conclusion of the hearing, bringing home a Nobel Prize and showing it to the Superintendent reminding him of the District's decision to deny her eligibility would be sweet justice. My sense is the Superintendent and the District would be thrilled. Michael Jordan did not make the initial cut on his high school basketball team.

Accordingly, and based upon the foregoing, I **CONCLUDE** that the petitioner has failed to demonstrate, by a preponderance of the relevant credible evidence, that the determination of respondent District, not to round-off a GPA from anything below 3.5 for purposes of eligibility to membership in NHS, was arbitrary or capricious. It is reasonable and fair. Whether that reasonableness and fairness would have obtained greater clarity, had the GPA requirement read 3.50 rather than 3.5, is left open to speculation.

Accordingly, and based upon the foregoing, it is **ORDERED** that the petitioner's appeal of her denial of eligibility for consideration for NHS admission based upon the scholastic GPA requirement 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.

12/1/00
DATE

Steven Reback
STEVEN C. REBACK, ALJ

Receipt Acknowledged:

12-1-00
DATE

Debbie Antanaitis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 5 2000

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

Es

WITNESSES

For Petitioner:

L.B., petitioner

L.B., petitioner's mother

For Respondent:

Robert Smith

DOCUMENTS IN EVIDENCE

Joint Exhibits:

J-1 Rumson-Fair Haven Regional Policy 6145.5 (2 pages) adopted March 24, 1998

J-2 Rumson-Fair Haven Regional Policy Administrative Regulations 6245.5 (3 pages) adopted and approved August 4, 2000

For Petitioner:

P-1 Photocopy of petitioner's transcript for her first 6 semesters at Rumson, showing a 3.49 GPA at the conclusion of the 6th semester.

P-2 Explanation of point system in respect to Rumson's Chapter of the National Honor Society.

For Respondent:

R-1 Page 79 of the Student Handbook of Rumson 2000-2001

R-2 Page 59 of Rumson's Student Handbook 1996-1997

R-3 Rumson-Fair Haven Regional High School School Year Calendar for 2000-2001

OAL DKT. NO. EDU 8599-00
AGENCY DKT. NO. 406-11/00

L.B., PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RUMSON-FAIR HAVEN REGIONAL SCHOOL DISTRICT, 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 of the record in this matter, the Commissioner finds no cause to disturb the findings and conclusions of the Administrative Law Judge (ALJ). Accordingly, the Initial Decision is adopted for the reasons so well expressed by the ALJ; the within Petition of Appeal is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: JAN 16 2001

Date of Mailing: JAN 16 2001

* 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.

2-01

EARLENE ANDERS, KAREN FILKIN, MARCIA GABRIEL, ELAINE LUKACS, ELISSA MANDEL, STANLEY MANDEL, PATRICIA MC GRATH, CORINNE MURPHY, NICHOLAS MUSICA, MARLENE PIGUT, JOYCE SHUPE, MARY LOUISE SMITH, AND SANDRA TRABAL,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	PARTIAL DECISION
BOARD OF EDUCATION OF THE, TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	
RESPONDENT.	:	
AND	:	
EARLENE ANDERS, KAREN FILKIN, MARCIA GABRIEL, ELAINE LUKACS, ELISSA MANDEL, STANLEY MANDEL, PATRICIA MC GRATH, CORINNE MURPHY, NICHOLAS MUSICA, MARLENE PIGUT, JOYCE SHUPE, MARY LOUISE SMITH, AND SANDRA TRABAL,	:	
PETITIONERS,	:	
V.	:	
MONMOUTH-OCEAN EDUCATIONAL SERVICES COMMISSION, MONMOUTH AND OCEAN COUNTIES,	:	
RESPONDENT.	:	SYNOPSIS

Petitioning child study team members, tenured and nontenured, alleged respondent Board and Monmouth-Ocean Educational Services Commission (ESC) violated their tenure and seniority rights when the Board eliminated their positions and entered into a contract with the ESC to obtain basic child study team services. Petitioners alleged if the Board's action was proper then they were entitled to employment with the ESC as tenured employees protected under *N.J.S.A.* 18A:6-10.

Citing the court's language in *Vicenzino*, the ALJ determined that a local board which acts in good faith to eliminate its CST(s) for reasons of economy may join with one or more boards of education or State agencies to provide basic CST services, including an ESC. (*N.J.A.C.* 6A:14-5.1 (a)1; *N.J.S.A.* 18A:46-5.1) Citing the Commissioner's 1999 decision in *Arlene Miller*, which is on appeal to the State Board of Education, the ALJ determined that the ESC did not take over or in any way replace the operation of any program of special education operated by the Board. Therefore, since the protection afforded by the statutes are accorded to employees of a "school" previously operated, and since it can hardly be said that the Board or any of its educational programs were "abolished," the ALJ concluded that neither *N.J.S.A.* 18A:28-16 nor *N.J.S.A.* 18A:6-31.3 afforded any protection to petitioners. Petitioners' claims with respect to issues 1,2, and 3 of the matter were dismissed.

Commissioner adopted the findings and determination in the Initial Decision, essentially for the reasons stated therein, and emphasized that the factual circumstances in the present matter were in sharp contrast with those in the *Shelko* and *Stuermer* because the Board did not *discontinue* the operation of child study team services (CST) and it *remains legally responsible* for such services to Lakewood students. The Board has merely chosen to provide the CST services through a joint agreement, rather than through its own employees, an arrangement it could alter at any time in the future by employing its own CST members, which would trigger petitioners' tenure and seniority rights, or by entering into a joint agreement with another public agency.

JAN 2 2000

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

PARTIAL INITIAL DECISION
PARTIAL SUMMARY DECISION
PURSUANT TO N.J.A.C. 1:1-12.5(e)
CONSOLIDATED CASES

EARLENE ANDERS, KAREN FILKIN, MARCIA GABRIEL, ELAINE LUKACS, ELISSA MANDEL, STANLEY MANDEL, PATRICIA MCGRATH, CORINNE MURPHY, NICHOLAS MUSICA, MARLENE PIGUT, JOYCE SHUPE, MARY LOUISE SMITH AND SANDRA TRABAL,

Petitioners,

v.

BOARD OF EDUCATION OF LAKEWOOD, OCEAN COUNTY,

Respondent,

and

EARLENE ANDERS, KAREN FILKIN, MARCIA GABRIEL, ELAINE LUKACS, ELISSA MANDEL, STANLEY MANDEL, PATRICIA MCGRATH, CORINNE MURPHY, NICHOLAS MUSICA, MARLENE PIGUT, JOYCE SHUPE, MARY LOUISE SMITH AND SANDRA TRABAL,

OAL DKT. NO. EDU 6329-99
AGENCY DKT. NO. 183-7/99

OAL DKT. NO. EDU 6330-99
AGENCY DKT. NO. 184-7/99

Petitioners,

v.

MONMOUTH-OCEAN EDUCATIONAL SERVICES COMMISSION, MONMOUTH AND OCEAN COUNTIES,

Respondent.

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

Thomas E. Monahan, Esq., for respondent Board of Education of Lakewood (Gilmore & Monahan, attorneys)

J. Peter Sokol, Esq., for respondent Monmouth-Ocean Educational Services Commission (McOmber & McOmber, attorneys)

Record Closed: May 17, 2000 Decided: November 16, 2000*

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

These matters commenced on July 6, 1999, when the above-named petitioners filed petitions of appeal with the Commissioner of Education alleging that the Board of Education of Lakewood (EDU 6329-99) and the Monmouth-Ocean Educational Services Commission (EDU 6330-99) had violated their tenure and seniority rights. An answer on behalf of the Lakewood Board of Education was filed on July 27, 1999. An answer on behalf of the Monmouth-Ocean Education Services Commission was filed on July 29, 1999, and on August 5, 1999, both files were transmitted to the Office of Administrative Law for determination as contested cases pursuant to *N.J.S.A.* 52:14F-1 to -13.

A prehearing conference was conducted on October 20, 1999, by telephone conference call and the prehearing order, which was entered as a result thereof on October 22, 1999,

---

* Extensions of time for issuing the initial decision were requested and granted pursuant to N.J.S.A.52:14B-10c.

consolidated the matters for disposition. The prehearing order also listed the following issues for determination:

1. May a local board of education eliminate all of the positions on its own child study team and enter into a contract with an educational services commission to obtain basic child study team services without violating *N.J.A.C.* 6A:14-3.1(b)?

2. If the answer to the previous question is yes, does *N.J.S.A.* 18A:28-16 entitle petitioners to employment with the Monmouth-Ocean Educational Services Commission as tenured employees protected under *N.J.S.A.* 18A:6-10?

3. What are the appropriate remedies, if any?

4. Have the actions of the Board of Education of Lakewood impermissibly affected the provision of thorough and efficient educational services?

5. Do the petitioners have standing to raise the previous issue?

A schedule for submissions for cross-motions for summary decision concerning issues 1, 2 and 3 was established. The prehearing order provided that issues 4 and 5 would be addressed, if necessary, after issues 1, 2 and 3 had been resolved.

Cross-motions for summary decision were received on January 21, 2000. Responding papers on behalf of the Monmouth-Ocean Educational Services Commission were received on March 1, 2000. Responding papers on behalf of petitioners were received on March 8, 2000. Oral argument was conducted by telephone conference call on May 17, 2000, whereupon the record closed.

FINDINGS OF FACT

The facts relevant to a determination of the issues to be addressed herein are not in dispute and I therefore **FIND** the following as uncontested facts.

Prior to June 30, 1999, each of the petitioners was employed by respondent Lakewood Board of Education (hereinafter Lakewood) as either a social worker, a learning disabilities teacher consultant or a psychologist, all child study team members. Petitioners Anders, Filkin, Lukacs, Stanley Mandel, McGrath, Musica, Pigut, Shupe, Smith and Trabal, are all tenured teaching staff members. Petitioners Gabriel, Elissa Mandel and Corinne Murphy, were non-tenured teaching staff members. On or about May 18, 1999, Lakewood advised the petitioners that their employment with the district would be terminated, effective June 30, 1999. The tenured teaching staff members were advised that their positions were being eliminated in accordance with a reduction in force pursuant to *N.J.S.A.* 18A:28-9 for economic reasons. Although no dollar figures have been specified, petitioners do not dispute that Lakewood's motivation was economy. Lakewood had made a determination to eliminate all four full-time child study teams within the district; by agreement dated June 14, 1999, Lakewood entered into a contract with the Monmouth-Ocean Educational Services Commission (hereinafter sometimes MOESC) to provide the services of three full-time child study teams which would perform the duties and functions previously performed by the four in-district teams. Petitioners Anders, Filkin, McGrath and Shupe were reassigned to other teaching positions within their tenure and seniority rights. All tenured teaching staff members were placed upon a preferred eligibility list for any future vacancies in positions to which their tenure and seniority rights would entitle them. Non-tenured teaching staff members Elissa Mandel and Mary Louise Smith applied to respondent MOESC and were hired. In July 1999, the petitioners filed the within actions alleging that the respondents' actions had violated the provisions of *N.J.A.C.* 6A:14-3.1(b), *N.J.S.A.* 18A:28-16 and their tenure and seniority rights.

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 whether 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, the parties have stipulated the facts relevant to the first three issues. Accordingly, there are no material facts in dispute and these matters are ripe for summary decision on these issues.

Most of the arguments advanced by petitioners herein have been considered by the courts and/or the Commissioner in the context of different fact patterns. In *Impey v. Bd. of Educ.*, 273 *N.J. Super.* 429 (App. Div. 1994), aff'd 142 *N.J.* 388 (1995), the court rejected the argument that *Viemeister v. Prospect Bd. of Educ.*, 5 *N.J. Super.* 215, 218 (App. Div. 1949), prevented a local board of education from abolishing the position of a tenured Speech Correctionist and simultaneously contracting with an Educational Services Commission to provide the speech

correction services previously provided by the tenured teaching staff member. In the Appellate Division opinion Judge Skillman explained:

> The Board's decision to contract with an ESC to provide speech correction services is significantly different from the administrative action involved in *Viemeister v. Board of Educ. of Prospect Park*, 5 *N.J. Super.* 215, 68 *A.*2d 768 (App. Div. 1949), in which a local board abolished the position of school principal, terminated the incumbent, and established a position of "teaching principal" which it appointed one of the school's teachers to fill. In affirming the State Board's decision invalidating the abolition of the position of school principal, we stated:
>
> > The fact that the formal resolutions adopted by the Board speak in terms of abolition of the position of principal and creation of a new position of "teaching principal," which finds no recognition in the tenure statutes, does not appear to be significant. We look to the substance rather than the form and, in substance; the principalship was continued but transferred to [the newly appointed "teaching principal"]. *Id.* at 218, 68 *A*2d 768.
>
> Therefore, while *Viemeister* involved the re-titling of the position of principal in order to remove a tenured incumbent, this case involves a statutorily authorized administrative change in the method of providing an educational service for the sole purpose of saving money.
>
> In sum, a local board has the authority both to contract with an ESC to provide educational services for the handicapped and to abolish a teaching position "for reasons of economy." We are satisfied that the Board's decision to contract with the Monmouth County ESC to provide speech correction services and its consequent abolition of appellant's tenured position constituted a proper exercise of these statutory powers. 273 *N.J. Super.* at 434-435.

Judge Skillman's opinion does not mention the provisions of *N.J.A.C.* 6:28-3.1(b) which existed at the time period in issue and which provided:

> A child study team shall consist of a school psychologist, a learning disabilities teacher-consultant and a school social worker. For pupils ages three to five, the study team shall include a speech correctionist or speech-language specialist. All members of the child study team shall be employees of a district board of education, have an identifiable, apportioned commitment to the

> local school district and shall be available during the hours pupils are in attendance.

The Supreme Court in its opinion, however, rejected petitioner's claim that the replacement of her tenured position by the Educational Services Commission, consisting of non-district personnel, violated the provisions of *N.J.A.C.* 6:28-3.1(b), agreeing with the ALJ, the Commissioner and the State Board of Education, who had determined that Ms. Impey, who served a K through 8 school, was not a member of "the basic child study team" referred to in the regulation. The Supreme Court also cited *N.J.S.A.* 18A:46-5.1, which defines the basic child study team as consisting of a school psychologist, a learning disability teacher consultant and a school social worker.

Whether the provisions of *N.J.A.C.* 6:28-3.1(b), now recodified and appearing substantially the same at *N.J.A.C.* 6A:14-3.1(b), prohibit replacement of the entire basic child study team by Educational Services Commission personnel, was addressed recently in *Vicenzino v. Bedminster Bd. of Educ.*, 312 *N.J. Super.* 243 (App. Div. 1998). In that case the Appellate Division affirmed the action of the Commissioner of Education in directing the Bedminster board to reinstate petitioner Marilyn Vicenzino to her school social worker position. The court rejected the arguments of the Bedminster Board of Education that it had rightfully eliminated petitioner's position pursuant to *N.J.S.A.* 18A:28-9* and that it was authorized to provide the child study team services previously provided by her through the county educational services commission instead, essentially for the reasons expressed by the administrative law judge in his written opinion (97 *N.J.A.R.* 2d (EDU) 356).

---

* That statutory provision authorizes reductions in force for economic reasons or other good cause:

> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions of 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.

After reviewing each of the cases cited by petitioner Vicenzino, the same cases cited by petitioners in the within matter, Administrative Law Judge Masin concluded:

> While the law would permit Bedminster to abolish its CST entirely if it entered into a proper multi-district arrangement for such services, on the undisputed facts of this case, which involves the complete abolition of only the social worker position in the district, with the retention of the board employed psychologist and LDTC, and ESC hired as outside contractor, and a significant amount of work assigned to that contractor, the case appears to be very much akin to *Cochran and Elson*. Unless the Supreme Court's decision in *Impey* represents an implied precedent for the termination of the position of one (or two) of the three mandated members of the basic CST and the contracting out of the work associated with only those positions, (which would make the requirement of, and the protections inherent in, *N.J.A.C.* 6:28-1.3 tenuous at best and would authorize the splitting up of the basic team members amongst different employers, quite possible raising significant practical concerns in regard to management and supervision of the "split" team) there appears to be no case supporting the Bedminster Board's action. *Impey* did not involve a basic team member. The court did not address the validity of *N.J.A.C.* 6:28-1.3(a). While it is quite conceivable that *Impey's* support for legitimate, good faith economic based decisions involving the abolition of positions and the contracting of work with the expectation of savings could be extended to permit such actions in regard to the members of the basic CST, as the regulations now stand, in those instances where a district chooses to maintain its own CST the school social worker, the school psychologist and the LDTC must be employees of the district and cannot be outside contractors. 97 *N.J.A.R.* 2d (EDU) 360.

The Appellate Division concurred with Judge Masin's conclusions, explaining:

> Interpreting these requirements in *pari materia* with a district board of education's authority to eliminate a position for economic reasons, under *N.J.S.A.* 18A:28-9, we conclude 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. To be sure, if the Board were in good faith to eliminate the CST 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. In that event, the board of education would have complied with *N.J.S.A.* 18A:46-5.1 and *N.J.S.A.* 18A:28-9.

> However, so long as the board elects to maintain its own CST, consistent with *N.J.A.C.* 6:28-3.1(b), each basic member, consisting of psychologists, learning disability specialists, and social workers, "shall be employees of a district board of education." Consequently, the board's decision to abolish petitioner's social worker position while maintaining the CST and contracting outside to replace petitioner's position, did not comply with *N.J.A.C.* 6:28-3.1.
>
> We affirm substantially for the reasons set forth in the ALJ's initial decision of December 19, 1996. 312 *N.J. Super. at 250-251.*

Petitioners herein correctly point out that the comments in the ALJ's *Vicenzino* opinion and in the opinion of the Appellate Division concerning abolition of the positions of all child study team members employed by a local board are technically *dicta* because those were not the facts in the *Vicenzino* case; they are the facts in the within matter, however, and for the following reasons I **CONCLUDE** that those opinions should apply to determine the outcome in the within matter.

The only difference between the abolition of the tenured teaching staff position in *Impey, supra*, and the abolition of the tenured teaching staff members' positions in the within matter is the existence of the State Board of Education regulation *N.J.A.C.* 6:28-3.1(b), quoted hereinabove. The Supreme Court determined that the State Board regulation did not apply in that matter because Gillian Impey taught in a school for pupils in grades K through 8 and accordingly, as a speech correctionist she was not a member of the basic child study team. Since that time *N.J.A.C.* 6:28-3.1(b) has been recodified as the result of a major reorganization and recodification of the Special Education Rules and now appears at *N.J.A.C.* 6A:14-3.1 in a substantially similar, but slightly different form:

> 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.

Petitioners herein have argued that the language of *N.J.S.A.* 18A:46-5.1, which requires each board of education "separately or jointly with one or more boards of education or State agencies" to provide for basic child study team services, does not authorize a board of education to provide basic child study team services solely through an education services commission because an educational services commission is neither a "board of education" nor a "State agency." Definitionally, however, an educational services commission is a public agency established pursuant to provisions of State statute whenever five or more boards of education in any county or in any two or more counties and the Commissioner seek and receive permission from the State Board of Education to establish such a commission. *N.J.S.A.* 18A:6-52. Educational services commissions are established specifically for the purpose of providing to public school districts "such educational and administrative services as may be authorized pursuant to rules of the State Board of Education." *N.J.S.A.* 18A:6-51. If there had been any question concerning the authorization of boards of education to provide basic child study team services through an educational services commission, that question was definitively resolved with the adoption in 1998 of the State Board Rule *N.J.A.C.* 6A:14-5.1, which provides in pertinent part:

> (a) Each district board of education, independently or through joint agreements, shall employ child study teams, speech correctionists or speech-language specialists and other school personnel in numbers sufficient to ensure provision of required programs and services pursuant to this chapter.
>
> 1. Joint agreements for child study team services may be entered into with local education agencies including other local school districts, educational services commissions, jointure commissions and county special services school districts.
>
> . . .

Although, as noted by Lakewood in its cross-motion for summary decision, the provisions of 6A:14-5.1(a) might on their face seem inconsistent with those of *N.J.A.C.* 6A:14-3.1(b), I am not persuaded by petitioners' argument that the joint agreements referred to in the last quoted regulation relate only to supplementing services provided by local district employees. Regulatory language which refers to supplementing existing local district services by subcontract relates only

to private clinics and agencies approved by the Department of Education. See *N.J.A.C.* 6A:14-5.1 subsection (c)1ii. The State Board of Education recently confirmed this interpretation in their opinion rendered on May 3, 2000 in *Arlene Miller v. Leo F. Klagholz,* and *Board of Ed. of the Township of New Hanover*, State Board Number 93-96. In that case Arlene Miller had been employed as a school psychologist by the Board of Education of the Township of New Hanover and was a member of the board's basic child study team. She was advised that her tenured position was being abolished, effective June 30, 1996, pursuant to a reduction in force. The Board then applied for and received a "waiver" from the Commissioner of Education of the provisions requiring boards to employ basic child study team members so as to be permitted to provide all basic child study team services by contracting with a private vendor. The State Board concluded that basic child study team services required by *N.J.S.A.* 18A:46-5.1 cannot be provided by a district solely through a contractual arrangement with a private vendor. The State Board explained:

> Quite simply, the clear and unambiguous language of the applicable statutes precludes a district from providing basic child study team services solely by contracting with a private vendor. *In re Jamesburg High School Closing, supra.* As set forth above, *N.J.S.A.* 16A:46-5.1 provides the authority under which district boards must provide basic child study team services, and the terms of that statute require that such services must be provided through its own employees, in combination with another board of education, or by another public entity. *See Impey v. Board of Educ of Borough of Shrewsbury*, 142 *N.J.* 388 (1995); *Vincenzino v. Bedminster Twp. Bd. of Educ.*, 312 *N.J. Super.* 243 (App. Div. 1998). Since the Legislature did not authorize the provision of basic child study team services through a contract with a private vendor, we cannot contradict the terms of the statute by attempting to provide such authority by waiving the administrative regulations which purport to implement the statute.
>
> We therefore declare the waiver in question to be valid.

The statutory and regulatory provisions permitting a board of education to provide basic child study team services through joint agreements with local education agencies, including educational services commissions, would be rendered meaningless if districts which had originally opted to employ their own child study team members were required to continue that

arrangement until such time as any tenured members of the basic team resigned or retired. Although the purpose of *N.J.A.C.* 6A:14-3.1(b) is not entirely clear, most probably it is to ensure that basic child study team services will be provided by public employees of one local education agency to avoid supervisory and administrative difficulties which would be presented by "split teams" as opined by Judge Masin in is *Vicenzino* opinion.* The purpose of *N.J.A.C.* 6A:14-

---

* It may, or may not, be of any legal significance, but the language of *N.J.A.C.* 6:28-3.1 (now 6A:14-3.1) at the times relevant in *Cochran v. Watchung Hills Regional High School Board of Education*, 1985 *S.L.D.* 1878, which language was then codified at *N.J.A.C.* 6:28-1.3, said: "All members of the basic child study team shall be employees of *the local board of education* . . ." In a 1984 recodification, the State Board changed the language to "All members of the child study team shall be employess of *a district board of education*. . ." The 1984 revision and recodification also eliminated the following language which had appeared at *N.J.A.C.* 6:28-1.3(f):

> Prior approval by the Office of the County Superintendent of Schools and the Bureau of Special Education and Pupil Personnel Services shall be obtained for the purchase by any local school district of services of eligible, approved diagnostic clinics; agencies; or professionals in private practice representing a basic child study team discipline to supplement members of the basic child study team. When such approval is granted to a local school district for the purchase of external diagnostic or professional services, the local school district's basic child study team shall develop and coordinate the appropriate individualized education program.

It was this pre-1984 language to which the State Board decision in *Cochran* referred and presumably the same regulatory language which was mentioned in passing in the Supreme Court's *Impey* opinion at 399 where it describes the decision as "adopting Commissioner of Education's determination that reduction of child study team from full-time to part-time violated *N.J.S.A.* 18A:28-9 because part-time services would be inadequate, especially in light of then-current statutory (*sic*) requirement that child study team services may only be supplemented."

The agency with whom the board of education contracted for basic child study team services in *Elson v. Board of Education of the Hudson County Area Vocational-Technical Schools*, 96 *N.J.A.R.* 2d (EDU) 229, was not a public agency, but an outside private child study team. Accordingly, although it is not possible to reconcile all of the reasoning applied in *Cochran* and *Elson* with the reasoning and conclusions reached in *Vicenzino*, *supra*, and herein, nevertheless the within reasoning and conclusions would support the results reached in *Cochran* and *Elson*.

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. 16, 2000
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

11-17-00
DATE

Deborah A. Attinson/cs
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 20 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

OAL DKT. NOS. EDU 6329-99 and 6330-99
AGENCY DKT. NOS. 183-7/99 and 184-7/99

EARLENE ANDERS, KAREN FILKIN, MARCIA GABRIEL, ELAINE LUKACS, ELISSA MANDEL, STANLEY MANDEL, PATRICIA MC GRATH, CORINNE MURPHY, NICHOLAS MUSICA, MARLENE PIGUT, JOYCE SHUPE, MARY LOUISE SMITH, AND SANDRA TRABAL,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	PARTIAL DECISION
BOARD OF EDUCATION OF THE, TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	
RESPONDENT.	:	
AND	:	
EARLENE ANDERS, KAREN FILKIN, MARCIA GABRIEL, ELAINE LUKACS, ELISSA MANDEL, STANLEY MANDEL, PATRICIA MC GRATH, CORINNE MURPHY, NICHOLAS MUSICA, MARLENE PIGUT, JOYCE SHUPE, MARY LOUISE SMITH, AND SANDRA TRABAL,	:	
PETITIONERS,	:	
V.	:	
MONMOUTH-OCEAN EDUCATIONAL SERVICES COMMISSION, MONMOUTH AND OCEAN COUNTIES,	:	
RESPONDENT.	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions, and the Lakewood Board of Education's (Board) and the Monmouth-Ocean Educational Services Commission's (MOESC) replies thereto were filed pursuant to the requirements of *N.J.A.C.* 1:1-18.4.

Initially, petitioners argue that the Administrative Law Judge (ALJ) failed to properly consider the tenure rights of the affected child study team (CST) members pursuant to *N.J.S.A.* 18A:28-5, reiterating those legal arguments previously presented to and considered by the ALJ. Additionally, they argue that the ALJ erred in determining that the *dicta* in *Vicenzino, supra,* should apply in the instant matter. The portion of the court decision under contention reads in pertinent part: "To be sure, if the Board were [to act] in good faith to eliminate the CST 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. In that event, the board would have complied with *N.J.S.A.* 18A:46-5.1 and *N.J.S.A.* 18A:28-9." (*Vicenzino* at 250)

Petitioners urge that all the decisions they cite emphasize the fundamental importance of recognizing tenure entitlements of educational services personnel, rights which would effectively be rendered a nullity if at any time a tenured CST member could be terminated from his or her position, because a local board of education sought to save money by providing the same CST services exclusively through a subcontracting arrangement with an educational services commission (ESC). They aver:

> It is respectfully submitted that the [ALJ] erred in concluding that the [Board] could ignore the tenure rights of the ten (10) Petitioners who had acquired tenure as Core Child Study Team members within the Lakewood School District. No statute or regulation exists that permits a local Board of Education to terminate the employment of a tenured teaching staff member, purportedly pursuant to a reduction in force, when the job duties and responsibilities of that position are to be filled by another (non-tenured) public employee who just happens to cost less!
>
> It is respectfully submitted that the adoption of the Initial Decision would render any tenure protections of Core Child Study Team members (i.e. School Psychologists, Social Workers, and Learning Disabilities Teacher Consultants) a ***nullity*** since these Child Study Team members would essentially have no job security knowing that they could be replaced at any time by a less expensive provider of Child Study Team services. How would the status of tenured Child Study Team members now differ from the status of "employees at will" in the private sector if they can be terminated

> at any time, despite rendering exemplary service, solely due to a local Board of Education's desire to hire cheaper "out of district" public employees to perform their important Child Study Team duties and responsibilities? (emphasis in text) (Petitioners' Exceptions at 19-20)

Petitioners' second exception contends that the ALJ erred in concluding that the New Jersey Supreme Court's decision in *Impey, supra,* provided legal justification for the Board's decision herein to terminate the employment of the affected CST members. More specifically, they except to the ALJ's conclusion that "the *Impey* decision authorizes boards for reason of economy to eliminate tenured child study team members and replace them with educational service commission employees. In the within matter the tenured positions have, in fact, been eliminated. No employee of the Lakewood Board of Education is performing the duties previously performed by the tenured child study team members." (Initial Decision at 13) Of this, petitioners state:

> As recognized by [the ALJ] earlier in [the Initial Decision] the key factual finding of the Supreme Court in the *Impey* case related to the Supreme Court's decision that Gillian Impey, as a Speech Correctionist, was not a member of the basic or Core [CST] and therefore could not avail herself of the protections of *N.J.A.C.* 6:28-3.1(b) (now codified at *N.J.A.C.* 6A:14-[1.1 *et seq.*]) which stated, in part, that "all [CST] members shall be employees of a district Board of Education...".
>
> It is submitted that, if the Shrewsbury Board of Education in the *Impey* case had attempted to replace a school Social Worker, a School Psychologist, or Learning Disabilities Teacher Consultant employed within the Shrewsbury School District, or, in fact, had determined to eliminate the District's entire in-district Child Study Team the Supreme Court would have determined that the Board of Education's actions were in violation of the prescriptions of *N.J.S.A.* 18A:28-5 and *N.J.A.C.* 6:28-3.1 (b)! Why else would the Supreme Court in *Impey* have cited *Cochrane/Watchung Hills* case with approval?
>
> In light of the above, it is respectfully submitted that [the ALJ]'s determination that the Supreme Court's decision in *Impey* legitimized the Board of Education's determination to eliminate all of the Core Child Study Teams within the Lakewood School District was unfounded and ignored the clear and unequivocal

Lastly, the Commissioner is in full agreement with the ALJ's legal analysis and conclusions rejecting petitioners' contention that they are entitled to the continued employment rights set forth in *N.J.S.A.* 18A:28-16 because the CST services in the Lakewood School District were taken over by the MOESC. As was held in the Commissioner's 1999 decision in *Miller*,[1] the elimination of a district's CST(s) by a board of education and its contracting of CST services with an ESC does not constitute the takeover by, or the transfer of, an educational program to an ESC and is, thus, distinguishable from the factual circumstances in *Shelko, supra,* and *Stuermer, supra.*

In *Shelko, supra*, the Ewing Board of Education ceased to operate a countywide preschool handicapped program (Project Child), while the board in *Stuermer, supra* ceased to operate a class for the deaf. When the county special services district (CSSD) in each matter assumed responsibility for the program, the local board retained no legal responsibility for or governance over the program it formerly operated. The programs in their entirety were absorbed by the countywide school districts. This is in stark contrast with the factual circumstances in the instant matter and in the 1999 *Miller* Commissioner decision, because in these two matters, the local boards of education *have not ceased or discontinued their responsibilities for and governance over the provision of CST services to their students.* Rather, the New Hanover and Lakewood Boards *remain legally responsible for the CST services* provided to their student population and those services *remain a part of the Boards' overall special education programs and services.* The New Hanover and Lakewood Boards have merely chosen to secure CST services jointly through an ESC, instead of separately by employing the CST themselves. Moreover, as expressed in the Commissioner's 1999 *Miller* decision and by the ALJ herein, the board of education may at any time choose to provide the CST services through its own

[1] In this matter, the New Hanover Board of Education eliminated its CST and entered into a contract with the Burlington County Educational Services Commission, initially for CST evaluations, and then, as amended by contract in December 1997, for all CST services, not just evaluations. Miller, a part-time tenured school psychologist, was the only CST member to file an appeal of the New Hanover Board's action.

employees again, in which case petitioners' tenure and seniority rights pursuant to *N.J.S.A.* 18A:28-12 would be triggered, or through another type of joint agreement with one or more public educational agencies authorized by statute or State Board regulation.

Consequently, the Commissioner fully concurs with the ALJ's legal analysis of petitioners' claims under *N.J.S.A.* 18A:28-16, found on pages 13-15 of the Initial Decision, and with her conclusion that the Commissioner's holding in the 1999 *Miller* case is applicable to the instant matter.

Accordingly, for the reasons well-stated by the ALJ in the Initial Decision,[2] petitioners' claims with respect to issues 1, 2 and 3 in this matter are hereby dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: JAN 2 2000

Date of Mailing: JAN 3 2000

[2] With the exception of the misstatement with respect to the *Impey* decision addressed above.

[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.

2-01

EDU # 6329-99 and 6330-99
C # 2-01
SB # 2-01

EARLENE ANDERS, ET AL.,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	STATE BOARD OF EDUCATION
RESPONDENT-RESPONDENT,	:	DECISION
AND	:	
EARLENE ANDERS, ET AL.,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	
MONMOUTH-OCEAN EDUCATIONAL SERVICES COMMISSION, MONMOUTH AND OCEAN COUNTIES,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, January 2, 2000

For the Petitioners-Appellants, Klausner & Hunter (Stephen B. Hunter, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Township of Lakewood, Gilmore & Monahan (Thomas E. Monahan, Esq., of Counsel)

For the Respondent-Respondent Monmouth-Ocean Educational Services Commission, McOmber & McOmber (J. Peter Sokol, Esq., of Counsel)

The appellants, child study team members, alleged, inter alia, that the Board of Education of the Township of Lakewood (hereinafter "Board") and the Monmouth-Ocean Educational Services Commission (hereinafter "ESC") had violated their tenure and seniority rights when the Board eliminated their positions and entered into a contract with the ESC in June 1999 to provide basic child study team services to the district's students. On January 2, 2000, the Commissioner of Education adopted the Administrative Law Judge's "Partial Decision" and dismissed the appellants' claim that their tenure and seniority rights had been violated.

The appellants filed the instant appeal from that determination to the State Board.

On November 21, 2001, the counsel for the appellants submitted a "Memorandum of Agreement for Recall of Child Study Teams," which was signed by representatives of the Board and the Lakewood Education Association, as a proposed settlement of this matter. Counsel indicated that, consistent with that agreement, the appellants were "withdraw[ing] the pending appeal in the above-captioned consolidated matters." The agreement provides that the Board would attempt to recall members of the child study team whose positions had been abolished in 1999 when it contracted with the ESC.

We have reviewed the proposed settlement and find it to be in accord with the principles expressed in Cardonick v. Board of Education of the Borough of Brooklawn, decided by the State Board of Education, April 6, 1983. Accordingly, we approve the proposed settlement in this matter to the extent that it represents a settlement of the

appellants' claims against the Board. Although the ESC is not a party to the proposed settlement, we note that the appellants have requested to withdraw their appeal in its entirety. The appellants' appeal against the ESC is therefore withdrawn, and the record in this matter is closed.

Kathleen A. Dietz abstained.

January 2, 2002

Date of mailing JAN 04 2002

3-01

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

September 28, 2000

OAL DKT. NO. EDU 3821-99
AGENCY DKT. NO. 399-9/98

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: 09/28/00

Date of Mailing: 01/03/01

7-01

S.M., on behalf of minor child, W.C.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning uncle challenged the Board's residency determination that W.C., his nephew from Haiti, was not entitled to a free public education in the District.

The ALJ determined that petitioner did not demonstrate economic or family hardship and did not meet the requirements of *N.J.S.A.* 18A:38-1b(1). The ALJ ordered petitioner to pay the District $6,912.71 for the cost of providing a public education to W.C. during the 1999-2000 school year and $45.61 per day for the 2000-2001 school year.

The Commissioner adopted the findings and determination in the Initial Decision as his own and directed petitioner to reimburse the Board the tuition due.

January 8, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11354-99
AGENCY DKT. NO. 310-10/99

S.M., ON BEHALF OF MINOR CHILD, W.C.,

Petitioner,

v.

BOARD OF EDUCATION

OF THE TOWNSHIP OF WEST ORANGE,

Respondent.

S.M., on behalf of minor child, **W.C.,** petitioner, *pro se*

Stephen J. Christiano, Esq., for respondent

Record Closed: October 12, 2000 Decided: November 20, 2000

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

NATURE OF THE CASE AND PROCEDURAL HISTORY

On September 17, 1999, S.M. (petitioner) filed a letter petition with the State Department of Education (DOE) contesting a decision by the Township of West Orange Board of Education (respondent) that W.C. was not entitled to a free public education in West Orange. Respondent filed an answer with the DOE on October 7, 1999, incorporating a claim for tuition reimbursement. The DOE transmitted the matter to the Office of Administrative Law on October 15, 1999, for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13. A hearing was conducted on October 12, 2000, on which date the record was closed.

FINDINGS OF FACT

Petitioner testified regarding the circumstances relevant to placement of W.C. in respondent's school district. Josefa Lopez (Lopez) testified to some extent in that respect on behalf of respondent and also testified regarding respondent's calculation of tuition reimbursement which she believes is due to respondent. The material facts are not in dispute.

Based upon a review of the entire record, I **FIND** the following to be facts.

N.C. is W.C.'s mother. Petitioner is W.C.'s uncle and is married to N.C.'s sister. Petitioner and his wife reside in West Orange, New Jersey. W.C. is eleven years old. N.C. has no other children.

Until approximately the summer of 1999, W.C. resided in Haiti with his mother. N.C. owned and operated a restaurant in Haiti and supported her son. For approximately four or five years, including during 1999, W.C. spent the summers with petitioner and his wife. In August 1999, N.C., as well as petitioner, and, apparently, his wife, decided that W.C. should remain with his aunt and uncle because the situation in Haiti was "very bad" and because they believed that he would receive a better education in the United States. (Petitioner's testimony on cross-examination.)

In approximately August 1999, N.C., while still in Haiti, executed an Affidavit of Parent, stating, in part, that she was not capable of supporting or providing care for W.C. because:

> [W.] is my only child and he is the priority in my life. I want him to have a good education, go to a better school where they can give him skills to be a real man and get a better future. My country is not actually secure and I am sure he won't get such education. So, I decide to let him stay in West Orange for his well-being.
>
> [Exh. R-1., p. 1.]

On September 2, 1999, petitioner executed an Affidavit for Non-resident Pupil Enrollment in support of an application to enroll W.C. in the public schools of West Orange pursuant to *N.J.S.A.* 18A:38-1. The affidavit stated, in part, that W.C. was residing with petitioner, that petitioner would assume all personal obligations for W.C. relative to school requirements, and that petitioner had never declared W.C., and would not do so in that year, as a dependent for federal income tax purposes. The affidavit also stated that W.C. was residing with petitioner because

> [h]is mother is single parent and Haiti is not safe; this situation goes wpost [*sic*] from day to day. His mother wants better education for him.
>
> [Exh. R-2.]

On September 2, 1999, petitioner went to respondent's offices to register W.C. in respondent's school district. He met with Lopez and gave her the executed Affidavit for Non-resident Pupil Enrollment and Affidavit of Parent. He provided no other information regarding W.C.'s status.

Lopez subsequently recommended that respondent deny registration on the basis that there was no demonstration of an economic or family hardship. Respondent subsequently determined to deny registration, and petitioner appealed that decision to the DOE.

Petitioner again spoke with Lopez and asked what steps he could take to have registration approved by respondent. Lopez told him that he had to demonstrate an economic or family hardship and suggested that one way of doing so would be for him to obtain custody of W.C. Petitioner attempted to initiate proceedings to obtain custody of W.C. in approximately September or October 1999 but, to his understanding, was advised that he could not do so until W.C. had been in the United States for at least six months. Petitioner did not subsequently attempt to obtain custody of W.C.

W.C. enrolled in respondent's district, pending a resolution of petitioner's appeal to the DOE, in October 1999. He attended the St. Cloud Elementary School (St. Cloud) through the balance of the 1999-2000 school year, a total of 157 days. W.C. has been attending the Roosevelt Middle School (Roosevelt), in respondent's district, during the 2000-2001 school year. He commenced attending that school on the first day of the school year, September 6, 2000, and was a student in that school as of October 12, 2000.

In the interim, in approximately late 1999, N.C. immigrated to the United States and was married. Her husband, who was born in the United States, is an American citizen and is employed. N.C. and her husband reside in Hempstead, Long Island (Hempstead), in the state of New York. N.C. is not yet employed because of her immigration status. N.C. did not arrange for her son to live with her and her husband because of her belief, apparently shared by petitioner, that the schools in West Orange are "better" than those in Hempstead. (Petitioner's testimony on cross-examination.) Petitioner anticipates that W.C. will move to Hempstead to live with N.C. and her husband at some point.

The fees charged by respondent for out-of-district elementary students and middle school students are based upon respondent's per-pupil spending in each category. The applicable per diem elementary school rate for the 1999-2000 school year was $44.03. Based on that rate and the fact that W.C. attended St. Cloud for 157 days, Lopez calculated that petitioner is liable to respondent for a total of $6,912.71 for the 1999-2000 school year. The per diem rate for middle school students for the 2000-2001 school year is $45.61. Based on that rate and the fact that W.C. commenced attending Roosevelt on September 6, 2000, Lopez calculated that petitioner is liable to respondent for a total of $1,185.86 for W.C.'s attendance at Roosevelt through October 12, 2000. Lopez therefore calculated that petitioner is liable to respondent for a total of $8,098.57, as of October 12, 2000.

DISCUSSION

The Commissioner of the DOE (Commissioner) generally has jurisdiction to hear and determine controversies and disputes arising under the school laws. *N.J.S.A.* 18A:6-9 addresses residence requirements relative to attendance in local school districts.

Public schools are required to provide a free education to individuals between the ages of five and twenty years in certain circumstances, including to individuals who are domiciled within the school district. *N.J.S.A.* 18A:38-1(a).

Local school districts must also provide a free education to any person who is kept in the home of another person domiciled within the district and supported by such other person gratis as if he/she were such other person's own child, upon the filing by that person with the board of education of a sworn statement. Such statement shall, if so required by the board, state that he/she is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements. The sworn statement must also state that he/she intends to keep and support the child gratuitously for a longer time than merely through the school term. A copy of certain documents regarding residency shall also be filed. The parent/guardian shall file with the board of education a sworn statement that he/she is incapable of supporting or providing care for the child because of a family or economic hardship and that the child is not residing with the resident of the district solely to receive a free public education therein. The statement shall be accompanied by documentation supporting the validity of the sworn statements. *N.J.S.A.* 18A:38-1(b)(1).

If in the board's judgment the evidence does not support the validity of a resident's claim, the board may deny admission to the child. The resident may contest such a decision to the Commissioner and shall be entitled to a hearing on the validity of the claim. 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 statutory criteria. No child shall be denied admission during the pendency of such proceedings. If the child is

then currently enrolled in the district, he/she shall not be removed during the period in which the resident may contest the board's decision nor during the pendency of the proceedings before the Commissioner. If in the judgment of the Commissioner the evidence does not support the resident's claim, the Commissioner shall assess tuition for the student, prorated to the time of the student's ineligible attendance in the district. *Ibid.*

As respondent argued, petitioner did not present evidence of an economic or family hardship. He testified generally that the situation in Haiti was unsafe and that school curricula were insufficient, focusing only on "politics." However, he did not reference any facts specific to N.C. and W.C., and the evidence supports a determination that hardship was not established. N.C., as found, operated a restaurant in Haiti and supported her son. In addition, hardship clearly has not existed since N.C.'s immigration to the United States and her marriage. The record supports a conclusion that W.C. has remained with his aunt and uncle because of a determination by them, as well as his mother, that schools in West Orange are in some manner "better" that those in Hempstead, N.Y.

I am persuaded that petitioner did not demonstrate, by a preponderance of the credible evidence, that W.C. is entitled to a free public education in respondent's school district. In addition, respondent's calculation of the monies owed to it for reimbursement relative to W.C.'s education is reasonable and consistent with the applicable statutory provisions. In the absence of evidence regarding payment schedules, I am persuaded that sixty days is a reasonable deadline for the payment of the amount in question. Finally, respondent's calculation of tuition due for the 2000-2001 school year should be adjusted to reflect any continued attendance by W.C. in respondent's school district subsequent to October 12, 2000, through the date of the final administrative decision in this case.

CONCLUSIONS

I **CONCLUDE** that petitioner did not demonstrate, by a preponderance of the credible evidence, that W.C. is entitled to a free public education in respondent's school

district; that respondent is entitled to reimbursement from petitioner in the amount of $6,912.71 for the cost of providing a public education to W.C. at St. Cloud during the 1999-2000 school year; that respondent is entitled to reimbursement from petitioner in the amount of $1,185.86 for the cost of providing a public education to W.C. at Roosevelt for the period from September 6, 2000, through October 12, 2000; that the latter figure should be increased to reflect any attendance by W.C. in respondent's school district subsequent to October 12, 2000, through the date of the final administrative decision in this case; and that the monies in question should be paid to respondent within sixty days of the effective date of this decision, unless an alternative payment schedule is agreed to by the parties.

ORDERS

It is hereby **ORDERED** that the petition filed by petitioner with the DOE on September 17, 1999, be and is hereby **DISMISSED**; that petitioner reimburse respondent $6,912.71 for W.C.'s attendance in respondent's school district during the 1999-2000 school year; that petitioner reimburse respondent $1,185.86 for W.C.'s attendance in respondent's school district for the period from September 6, 2000, through October 12, 2000; that the latter figure be increased to reflect any attendance by W.C. in respondent's school district subsequent to October 12, 2000, through the date of the final administrative decision in this case; and that petitioner reimburse respondent the amounts in question within sixty days of the effective date of this decision, unless an alternative payment schedule is agreed to by 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.

November 29, 2000
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

11/22/00
DATE

D. N. Contreras
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 27 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

For Petitioner:

S.M.

For Respondent:

Josefa Rivera

In Evidence

R-1 Affidavit of Parent

R-2 Affidavit for Non-resident Pupil Enrollment

R-3 Tuition calculation

OAL DKT. NO. EDU 11354-99
AGENCY DKT. NO. 310-10/99

S.M., on behalf of minor child, W.C.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	

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

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioner has failed to prove that W.C. is entitled to a free public education in respondent's District.[1] Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein, and the within Petition of Appeal is dismissed. Pursuant to *N.J.S.A.* 18A:38-1b(1), the Commissioner directs that petitioner reimburse the Board for tuition in the amount of $6,912.71 for the 1999-

[1] Notwithstanding this determination, the Commissioner notes with concern the ALJ's finding that "[Josefa] Lopez told [petitioner] that he had to demonstrate an economic or family hardship and suggested that one way of doing so would be for him to obtain custody of W.C." (Initial Decision at 3) As to such representations made by local boards and district staff, the Commissioner cautions that: "***although a local board should offer, where appropriate, accurate information about the enabling statute, *N.J.S.A.* 18A:38-1 *et seq.*, its related policies, and the consequences of noncompliance, *it is not the role of a local board to provide legal advice to parents, guardians and residents regarding how they may constitute their families and relationships in order to effectuate compliance with the residency law, particularly where the advice may carry legal consequences beyond those which the parties may presently anticipate." E.G.P. on behalf of minor child, M.B. v. Board of Education of the Borough of Rutherford, Bergen County*, Commissioner Decision December 21, 1998, *aff'd* State Board June 2, 1999. (emphasis added) (Slip Opinion at 20)

2000 school year, and $45.61 per day for the 2000-2001 school year, as set forth in the Initial Decision.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: JAN 08 2001

Date of Mailing: JAN 08 2001

[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.

8-01

L.H. AND L.H., on behalf of minor child, H.R.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY, AND COMMISSIONER DAVID C. HESPE AND THE STATE BOARD OF EDUCATION,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning parents challenged the Board's decision to expel H.R. for allegedly possessing a weapon (miniature baseball bat). Petitioners asserted that the Commissioner and State Board violated H.R.'s rights by failing to set uniform standards of suspension and expulsion.

The ALJ dismissed the matter as moot in view of the fact that H.R. was restored as a student in the District, his record was expunged, and petitioners' argument that this case represented a chance to deal with an issue of general public concern was not persuasive.

The Commissioner concurred and adopted the decision as his own.

January 08, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 05449-00N
AGENCY DKT. NO. 128-4/00

H.R., A MINOR, BY HIS PARENTS,
L.H., and L.H.,
Petitioners,
v.
RAHWAY BOARD OF EDUCATION,
COMMISSIONER DAVID C. HESPE
AND THE STATE BOARD OF
EDUCATION,
Respondents.

Ellen M. Boylan, Esq., for petitioner (Education Law Center, attorneys)

Michael C. Walters, Deputy Attorney General, for respondents (John J. Farmer, Jr., Attorney General of New Jersey, attorney)

Record Closed: October 30, 2000 Decided: November 14, 2000

BEFORE **JEFF S. MASIN,** ACTING CHIEF ALJ:

H.R. was expelled from the Rahway School District by resolution of the respondent Board of Education ("BOE") entered on January 20, 2000. His expulsion was accomplished following a process that began with an incident on October 5, 1999, when H.R. purportedly possessed a "weapon," (described as an 18-inch miniature baseball bat) on school property.[1] The BOE had in place at the time of the incident a so-called "zero tolerance" policy, Policy 5114,

[1]The details of this event are not relevant to the present decision, in view of the BOE's agreement to restore L. to the district.

which provided that there was "zero tolerance for weapons" and that students found in possession thereof would be scheduled for a superintendent's suspension hearing, which, depending upon the Superintendent's determination of the facts and whether they warranted expulsion, would lead to a BOE expulsion hearing. Importantly, as will be discussed in detail below, while the policy is denominated as a "zero tolerance" policy, it does not mandate expulsion in every instance where a student is determined to have possessed a weapon on school property or at a school sponsored event, but instead states that such possession is "strictly forbidden and *may* warrant expulsion from school" (emphasis added).

Following his expulsion, H.R.'s parents filed a petition with the Commissioner of Education seeking to appeal the BOE's decision.[2] In their petition they sought declaratory rulings that the BOE's actions had violated H.R.'s constitutional rights. More specifically, they contended that the BOE had violated his right to a through and efficient education under the New Jersey Constitution, Art. VIII, § 4; to procedural due process as guaranteed by the Fourteenth Amendment to the United State Constitution; to equal protection as guaranteed by the New Jersey Constitution; and that the Board had acted in an arbitrary and capricious manner. In that same petition, the petitioners asserted that the Commissioner of Education ("Commissioner") and the State Board of Education ("State Board") (these two parties hereinafter referred to as the " state respondents") had failed to set uniform standards to guide local districts in imposing long-term suspensions and expulsions and had thereby allowed the existence of "substantial inequality in educational opportunity both within and between school districts throughout the State," thereby violating H.R.'s right to a through and efficient education as guaranteed by the State Constitution. The Commissioner declared the petition a contested case and transferred it to the Office of Administrative Law ("OAL"), pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13. Upon receiving the case, and in view of the fact that H.R. is a classified special education student, this judge contacted counsel to discuss whether the case was properly filed as a regular education matter under the ultimate jurisdiction of the Commissioner, or alternatively, should have been filed as a request for a due process hearing, pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 *U.S.C.* §1400-1491, in which case the final administrative decision would be made by the administrative law judge. Counsel for the petitioners specifically advised that, although cognizant of the child's status and the special

[2] An amended petition was filed on August 31, 2000, pursuant to an interlocutory order permitting the filing.

provisions of statute and regulation governing the disciplinary process for classified students, they nevertheless wanted the matter treated as a regular education proceeding.

Subsequent to these discussions, counsel advised me that the parents had resolved their dispute with the BOE and that the student had been reinstated in the district. Terms of the settlement agreement filed with me include a provision that the suspension and expulsion be expunged from H.R.'s record. *See* Stipulation of Settlement and Dismissal of Claims Against Rahway Board of Education, dated July 20, 2000. Counsel for the petitioners nevertheless advised that they wished to press forward on their petition as it relates to the State respondents. Both parties now seek summary decision as to aspects of the remaining issues.

Motions for Summary Decision

The respondents move to dismiss the petition as moot in view of the fact that H.R. has been restored as a student in the district and his record expunged and the petitioners have advised that they seek no further relief from the BOE. Alternatively, the respondents contend that even if the case is not entirely moot, the constitutional claims against the Commissioner and State Board should not be decided, as their resolution is not necessary since the student is no longer expelled and no remedy is sought against the BOE. The respondents rely upon well established case law in support of the proposition that constitutional claims are not to be decided unless absolutely necessary to the disposition of the case. Finally, the respondents contend that if the case is not moot and the constitutional claims are decided on the merits, the petitioners' constitutional claims are without merit.

The petitioners' cross-move for partial summary decision regarding their claims that the student's rights to equal educational opportunity in student discipline and equal protection of the laws have been denied. They have not moved for summary decision on their challenge that the state's allowance of zero tolerance policies has violated the student's constitutional right to a public education, believing that resolution of this claim will require expert evidence "establishing the lack of effectiveness and counterproductiveness of such policies".

Mootness

This case arose because H.R., a student in the Rahway school district, was expelled from school. When originally filed, the petition sought, in addition to several declaratory rulings, his reinstatement to the educational program from which he was removed and the expungement from his school records of the suspension and expulsion. As a result of the negotiated resolution between the petitioners and the BOE, the reinstatement and expungement have been achieved and no further relief is sought against the BOE. As a result of the resolution of H.R.'s expulsion, any relief granted herein against the State respondents will not effectuate H.R.'s return to school or award him any relief, save a declaration that his rights were violated by the failure of the State respondents to provide the local board with standards. The petitioners argue that while his current situation has been resolved, H.R. is nevertheless entitled to be protected by a ruling in this case from "future unlawful disciplinary action by the Board, or any other school district," to "vindication" of the wrong inflicted upon him by the fact that his right to a public education was severely infringed upon for almost an entire school year and to "a finding that the State violated his constitutional right." To the extent that the case might be deemed moot, they argue that it nevertheless falls within the narrow exception to the mootness doctrine for those cases in which the challenge relates to a matter of public interest, capable of repetition, yet evading review, citing *Warnock Automotive v. Treasury Dept.*, 272 *N.J. Super.* 450, 453 (App. Div. 1994); *New Jersey Division of Youth and Family Services v. J.B.*, 120 *N.J.* 112, 118-19 (1990) and *J.A. v. Board of Education of South Orange/Maplewood*, 318 *N.J. Super.* 512 (1999). [3]

The Attorney General responds that even as regards the constitutional contentions, the doctrine that these matters should not be decided as academic exercises, but only in real cases or controversies, means that with H.R.'s expulsion resolved and the record of the suspension and expulsion expunged, there are no viable claims to be decided. He disputes the contention that this case involves an issue that readily evades review, noting that there are several cases that have been decided concerning the expulsion of students under so-called "zero tolerance" policies, pointing to *M.C. v. Bergenfield Board of Education*, EDU 7318-00, Initial Decision, August 18, 2000, and *V.A., on behalf of minor child, K.M.A. v. Board of Education of the Borough of*

[3] In *Student Members of Playcrafters v. Bd. of Education*, 177 *N.J.Super.* 66, 73-74 (App. Div. 1981), the court stated the exception differently, finding that the case was of public importance and bound to recur, but without any reference to the "evade review" component.

Collingswood, EDU *2799-99,* Initial Decision (February 2, 2000) http://lawlibrary.rutgers.edu/oal/search.html, *adopted,* Comm'r *(March 20, 2000), adopted,* State Bd. (July 5, 2000), http://www.state.nj.us/njded/legal/index.html. Finally, the respondents note that the OAL has no authority to direct the State Board to adopt regulations, or to invalidate state regulations or statutes that establish the framework for discipline.

DISCUSSION

The original challenge to the conduct of the Rahway Board of Education sought to overturn the child's expulsion from school, return him to the district's student roster and expunge his record. The practical effect of the settlement reached between the petitioners and the BOE is that the student is no longer expelled and his record is clear. There is no longer a live controversy regarding the student's ability to attend the district schools, commensurate with the IEP in place. There is no longer any "black mark" in his records concerning this incident. To the extent that the removal of any reference to a disciplinary record arising from this incident serves to vindicate the student's position that he did nothing wrong, he has been so vindicated.

The policy under which H.R. was expelled is denominated a "zero tolerance" policy. However, while the implication of that title might appear to be that any student found in possession of a weapon must, as a matter of policy, be expelled, in fact the actual policy provides for no such definitive outcome. Instead, it first provides that the principal determine if the item in question is a weapon, and if so determined, then for the Superintendent to hold a suspension hearing and to decide, based "on the facts of the case presented to him or her . . . whether or not the charges warrant expulsion." Significantly, even where a weapon is involved, the policy does not necessarily require the extreme sanction of expulsion. Thus, if the Superintendent determines that expulsion is not warranted, he or she then "will determine the consequences of the pupil's actions and the conditions of the pupil's return to school." Only after such a fact based hearing and a decision that expulsion is warranted does the matter proceed to the Board level, where the Board is directed to "determine if the case warrants expulsion . . . based either on their hearing of the case or reading of the written transcript of the hearing." Thus, the policy, while clearly and unequivocally stating that the District has "no tolerance for the presence of weapons or other dangerous objects in school or on school property . . . ," nevertheless provides

for a decision as to whether one in possession is to be suspended or expelled, or otherwise sanctioned, if at all. This decision is to be fact-based and, in the case of a possible expulsion, must involve, first, a preliminary determination by the principal as to the nature of the item possessed, second, a determination by the Superintendent as to a possible penalty and whether that might be expulsion, and, third, a final determination by the BOE. Since as written the policy requires a fact based analysis including the right to a hearing before determination of whether any sanction is appropriate, and if so, to what level that sanction should reach, any problem with the policy must be with its application in any given case, and, perhaps, in the broader implications raised herein, about discipline in "similar" cases, district by district, and the role of the State in overseeing the disciplinary process. Given that the petitioners have resolved their dispute with Rahway, the question of how the policy was applied in H.R.'s case is no longer in controversy. To the extent that the petitioners allege that the Commissioner and State Board could be said to have acquiesced in H.R.'s expulsion by their lack of direction and guidance, the return of the student to the district and expungement of the record of his discipline effectively ends any controversy about the State authorities' purported lack of action continuing to affect H.R. This means that the sole remaining contentions are those aimed at the State respondents. While the petition suggests that the focus of the petitioners' objections to the State's conduct, namely its perceived inaction, are directed to a lack of standards for long-term suspensions and expulsions imposed under any policies, the petitioners' brief more directly emphasizes the "zero tolerance" policies in effect in some districts, while also mentioning a lack of standards regarding such matters as the "right to alternative education" and "due process protections."

It is first very important to recognize that the concerns raised by the Education Law Center can be addressed, indeed, in the context of a case now moot are more properly addressed, by way of a petition for rulemaking pursuant to *N.J.S.A.* 52:14B-4 (f). Such a petition could lead to a rulemaking process in which all interested parties could have input in molding any Statewide regulations deemed appropriate to guide local districts in the delicate task of dealing with the range of serious disciplinary matters, often involving safety issues, that plague our schools. The wide-ranging issues and complex considerations that enter into the entire subject of disciplinary policies and the rights of students and parents to safe schools, to due process, to an appropriate learning environment, to alternative education where discipline is properly imposed, and the ultimate responsibility, if any, of the State and/or its districts to provide education for those

appropriately found to require exclusion from the normal educational process due to significantly inappropriate conduct, are not simple matters. While I do not mean to imply that I necessarily believe that any such regulations are in fact needed, and it remains to be seen what the position of the appropriate State agencies would be to such a petition, if the petitioners and/or their counsel believe such standards are appropriate, the rulemaking petition is a vehicle to seek such regulation.

If the issues raised by petitioners regarding the State's responsibility in the disciplinary realm are to be initially decided in the context of administrative litigation, such determinations about the constitutional implications of a purported lack of State guidance to districts regarding "zero tolerance" policies and their application are best determined in the context of live controversies about the application of a given policy in a given case, or, alternatively, in a case involving a policy so strict on its face and so devoid of discretion as to raise questions of facial unconstitutionality. The argument that this case represents a chance to deal with an issue of general public concern that arises with regularity yet evades review, is not persuasive. Expulsions unfortunately occur with some regularity, and not all of these are resolved as in this case. Decisions already rendered have considered some of the issues raised here in cases that were clearly not moot, and it is highly likely that other such controversies will arise in the future. *V.A. v. Board of Educ., supra.; M.C. v. Bergenfield Board of Educ., supra.; K.M.A. v. Board of Education of Piscataway, supra.* While the petitioners have identified a line of cases in which the appellate courts have carved out an exception to the mootness doctrine, the likelihood of repetition of the circumstances addressed therein was substantially less than in this matter. The bidding situation in *Warnock, supra.*, involving an issue of a franchiser owned franchisee/bidder, acceptance of whose bid would have undermined important policy matters not directly relevant to the bidding statutes themselves, but deemed to be important considerations nevertheless, were, quite probably, deemed unlikely to recur with any regularity at all. The press access issue in *J.B., supra.*, involved First Amendment issues and the confidentiality imposed in Division of Youth and Family Services proceedings in a context of great public interest, but again, in a circumstance with little likelihood of any regular repetition. As for *J.A., supra.*, the court pointed out that there were claims for damages and attorneys fees pending, the outcome of which required a determination as to whether due process rights had been violated. Even if the seemingly more liberal test expressed in *Student Members, supra.*, is applied, that case involved

an analysis of the facial constitutionality of a policy arguably in violation of the Establishment Clause, where there was no suggestion that other districts were regularly applying such a policy or that cases involving such policies were regularly appearing in the courts or in the administrative forum, whereas, as noted above, cases involving the use of disciplinary policies, and more specifically, policies labeled as "zero tolerance," are now regularly arising, at least in the administrative forum. Given that there appears to be no dearth of these cases, the resolution of the issues raised herein are best left to an actual, ongoing controversy about the application of such a policy in a given context.

For the reasons stated, I **CONCLUDE** that the matter before me is **MOOT** and is therefore **DISMISSED**.

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

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

November 14, 2000
DATE

JEFF S. MASIN, ACTING CHIEF ALJ

Receipt Acknowledged:

11/22/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 27 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONERS:

Exhibit A — Karen Ayres, *Family Sues for School Incident, The Star Ledger*, 8/18/00, pp. 33, 36

Exhibit B — Rahway Bd. of Ed. Resolution of expulsion, dated 1/20/00 (provided by Rahway Bd. of Ed. in response to Interrogatory #25)

Exhibit C — Abridged Transcript of Expulsion Hearing of 12/16/99 before the Rahway Bd. of Ed.

Exhibit D — Rahway Bd. of Ed. Zero Tolerance Policy (provided by Rahway Bd. of Ed. in response to Interrogatory #5)

Exhibit E — Initial Decision in *M.C., et al v. Bergenfield Bd. of Ed.*, OAL Dkt. No. EDU 7381-00, dated 8/18/00

Exhibit F — Commissioner of Ed. decision on application for emergent relief in *V.A., et al v. Bd. of Ed. of Borough of Collingswood*, OAL Dkt. No. EDU 2799-99, dated 6/29/99

FOR THE RESPONDENT:

None

OAL DKT. NO. EDU 05449-00
AGENCY DKT. NO. 128-4/00

L.H. AND L.H., on behalf of minor child, H.R.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY, AND COMMISSIONER DAVID C. HESPE AND THE STATE BOARD OF EDUCATION,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioners' exceptions are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in reaching his decision.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ that this matter is properly dismissed as moot. 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: JAN 0 8 2001

Date of Mailing: JAN 0 8 2001

* 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.

8-01

EDU #5449-00
C # 8-01
SB # 6-01

L. H. AND L.H., on behalf of minor child, H.R., :

PETITIONERS-APPELLANTS, :

V. :

BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY, COMMISSIONER DAVID C. HESPE, AND THE STATE BOARD OF EDUCATION, :

RESPONDENTS-RESPONDENTS. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, January 8, 2001

For the Petitioners-Appellants, Education Law Center (Ellen M. Boylan, Esq., of Counsel)

For the Respondent Board of Education of the City of Rahway, Schenck, Price, Smith & King (Joanne L. Butler, Esq., of Counsel)

For the Respondents Commissioner David C. Hespe and State Board of Education, Michael C. Walters, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

Petitioners in this matter are the parents of a classified special education student, H.R., who was expelled by the Rahway Board of Education (hereinafter "Board" or "Rahway Board") on the basis of an incident that occurred on October 5, 1999, at which time the student allegedly was in possession of a "weapon" on school property.[1]

[1] The "weapon" at issue was an 18 inch miniature baseball bat.

Following the expulsion of H.R., petitioners challenged the Board's action by filing a petition of appeal with the Commissioner of Education asserting that the Board had violated their son's rights under the New Jersey and United States Constitutions. In their petition, the petitioners also claimed that the Commissioner and the State Board of Education had violated their son's right to a thorough and efficient education under the New Jersey State Constitution by failing to set uniform standards to guide school districts in imposing long-term suspensions and expulsions.

Following transmittal of the case to the Office of Administrative Law, the Administrative Law Judge ("ALJ") raised the question of whether the matter should have been filed as a request for a due process hearing pursuant to the Individuals with Disabilities Education Act ("IDEA") rather than as one under the Commissioner's jurisdiction pursuant to N.J.S.A. 18A:6-9 (Commissioner has jurisdiction over all controversies and disputes arising under the education laws). Counsel for the petitioners specifically advised the ALJ that although the petitioners were cognizant of H.R.'s status as a classified special education student, they did not wish to invoke the special provisions of statute and regulation governing the process for disciplining classified students.[2]

On October 6, 2000, counsel for the petitioners submitted to the ALJ a Stipulation of Settlement and Dismissal of Claims Against Rahway Board of Education executed by herself and the counsel for the Rahway Board. Pursuant to the terms of the settlement,

[2] We note that the protections afforded classified special education students subject to disciplinary action are, under our regulations, as well as the IDEA, greater than those applicable to non-classified students. See N.J.A.C. 6A:14-2.8.

which was dated July 20, 2000,[3] H.R. was to be reinstated to the educational program from which he had been removed, his record was to be expunged, the Board was to investigate the availability of compensatory vocational education services to make up for the vocational program H.R. had missed, and the Rahway Board would withdraw the criminal charges against him. In return, the petitioners agreed to dismiss with prejudice the claims they had raised against the Board and to release the Board from all other claims they might have arising from the incident and expulsion.

On November 14, 2001, the ALJ issued his initial decision in the matter. On the basis of motions for summary decision, the ALJ dismissed the matter in its entirety, concluding that it was moot. The lynchpin of the ALJ's determination was that the "practical effect of the settlement reached between the petitioners and the [Rahway Board] is that the student is no longer expelled and his record is clear." Initial Decision, slip op. at 5.

The Commissioner adopted the ALJ's determination as his final decision in the matter.

Petitioners appealed to the State Board. Counsel for the petitioners contends that the matter is not moot as to the petitioners' claims against the Commissioner and the State Board. In this respect, counsel argues that the constitutionality of zero tolerance policies and the responsibility of the State respondents to issue uniform guidelines for the discipline of students are of great public importance so that settlement of the petitioners' claims against the Rahway Board should not render the claims

[3] In her October 6, 2000 cover letter submitting the Stipulation of Settlement to the ALJ, counsel for the petitioners indicated that the parties had settled their dispute in July 2000, at which time she had prepared the Stipulation and sent it to the counsel for the Board, but that she had not received an executed copy from the Board's counsel until October.

against the State respondents moot. Counsel for the petitioners also seeks to supplement the record in the matter with comments submitted to the Department of Education by the Education Law Center, which is representing the appellants in this case, on discussion level regulations on Programs to Support Student Development and the response of Department staff thereto.

Our review has revealed that while the record includes the Stipulation of Settlement submitted to the ALJ on October 6, 2001, there is no indication that the settlement was ever approved by the ALJ pursuant to the regulatory requirements of N.J.A.C. 1:1-19.1. We cannot ignore this fact in view of the character and specificity of those requirements. Specifically, that regulation requires in pertinent part that:

> (a) Where the parties to a case wish to settle the matter, and the agency head has not consented to the settlement terms, the judge shall require the parties to disclose the full settlement terms:
>
> 1. In writing, by consent order or stipulation signed by all parties or their attorneys; or
>
> 2. Orally, by the parties or their representatives.
>
> (b) Under (a) above, if the judge determines from the written order/stipulation or from the parties' testimony under oath that the settlement is voluntary, consistent with the law and fully dispositive of all issues in controversy, the judge shall issue an initial decision incorporating the full terms and approving the settlement.

In that execution of some of the terms of the settlement provided the basis for the ALJ's initial decision and because the Commissioner adopted that decision, we are not able to decide the appeal before us without assurance that the regulatory requirements have been met and that the settlement has been properly approved. We therefore remand this matter to the Commissioner for this purpose. We retain jurisdiction over the

appeal, including the petitioners' motion to supplement the record, but place the matter in abeyance pending the Commissioner's determination with respect to the settlement.

June 6, 2001

Date of mailing JUN 08 2001

SB 7-01

SB # 7-01

IN THE MATTER OF THE DENIAL OF THE	:	
CHARTER SCHOOL APPLICATION OF	:	STATE BOARD OF EDUCATION
THE NEW WORLD CHARTER SCHOOL,	:	DECISION
ESSEX COUNTY.	:	

Decided by the Commissioner of Education, January 11, 2001

For the Appellant, Michael Strickland, pro se

On February 12, 2001, Michael Strickland (hereinafter "appellant"), acting on behalf of the Board of Trustees of the proposed New World Charter School, filed an appeal to the State Board of Education from a letter decision of the Commissioner of Education denying the proposed school's application to operate a charter school pursuant to the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 et seq. On March 15, 2001, the Director of the State Board Appeals Office ("Director") advised the appellant that the Commissioner had provided the State Board with the record in this matter and that the briefing schedule was therefore being established. She informed him that a brief in support of his appeal was due on or before April 2, 2001.

The appellant, however, failed to file a brief by that date. By letter dated April 4, 2001, the Director advised the appellant of his failure to file a brief and informed him that this matter was being referred to the Legal Committee of the State Board for consideration of his failure to perfect the appeal.

The appellant has still failed to file a brief in support of his appeal, a month after the deadline. Nor has he offered any explanation for his 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 2, 2001

Date of mailing MAY 4 2001

(SB) 3-01

SB #3-01

IN THE MATTER OF THE GRANT OF THE :
CHARTER SCHOOL APPLICATION OF THE :
GREEN WILLOW CHARTER SCHOOL, :
BERGEN COUNTY :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, January 11, 2001

For the Appellant Board of Education of the School District of Mahwah, Schwartz, Simon, Edelstein, Celso & Kessler (Nathanya G. Simon, Esq., of Counsel)

For the Appellant Board of Education of the School District of Saddle River, Fogarty & Hara (John R. Vreeland, Esq., of Counsel)

For the Appellant Board of Education of the School District of Ramsey, Winne, Banta, Rizzi, Hetherington & Basralian (Robert M. Jacobs, Esq., of Counsel)

For the Appellant Board of Education of the School District of Upper Saddle River, Wiley, Malehorn and Sirota (Fredric J. Sirota, Esq., of Counsel)

This is an appeal by four district boards of education from the grant of contingent approval by the Commissioner of Education on January 11, 2001 to the Green Willow Charter School (hereinafter "Charter School") to operate a charter school pursuant to the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 et seq. (hereinafter "Act") commencing in September 2001. As set forth in their briefs, all four boards claim that the application of the Charter School is contrary to the Charter School Program Act, that the Commissioner failed to consider concerns expressed by Department of Education personnel who reviewed the application, that the Commissioner improperly failed to

consider the financial impact of the approval, and that the Act imposes unfunded mandates on the district boards contrary to the requirements of the New Jersey Constitution.[1]

We reject the contention that conditional approval of the Charter School's application was contrary to the legislative intent of the Charter School Program Act. The thrust of the district boards' arguments is that the application does not fulfill the Act's intent to provide educational approaches that may not be available in the traditional public school classroom because the districts involved here offer a vast array of educational programs. These arguments are negated by the contents of the application. Specifically, the application indicates that the Charter School will provide an "art infused, thematic, interdisciplinary" approach, as well as small classrooms and multi-age grouping. While the substance of the districts' programs may be outstanding and the breadth of their overall educational programs vast, none of these districts suggests that it is taking the same approach as the Charter School in implementing any of those programs.

Similarly, we find no merit to the claim that the Commissioner improperly ignored the reviewers' concerns. Most strikingly, the districts concede that notwithstanding such concerns, even those portions of the application which they attack were rated "adequate" by the reviewers. Moreover, the fact that the Department required the Charter School to submit a supplemental application, as well as the supplemental application itself and the evaluation documents, reflect the extensive review given to the

[1] We note that briefs were filed on behalf of the boards of education of Mahwah, Upper Saddle River and Ramsey. In its letter of February 28, 2001, which was accompanied by the affidavit of its interim superintendent, the Saddle River board indicated that it would rely upon the briefs filed on behalf of the other three boards.

application before it was approved and that the reviewers' concerns were not ignored. In this respect, we stress that, contrary to the districts' view, the Commissioner need not set forth extensive analysis each time he reviews a concern expressed during the evaluation process. Furthermore, in this instance, we find that the substance of the application supports the conclusions reached by both the reviewers and the Commissioner that it was adequate in all categories. See, e.g., In re Grant of Charter School Application, 320 N.J. Super. 174 (App. Div. 1999), aff'd with modification, 164 N.J. 316 (2000).

Nor is there any merit to the districts' claim that the Commissioner improperly failed to evaluate the financial impact of the Charter School before approving its application. We stress that it is now settled that the Commissioner is required to expressly evaluate the financial impact of the grant of a charter only when a district of residence demonstrates with some specificity that the constitutional requirements of a thorough and efficient education would be jeopardized by the loss of funds attending the grant of the charter. In re Grant of Charter School Application, 164 N.J. 334-335. As expressed by the New Jersey Supreme Court:

> ...the Commissioner must consider the economic impact that approval of a charter school will have on a district of residence when during the approval process a district makes a preliminary showing that satisfaction of the thorough-and-efficient education requirements would be jeopardized....[T]he district must be able to support its assertions. We do not impose on the Commissioner the burden of canvassing the financial condition of the district of residence in order to determine its ability to adjust to the per-pupil loss upon approval of the charter school based on unsubstantiated, generalized protests.

Id. at 336.

None of the districts involved in this appeal suggest that it will not be able to meet its obligation to provide a thorough and efficient education to its students, and no evidence has been presented that raises constitutional concerns about the ability of any of these districts to do so. Id. at 335. Rather, the focus of the districts' arguments is almost exclusively on the districts' taxpayers, not its students. We can identify nothing in either the Act or the New Jersey Constitution that imposes an obligation on the Commissioner to consider the fiscal effects on the local taxpayers when he determines whether to approve a charter application.

Likewise, we find no merit to the claim that either the Act or its implementing regulations impose an unfunded State mandate on the districts in violation of Article VIII, Section II, paragraph 5 of the New Jersey Constitution (hereinafter "Amendment"). That Amendment provides that any law enacted on or after January 17, 1996, and any rule originally adopted after July 1, 1996, which is determined to be an unfunded mandate shall cease to be mandatory in effect and shall expire. The mechanism to implement the Amendment was provided by N.J.S.A. 52:13H-1, which created the Council on Local Mandates and charged it with the responsibility of deciding claims that such statutes and regulations constituted unfunded mandates. Hence, the claim being made in this appeal is outside of our jurisdiction.

However, we note that the Charter School Program Act became effective on January 11, 1996, six days before the effective date which the Amendment established for purposes of its application. See In the Matter of a Complaint filed by the Board of Education for the City of Clifton, decided by the Council on Local Mandates, May 13,

1998.[2] Further, we recognize that the funding regulation which we adopted effective June 1, 1998 was determined by the Council on Local Mandates to be an unfunded mandate. In the Matter of the Complaints Filed by the Highland Park Board of Education and the Borough of Highland Park, decided by the Council on Local Mandates, May 11, 2000. See 30 N.J.R. 588(a) and 30 N.J.R. 2084(a) (amending N.J.A.C. 6A:11-1.2 to define "local levy budget per pupil for the specific grade level" as the "program budget per pupil"). However, we note that effective October 2, 2000, we amended the regulation so that it does not now constitute an unfunded mandate. See 32 N.J.R. 2523(a) and 32 N.J.R. 3560(a) (rewriting the definition of "local levy budget

[2] In a footnote in its brief, the Ramsey board contends that the determination made by the Council on Local Mandates is not dispositive of whether the Amendment applies to the Charter School Program Act because rulings of the Council are political and are not subject to judicial review. This, argues the Ramsey board, precludes the Council from making constitutional determinations such as it is seeking here because constitutional determinations must in all cases be subject to judicial review. Brief on behalf of the Ramsey Board of Education, at 8, note 3.

In addressing this argument, we note that it is now well established that when a controversy arising under the school laws presents constitutional issues, such as is the case here, "such issues should merely be noted....Factual presentations relevant to the constitutional issues may be made, however, to ensure an adequate record for determination on appeal. In this way both the integrity of the administrative system and the [party's] right to a judicial determination of constitutional issues will be preserved." Parents for Student Safety, Inc. v. Board of Education of the Morris School District, decided by the State Board of Education, February 5, 1986, slip op. at 5, aff'd, Docket #A-3257-85-T7 (App. Div. 1987), quoting Paterson Redevelopment Agency v. Schulman, 78 N.J. 378, 388 (1979). Moreover, "in litigation to resolve purely constitutional claims,...although an agency may base its decision on constitutional considerations, such legal determinations do not receive even a presumption of correctness on appellate review." Bd. of Ed. v. Neptune Educ. Ass'n., 293 N.J. Super. 1, 9 (App. Div. 1996), quoting Abbott v. Burke, 100 N.J. 269, 298-99 (1985). Nonetheless, the Court stressed that "[w]here the broader subject matter of a case is within the purview of an administrative agency's authority, it is valuable to have the insights and policy reflections of that agency, even if the only issue to be decided is one of constitutional dimensions, in respect of which the agency is seen to have no particular expertise or authoritative decisional role." Id.

Hence, while we recognize that we do not have the authority to decide the broader constitutional issue being raised by the Ramsey board, we reject its argument in the context of this case. By the terms of the Amendment itself, it applies only to laws enacted after January 17, 1996. Accordingly, it is not the character of the decisions made by the Council on Local Mandates that would limit judicial review of the substance of the Charter School Program Act under Article VIII, Section II, paragraph 5, but the fact that the Charter School Program Act was enacted by the Legislature before the date on which the Amendment became applicable to such laws.

per pupil for the specific grade level" and inserting additional language relating to the definition of "program budget").

Accordingly, for the reasons stated herein, the State Board of Education affirms the Commissioner's determination to grant conditional approval to the charter application of the Green Willow Charter School. In doing so, we direct the Commissioner to insure that the Charter School either secures the funding that its application indicates it is pursuing, i.e., a $300,000 loan from Prudential and a $125,000 grant from the federal government, or that it makes appropriate adjustments in its budget and operations before it opens. Finally, in view of our determination, we deny the motion to participate made on behalf of the Commissioner.

May 2, 2001

Date of mailing MAY 4 2001

4-01

THERESA D'ELIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 28, 2000

OAL DKT. NO. EDU 3820-99
AGENCY DKT. NO. 399-9/98

THERESA D'ELIA,	:	
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.

John M. Sheeran
ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 09/28/00

Date of Mailing: 01/03/01

9-01

THERESA D'ELIA, DEBORAH FOWLKES, MARY HART AND DEBORAH ROBINSON,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	
RESPONDENT.	:	

January 8, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11820-99
AGENCY DKT. NO. 291-9/99

THERESA D'ELIA, DEBORAH FOWLKES, MARY HART AND DEBORAH ROBINSON,

Petitioners,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

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

Charlotte Kitler, Esq., for respondent

Record Closed: November 16, 2000 Decided: November 20, 2000

BEFORE **RICHARD McGILL,** ALJ

Theresa D'Elia, Deborah Fowlkes, Mary Hart and Deborah Robinson filed a petition with the Commissioner of Education to contest a determination by the State-Operated School District of the City of Jersey City to withhold their increments for the 1998-1999 school year. Respondent filed an answer, and the matter was transmitted to the Office of Administrative Law on November 18, 1999, for determination as a contested case.

The petitions of Theresa D'Elia and Deborah Fowlkes were withdrawn by letter dated October 6, 2000, and the petition of Deborah Robinson was withdrawn by letter dated October 11, 2000. Prior to hearing, the parties submitted a Stipulation of Settlement in regard to the petition of Mary Hart.

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.

Nov. 20, 2000
DATE

RICHARD MCGILL, ALJ

Receipt Acknowledged:

11/22/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

NOV 27 2000
DATE

OFFICE OF ADMINISTRATIVE LAW

cml

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
RECEIVED
Nov 16 1 59 PM '00

CHARLOTTE KITLER
General Counsel
State-Operated School District
of Jersey City
346 Claremont Avenue
Jersey City, New Jersey 07305
(201) 915-6231
Attorney for Respondent

THERESA D'ELIA, MARY HART, et als., Petitioners,	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
v.	Agency Dkt. No. 291-99 OAL Dkt. No. EDUOR 11820-99
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY, Respondent.	STIPULATION OF SETTLEMENT AS TO MARY HART

This Agreement is entered into as a resolution of the within matter regarding the appeal of petitioner MARY HART from the withholding of her increment for the 1999-2000 school year. Petitioner MARY HART and respondent hereby agree to an amicable resolution of the within matter as follows:

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

2. The petitioner Mary Hart withdraws her petition in the within matter.

3. The parties understand that the petitioner is entitled, under the terms of the collective bargaining agreement between the Jersey City Education Association and the Jersey City School District (§ 11-5), to request a review after three (3) years of performance for the prospective restoration of an increment that has been withheld.

4. The respondent Jersey City School District agrees that petitioner Mary Hart shall have the right to request a review for the restoration of her salary increment which is the subject of her petition after two (2) years (rather than three years) of performance pursuant to all other terms of § 11-5 of the collective bargaining agreement between the Jersey City Education Association and the respondent Jersey City School District.

5. The petitioner Mary Hart acknowledges that she has had the right and opportunity to discuss all aspects of this Stipulation with her attorney prior to signing it, that she has read and fully understands all of the terms of this Stipulation, and that she had entered into this Stipulation knowingly and voluntarily, without coercion or duress.

6. It is understood that this Stipulation will take effect upon its approval by the Administrative Law Judge and by the Commissioner of Education.

Mary Hart
MARY HART

DATED: 10/18/00

PHILIP FEINTUCH, Esq.
Attorney for Petitioner

DATED: 11/7/00

Charlotte K.K.
CHARLOTTE KITLER, Esq.
Attorney for Respondent

DATED: 11/14/00

OAL DKT. NO. EDU 11820-99
AGENCY DKT. NO. 291-9/99

THERESA D'ELIA, DEBORAH FOWLKES, MARY HART AND DEBORAH ROBINSON,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	
RESPONDENT.	:	

The record, Stipulation of Settlement as to Petitioner Mary Hart 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 with respect to Petitioner Hart.

Further, the Commissioner approves the withdrawal of Petitioners D'Elia, Fowlkes and Robinson, noting that this matter is no longer deemed contested and is, accordingly, dismissed.

COMMISSIONER OF EDUCATION

Date of Decision: JAN 08 2001

Date of Mailing: JAN 08 2001

10-01

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

SEP 28 2000

OAL DKT. NO. EDU 3825-99
AGENCY DKT. NO.399-9/98

LINDA ANTHONY,	:	
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

SEP 28 2000

Date of Decision: _____

Date of Mailing: JAN 9 2001

(SB) 10-01

SB # 10-01

PHILLIPSBURG EDUCATION ASSOCIATION, :

APPELLANT, :

V. :

BOARD OF EDUCATION OF PHILLIPSBURG, WARREN COUNTY, AND VITO A. GAGLIARDI, SR., ACTING COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF EDUCATION, :

RESPONDENTS. :

STATE BOARD OF EDUCATION

DECISION

Equivalency granted by the Commissioner of Education, February 1, 2001

For the Appellant, Zazzali, Fagella & Nowak (Richard A. Friedman, Esq., of Counsel)

For the Respondent Phillipsburg Board of Education, Schenck, Price, Smith & King, LLP (Richard H. Bauch, Esq., of Counsel)

For the Respondent Vito A. Gagliardi, Sr., Commissioner of Education, Allison Colsey Eck, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

This is an appeal from the grant of an equivalency by the Commissioner of Education to the Phillipsburg Board of Education pursuant to N.J.A.C. 6A:5-1 et seq. The equivalency at issue permits "a certified school psychologist to assist in providing comprehensive support services to students in the district's alternative school program," notwithstanding the requirements of N.J.A.C. 6:11-3.1. N.J.A.C. 6:11-3.1 requires in pertinent part that:

> [p]ursuant to N.J.S.A. 18A:26-2, the requirement of certification applies to any person who is employed by a district board of education to perform duties that are regulated through certification rules pursuant to this chapter. Such duties shall be performed by the holder of the required certificate or under his or her direct and continuous personal supervision.

Absent the equivalency, N.J.A.C. 6:11-11.11 of the certification regulations would require that an individual possess an educational services certificate with a student personnel services endorsement in order to be authorized to perform the duties attending the position which the Board planned to establish.

The Commissioner granted the equivalency by letter of February 2, 2001, and on March 1, 2001 the Phillipsburg Education Association filed a notice of appeal to the State Board of Education. The Association contends that the grant of the equivalency in this case was improper because such grant was contrary to the State Board's decisions in Guttenberg Education Association v. Leo Klagholz and the Board of Education of the Borough of Guttenberg, decided by the State Board of Education, March 3, 1999, and In the Matter of the Waiver Granted to the Board of Education of the Township of Middletown, decided by the State Board of Education, May 3, 2000. The Association further argues that the equivalency is in violation of N.J.A.C. 6A:5-1.3(a)(1)(i), which was adopted by the State Board effective July 3, 2000, and which provides that "[c]ertification requirements of N.J.S.A. 18A:26-2 shall not be violated."

On June 1, 2001, the Board filed a motion with the State Board seeking dismissal of the appeal on the grounds that the State Board lacks the jurisdiction to decide it. The Board argues that a challenge such as the one involved here must first be made to the Commissioner. In support of its position, the Board points to the equivalency and

waiver regulations, which include the provision that "[a] school district may appeal a decision for an equivalency and waiver decision in accordance with the provisions in N.J.A.C. 6A:3." The Board also argues that requiring a party to appeal first to the Commissioner is consistent with the State Board's decision in Linda Peters v. Board of Education of the Pinelands Regional School District and Leo F. Klagholz, Commissioner, decided by the State Board of Education, April 1, 1998.

With respect to the substantive issues raised by this appeal, the Board argues that the equivalency should be sustained because the Board sought "to address program needs as opposed to individual needs." Board's brief, at 12. The Board further contends that the equivalency is valid because, although comprehensive support services are ordinarily provided by individuals possessing student personnel certification, a school psychologist is required to complete similar and more rigorous courses than a guidance counselor.

In her brief on behalf of the Commissioner, the Deputy Attorney General argues that the equivalency should be sustained because it was not sought as a waiver of certification requirements for a specific position, but rather to permit the Board to substitute "one type of certificated position to perform the duties of another to better carry out the objectives of the District's alternate school program." Brief on behalf of the Commissioner, at 11.

Initially, we deny the Board's motion to dismiss. As the final decision of the Commissioner of Education with respect to the equivalency or waiver, an appeal from a determination by the Commissioner to grant or deny such equivalency or waiver is properly made to the State Board of Education. This is consistent with both the

statutory and regulatory schemes governing appeals to the State Board, N.J.S.A. 18A:6-27 and N.J.S.A. 18A:6-28; N.J.A.C. 6A:4-1.1(a), and with our decisions in Guttenberg, supra, and Middletown, supra. In this respect, we stress that Peters, supra, which was properly initiated as a controverted case before the Commissioner, involved a challenge by a tenured teaching staff member to the action of a district board to reduce her employment on the grounds that the district board's action was in violation of her tenure and seniority rights. In contrast, the instant appeal is a facial challenge to the grant of a waiver or equivalency by the Commissioner, as were the appeals in Guttenberg and Middletown. While we recognize that an inadvertent change in citation occurred when we readopted the equivalency and waiver regulations effective July 3, 2000, and that such change has caused some confusion, the change was made in error and it was not our intention to alter either the appeals process or our jurisdiction over appeals from determinations made by the Commissioner.[1]

We now turn to the substance of the appeal. As set forth above, the equivalency in this case permits the Board to employ an individual possessing certification as a school psychologist to provide comprehensive support services ordinarily provided by a guidance counselor. However, N.J.A.C. 6:11-11.11 of the certification rules requires that an individual possess student personnel services certification in order to be authorized to provide such services. That being the case, the equivalency involved here permits the Board to employ an individual to serve in a position for which he is not

[1] The change in citation was from N.J.A.C. 6:2 (now recodified as N.J.A.C. 6A:4) (appeals to the State Board) to N.J.A.C. 6A:3 (Controversies and disputes). The change occurred subsequent to publication of the proposed rules for equivalencies and waivers and was made as a technical change upon adoption. See 32 N.J.R. 1328 and 32 N.J.R. 2470. We are currently proposing an amendment to the rules to correct the error.

appropriately certified. There is no other way to view this but as a waiver of the certification rules.

In this respect, we reject the distinction that the Board and the Deputy Attorney General representing the Commissioner attempt to make between "individual needs" and "program needs." While the Board may have been motivated by a desire to implement a specific program design for its alternate school when it applied for the equivalency, rather than by a desire to employ a particular individual who does not possess appropriate certification to provide the services at issue, the effect is the same. Regardless of the Board's reason for seeking this equivalency, its grant by the Commissioner operates to waive the certification rules in contravention of N.J.A.C. 6A:5-1.3(a)(1)(i) and our decisions in Guttenberg and Middletown.

Nor can such waiver be justified by the fact that more graduate work is required in order to obtain certification as a school psychologist than is required to obtain certification as a guidance counselor. Further, it is of no moment in this context that the preparation for serving as a school psychologist is rigorous. The fact of the matter is that the services provided by a school psychologist are not the same as those provided by a guidance counselor. This is reflected both by the fact that separate and distinct endorsements are required for service in these capacities and, most significantly, that the preparation required in order to obtain these endorsements is quite different. Compare N.J.A.C. 6:11-11.11 with N.J.A.C. 6:11-11.12.

We again repeat that:

> Certification requirements establish the threshold qualifications for teaching staff members employed in the public school system throughout the state. N.J.S.A. 18A:1-1; N.J.S.A. 18A:26-2. As such, and under the current statutory

> framework embodied in Title 18A, the certification process is critical to assuring the provision of a thorough and efficient education. [Hence], an equivalency or waiver cannot properly be granted under N.J.A.C. 6:3A-1.1 et seq. when the provision of a thorough and efficient education might be compromised. Commissioner's Brief, at 4. Since certification requirements are at the core of the current structure governing the delivery of all education programs under our jurisdiction, setting aside the standards embodied in our certification rules necessarily risks such a compromise.
>
> It was not our intention to create such a risk when we adopted N.J.A.C. 6:3A-1.1 et seq.

Middletown, supra, slip op. at 4, quoting Guttenberg, supra, slip op. at 7.

This is no less true for positions involving the provision of educational support services than for instructional positions. Not only is the character of positions that involve the provision of educational services such that appropriate certification is required in order to be qualified to provide these services, N.J.S.A. 18A:1-1, but such services are essential to the success of the education programs provided by our public schools. See Abbott v. Burke, 119 N.J. 287 (1990) (subsequent history omitted).

Therefore, for the reasons stated, we invalidate the equivalency that was granted by the Commissioner in this case.

August 1, 2001

Date of mailing AUG 03 2001

SB 14-01

SB # 14-01

IN THE MATTER OF THE NONRENEWAL OF :
THE CHARTER OF THE SAMUEL DE WITT :
PROCTOR ACADEMY CHARTER SCHOOL, :
MERCER COUNTY. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, May 1, 2001

For the Appellant, Lori M. McNeely, Esq.

For the Participant Commissioner of Education, Kathleen Asher, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

The Samuel DeWitt Proctor Academy Charter School (hereinafter "appellant") filed an appeal to the State Board of Education from a letter decision of the Commissioner of Education dated May 1, 2001, in which he determined that the charter for the school, which was due to expire on June 30, 2001, would not be renewed for an additional five-year period. See N.J.S.A. 18A:36A-17; N.J.A.C. 6A:11-2.3(b). Observing that the school had been placed on probationary status in February 2001 as the result of the "need to implement significant modifications to its academic program," the Commissioner found that "reasonable progress has not been made in meeting the school's academic goals and fulfilling the terms and provisions of the charter." Commissioner's Decision, slip op. at 2. He pointed out that:

> In the goals and objectives of the charter, the school indicated that it would provide a rigorous college preparatory

> program resulting in high academic achievement. However, throughout its four-year tenure, the school has not made reasonable progress in meeting this provision of its charter. In addition, the school has had consistent difficulty in sustaining a suitable academic environment to promote high academic achievement.

Id. at 1.

The Commissioner identified the following deficiencies as impacting his decision to deny the school's renewal request:

> The school's enrollment has not been stable as evidenced by the fact that the school is under-subscribed and has experienced increasingly high numbers of student withdrawals. Thus far this academic year, 46 students have withdrawn. While approved to serve 136 students, the school is currently serving 101 students.
>
> Since the school's inception, there have been seven (7) interim or appointed heads of school contributing to instability in school governance and instructional leadership. This year alone the school has had three (3) interim heads of school.
>
> High School Proficiency Test (HSPT) results indicate that less than 50 percent of the students taking the HSPT administered in October 2000 passed the reading and mathematics sections.
>
> In the absence of the March 31 submission of a revised budget reflecting the decreased revenue due to decreased student enrollment, the department could not make a determination about the school's fiscal solvency.
>
> The Board of Trustees has failed to implement an accountability plan that provides adequate means to demonstrate academic progress.

Id. at 2.

Consequently, the Commissioner directed the school to cease operations on June 30, 2001.

On June 18, 2001, the appellant filed a brief in support of its appeal. On June 29, a Deputy Attorney General filed a motion to participate on behalf of the Commissioner and an answer brief on the merits of the appeal. The appellant did not oppose the motion.

Initially, we grant the Commissioner's motion to participate and have considered his answer brief in reviewing this matter.

After a thorough review of the entire record, we affirm the Commissioner's decision.

Initially, we stress that there is nothing in the statutory scheme that would preclude the Commissioner from denying a charter school's renewal application at the expiration of a probationary period.[1] Indeed, neither the statute nor the implementing regulations require the Commissioner to provide a charter school with a probationary period before he denies its renewal request. See N.J.S.A. 18A:36A-17; N.J.A.C. 6A:11-2.3 and 6A:11-2.4. Rather, N.J.A.C. 6A:11-2.3(b) requires that the Commissioner base his determination as to whether to grant or deny a renewal application on a "comprehensive review of the school."

The record reveals that the Commissioner did perform such a review. Staff from the Department of Education conducted a site visit to the school and an interview session in January 2001 to review the evidence of academic progress presented in the school's renewal application. Thereafter, on February 1, citing serious concerns about the school's record of student achievement, the Commissioner placed the school on

---

[1] We note in that regard that the Commissioner is authorized to summarily revoke a school's charter if a remedial plan developed during a probationary period is unsuccessful. N.J.S.A. 18A:36A-17.

probationary status for 90 days to allow for the development and implementation of a remedial plan.

On February 20, the school submitted a remedial plan, and, after the Department requested greater specificity, the school submitted an amended plan on March 20. Department staff reviewed the plans, conducted telephone conferences and on-site reviews to discuss the specific actions the school had taken to improve its academic program and to increase student achievement results. In his decision of May 1, 2001, the Commissioner acknowledged that "concerted efforts" had been made by the school's Board of Trustees and administrative staff to address the substantive issues affecting the school's performance, but he concluded that "reasonable progress had not been made in meeting the school's academic goals and fulfilling the terms and provisions of the charter." Commissioner's Decision, slip op. at 2.

Our own review of the record confirms the deficiencies cited by the Commissioner and substantiates the seriousness of those deficiencies. The school's charter application, which was approved by the Commissioner in 1997 as a residential program for grades seven through twelve,[2] pledged that the school's "hallmark will be its high expectation of academic excellence." However, a report prepared on January 30, 2001 by Department staff following a site visit rated the school's academic program inadequate in virtually every category. Those problems persisted even after the school was placed on probation and implemented a remedial plan. A report prepared on April

---

[2] We note that the school applied for and was granted an amendment to its charter in 1999 reducing its residential program from seven days per week to five. The school subsequently applied for an amendment to end the residential program entirely for seventh and eighth grade students, indicating that it could not continue to provide this program due to facility limitations and insufficient residential staff to ensure the safety of all students. The Commissioner approved that amendment on December 13, 2000.

16, 2001 by the director of the Department's Office of Charter Schools following a site visit to assess the school's progress in implementing the remedial plan exemplifies its failings in this regard. The report related that students' Individual Learning Plans reflected no learning strategies and no guidance for remediation efforts, that assessment measures lacked clear alignment with curriculum, that remediation efforts had no clear alignment to the core curriculum content standards, that there was a lack of feedback to guide students' work and an absence of clear and objective writing rubrics to guide the evaluation of student progress, that curriculum development for math and language arts had been minimal, that there were only five hours of instructional time per day (below the statewide average for charter and traditional schools), that an observed teacher had only a county substitute certificate and was not offered the opportunity to participate in the provisional teacher training program although he held a certificate of eligibility, that summer school course offerings and criteria had yet to be articulated, and that 46 students had withdrawn from the school since September 2000.

Particularly striking is the appellant's response to the Commissioner's charge that there had been seven heads of the school during its four years of existence. The appellant, in its defense, insists that it has had six, not seven, heads of the school in four years and that the last three were part of a management team rather than a succession of different people. Even accepting the appellant's "head count," such instability in educational leadership during the school's formative years is particularly troubling given the academic deficiencies identified in the record.

Thus, we reject the appellant's contention that its charter should have been renewed in light of its remedial plan.

We also reject the appellant's argument that it received disparate treatment and that the Commissioner created an impermissible classification which discriminated against students and charter schools in Abbott districts. There is absolutely no basis in the record for such an allegation. Nor does the Commissioner's decision "send a message that under-performing communities may be denied the opportunity to have charter schools" and that "this denial deprives the students of these communities of their rights to a thorough and efficient education." Appeal Brief, at 27. To the contrary, we find that the Commissioner's action was based on well-documented deficiencies at this particular school, and, upon review of the record, we conclude that such deficiencies created an environment which belied any expectation of academic excellence.

Accordingly, given the nature and severity of the deficiencies demonstrated by the record, we conclude that the Commissioner's decision to deny the school's renewal application was the appropriate one, and we affirm that determination.[3]

August 1, 2001

Date of mailing AUG 03 2001

[3] We note that the Commissioner's decision was, under the circumstances, tantamount to a revocation of the school's charter. Revocation, however, was not necessary in this instance since the charter was due to expire on June 30, 2001 at the end of its initial four-year term.

11-01

NADINE SKIPWITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SEP 28 2000

OAL DKT. NO. EDU 01781-99
AGENCY DKT. NO. 481-10/98

NADINE SKIPWITH,	:	
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: SEP 28 2000

Date of Mailing: JAN 9 2001

(SB) 11-01

SB #11-01

IN THE MATTER OF THE DENIAL OF THE CHARTER SCHOOL APPLICATION OF THE IBRAHIM CHARTER SCHOOL, PASSAIC COUNTY.	:	STATE BOARD OF EDUCATION DECISION

Decided by the Commissioner of Education, January 11, 2001

For the Appellant, Dr. Syed Mohd. Tariq Shuaib, pro se

By letter dated January 11, 2001, the Commissioner of Education notified the proposed Ibrahim Charter School that he had denied its application to operate a charter school in the 2001-2002 academic year.

On February 28, 2001, Dr. Syed Mohd. Tariq Shuaib (hereinafter "appellant"), a "representative" of the proposed school, filed a notice of appeal with the State Board of Education from the Commissioner's determination. By letter dated March 7, the Director of the State Board Appeals Office ("Director") acknowledged receipt of the notice of appeal and advised the appellant that his notice was deficient in that he had failed to attach a copy of the decision being appealed or a certification evidencing that he had served the notice of appeal on all interested parties. He was given until March 19 to correct these deficiencies.

On March 20, 2001, the appellant filed a brief in support of his appeal, along with a copy of the Commissioner's January 11 letter decision denying the proposed school's application and a certification of service of the notice of appeal and brief.

On April 19, the Commissioner filed a motion to participate in the appeal, along with a substantive brief in response to the appellant's appeal brief. In that brief, the Deputy Attorney General ("DAG") representing the Commissioner argued that the Commissioner had acted within his authority in denying the proposed school's application. She also contended that the appellant's notice of appeal had not been filed in a timely manner.

By letter dated May 7, 2001, the Director notified the appellant that review of the papers filed in this matter indicated that the notice of appeal had been filed beyond the thirty-day statutory time limitation set forth in N.J.S.A. 18A:6-28. She advised him that the matter was being referred to the Legal Committee of the State Board for consideration of the effect of his failure to file a timely notice of appeal. He was further informed that he could submit an affidavit setting forth the circumstances of his late filing by May 18.

By letter dated May 7 and faxed on that date, the appellant submitted a letter in response to the substantive brief filed with the Commissioner's motion to participate. In an apparent reference to the Commissioner's contention that the appeal was untimely, the appellant expresses his "hope" that the DAG "is not looking at the previous application..." which the proposed school had submitted for the 2000-2001 academic year. He also states in that regard: "I believe the letter dated 1/11/01 appealing to the commissioner of education triggers the appeals process. Therefore, DAG, Kathleen Asher [sic] argument that it was not filed timely is vague." This represents the only

reference made by the appellant to the issue of the timeliness of his appeal. He has not filed an affidavit or otherwise provided an explanation for his late filing.

Pursuant to N.J.S.A. 18A:6-28, appeals to the State Board must be taken "within 30 days after the decision appealed from is filed." The State Board may not grant extensions to enlarge the time specified for appeal. N.J.A.C. 6A:4-1.5(a). In contrast to the period for filing petitions to the Commissioner of Education, see N.J.A.C. 6A:3-1.3(d); N.J.A.C. 6A:3-1.16, the time limit within which an appeal must be taken to the State Board is statutory, and, given the jurisdictional nature of the statutory time limit, the State Board lacks the authority to extend it. Mount Pleasant-Blythedale Union Free School District v. New Jersey Department of Education, Docket #A-2180-89T1 (App. Div. 1990), slip op. at 5. The Appellate Division has "consistently concluded" that appeals must be timely filed and that "neither an agency nor our court on appeal may expand a mandatory statutory time limitation." In the Matter of the Special Election of the Northern Burlington County Regional School District, Docket #A-1743-95T5 (App. Div. 1996), slip op. at 3, citing Scrudato v. Mascot Sav. & Loan Ass'n, 50 N.J. Super. 264 (App. Div. 1958).

In Yorke v. Board of Education of the Township of Piscataway, decided by the State Board of Education, July 6, 1988, aff'd, Docket #A-5912-87T1 (App. Div. 1989), the Court upheld the dismissal of an appeal by the State Board where it found that the notice of appeal had been filed one day late by the appellant's counsel, who alleged that he had misread or misunderstood the applicable regulations. The Court added that even if the statute could be construed to permit enlargement of the time for filing an appeal, the appellant therein had failed to establish good cause. See also In the Matter

of the Grant of the Charter School Application of the International Charter School of Trenton, etc., Docket #A-004932-97T1 (App. Div. 1998) (the Court, upon reconsideration, upheld the State Board's dismissal of an appeal filed one day late).

In the instant case, the Commissioner's decision to deny the proposed charter school's application was issued on January 11, 2001 and mailed to the appellant on that date. Accordingly, pursuant to N.J.A.C. 6A:4-1.4, the decision appealed from was deemed filed on January 14, 2001, three days after it was mailed. Therefore, as mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6A:4-1.3(a); N.J.A.C. 6A:4-1.4(a), as computed under N.J.A.C. 6A:4-1.4(c), the appellant was required to file his notice of appeal with the State Board on or before February 13, 2001. As previously indicated, the appellant's notice of appeal was not filed until February 28, more than two weeks after the statutory deadline.

Even if N.J.S.A. 18A:6-28 can be construed to provide us with the authority to enlarge the time limit for filing an appeal, we find no substantive basis to warrant doing so in this instance. The appellant has provided no explanation for his late filing, despite being given the opportunity to do so, and we find nothing in the record that would justify such enlargement. We stress in that regard that our determination with regard to the timeliness of the appellant's notice of appeal is based entirely on the proposed school's application for the 2001-2002 year and the Commissioner's letter decision of January 11, 2001 denying that application.

Accordingly, we dismiss the appeal in this matter for failure to file notice thereof within the statutory time limit as computed under the applicable regulations. In so

doing, we deny the Commissioner's motion to participate as unnecessary under the circumstances.

June 6, 2001

Date of mailing JUN 08 2001

12-01

MARY ANN PINTO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SEP 28 2000

OAL DKT. NO. EDU 04813-99
AGENCY DKT. NO.102-5/99

MARY ANN PINTO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, 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: SEP 28 2000

Date of Mailing: JAN 9 2001

13-01

13-01

RENARD NEAL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY	:	DECISION
RESPONDENT.	:	
_____	:	

SEP 2 8 2000

OAL DKT. NO. EDU 04144-99
AGENCY DKT. NO. 91-4/99

RENARD NEAL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, 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: SEP 28 2000

Date of Mailing: JAN 9 2001

14-01

J.M., Sr., individually and on behalf of minor son, J.M. Jr.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY AND JORGE PRADO, PRINCIPAL,	:	DECISION
RESPONDENTS.	:	
	:	

SEP 28 2000

OAL DKT. NO. EDU 5524-98
AGENCY DKT. NO. 95-4/98

J.M., Sr., individually and on behalf of minor son, J.M. Jr.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY AND JORGE PRADO, PRINCIPAL,	:	DECISION
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.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: SEP 28 2000

Date of Mailing: JAN 9 2001

15-01

S.E. AND J.M., on behalf of minor child, S.T.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEYMOUTH, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SEP 2 8 2000

OAL DKT. NO. EDU 534-00
AGENCY DKT. NO. 49-2/00

S.E. AND J.M., on behalf of minor child, S.T.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEYMOUTH, ATLANTIC 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: SEP 28 2000

Date of Mailing: JAN 9 2001

(SB) 15-01

SB # 15-01

IN THE MATTER OF THE REVOCATION :
OF THE CHARTER OF THE GREENVILLE :
COMMUNITY CHARTER SCHOOL, :
HUDSON COUNTY. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, April 11, 2001

Decision on motion by the Assistant Commissioner of Education, June 25, 2001

Decision on motion by the State Board of Education, June 27, 2001

For the Appellant, Carpenter, Bennett & Morrissey (Stephen F. Payerle, Esq., of Counsel)

For the Participant Commissioner of Education, Allison Colsey Eck, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

This is an appeal by the Greenville Community Charter School from a determination made by the Commissioner of Education on April 11, 2001 to revoke the School's charter effective June 30, 2001. As set forth in the Commissioner's letter decision, his determination resulted from the School's repeated problems in maintaining a suitable educational facility and its failure to resolve issues related to the School's governance structure and the certification of instructional staff despite repeated directives from the Department of Education. The Commissioner's determination was also based on the results of the program review conducted by Department of Education staff, which revealed that the School had violated provisions of its charter and was not

operating in accordance with State statutes and regulations. In addition, the deficiencies cited by Department staff on the basis of site visits conducted a month after the program review led the Commissioner to conclude that there was no reasonable prospect that the School's Board of Trustees would be able to correct the School's deficiencies even if it were afforded a probationary period.

The Charter School appealed to the State Board of Education, seeking reversal of the Commissioner's determination and the establishment of a limited probationary period to allow the Board of Trustees to address and correct its deficiencies. It also moved to correct the record to reflect that a draft letter dated April 6, 2001 from Anne O'Dea, which was included in the record certified to the State Board as Item 16 under "Correspondence," had never been sent. In addition, the School sought to supplement the record on appeal with various certifications and documents relating to the deficiencies identified by the Commissioner in his April 11 decision and the efforts to correct its deficiencies that have been made by the School since the program review was conducted on March 7, 2001.

By motion filed on July 3, 2001, the Commissioner applied for leave to participate in the matter. The Charter School did not oppose such participation but, on July 16, 2001, filed a letter brief in response to that filed on behalf of the Commissioner.

Initially, we grant leave to the Commissioner to participate in this appeal and, in deciding the matter, have considered both the brief filed on his behalf and the Charter School's response. We also direct correction of the Statement of Items Comprising the Record to reflect that the draft letter listed as Item 16 under "Correspondence" was never sent. Additionally, we grant the Charter School's motion to supplement the record

and have considered the documents and certifications included in the appendix to its appeal brief in making our determination.

Based on exhaustive review of the entire record, we affirm the Commissioner's decision of April 11, 2001. The record before us fully documents the deficiencies cited by the Commissioner and substantiates the seriousness of those deficiencies. Most striking are the ongoing failures of the School to provide an adequate and safe educational facility for the children attending the School, to correct its governance structure to conform to the requirements of law, to secure teaching staff members who possess standard certification appropriate to their assignments, to develop an adequate curriculum that, as their charter application promised, incorporates the core curriculum content standards, or to develop and implement an effective discipline policy. In point of fact, the School does not deny that such deficiencies exist, but rather focuses its appeal on its ability to correct any deficiencies in a reasonable period as demonstrated by its efforts since the March 7 program review.

We reject the School's contention that it can remedy the deficiencies documented by the record before us in a "reasonable" period of time. Nor, under the circumstances, should it be afforded such additional time to attempt to remedy them. In this respect, we cannot ignore that the deficiencies that have been identified are serious and that they are not limited to just one area. In fact, given the nature and gravity of the School's deficiencies over a prolonged period of time, assessment of its efforts at remediation leads inevitably to the conclusion that they have been woefully inadequate. Not only have the fundamental deficiencies of this School persisted, but the record, including the supplemental materials, shows that the School has failed to acknowledge

or comprehend the scope and depth of its problems or their educational implications so as to be able to approach its problems proactively and comprehensively. To the contrary, the "improvements" to which the School has pointed in this appeal well illustrate that the School does not yet understand the import of its failures.

For example, the School argues that it has demonstrated a reasonable prospect of correcting its deficiencies in staff certification since the Commissioner's determination of April 11, 2001. However, although the School represents that four individuals who taught at the School this past year are at varying stages in pursuing standard certification, the fact remains that only one of its teachers possesses standard certification appropriate to her assignment. Moreover, the School does not appear to recognize even at this point that neither a county substitute certificate nor a Certificate of Eligibility, even with Advanced Standing, is appropriate certification to teach in New Jersey or that a submitting an "application for the emergency hiring" of a registered nurse does not render that individual a Certified School Nurse. See Certifications of Marissa Klein, Nasheca Roberts, Terri Fuchs, Sikirat Alli, Kathleen Ryan, and Bibiana Thomas, Appendix, Volume II, Pa 375-386.

Given the nature and severity of the deficiencies demonstrated by the record, the Commissioner followed the appropriate course in revoking the charter of the Greenville Community Charter School. To have done otherwise in these circumstances would have been to ignore his obligations to ensure the health and safety of New Jersey's school children and to ensure that those attending the Greenville Community Charter School are provided with a thorough and efficient education. In this regard we stress that in addition to the areas cited by the Commissioner, this School has failed to fulfill

the commitments that it made in its charter application, including its promise to provide each student with an individualized learning plan, and has provided no evidence of increased student performance under any standardized method of measurement. To the contrary, the record reflects that the students were being taught below grade level.

In addition to the significant educational deficits demonstrated by this record, the School's ongoing facilities problems are particularly disturbing. Staff reports of site visits in April indicate ongoing problems regarding the structural soundness of the roof, that the facility was unsanitary, that a broken window in the Kindergarten classroom observed the previous October still had not been fixed, that cleaning products were stored in open boxes outside the students' bathrooms, that wet ceiling insulation was hanging from the ceiling, shelving units were not secured to the wall, the door leading to the electrical room was open, the wheels on the movable partition panels in the Kindergarten section of the main room did not lock. The site visits further revealed an undisciplined and chaotic environment, that there was a total lack of control over the students, and that no learning was taking place. Given this record, it would have been irresponsible for the Commissioner to permit this school to continue to operate.

We reject the School's contention that it should have been provided a probationary period to correct its deficiencies. As previously stated, this record demonstrates severe and ongoing deficits in almost every area. The import of some of the School's deficiencies, particularly those relating to the facility, are obvious and should have been immediately corrected by the School without the necessity of intervention by the Department. Nonetheless, the record documents that from the School's inception, the Department continuously notified the School of those areas in

which there were issues that it needed to resolve, including its governance structure, staff certification, and facilities. To now argue that more time should be afforded to the School to allow it to address its failures in these same areas is disingenuous.

Nor does the law require that a probationary period be afforded to a charter school before revoking its charter. As the Deputy Attorney General representing the Commissioner points out, N.J.S.A. 18A:36A-17 and N.J.A.C. 6A:11-2.4 provide that the Commissioner may place a charter school on probation but do not require that he do so. As indicated, given the circumstances here, we fully concur with the Commissioner's determination not to provide a probationary period in this case.

We also reject the contention that N.J.S.A. 18A:36A-17.1 requires that the Commissioner's determination be set aside. That statutory provision requires that the Commissioner notify the board of trustees or the applicant when he determines that a board of trustees is in jeopardy of losing its charter and requires the board of trustees or the applicant to provide to the Commissioner a complete written list of the names and addresses of all students and staff within forty-eight hours of such notification "so the commissioner may send the appropriate notice to the parents or guardians and staff." N.J.S.A. 18A:36A-17.1. This provision was enacted by the Legislature in response to a conditional veto by the Governor of Assembly Bill 1344, which was an amendment to P.L. 1995, c. 426 relating to the funding and evaluation of charter schools. In his conditional veto, the Governor recommended that because of the vital role played by parents and staff, "the bill [should] specifically authorize the commissioner to direct ...charter schools...to provide him with a list of names and addresses of students and

staff to ensure that these individuals may be promptly notified of a change in the status of an existing charter school...."

As reflected by the terms of the statute, the intent of N.J.S.A. 18A:36A-17.1 is to ensure that parents and staff are promptly notified of a change in status, and the statutory provision does not confer any rights on the charter school that is the subject of such change. Hence, although the Commissioner did not notify the Greenville Community Charter School of the change in its status before revoking its charter, his failure to strictly comply with the terms of N.J.S.A. 18A:36A-17.1 does not provide any basis to set aside his determination in this case.[1]

In summary, the record before us clearly and unambiguously shows an educational failure in the extreme and demonstrates that the Board of Trustees of the Greenville Community Charter School has failed since its inception to comply with the requirements of New Jersey law and of its own charter. We find that the School's failure has been persistent and ongoing despite consistent notification by the Department during the two years of the School's operation. Given these circumstances and the nature and gravity of the School's deficiencies, we conclude that the Commissioner's determination to revoke its charter was the appropriate one, and we therefore affirm that determination.

August 1, 2001

AUG 03 2001

Date of mailing _____

[1] We note that in his letter decision of April 11, 2001, the Commissioner did direct the School to submit to him a list of all parents and staff so that he could comply with the statute's mandate that he promptly notify them of the change in the School's status. We further note that there is no indication that he failed to fulfill his obligation to do so.

17-01

EDU # 8784-99
C # 17-01
SB # 5-01

ROBERT BARRATT,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF GLASSBORO, GLOUCESTER COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, January 11, 2001

For the Petitioner-Appellant, Selikoff & Cohen (Steven R. Cohen, Esq., of Counsel)

For the Respondent-Respondent, Capehart & Scatchard, P.A. (Kim C. Belin, Esq., of Counsel)

The decision of the Commissioner of Education remanding this matter to the Office of Administrative Law for further proceedings is affirmed for the reasons expressed therein. In so doing, we deny the Glassboro Board's motion to supplement the record on appeal. N.J.A.C. 6A:4-1.9(b). Consequently, in determining this matter, we have disregarded the documents appended to the Board's answer brief which are not included in the record, along with all references to such materials in its brief. We note that, to the extent that the information contained in those documents may be relevant to the issues encompassed within the remand of this matter, our decision does

not preclude the Board from seeking to introduce such materials into the record during the proceedings on remand. N.J.A.C. 1:1-15.1 et seq.

We also deny the petitioner's request for oral argument as not necessary for a fair determination of this matter. N.J.A.C. 6A:4-3.2.

June 6, 2001

Date of mailing JUN 08 2001

(SB) 15-01

State of New Jersey

STATE BOARD OF EDUCATION
DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

VITO A. GAGLIARDI, SR.
Commissioner

MAUD DAHME
President

June 27, 2001

Stephen F. Payerle, Esq.
Carpenter, Bennett & Morrissey
Three Gateway Center
100 Mulberry Street
Newark, NJ 07102-4079

Re: IN THE MATTER OF THE REVOCATION OF THE CHARTER OF THE GREENVILLE COMMUNITY CHARTER SCHOOL, STATE BOARD DOCKET #15-01

Dear Mr. Payerle:

On April 11, 2001, the Commissioner of Education notified the Board of Trustees of the Greenville Community Charter School that because the School was not operating in compliance with its charter, statutes and regulations, he was revoking the School's charter effective June 30, 2001.

On May 14, 2001, counsel for the Board of Trustees filed a notice of appeal to the State Board of Education. That appeal is currently pending before the State Board.

On May 23, 2001, counsel filed a motion nunc pro tunc with the Commissioner of Education seeking a stay of his April 11 determination. While that motion was pending, counsel filed an application for emergent relief with the State Board seeking to stay the Commissioner's determination.

By letter decision of June 25, 2001, an Assistant Commissioner acting on behalf of the Commissioner pursuant to N.J.S.A. 18A:4-22(d) declined to stay the Commissioner's decision, finding that the Board of Trustees had not shown that it was likely to prevail on the merits of its appeal to the State Board. The Assistant Commissioner noted that the Board of Trustees does not dispute the cumulative findings that led to the revocation of the charter and stressed that students, parents and staff had been on notice of the revocation since April 11, 2001. Given the

circumstances, the Assistant Commissioner could not find that students, parents and staff would suffer greater harm from the necessity of making alternative arrangements for the next school year than they would from remaining in a school that has been seriously and persistently deficient and which would continue to face likely closure.

By facsimile transmission of June 25, counsel for the Board of Trustees indicated to us that the Board of Trustees is continuing to pursue its application to the State Board for emergent relief. As set forth in its moving papers, the Board of Trustees is arguing that a stay of the revocation should be granted because the School has made progress in correcting its deficiencies since the on-site visit by Department of Education staff on March 7, 2001. The Board of Trustees contends that this progress demonstrates a reasonable likelihood that, if given a chance, the School will be able to correct its deficiencies.

After careful review of the moving papers, we find that the Board of Trustees has failed to demonstrate that it is entitled to emergent relief under the standard set forth in Crowe v. De Gioia, 90 N.J. 126 (1982).[1]

The Commissioner's determination of April 11, 2001 indicates that the March 7 on-site visit was not the first visit to the Greenville Community Charter School and that the School's problems persisted despite site visits on June 28 and October 20, 2000. As set forth in the Assistant Commissioner's decision, as well as in the Commissioner's April 11 determination, the School's deficiencies were in the areas of educational programming, staff certification, the provision of required health services, and the maintenance of student records. Significantly, the Commissioner's April 11 decision specifies that the school had not made reasonable progress in developing its curriculum and had failed to provide statutorily-required course work. As the Assistant Commissioner observed, the Board of Trustees does not dispute these findings. Nor does it argue that it has corrected the deficiencies at this point. Rather, by its application, it is seeking additional time to address them.

We concur with the Assistant Commissioner that the Board of Trustees has not demonstrated the likelihood that it will prevail in its appeal. Moreover, the brief submitted in support of the Trustees' application for emergent relief indicates that, even at this point, only one of the School's five teachers possesses standard certification and its curriculum is not yet developed. Permitting the School to continue to operate while its appeal is pending would delay the necessity for students, parents and staff to make other arrangements for the upcoming school year. Under the circumstances, this would create an unacceptable risk of harm, especially to the students. We find that the harm to the students, parents and staff if we were to grant a stay is of such character as to far outweigh any harm to the Board of Trustees that might result from our denial of a stay.

---

[1] Pursuant to N.J.A.C. 6A:4-3.3, "[t]he President of the State Board or, in the President's absence, the chairperson of the Legal Committee is authorized to decide on behalf of the State Board applications for emergency relief...unless the determination would constitute the final decision with respect to the controversy."

Accordingly, for the reasons stated, we deny the application for emergent relief.

Sincerely,

Maud Dahme, President
State Board of Education

Ronald K. Butcher, Chairperson
Legal Committee of the State Board

c: Members, State Board of Education
Robert Osak
Audrey Kerrigan
Michelle Miller
Roslynne Novack

17-01

ROBERT BARRATT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF GLASSBORO, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner claimed tenure entitlement to the position of Athletic Director (AD). The Board had reassigned his duties as AD to another teaching staff member holding the newly created position of "Vice Principal-Student Activities/Athletics" for the 1999-2000 school year.

The ALJ determined that the Board took no official action to abolish the AD position, to articulate reasons for its action or to establish a preferred eligibility list. Thus, the ALJ concluded that when the Board summarily reassigned all of petitioner's duties to another individual, petitioner clearly held tenure in the AD position and his tenure rights were violated. The ALJ ordered that the Board provide petitioner back pay and benefits associated with the AD position from July 1, 1999 until such time as it may abolish his position in accordance with the requirements of the statutes. (Petitioner did not seek appointment to the newly created Vice Principal position effective July 1, 1999 as he did not hold the New Jersey Administrative Certificate required.)

The Commissioner reversed the ALJ's determination that petitioner clearly held tenure in the AD position because he served under his instructional certificate and any tenure protections flowing from petitioner's AD assignment attached to his tenured position as teacher. (*N.J.S.A.* 18A:26-2.2; *Grosso*; *Elllicott*) The Commissioner found that the Board could assign petitioner to any instructional/teacher position within the scope of his certificate and not violate his tenure rights, so long as he did not suffer a reduction in salary. (*Carpenito*) The Commissioner found that the Initial Decision did not address the Board's claim that the AD position was an extracurricular, stipended assignment and that the record was void of any specific information about petitioner's actual work day or the details of his salary/compensation. No tenure protections flow from extracurricular positions. Therefore, the Commissioner remanded this matter to the OAL in order that the record may be supplemented with respect to whether or not the AD position was an extracurricular assignment or a salaried position and a determination made as to the applicability of *Connor* and/or *Reinhardt.* Accordingly, the matter was remanded for further proceedings on the issue of whether or not the Board violated petitioner's tenure rights by its action assigning him to a position within the scope of his certification for the 1999-2000 school year.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 8784-99

AGENCY DKT. NO. 260-8/99

ROBERT BARRATT,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF GLASSBORO, GLOUCESTER COUNTY,

Respondent.

Carol H. Alling, Esq., for petitioner (Selikoff & Cohen, attorneys)

Kim C. Belin, Esq., for respondent (Capehart & Scatchard, attorneys)

Record Closed: July 14, 2000 Decided: November 27, 2000*

This matter commenced on August 24, 1999, when Robert Barratt (hereinafter petitioner) filed a petition of appeal with the Commissioner of Education seeking a determination that the Board of Education of the Borough of Glassboro (hereinafter respondent) had violated his tenure rights by reassigning his duties as Athletic Director to another teaching staff member. An answer and affirmative defenses were filed on behalf of respondent on October 5, 1999, and on October

---

* Extensions of time for issuing the initial decision were requested and granted pursuant to *N.J.S.A.* 52:14B-10(c).

27, 1999, 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 January 19, 2000, at which time the following were identified as the issues for determination:

1. Did petitioner have tenure rights to the position Athletic Director?

2. If the answer to the previous question is yes, did respondent's action assigning the duties of Athletic Director to Donna Covely violate such tenure rights?

3. If the answers to questions 1 and 2 are yes, what are the appropriate remedies?

The prehearing order which was entered on February 29, 2000, provided for the filing of cross-motions for summary decision. Petitioner filed a motion and supporting papers on April 17, 2000. Respondent's reply and cross-motion for summary decision were filed on May 9, 2000. Petitioner filed a letter brief in opposition to respondent's motion on May 22, 2000. Oral argument on the cross-motions was conducted on July 14, 2000, whereupon the record closed.

FINDINGS OF FACT

The facts relevant to a determination of this matter are not in dispute and I therefore **FIND** the following as uncontested facts.

Petitioner commenced employment with respondent in 1974 as a teacher, assigned to teach mathematics. He holds an instructional certificate with endorsements in social studies and mathematics. In accordance with *N.J.S.A.* 18A:28-5, petitioner acquired tenure in the position teacher in 1979. From September 1980 through the end of the 1998-99 school year, petitioner also served as Athletic Director pursuant to a job description adopted by respondent August 1, 1979. That job description is attached hereto and made a part hereof as if set forth herein at length. Prior to 1991 "Athletic Director" was an unrecognized position title; there is no

indication in the within record that the attached job description was ever submitted to the county superintendent of schools as required by *N.J.A.C.* 6:11-3.3. During the course of petitioner's employment as Athletic Director, however, the Legislature enacted *N.J.S.A.* 18A:26-2.1 and 2.2, effective July 1, 1994. Those statutory provisions read:

18A:26-2.1:

Supervisory certificate required for appointment as director of athletics

> To be eligible for appointment as the director of athletics in any public secondary school an applicant shall possess a supervisory certificate issued by the State Board of Examiners.

18A:26-2.2:

Prospective application of L.1991, c. 17

> Notwithstanding the provisions of section I of this act, any individual who possesses a New Jersey teacher's certificate and who is employed as a director of athletics in a public high school prior to the effective date of this act may continue to be so employed.

Petitioner continued to be employed by respondent as Athletic Director through the conclusion of the 1998-99 school year. For the 1999-00 school year petitioner was not reappointed as Athletic Director. Rather, respondent appointed Donna L. Covely to the position "Vice Principal-Student Activities/Athletics" effective July 1, 1999. All of the duties of Athletic Director were transferred to Ms. Covely.* The position to which Ms. Covely is assigned requires a New Jersey Administrative Certificate. Petitioner does not hold the appropriate certificate.

---

* Ms. Covely was provided with notice of the within action and was advised of her right to intervene. She did not respond.

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 whether 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, the parties agree that there is no material fact in issue and accordingly, this matter is ripe for summary decision.

Notwithstanding the wording of the issues in the prehearing order quoted hereinabove, the only issue necessary for determination is whether petitioner had tenure in the position Athletic Director at the conclusion of the 1998-99 school year. It is undisputed that respondent took no official action to abolish the position Athletic Director for reasons of economy or for reasons of change in the administrative or supervisory organization of the district pursuant to *N.J.S.A.* 18:28-9 and that it did not take the consequent necessary actions prescribed in *N.J.S.A.* 18A:28-11 and 28-12. It is respondent's position that it was not required to effectuate a reduction in force with respect to the position Athletic Director because, it contends, petitioner never acquired tenure in the position.

As previously explained on numerous occasions, see, *e.g.*, *Howley and Bookholdt v. Ewing Bd. of Ed.*, 6 *N.J.A.R.* 509 (1982); *Connor v. Bd. of Ed. of Township of Cinnaminson*, 96 *N.J.A.R.* 2d (EDU) 861, tenure is a legislative status, not a contractual one, and in order to be protected by the status, a teaching staff member must have met the precise conditions articulated in the statute. In order to acquire tenure in any position in the public schools in any district, the teaching staff member must be a citizen of the United States (*N.J.S.A.* 18A:28-3), must hold an appropriate certificate for the position, issued by the State Board of Examiners, in full force and effect (*N.J.S.A.* 18A:28-4) and, pursuant to *N.J.S.A.* 18A: 28-5, must hold employment in the district for:

> (a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) the equivalent of more than three academic years within a period of any four consecutive academic years.

Prior to amendment in 1962, the tenure statute set forth only four tenure eligible positions, teacher, principal, assistant superintendent, and superintendent, and no rights of tenure

attached to any gradation within any one of those designations. *See*, *Lascari v. Board of Education of Borough of Lodi*, 36 *N.J. Super.* 426 (App. Div. 1955), wherein it was held that the position of vice-principal had no tenure, and, therefore, where the teacher, after serving as vice-principal, was transferred to regular teaching duties without loss of salary, he was not deprived of his tenure status which was merely that of a teacher. This was specifically changed by the 1962 amendment to the statute which provided in pertinent part:

> The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses. . . *and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners*. . . shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation. . . . (Emphasis added.)*

That tenure is acquired in a particular *position* is made clear by the effect of *N.J.S.A.* 18A:28-6, which was also part of the 1962 amendment, and 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 if fixed by the employing board for such purposes; 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;

---

* Further amendments were made to this statute in 1991 and 1996 but are not relevant to a determination of the issues herein. A 1999 amendment to the statute added "school athletic trainer" to the list of tenure eligible positions.

> provided that the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion.

Respondent's arguments herein focus on the time period prior to July 1994; respondent asserts that in the absence of a determination from the county superintendent of schools, pursuant to *N.J.A.C.* 6:11-3.3(b), that the position Athletic Director required the possession of an instructional certificate, respondent's own job description (attached hereto) requiring such a certificate does not elevate the position to that of a teaching staff member eligible for tenure, citing *Jennings v. Board of Ed. of Highland Park*, 89 *S.L.D.* 1097. All that occurred with respect to petitioner's position Athletic Director prior to 1994 is irrelevant, however, in regard to a resolution of the within matter. After 1994 the only person not holding a supervisor's endorsement (or one or the other supervisory endorsements on the administrative certificate) who could function as Athletic Director was someone, such as petitioner, who had held the position Athletic Director prior to July 1994. After July 1994 such a person was statutorily required to possess a standard New Jersey Instructional Certificate. Therefore, commencing with July 1994, petitioner, who held a standard New Jersey Instructional Certificate with endorsements as teacher of mathematics and teacher of social studies, served in a recognized position title continuously for five academic years. It is not necessary to determine, therefore, whether petitioner was required to serve two years and one day pursuant to *N.J.S.A.* 18A:28-6 or three years and one day pursuant to *N.J.S.A.* 18A:28-5, because in July 1999, when respondent summarily reassigned all of his duties to another teaching staff member, petitioner clearly held tenure in the position Athletic Director in respondent's district, and he was entitled to all of the protections which such tenure status provides. Respondent took no official action to abolish the position, to articulate reasons for its action or to establish a preferred eligibility list. For all of these reasons, petitioner is entitled to prevail herein as a matter of law. I **CONCLUDE** that his tenure rights were violated.

Petitioner does not seek appointment to the newly created position title currently held by Ms. Covely, which position requires an administrative certificate that petitioner does not possess and which includes numerous other duties in addition to those he had performed as Athletic Director. Until such time as respondent acts as required by statute to abolish the position Athletic Director for reasons of economy or efficiency or whatever legitimate reason it may articulate, petitioner is entitled to the salary and emoluments associated therewith.

For all of the foregoing reasons, petitioner's motion for summary decision is hereby **GRANTED.** Respondent's motion for summary decision is hereby **DENIED** and respondent is **ORDERED** to provide petitioner with back pay and benefits associated with the position Athletic Director from July 1, 1999 until such time as it may abolish his position in accordance with the requirements of the statutes.

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

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

Nov 27, 2000
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

11/27/00
DATE

Debbie Antanaitis/kp
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 29 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

JOB DESCRIPTION - ATHLETIC DIRECTOR

Title — Athletic Director

Qualifications — Holds or is eligible for a New Jersey Instructional Certificate

Basic Function — Assume professional responsibility for the administration and supervision of the High School Interscholastic Athletic Program.

Duties and Responsibilities

1. Organize and administer the program of interscholastic athletics.
2. Participate in the selection and assignment of the coaching staff. Conduct an annual evaluation of the interscholastic athletic program. Provide data to and consult with the High School for the annual evaluation of the coaching staff.
3. Schedule and contract all sports contests.
4. Arrange for the hiring and payment of officials for home athletic contests, and assume responsibility for the proper supervision of home games.
5. Arrange for transportation for all away athletic contests.
6. Prepare and administer the interscholastic athletic program budget.
7. Requisition all supplies, uniforms, and equipment for interscholastic athletics.
8. Supervise the cleaning, storage, and care of all athletic equipment.
9. Develop and implement the rules and regulations governing the conduct of athletic activities for both students and staff. Annually update and distribute the Coaches Guide.
10. Supervise the proper administering of all school, conference and state rules on physical and academic requirements of eligibility for participation in each sport, and verify, with the principal, each student's eligibility.
11. Make all necessary arrangements for the preparation and use of playing fields, equipment and facilities.

12. Supervise all ticket sales connected with the interscholastic athletic program and assume responsibility for proper handling and accounting of receipts. Employ personnel to work at home games.

13. Arrange all details of visiting team needs, including gymnasium services and field assistance, as appropriate.

14. Arrange and communicate the practice time schedules for the coaches on the fields and in the gymnasiums.

15. Assure the completion of medicals for all athletes prior to the beginning of each season.

16. Arrange for medical coverage, doctor and ambulance at all football home games.

17. Keep records of the results of all interscholastic athletic contests and maintain a record file of all award winners.

18. Supervise and assist coaches through visits, observation and meetings.

19. Represent, as appropriate, Glassboro High School at athletic meetings of the State, Regional and Conference Athletic Directors Associations. Keep the administration and coaching staff informed on activities of meetings.

20. Represent, when directed, Glassboro High School at athletic meetings of the New Jersey State Interscholastic Athletic Association and Olympic Conference. Keep the administration and coaching staff informed on activities of meetings.

21. Communicate and interpret to all coaches and other personnel all local, state and federal rules and regulations affecting the interscholastic athletic program.

22. Make monthly reports to the High School principal of athletic results, changes in program, recommendations, financial reports, etc.

23. Arrange for appropriate publicity for interscholastic athletic activities. Prepare, have printed, and distribute athletic schedules prior to each sport season.

24. Arrange for police protection, and other security personnel, for any athletic contest as necessary.

25. Arrange for the postponement of any home interscholastic athletic contest in consultation with the Head Coach of the sport involved, and the High School principal. Reschedule the postponed contest on a suitable date in consultation with the Head Coach of the sport involved.

26. Assist in upholding and enforcing school rules, administrative regulations and board policy.

27. Supervise behavior in the hallways, gymnasium, and on school grounds for the safety and well being of students, personnel and visitors.

28. Perform duties which are within the scope of his/her employment and certifications as assigned by his/her supervisor in accordance with N. J. State Law, State Board of Education Rules and Regulations, local Board of Education policies and contractural obligations.

29. Maintain ethical and professional behavior in working with school personnel and other agencies.

Relationships — The Athletic Director shall be under the direction of the High School Principal.

References

NJSA 18A:11-1	NJAC 6:3-1.21
NJSA 18A:1-1	NJAC 6:11-3.4

Approved: August 1, 1979

OAL DKT. NO. EDU 8784-99
AGENCY DKT. NO. 260-8/99

ROBERT BARRATT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF GLASSBORO, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions and petitioner's reply thereto were timely filed pursuant to *N.J.A.C.* 1:1-18.4.

The Board's exceptions aver that the Administrative Law Judge (ALJ) erred in interpreting the grandfather clause of *N.J.S.A.* 18A: 26-2.2 as conferring tenure rights by virtue of the statute's requirement that an athletic director (AD) possess an instructional certificate. The Board argues, *inter alia,* that prior to the enactment of this statute, many ADs were not certificated staff, thus, *N.J.S.A.* 18A:26-2.2 terminated the employment of any person so employed and allowed those already employed as ADs with instructional certificates to retain their jobs. It further argues that:

> Historically, the position of AD was an extra-curricular position much like coaching in which a staff member was and is required to be a certificated teacher. [citations omitted] If the coach resigned from coaching or if another staff member was selected as coach, the former coach would return to his/her teaching position. This analogy is applicable to the case herein. No tenure rights were conferred by the grandfather clause. Mr. Barratt's tenure remains in the category of teacher. (Board's Exceptions at 3)

The Board also excepts to the ALJ's finding at page 7 of the Initial Decision that petitioner prevailed as a matter of law because the Board took no official action to abolish his AD position, to articulate the reasons for its actions or to establish a preferred eligibility list. With respect to this, it avers that the ALJ's finding ignored the fact that it took two separate votes to establish the newly combined Vice-principal/Student Activities/Athletic Director position at Glassboro High School. In support thereof, the Board submits the minutes of its meetings on March 31 and May 26, 1999[1] and argues that these actions constitute formal action abolishing the AD position as it was known before. Moreover, the Board maintains that it "was not in need of two ADs, and was fully aware that creating the newly combined position effectively eliminated the former AD position. To hold otherwise exalts form over substance which has been consistently rejected by the courts. [citations omitted]" (Board's Exceptions at 3)

The Board next reiterates its argument that it was not obligated to give reasons for not reassigning petitioner to the AD position, averring that unless there is evidence of arbitrary or capricious or unreasonable judgment, the exercise of its discretionary authority with respect to nontenured extracurricular athletic staff must be sustained. It cites in support of its position *Norcross v. Bd. of Ed. of North Hunterdon Reg'l H.S. District*, 1991 *S.L.D.* 1154, *aff'd* State Board 92 *N.J.A.R.*2d (EDU) 176 (1991), *aff'd* Appellate Division No. A-3533-91, March 30, 1993 (unpublished).

Finally, the Board avers that the ALJ's decision must be reversed because its decision in creating the newly combined position was neither arbitrary nor capricious and, as

---

[1] Petitioner's reply exceptions urge that the minutes of these two Board meetings not be considered by the Commissioner because they were never submitted to the ALJ or made part of the record in proceedings before the OAL, nor did the Board move or otherwise show cause why the evidentiary record should be supplemented. Petitioner further argues that the minutes do not provide reasons why the Board wanted to abolish his AD position, nor do they authorize the publication of a preferred eligibility list for that position; thus, the minutes do not satisfy the statutory requirements for abolishing a position in accordance with *N.J.S.A.* 18A:28-9 and 28-12. See Petitioner's Reply Exceptions at 7-8.

held in prior case law, it is not obligated to restructure its educational program to accommodate an individual's tenure/employment rights.

Petitioner's reply exceptions urge acceptance of the ALJ's recommended decision because he has established that he achieved tenure in the position of AD and that the elimination of his tenured position by an informal transfer of its duties to another position, rather than by a formal abolishment, denied him his due process rights to challenge the legal sufficiency of the Board's reasons, as well as his rights to be listed for reinstatement to the AD or similar position. Petitioner further argues that under the circumstances of the instant matter, the ALJ's findings and determinations are fully supported by the tenure law and cases decided thereunder. Consequently, petitioner urges that the Commissioner should affirm the ALJ's order requiring the Board to provide him back pay and benefits associated with the position of AD from July 1, 1999 until such time as the Board abolishes his position in accordance with statutory requirements.

Upon review of the record in this matter, including the parties' exceptions, the Commissioner is unable to accept the ALJ's determination that "petitioner clearly held tenure *in the position Athletic Director* in respondent's district***." (emphasis supplied) (Initial Decision at 7) With the enactment of *N.J.S.A.* 18A:26-2.2, those individuals who were employed prior to July 1, 1994 as an AD and who possessed an instructional certificate were allowed to continue in their employment as an AD. For such individuals serving as an AD in 1994 by virtue of an *instructional certificate*, tenure would be obtained in the *position of teacher*. See the State Board of Education's decisions in *Grosso v. New Providence Bd. of Ed.*, 1990 *S.L.D.* 1750 and *Ellicott v. Frankford Bd. of Ed.*, 1990 *S.L.D.* 1714, *aff'd* 251 *N.J. Super.* 342 (App. Div. 1991), wherein it was held that under the statutory scheme, particularly, *N.J.S.A.* 18A:28-5, "teacher" is a separately tenurable position, and that teaching staff members serving under instructional

certificates achieve tenure in the *position of teacher.* Furthermore, the position of athletic director is not enumerated as a separately tenurable position in *N.J.S.A.* 18A:28-5.

Similarly, for those who serve as an AD by virtue of a supervisor endorsement on an administrative certificate, tenure accrues not in the position of AD but rather, in the *position of supervisor*, which is a *separately tenurable position enumerated in N.J.S.A.* 18A:28-5. *See Connor, supra,* and *Nester v. Board of Education of the Township of Old Bridge*, decided by the Commissioner September 8, 1997, which determined that the AD petitioners were tenured in the *position of supervisor.*

Consequently, under the facts of the instant matter, any tenure protections flowing from petitioner's AD assignment attached to *his tenured position as teacher,* a status the parties do not dispute he achieved in the Glassboro district.[2] Therefore, the Board could assign petitioner to any instructional/teacher position within the scope of his certificate and not violate his tenure rights, *so long as he did not suffer a reduction in salary. Carpenito v. Board of Education of the Borough of Rumson, Monmouth County*, 96 *N.J.A.R.*2d (EDU) 958 (1996), *rev'd* State Board February 4, 1998, *rev'd* 322 *N.J. Super.* 522 (App. Div. 1999).

Petitioner, however, avers that he *did* suffer a reduction in salary and urges that the instant matter is most similar to *Connor, supra,* wherein it was determined that the board unlawfully reduced the salary of an AD by expanding the duties of his position without abolishing his position of AD before naming him director of athletics and activities. The Board, on the other hand, claims petitioner did not suffer a loss or reduction of salary because the AD

[2] Petitioner commenced his employment as a teacher in the Board's district in 1974. Page 2 of the Initial Decision states that he attained tenure in 1979 which is apparently a typographical error.

position was an extracurricular, stipended assignment [3] and, therefore, the only loss petitioner suffered was the extracurricular stipend he received as an AD. Of this, the Board states:

> In the present controversy, the Board determined not to reassign Petitioner to the position of AD. Such action was a proper exercise of the board's authority. Despite this authority, Petitioner alleges that the Board improperly reduced his salary by not reassigning him to the AD position. However, this allegation is unsupported by the law. *** Mr. Barratt is a tenured teacher for which he cannot be dismissed or reduced in salary. *N.J.S.A.* 18A:6-10; 18A:28-5. However, a transfer is not a demotion. [*Lascari, supra*] Mr. Barratt's only loss is the stipend he received as an AD. There is no impact on his salary earned as a tenured teacher. If the duties of an AD were engrafted into his duties as a teacher, the protections afforded by the tenure statute would apply. However, there is no evidence that the AD duties were part of Mr. Barratt's duties as a teacher. (Board's Reply Brief In Opposition to Petitioner's Request for Summary Decision at 10-11).

The Commissioner notes that the boards of education in *Connor, supra,* and *Reinhardt v. Freehold Regional High School District*, 97 *N.J.A.R.*2d (EDU) 186 (1996) argued in a similar vein that the tenured petitioners therein did not suffer a loss of salary because the AD positions they held were stipended; however, the boards did not prevail in those matters because records in both matters did not support such a claim. Moreover, the position in the *Connor* matter was a hybrid position, wherein part of the petitioner's workday was comprised of a teaching assignment and part of it was devoted to AD duties before it became a full-time AD position; while the AD position under dispute in *Reinhardt* initially consisted of a reduced teaching load before it became a full-time AD position.

Thus, any determination as to whether tenure rights were violated in this matter will rest substantially on whether or not the AD position at issue was, in fact, an extracurricular stipended

---

[3] The Commissioner notes that petitioner himself states at page 1 of his April 14, 2000 Brief for Summary Disposition that the Board "violated his tenure rights at the end of the 1998-99 academic year by refusing to renew his appointment for the following year to the *extracurricular position of Athletic Director*" and at page 3 that "from September, 1980 through the end of the 1998-99 school year, he was appointed to the *extracurricular position of Athletic Director* at Glassboro High School." (emphasis supplied)

assignment, as opposed to a salaried position.[4] In the instant matter, the Initial Decision does not address the Board's claim that petitioner's employment as AD was an extracurricular, stipended assignment, rather than a salaried position. Furthermore, the record is void of any *specific* information about petitioner's actual work day or the details of his salary/compensation, so as to permit the Commissioner to make such a determination himself. Consequently, the Commissioner finds and determines that the matter must be remanded to the OAL for supplementation of the record with respect to these issues and a determination as to whether the factual circumstances of petitioner's employment as an AD are akin to those in *Connor, supra,* and/or *Reinhardt, supra,* which, if so found, may warrant a conclusion that petitioner's tenure rights were violated by the Board in assigning him to a position within the scope of his certification and commensurate with his tenured position as teacher for the 1999-2000 school year, but at a salary less than that which he received for the prior school year.

Accordingly, the matter is remanded to the OAL, for the reasons expressed herein, for further proceedings on the issue of whether or not the Board violated petitioner's tenure rights by assigning him to a position within the scope of his certification for the 1999-2000 school year.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: JAN 11 2001

Date of Mailing: JAN 11 2001

[4] It is well established that no tenure protections flow from extracurricular positions, *Norcross, supra.*

[5] 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.

19-01

19-01 SEC

IN THE MATTER OF DIANE HILL, :

MARION P. THOMAS CHARTER :

SCHOOL, ESSEX COUNTY. :

_____:

COMMISSIONER OF EDUCATION

DECISION

JAN 19 2001

SCHOOL ETHICS COMMISSION	:	**BEFORE THE**
	:	**SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DOCKET NO. D16-00**
DIANE HILL,	:	
Marion P. Thomas Charter School	:	**RESOLUTION OF REMOVAL FOR**
Essex County	:	**FAILING TO FILE FINANCIAL**
	:	**DISCLOSURE STATEMENT**
	:	

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:12-25 of the Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement for the School Ethics Commission;

WHEREAS, Diane Hill is a member of the Marion P. Thomas Charter School Board of Trustees and thus a "school official" under N.J.A.C. 6A:28-1.2 of the New Jersey Administrative Code.

WHEREAS, the deadline to file these disclosure statements was April 30, 2000 for school officials in office since January 30, 2000 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission issued an Order on August 8, 2000, directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the disclosure statements; and

WHEREAS, this school official failed to reply to the Order to Show Cause although the return receipt indicates that the designated person at the school received the Order on August 11, 2000 directing her to deliver it to this school official; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that the Commission would discuss this matter at its September 2000 meeting, that she had the right to attend, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, on September 26, 2000, the designated person of the Marion Thomas Charter School faxed to the Commission Ms. Hill's disclosure statements, which provided no answers to the questions on the Financial Disclosure Statement; and

WHEREAS, on September 26, 2000, the Commission returned Ms. Hill's incomplete statements by fax indicating that they had not been properly and completely filled out; and

WHEREAS, at its meeting on September 27, 2000, the Commission found that Ms. Hill's failure to file complete disclosure statements constituted a violation of N.J.S.A. 18A:12-25 and 26, but gave her until October 15, 2000 to file completed disclosure statements or face removal thereafter; and

WHEREAS, the Commission received no changes to Ms. Hill's statements by October 15, 2000; and

WHEREAS, on October 30, 2000, Ms. Hill faxed disclosure statements writing in "N/A" in the spaces for answers on the Personal/Relative Disclosure Statement, but not writing any answers to the questions on the Financial Disclosure Statement;

WHEREAS, the Commission considered Ms. Hill's October 30, 2000 filed statements at its meeting of November 28, 2000; and

WHEREAS, the Commission finds that Ms. Hill was given the opportunity to file complete disclosure statements, but has still declined to answer questions on the Financial Disclosure Statements in violation of N.J.S.A. 18A:12-26; and

WHEREAS, the appropriate penalty for the violation is removal from the Board, especially in light of the Commission's correspondence giving Ms. Hill ample time to correct the deficiencies in her disclosure statement;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Diane Hill violated N.J.S.A. 18A:12-26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of removal from the board.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: November 28, 2000

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 to you, you 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.

LJB/e:lisa/dec/D1600.doc

AGENCY DKT. NO. 435-12/00

IN THE MATTER OF DIANE HILL, :
MARION P. THOMAS CHARTER :
SCHOOL, ESSEX COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the decision of the School Ethics Commission have been reviewed. No comments with respect to the recommended sanction were received by the Commissioner. *N.J.A.C.* 1:6C-18.1.

Initially, the Commissioner emphasizes that pursuant to *N.J.S.A.* 18A:12-29(c), the Commission's determination as to violation of the Act is not reviewable by him. 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 a review of the recommended penalty and its implementation.

Upon thorough review of the full record in this matter, the Commissioner determines to accept the Commission's recommendation that removal is the appropriate penalty, in that Ms. Hill, a "school official" pursuant to *N.J.A.C.* 6A:28-1.2, has been granted sufficient time and opportunity to file a complete financial disclosure statement required by *N.J.S.A.* 18A:12-26, but has failed to do so within prescribed time limits.

IT IS ORDERED that the above-named school official is removed from office as of the date of this decision.*

COMMISSIONER OF EDUCATION

Date of Decision: JAN 19 2001

Date of Mailing: JAN 22 2001

* 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.

21-01

#21-01

B. H., on behalf of minor child, C. H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WALL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

January 22, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2551-00

AGENCY DKT. NO. 90-3/00

B.H. ON BEHALF OF MINOR CHILD C.H.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WALL, MONMOUTH COUNTY,

Respondent.

Charles T. Hutchins, Esq., for the petitioner

Douglas J. Kovats, Esq., for the respondent (Kenney & Gross, attorneys)

Record Closed: November 30, 2000 Decided: December 5, 2000

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

This matter was transmitted to the Office of Administrative Law (OAL) on April 11, 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 parties have agreed to a settlement and have prepared an agreement indicating the terms thereof, which is attached and fully incorporated herein.

The stipulation of settlement entered into by the parties is hereby adopted.

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 **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.

DEC 0 5 2000
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

12/6/00
DATE

Debbie Antanaitis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 7 2000
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

KENNEY, GROSS, KOVATS
And CAMPBELL, LLP
130 Maple Avenue, Bldg. 8
P.O. Box 8610
Red Bank, NJ 07701
(732) 530-7500
Attorney for Wall Township
Board of Education

B.H., o/b/o C.H. Petitioner, v. BOARD OF EDUCATION OF THE TOWNSHIP OF WALL, Respondent.	COMMISSIONER OF EDUCATION STATE OF NEW JERSEY OAL Docket No. EDU 255-00 Agency Docket No. 90-3/00
WALL TOWNSHIP BOARD OF EDUCATION, Petitioner, v. B.H. o/b/o C.H., Respondent.	Agency Ref. No. 01-4480 STIPULATION OF SETTLEMENT

The parties to this action hereby stipulate that the following terms constitute a complete settlement of all issues and claims set forth in the above-encaptioned matters:

1. For the balance of the 2000-2001 school year, C.H.'s Individualized Educational Program shall be comprised of the following:

a. Classification/Placement Recommendation. The parties are in agreement with C.H.'s classification; C.H.'s I.E.P. will be implemented as follows:

i. C.H. shall attend the MCVSD Air Conditioning Program for a portion of his day and the Manasquan/Wall Alternative School program for the remainder of the school day.

ii. At the conclusion of mid-terms on or about January 29, 2001, C.H. will continue to attend the MCVSD Air Conditioning Program for a portion of his day, however, he shall be readmitted to the Wall Township High School for the remainder of the school day.

b. Related Services. Periodic and/or weekly scheduled counseling primarily for anger management within the school.

c. Supplemental Conditions. Except as modified herein, in addition to the implementation of the I.E.P. incorporated by reference as if fully set forth within, the parties further agree:

i. C.H.'s attendance and punctuality for all classes and other assigned locations are to conform with the Wall Township High School Attendance Policy.

ii. C.H. may not leave school property during the course of the school day unless express administrative approval is granted.

iii. C.H.'s behavior must conform to the Wall Township High School Code of Conduct.

iv. C.H. shall abide by the directions of his treating physicians concerning any medication(s) prescribed to assist C.H. to control his anger and impulse behaviors.

v. In the event any disciplinary incident(s) involving C.H. is sustained, sanctions up to and including removal from the Wall High School Program may be imposed.

d. Liability/Waiver. The parties further agree that the above Stipulation of Settlement was reached without any admission of or finding of liability. Accordingly, the parties waive their right to pursue reasonable attorney's fees and costs pursuant to the I.D.E.A. (20 USC §1415(e)(4); §615(i); The Rehabilitation Act of 1973 (29 USC §701 et seq.); 42 USC §1983; Americans with Disabilities Act of 1990 (ADA)(42 USC §1210 et seq.); New Jersey Law Against Discrimination, N.J.S.A. 10:5-27.1 (LAD); as well as other Federal and State statutes providing for reimbursement of reasonable attorneys fees and costs related to the above-encaptioned actions.

e. Voluntariness. Both parties acknowledge that they have entered into this Agreement of their own accord, without coercion or pressure of any kind; they have obtained independent legal counsel of their own selection and that they have been duly apprised of their legal rights; that all provisions of this Agreement, as well as all questions pertaining thereto, have been satisfactorily explained to them; and that the settlement embodied in this Agreement is in all respects acceptable to them.

4C

f. Release In accordance with the provisions of paragraph d above, both parties hereby waive and generally release each other, its officers, employees (both former and present), from any and all claims, liabilities, demands or causes of action, including reasonable attorneys' fees, that they may have against them based upon the facts presented and relief requested in OAL Docket No. EDU 2551-00 and Agency Docket No. 90-3/00. However, under no circumstances shall this release constitute a waiver of any rights or remedies sought by B.H., on behalf of C.H., for causes of actions which arose out of events that took place at Wall Township High School in December 1999, or which arose out of actions taken by the Wall Township Board of Education in January 2000, which causes of action were set forth in the Title 59 Notice of Claim previously served on Wall Township High School, the Wall Township Board of Education, and other parties.

ON BEHALF OF C.H.

Barbara Hollingshead

Barbara Hollingshead

Dated: 11-17-2000

Krystal Lalonde

Witness

FOR THE BOARD OF EDUCATION OF THE TOWNSHIP OF WALL

Todd Luttman, President

Dated: 11/21/00

Jack Hahn, Board Secretary/ Business Administrator

Witness

OAL DKT. NO. EDU 2551-00
AGENCY DKT. NO. 90-3/00

B. H., on behalf of minor child, C. H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WALL, 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 adopts the Stipulation of Settlement as the final decision in this matter. In so holding, however, the Commissioner notes for the record that the settlement terms stipulate elements of an Individualized Educational Program (IEP) for C.H. for the 2000-2001 school year, an issue over which the Commissioner does not have jurisdiction. Consequently, it is emphasized that adoption of the Stipulation of Settlement as the final decision in this matter merely signifies approval of an amicable resolution of the controversy reached by the parties and is *without comment as to the appropriateness of any of the IEP terms* set forth in the settlement.

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: JAN 22 2001

Date of Mailing: JAN 22 2001

22-01

#22-01

BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning school district challenged the rejection by the Department of Education of its Early Childhood Education Plan and concomitant funding request. The Department filed an answer, generally denying the allegations of the petition.

After common issues involving this and numerous other appeals were resolved by the Chief ALJ, petitioner advised the ALJ of the two remaining issues in this matter. Subsequently, petitioner informed the ALJ that it was challenging only the alleged denial of supplemental funding to provide temporary facilities for the District's early Childhood Education Programs. The Department then moved to dismiss the petition. After petitioner responded to the motion, the ALJ determined that, because petitioner's submissions failed to establish that it had specifically requested funds for temporary facilities for the 1999-2000 school year, such a request could not have been denied by the Department. As such, the ALJ recommended dismissal of the petition.

The Commissioner affirmed the decision of the ALJ for the reasons set forth therein. Petition was dismissed.

January 22, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4320-99

AGENCY DKT. NO. 105-5/99

BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION,

respondent.

George F. Hendricks, Esq., for petitioner (Hendricks & Hendricks, attorneys)

Michelle L. Miller, Deputy Attorney General and **Michael Walters,** Deputy Attorney General, for respondent (John J. Farmer, Jr., Attorney General of New Jersey, attorney)

Record Closed: November 6, 2000 Decided: December 7, 2000

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter commenced on May 6, 1999, when the Board of Education of the City of New Brunswick (hereinafter petitioner) filed a petition of appeal with the Commissioner of Education contesting the Department of Education's rejection of its early childhood education plan and concomitant funding request. An answer was filed on behalf of the Department of Education (hereinafter respondent) on May 21, 1999, and on June 7, 1999 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.

On June 11, 1999, petitioner filed an amended verified petition of appeal. A prehearing conference took place by telephone conference call on July 15, 1999, at which time it was determined that respondent would file an answer to the amended petition of appeal on or before August 6, 1999. Thereafter a number of telephone conference calls took place while various issues common to all of the "*Abbott v. Burke*" early childhood education appeals were being considered by Chief Judge Barbara Harned and while related matters were pending in the New Jersey Supreme Court. By letter dated August 1, 2000, counsel for petitioner advised the undersigned of the following remaining outstanding issues in the above-captioned matter:

> 1. Whether or not the State Department of Education violated the dictates of *Abbott V*, 153 *N.J.* 480, 1998 decision in denying New Brunswick Board of Education's request for supplementary funding, more particularly, failing to provide the District funding for temporary facilities for the Early Childhood Programs.
>
> 2. Whether or not the State Department of Education violated the dictates of *Abbott V*, 153 *N.J.* 480, 1998 for failure to provide supplemental funding for Whole School Reform, more particularly, language teachers, music teachers, art teachers.

Following a telephone conference call on August 9, 2000, the undersigned wrote to the parties by letter dated August 10, 2000, as follows:

> This will confirm, pursuant to our telephone conference call on August 9, 2000, that Mr. Hendricks will, on or before August 18, 2000, provide copies of petitioner's 1999-2000 supplemental funding requests 1) for temporary facilities for the Early Childhood Programs and 2) for Whole School Reform, more particularly, language teachers, music teachers, and art teachers. As I indicated to you on the phone, I was unable to locate any documentation concerning a request for language teachers, music teachers and art teachers, and the document I found entitled "Supplemental Funding Request Report for Facilities-Acquisition and Const.

> Services" talks about a five-year maintenance plan and substandard classroom upgrade and does not mention temporary facilities for Early Childhood Programs. Assuming that petitioner can establish that it applied for supplemental funding for these two articulated purposes, initial discovery requests will then be issued no later than August 25, 2000. We also determined that all discovery would be completed by September 25, 2000, and that the hearing would commence on October 2, 2000 and continue on October 6, 2000, rather than the November dates we had previously scheduled. I will wait until we receive whatever Mr. Hendricks provides on August 18, 2000, to prepare the final prehearing order articulating the issues for determination at the hearing. I am wondering whether perhaps remedies/mootness needs to be considered as an issue as well, *i.e.*, if petitioner were to prevail on the issues as articulated in Mr. Hendricks' August 1, 2000 letter, to what relief would it be entitled? If the District had somehow managed to find funds for 1999-2000 and paid for the temporary facilities and the whole school reform teachers, then reimbursement would be an appropriate remedy, but given the fact that it probably did not happen (did it?) what could legally be done with the money now if the State were required to provide it?
>
> As I indicated, I will be on a scheduled vacation from August 14 to September 6, 2000. Please let my secretary know if you wish to have a conference call in September before I issue the prehearing order.

Petitioner's counsel replied by letter dated August 16, 2000, as follows:

> After conferring with the appropriate officials of the New Brunswick Board of Education, our appeal would be limited to issue 1, as per my letter of August 1, 2000, more particularly for supplemental funds for temporary facilities for the Early Childhood Programs.
>
> If the Court should be so inclined to order the State to comply with *Abbott V* to provide funding for temporary facilities for the Early Childhood Programs, the Board would rent and remodel facilities. It should be noted that the Board could not do same without the appropriate requested funds. That would include 1999-2000 as well as the 2000-2001.

> In response to Your Honor's request, enclosed is a portion of our supplementary funding request for temporary facilities (which was attached to our Amended Verified Petition of Appeal).

Thereafter, respondent filed a motion to dismiss the appeal in the within matter (as well as a subsequent appeal for the 2000-2001 school year, OAL DKT. NO. EDU 6289-00). Respondent's letter brief in support the motion to dismiss in regard to the within matter argued that the case is moot because any request for temporary facilities must be reviewed within the context of current facts, *i.e.,* the number of students currently needing to be served, and petitioner has filed an amended application for 2000-2001 rescinding its request for temporary facilities in the form of modular units or trailers. Petitioner filed a letter brief in opposition to the motion, dated September 13, 2000, and oral argument on the motion to dismiss was conducted by telephone conference call on September 21, 2000. Thereafter, by letter dated September 22, 2000, the undersigned wrote to the parties, as follows:

> This will confirm, pursuant to our telephone conference call on September 21, 2000, that unless petitioner provides the paperwork to prove that the Commissioner denied a specific request ($2,000,000.00?) for supplemental funds to rent and renovate temporary facilities for the early childhood program for 1999-2000, that appeal will be dismissed. The Supplemental Funding Request Report, which was attached to the Amended Verified Petition of Appeal and which I have attached to this letter, shows a $2,348,500 request for Facilities Acquisition and Construction Services, all of which, we can conclude, was denied since the department approval stated:
>
> Supplemental Funding
>
> > **Supplemental funds in the amount of $4,997,101 have been approved.** These funds are for existing instructional programs and will fund elementary and secondary teacher salaries and associated fringe benefits. These positions will be reconsidered when the district enters whole school reform.
>
> However, the only specifics I see in the petition concerning the supplemental fundings request for facilities are those which are also attached to Mr. Hendricks' letter dated August 16, 2000 and which state, "Without the Supplemental Funding, the five-year maintenance plan and substandard classroom upgrade will not take place. The absence of both functions in the 1999-2000 budget will put a further strain on our already critical facilities needs." If documentation of the specific request which petitioner says the Department denied is forthcoming by

> October 6, 2000, I will proceed to decide the pending motion on the merits; otherwise the 1999-2000 case will be dismissed. We will reserve the October 2 and October 6, 2000 dates which we currently have reserved for trial dates to use as a settlement conference in the 2000-2001 case if the Department has rendered a determination on the pending amended plan before then.
>
> This will also confirm that neither of you had any objection to the motion of NJEA and the New Brunswick Education Association to participate in this matter as long as participation is restricted to filing a brief and filing exceptions to an initial decision. Please forward confirming letters.
>
> Please let me know the status of these matters as soon as you do. Thank you for your cooperation.

The October 6, 2000 deadline for verifying that petitioner had, in fact, requested supplemental funds to rent and renovate temporary facilities was extended at petitioner's request. By letter dated October 30, 2000, petitioner's counsel advised as follows:

> Enclosed please find Memorandum of New Brunswick Board of Education Business Administrator, Edward Kent, memorializing the process of applying for Early Childhood facilities for the 1999-2000 budget, as well as Mr. Ronald Larkin's correspondence to Barbara Anderson, Assistant Commissioner of NJ Department of Education, dated December 23, 1998, and the Department of Education's response, dated January 13, 1999.
>
> It is the New Brunswick Board of Education's position that they applied for the Early Childhood Temporary Facility funds and were rejected. On this application for summary dismissal the Petitioner's factual assertions should be given most favorable consideration. Please review and advise.

The documents referenced in counsel's October 30, 2000 letter, *i.e.,* the October 5, 2000 memorandum from Board Secretary Edward D. Kent, the December 23, 1998 letter of Superintendent Ronald F. Larkin to Dr. Barbara Anderson, Assistant Commissioner, and the January 13, 1999 letter from Mike Azzara, Assistant Commissioner, to Superintendent Larkin (2 pages), are all attached hereto and made a part hereof as if set forth herein at length. Counsel for the Department of Education filed a response to petitioner's October 30, 2000 letter on

November 6, 2000, whereupon the record closed. Respondent's November 6, 2000 letter memorandum pointed out that the documentation supplied refers to $8,820,000.00 for the purchase of permanent facilities, not $2,000,000, plus or minus, for leasing/renovating temporary facilities as previously asserted.

Based upon all of the foregoing, I **CONCLUDE** that since petitioner's submissions fail to establish that any specific request for supplemental funding to rent and renovate temporary facilities was made to the Department of Education for the 1999-2000 budget year, the Commissioner could not have denied such a request, and accordingly, the Commissioner and the within forum are without jurisdiction to entertain petitioner's appeal of a denial. Given this conclusion, it is not necessary to consider respondent's arguments that such an appeal for the 1999-2000 school year is moot. Respondent's arguments concerning petitioner's appeal for the 2000-2001 school year will be addressed in the context of that case (EDU 6289-00).

For the foregoing reasons, it is hereby **ORDERED** that the within matter is **DISMISSED WITH PREJUDICE** and these proceedings are 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.

Dec 7, 2000
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

12-8-00
DATE

Deborah N. Gutmacher
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 8 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

NEW BRUNSWICK BOARD OF EDUCATION

MEMORANDUM

TO: George Hendricks, Esq.

FROM: Edward D. Kent
Business Administrator/Board Secretary

DATE: October 5, 2000

RE: **Early Childhood Appeal**

With reference to our December 23, 1998 letter to Assistant Commissioner Anderson requesting $8,820,000.00 for Early Childhood facilities, and Assistant Commissioner Azzara's January 13, 1999 denial of the funds by requesting additional data, I contacted our Budget Examiner, Mr. Scott Henry with whom Dr. Larkin and I met to discuss the issue. The meeting took place in our conference room in either late January or early February, 1999. At that meeting, Mr. Henry advised us not to include this in the 1999-2000 budget, but to add it into our five-year Facilities Plan, which we did.

The Facility Construction and Financing Act has now been approved, but we still do not have sufficient facilities to address the needs of the Early Childhood Program.

As with everything that comes from Mr. Henry, nothing is in writing.

I hope this helps clarify the issue.

EDK/dm

RECEIVED
OCT 06 2000
ENDRICKS & HENDR

December 23, 1998

Dr. Barbara Anderson
Assistant Commissioner
NJ Department of Education
P.O. Box 500
Trenton, NJ 08625-0500

RE: Supplemental Request - Early Childhood Program Aid

Dear Dr. Anderson:

The New Brunswick Public Schools, in an effort to be in compliance with the Supreme Court ruling, seeks emergent relief from a financial dilemma.

The mandate of providing an education for all 3, 4 and 5 year old children in New Brunswick cannot be met without the purchase of additional land and facilities. The Community Based Providers can only accommodate approximately 240 children, the current district capacity is approximately 780 children, and the planned expansion within the district (modulars) will accommodate another 450 children. With an estimated 2,300 children eligible within the district, we find ourselves deficient in space to service the remaining 830 children.

To address this need, we have identified two parcels of land, one of which contains a building that needs renovations, and the other is barren land requiring access and egress routes. The estimated cost of land, building, and renovations is estimated to be $8,820,000.00. Since the district has no surplus in its General Fund Accounts, and all of our Early Childhood Program Aid has been devoted to existing programs within the district, I am asking for your assistance. If we cannot obtain the above stated parcels of land, and begin to make the necessary renovations and improvements by the end of January 1999, we will be unable to open the doors of these facilities to meet the September 1999 mandate.

Your consideration and direction in this matter will be greatly appreciated.

Have a very happy and safe holiday!

Sincerely,

Ronald F. Larkin
Superintendent of Schools

C: L. Klagholz
M. Azzara
E. Kent

State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

CHRISTINE TODD WHITMAN
Governor

LEO KLAGHOLZ
Commissioner

January 13, 1999

Dr. Ronald F. Larkin
Superintendent of Schools
New Brunswick Board of Education
P.O. Box 2683
New Brunswick, NJ 08903

RECEIVED
JAN 19 1999
Superintendent's
Office

Dear Dr. Larkin:

I am writing in response to your December 23, 1998 request to Assistant Commissioner Anderson for supplemental Early Childhood Program Aid in order to fund the purchase of land, building, and building renovations for early childhood facilities in the New Brunswick School District.

The Supreme Court was aware that its decision in Abbott created a dilemma for these districts, by requiring the operation of Early Childhood Programs in the fall of 1999, at least one year ahead of the anticipated completion of the first projects resulting from the Five-Year Facilities Management Plans. Thus, while the court accepted the FMP process as an appropriate measure to address Abbott facilities, it encouraged the use of temporary facilities, including trailers, to implement early childhood programs in the interim. The court also encouraged collaboration with community-based providers of pre-school services, as your letter reflects.

The pre-school enrollment numbers that you indicate for New Brunswick suggest a significant increase in the three, four, and five-year old cohorts over the district's current kindergarten enrollment of 595. Planning permanent pre-school facilities should consider the degree to which this increase in the cohort size will be sustained over at least a five-year period, per the enrollment projections required in NJAC 19A-5.1(c). Additional consideration must be given to the willingness of community-based providers to expand their capacities, and to the percentage of the eligible cohort that will actually enroll in any program. The court-appointed master in Abbott estimated that 75 percent of students who would attend kindergarten in public school would actually participate in pre-school. A more complete enrollment picture would be required to justify the expenditure requested in your letter.

Even if the need for these facilities prior to the Abbott Facilities Management Plan were approved by the department, no commitment of additional state funds could be made prior to the review and approval of the district-wide budget for reallocations. Further, alternatives to an outright appropriation of $8.8 million in additional state aid will have to be considered, including lease-purchase financing or local bonds, which would spread the cost out over several years. An amortization schedule for bonds in the requested amount would help evaluate alternative financing strategies. Additional state fund decisions will not occur until March 22, 1999 or thereabouts.

As you know, debt service payments on bonds or COP's would be eligible for state aid under existing formulas. Furthermore, a bill introduced in the Legislature by Assemblymen Asselta and Gibson would reimburse Abbott districts for the full amount of construction costs falling within the facilities standards that is started before the adoption of funding legislation.

If you still want this request to be considered as part of your Early Childhood Plan, please submit the following:

a) a demographic study supporting your long-term projection of 3 and 4 year olds.

b) an amortization schedule for the issuance of bonds or lease purchase financing.

c) a detailed demonstration that the use of trailers or other temporary facilities is not possible.

I trust this information will help clarify the options available to the New Brunswick School District.

Please call the Division of Finance if you require additional information.

Sincerely,

Mike Azzara
Assistant Commissioner

MA/F/jn/lrknECPrply.doc
c: Barbara Anderson
Doug Groff
Gwen Grant
Frank Van Camp
James Nichols
Mary Jean Guidette

OAL DKT. NO. EDU 4320-99
AGENCY DKT. NO. 105-5/99

BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
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 (OAL) have been reviewed. The parties did not file exceptions.

Upon careful and independent review of the record in this matter, the Commissioner finds no cause to disturb the findings and conclusions of the ALJ. Accordingly, the Initial Decision is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: JAN 22 2001

Date of Mailing: JAN 22 2001

* 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.

(SB) 22-01

SB# 22-01

IN THE MATTER OF THE REVOCATION OF	:	
THE CHARTER OF THE COLLEGE	:	STATE BOARD OF EDUCATION
PREPARATORY ACADEMY CHARTER	:	DECISION ON MOTIONS
SCHOOL, MORRIS COUNTY.	:	

Decided by the Commissioner of Education, June 14, 2001

Decision on motion by the Commissioner of Education, August 14, 2001

For the Appellant, Schwartz, Simon, Edelstein, Celso & Kessler (Carol R. Smeltzer, Esq. of Counsel)

For the Participant Commissioner of Education, Kathleen Asher, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

On June 14, 2001, the Commissioner of Education notified the Board of Trustees of the College Preparatory Academy Charter School ("School" or "Charter School") that he was revoking the School's charter, which had initially been granted for the 2000-01 school year. The Commissioner indicated that the Charter School was not operating in compliance with its charter, statutes and regulations and, in addition, had experienced a steady decline in student enrollment over the course of the academic year. The Commissioner observed that the Charter School had been placed on probation for the

second time in March 2001[1] and that a visit to the School by Department of Education staff in May 2001 revealed that it was in a significant deficit position and fiscally insolvent. He found, in addition, that the School had submitted a weak financial plan on May 30, 2001 that relied on unsubstantiated sources of funds and that the School had failed to submit a viable plan to eliminate its deficit position. He therefore directed the School to cease operations on June 30, 2001.

On July 12, 2001, the Board of Trustees filed a notice of appeal to the State Board of Education. That appeal is currently pending before the State Board.

On August 1, 2001, the Board of Trustees filed a motion for a stay of the Commissioner's decision with the State Board. By letter of that date, the Director of the State Board Appeals Office advised the counsel for the Board of Trustees that, pursuant to N.J.A.C. 6A:4-2.2, a motion to stay a determination of the Commissioner pending determination of an appeal to the State Board must first be made to the Commissioner.

On August 2, 2001, the Board of Trustees filed a motion with the Commissioner seeking a stay of his decision. By letter decision of August 14, 2001, the Commissioner declined to stay his decision, finding that the Board of Trustees:

> offers no documentation or factual information whatsoever to support its assertions that the deficiencies leading to the revocation of its charter as set forth in the June 14, 2001 decision were erroneously determined by the Department, or, have in fact been remedied....
>
> In this regard, I note that Petitioner does not dispute the cumulative findings with respect to its financial operation that led to the decision on June 14, 2001 to revoke its charter, but merely seeks an opportunity to correct them

[1] We note that the Commissioner had first placed the School on probation in November 2000 after it had failed to comply with his directive to provide the names of the students who had transferred out of the School and the names, addresses and phone numbers of their parents.

> during the next academic year. Nor does Petitioner address at all the issue of repaying affected school districts for the overpayment of charter school aid due to the withdrawal of students during last academic year. Under these circumstances, I cannot find that Petitioner is likely to prevail on the merits of its appeal, or that students, parents/guardians and staff, who have been on notice of the impending revocation since June 2001, will suffer greater harm by having to make alternative educational and employment arrangements for the next school year than they would by remaining in a school which has been determined to be in a significant deficit position and fiscally insolvent.

Commissioner's Decision, slip op. at 3-4.

The Commissioner also rejected the Charter School's due process arguments, stressing that the school laws and implementing regulations did not require him to place a charter school on probation before he could revoke its charter.

On August 15, 2001, the Board of Trustees renewed its application to the State Board for emergent relief in the form of a stay of the Commissioner's decision. As set forth in its moving papers, the Board of Trustees argues that the School and its students will suffer irreparable harm if a stay is not granted, stating that there were approximately 119 students enrolled at the School for the 2001-02 school year and that "[w]ithout a stay of the Commissioner's decision, students will be forced to make enrollment decisions well before September 5, 2001. Many of the families comprising the [Charter School's] population lack the financial means to enroll their children in private schools. To force them to reenroll their children in public schools, would cause irreparable harm to the students of [the Charter School]." Brief in Support of Motion, at 6-7.

However, in a certification filed with the motion, the counsel for the Board of Trustees avers that "the school will not open to students for the 2001-02 school year. Accordingly, the State Board may grant the requested stay, without concern that the

school children will suffer any detrimental impact as a result thereof." Certification of Carol R. Smeltzer, Esq., at 3. She notes that "should the State Board decline to grant its requested emergent relief, the school will be required to immediately liquidate its assets [pursuant to a letter dated August 3, 2001 from Anne O'Dea, Director of the Office of Charter Schools]. Such liquidation would detrimentally impact the College Preparatory Academy Charter School." Id.

The Board of Trustees further contends in its motion that there is a reasonable probability that it will prevail on the merits of its appeal and that the equities weigh in favor of the Charter School.

On August 21, 2001, the Commissioner filed a motion to participate in this matter, along with a brief in opposition to the motion for a stay. The Board of Trustees filed a brief in opposition to the Commissioner's motion. In its brief, the Board of Trustees indicates that "it has no intention of opening for the 2001-02 school year but rather that a stay is required to prevent the liquidation of assets pending a final disposition by the State Board on the merits of its request for a planning year and an opportunity to reopen for the 2002-03 school year." Brief in Opposition to Motion to Participate, at 2.

Initially, we grant the Commissioner's motion to participate and have considered his brief in reviewing this motion.

After careful review of the papers, we find that the Board of Trustees has failed to demonstrate that it is entitled to emergent relief under the standard set forth in Crowe v. De Gioia, 90 N.J. 126 (1982).

We fully agree with the Commissioner that the Board of Trustees has not demonstrated the likelihood that it will prevail in its appeal. There is nothing in the brief and materials submitted by the Board of Trustees in support of its motion that would counter the Commissioner's findings regarding the serious deficiencies at the School. Contrary to its contention, the Board of Trustees was provided with considerable notice of the School's financial deficiencies and given the opportunity to correct them. For example, by letter dated April 6, 2001, the County Superintendent directed the Charter School to make a payment in the amount of $21,572 to the Dover school district by April 16, 2001 for overpayment of tuition. Such overpayment resulted from students who had withdrawn from the Charter School and returned to the Dover district. When the Charter School sought to have such payment deferred, the County Superintendent, by letter dated April 17, denied such request but extended the deadline for making that repayment to April 20. The County Superintendent added that since the total overpayment was $76,180, the School should also make arrangements to encumber at least $54,608 to be returned to Dover at the conclusion of the current quarterly period in June. The record shows that as of June 14, 2001, the Charter School still had not made any of the required payments but was proposing to defer the repayment by making twelve equal payments during the next school year.

The deficiencies with regard to the certification of staff members, which had included certified teachers being assigned outside of their certification and individuals being employed as teachers before being admitted to the provisional teacher training program, continued even through the second probationary period. In a letter dated May 14, 2001 to the Board of Trustees, the Director of the Office of Charter Schools

found "no evidence that the use of inappropriately certified and non-certified teachers of physics and Spanish, respectively, has been successfully corrected." In addition, the record indicates a continuing failure by the School to comply with the regulations governing the employment and training of provisional teachers, N.J.A.C. 6:11-5.1 et seq. See, e.g., memo dated June 13, 2001 from Judy Cifone to Anne O'Dea.

We also concur with the Commissioner's rejection of the Board of Trustees' due process argument. As we stressed in In the Matter of the Revocation of the Charter of the Greenville Community Charter School, decided by the State Board of Education, August 1, 2001, the law does not require that a charter school be afforded a probationary period to correct deficiencies before its charter can be revoked. Rather, N.J.S.A. 18A:36A-17 and N.J.A.C. 6A:11-2.4 provide that the Commissioner may place a charter school on probation, but do not require that he do so. In this instance, the Charter School was placed on probationary status twice during its first year of operation before its charter was revoked at the end of that school year. Moreover, as previously indicated, the School was given considerable notice of its deficiencies and provided with the opportunity to correct them.

It is also noteworthy that while the Board of Trustees contends in its brief in support of its motion that its students will suffer irreparable harm if the School is not permitted to operate in the 2001-02 school year, it also acknowledges that it has no intention of opening for the 2001-02 year and that it is seeking a stay to prevent the liquidation of assets.

Given these circumstances and the nature and gravity of the School's deficiencies, we can find no basis for concluding that denial of the relief sought would

cause irreparable harm to the School's students. Nor do the equities favor the granting of a stay.

Accordingly, for the reasons stated, we deny the Board of Trustee's application for emergent relief.

September 5, 2001

Date of mailing SEP 07 2001

23-01

#23-01

LESTER VINCENTI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION *ET AL.*,	:	DECISION
RESPONDENTS.	:	
	:	

SYNOPSIS

Petitioning social studies teacher alleged that the Essex County Educational Services Commission Board's (ECESC) termination of his services in January 1999 was violative of school law and regulation and contrary to the terms of the parties' employment contract. Petitioner sought reinstatement with compensation.

The ALJ determined that petitioner had no legal right to the position held by Mr. Harold Morrison, the teacher that petitioner was replacing due to Mr. Morrison's unexplained absence. The ALJ found that petitioner's employment was not approved by the ECESC Board of Directors; petitioner never received nor executed a written contract of employment; and, during the entire time of petitioner's employment, Mr. Morrison was not terminated nor had he resigned, retired or died. Thus, the ALJ concluded that petitioner had no legal right to the position held by Mr. Morrison, notwithstanding his unexplained absence or the verbal promises made to petitioner granting him greater than substitute status.

The Commissioner adopted the findings and determination in the Initial Decision as his own. The Commissioner noted that by the explicit wording of *N.J.S.A.* 18A:27-1, no teaching staff member may be appointed except by a recorded roll call majority vote of the full membership of the board. This is true even as here where it was alleged that the Board's administrator provided assurances of employment to petitioner. (*Brennan*; *Fanago*; *Bolger*) Petition was dismissed.

January 25, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3954-99
AGENCY DKT. NO. 50-3/99

LESTER VINCENTI,

Petitioner,

v.

BOARD OF EDUCATION OF THE ESSEX COUNTY EDUCATION COMMISSION, *et. al.*,

Respondent.

Lester Vincenti, Petitioner, *pro se*

John H. Watson, Esq., and **Avery Pilgram**, Esq., for Respondent

Record Closed: September 20, 2000 Decided: September 21, 2000

BEFORE **THOMAS R. VENA**, ALJ

STATEMENT OF THE CASE

Petitioner, Lester Vincenti, alleges that the Board of Education of the Essex County Educational Services Commission (ECESC) violated State Education law and Regulations and acted in violation of an alleged contract between the parties when it terminated his employment in January 1999. Petitioner seeks an order from the Commissioner of Education (Commissioner) reinstating him to the position, together with lost back pay, among other things. This matter was transmitted to the Office of

Administrative Law (OAL) for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The hearing was held on July 10, 2000, July 11, 2000 and August 1, 2000 at the offices of the OAL in Newark, New Jersey. The parties submitted post-hearing memoranda which were received from petitioner on September 7, 2000 and respondent on September 11, 2000 with replies thereto received on September 18, 2000 and September 20, 2000, at which time the record was closed.

ISSUES

The issues to be determined by this administrative tribunal, as set forth in the Pre-hearing Order dated June 7, 2000, are as follow:

1. Whether Petitioner's termination by Respondent violated the provisions of *N.J.S.A.* 18A:27-1, *et seq.*, and/or regulations promulgated pursuant thereto.

2. Whether a contract existed between the parties.

3. Whether, if so, that contract provided for terms and conditions prior to its termination.

4. Whether, if so, the terms of the employment contract were breached.

5. If a contract existed between the parties and it was breached, and/or Respondent otherwise violated the terms of *N.J.S.A.* 18A:27-1, *et seq.*, and regulations promulgated pursuant thereto, is Petitioner entitled to damages and, if so, to what damages is the Petitioner entitled?

In sum: Did any statute, regulation or contract prohibit Petitioner's termination by Respondent on January 27, 1999, and, if so, to what damages is Petitioner entitled?

FINDINGS OF FACT

Based upon the testimony of the witnesses appearing before me and a thorough review of the documents submitted in evidence, and having considered the credibility of the witnesses, I **FIND** the following facts:

The full-time social studies teacher at the Essex Campus of ECESC for the 1998-1999 school year was Harold Morrison. Toward the end of October, Mr. Morrison stopped reporting for work without explanation. Efforts to contact Mr. Morrison were unsuccessful and the ECESC Superintendent, Dr. Jacqueline A. Young, wrote to him confirming that Dr. J. Kenneth Watts, the Essex Campus Principal, and others had been unsuccessful in contacting him and insisting that he contact her by December 15, 1998 to discuss what action should be taken (P-8).

When Mr. Morrison failed to contact Dr. Young or anyone else connected with the ECESC following the December 3, 1998 letter (P-8), Respondent took steps to ensure that a social studies teacher performed those services pending some resolution of the problem regarding Mr. Morrison's absence. To that end, and in fact prior to the written request, Respondent ran an advertisement for the position in the Education Section of *The Star Ledger* on November 22, 1998 (P-20).

Still without a certified social studies teacher, the Principal of the Essex Campus program, Dr. J. Kenneth Watts, contacted Petitioner Lester Vincenti in December 1998 following the suggestion of Lola Thomas, the District's Coordinator of Home Instruction.

The critical telephone conversation between Dr. Watts and Mr. Vincenti took place on December 24, 1998 at approximately 11:00 a.m. Dr. Watts and Mr. Vincenti discussed the opportunity available as a result of the absence of Mr. Morrison and Mr. Vincenti's qualification to teach social studies at the Essex Campus. Having been filled in by Ms. Thomas, Dr. Watts advised Mr. Vincenti that he "fit the bill completely." Arrangements were made for Mr. Vincenti to commence employment as a social

studies teacher at the Essex Campus upon return from the Christmas break, January 4, 1999, at the rate of $23 per hour, six hours per day, five days per week. While affirmed as a "contract position," no written contract was ever provided by the ECESC and none was signed by Mr. Vincenti. Petitioner's employment was never approved by the ECESC Board of Directors.

Mr. Vincenti reported for work as instructed on January 4, 1999 at 8:30 a.m. The dates and hours he actually worked for Respondent are as follows:

January 4 through January 6 – three days – eighteen hours (R-1)
January 7 through January 20, 1999 – eight days – forty-eight hours (R-2)
January 21, 1999 – one day – six hours (R-3)

On Monday, January 25, 1999, suffering from a 102° fever, Vincenti called in sick. He did so by leaving a message on an answering machine at approximately 6:00 a.m. on that date. At 7:00 a.m. he was contacted by Dr. Watts who advised him "your services are no longer required."

During this period of time, the staff of ECESC continued to seek resolution of the status of Mr. Morrison. Following the failure to Mr. Morrison to respond to Dr. Young's letter of December 3, 1998 (P-8), she advised him via certified mail and regular mail that she was recommending to the Board of Directors of the Essex County Educational Services Commission on January 27, 1999 that he would be terminated immediately due to "excessive absenteeism and failure to report absences" (P-9). The certified mail was returned unsigned, but the letter mailed via regular mail was not returned and was therefore presumptively delivered. No response has ever been received from Mr. Morrison. On January 27, 1999, the Board of Directors terminated Mr. Morrison (R-10).

CONCLUSIONS OF LAW

Based on the foregoing facts and the applicable law, I **CONCLUDE** that Mr. Vincenti has no legal entitlement to relief.

Pursuant to the provisions of *N.J.S.A.* 18:16-1, the Board of Education of any School District is granted authority to employ principals, teachers and other personnel.[1]

Employees retained by a district board of education need not be permanent employees and are not so considered unless validly appointed for a school term. District boards have the authority to retain substitute personnel by virtue of *N.J.S.A.* 18A:16-1.1 which states:

> In each district the board of education may designate some person to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee subject to the provisions of Section 18A:17-13.
>
> The act of any person designated shall in all cases be legal and binding as if done and performed by the officer or employee for whom such designated person is acting but no person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting.

Notwithstanding the provisions of the foregoing statute, even the appointment of a substitute teacher is not legally valid unless via "a recorded roll call majority vote of the full membership of the board of education appointing him." *N.J.S.A.* 18A:27-1. If appointed other than as a substitute during the term of an absent employee, appointments shall be for the period of the school year, *i.e.,* "for the period from July 1 of the year in which such board shall organize to the succeeding June 30." *N.J.S.A.* 18A:27-3. This presumes, however, not only the regular permanent employment of the individual and approval by the district board of education, but also through the issuance of and complete execution of a written contract of employment pursuant to *N.J.S.A.*

---

[1] Technically, the Respondent here is not a board of education. It is in fact the Board of Directors of an Educational Services Commission. While its provision of educational services differs from that of a Board of Education, its rights and obligations, as well as the rights and obligations of its employee, are the same as in any school district pursuant to its enabling statute, *N.J.S.A.* 18A:6-51, *et seq.* The superintendent has the same powers as conferred by statute on any superintendent of schools, *N.J.S.A.* 18A:6-60. Its ability to employ personnel is the same, *N.J.S.A.* 18A:6-65. The rights and benefits of personnel are also the same as those holding a position or employment under a public school district board of education, *N.J.S.A.* 18A:6-66.

18A:27-5 or via a specific set of rules governing employment of teachers by the district board in question. *N.J.S.A.* 18A:27-4.

Thus, the critical distinction from a statutory perspective is that between the filling of a vacancy caused by termination, retirement, resignation or death versus the retention of an individual to provide services "during the absence, disability or disqualification" of an existing staff member. Here, certain key facts are undisputed:

- Mr. Vincenti's employment was not approved by Respondent's Board of Directors.

- Mr. Vincenti never received nor executed a written contract of employment.

- During the entire time of Mr. Vincenti's employment, Mr. Morrison had not been terminated nor had he resigned, retired or died.

The foregoing uncontested facts forebear but a single conclusion: During Mr. Vincenti's employment with Respondent he was serving as the temporary replacement for Mr. Morrison during the latter's unexplained absence pursuant to the provisions of *N.J.S.A.* 18A:16-1.1. In fact, that absence could have continued for a virtually unlimited period of time without resulting in the conversion of Mr. Vincenti's appointment from a temporary one to a permanent one. *Lammers v. Board of Education,* 134 *N.J.* 264 (1993). While this is not to say that district boards are entitled to retain temporary employees indefinitely during the course of an existing vacancy, *Sayreville Education Association v. Board of Education of the Borough of Sayreville,* 193 *N.J. Super.* 424 (App. Div. 1984), it is clear that subsequent termination of a permanent employee will not convert a substitute's temporary employment to a permanent one. *Driscoll v. Board of Education of Clifton,* 165 *N.J. Super.* 241 (App. Div. 1977) *aff'd,* 79 *N.J.* 126 (1979).

Thus, I **CONCLUDE** that Mr. Vincenti had no legal right to the position held by Mr. Morrison notwithstanding his unexplained absence and notwithstanding any other information he may have been given verbally to the contrary. While I **CONCLUDE** that

there was insufficient evidence presented here to justify a conclusion that promises were made to Mr. Vincenti granting him greater than substitute status, I also **CONCLUDE** that any such promises if indeed made would be irrelevant in light of the uncontested facts adduced at hearing, and cannot form a basis to bestow rights upon Mr. Vincenti not authorized by statute.

To reiterate, the basis of Petitioner's claim for relief is truly fact sensitive, and those uncontroverted facts mandated but one result. There was no vacancy for Mr. Vincenti to fill and, therefore, there was no transmittal of rights to any position.

ORDER

For the foregoing reasons and authorities cited, it is hereby **ORDERED** that Petitioner's petition for relief be 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.

Sept. 21, 2000
DATE

Thomas R. Vena
THOMAS R. VENA, ALJ

Receipt Acknowledged:

9-25-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 28 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

APPENDIX

Witnesses

For Petitioner:

Dr. J. Kenneth Watts
Dr. Jacqueline A. Young
Steven Sarsfield
Lola Thomas
Dr. Margaret Garofalo
Lester Vincenti, Petitioner, *pro se*

For Respondent:

None

Exhibits

For Petitioner:

P-6 Union Contract - FOR IDENTIFICATION ONLY
P-8 Jacqueline A. Young to Harold Morrison dated 12/3/98
P-9 Jacqueline A. Young to Harold Morrison dated 1/25/99
P-10 Personnel Policies & Procedures, Essex County Educational Services Commission, Staff Attendance, effective date 11/20/86 (3 pp.)
P-11 Collective Bargaining Agreement - FOR IDENTIFICATION ONLY
P-12 Lester Vincenti to Jacqueline Young dated 2/24/99
P-13 Lester Vincenti to Dr. Jacqueline Young dated 2/10/99
P-14 Lester Vincenti to Secretary, Essex County Educational Services Commission, dated 3/25/99, with attachment (3 pp.)

P-15 Lester Vincenti to Dr. J. Kenneth Watts dated 1/26/99 – FOR IDENTIFICATION ONLY

P-16 Steven Sarsfield to Lester Vincenti (undated 1page memo with 1 page attachment (front and back))

P-17 Daily Planning and Instructional Book

P-18 Lester Vincenti to Lola Thomas dated 10/1/98

P-19 Payroll Record - FOR IDENTIFICATION ONLY

P-20 Advertisement of 11/22/98

P-21 Lester Vincenti to Steven Sarsfield dated 2/4/99

P-22 Job Description - Alternative Education - FOR IDENTIFICATION ONLY

P-23 Job Description - Director of Services to Non-Public Schools - FOR IDENTIFICATION ONLY

P-24 Job Description – Supervisor of Instruction, Division of Services to Non-Public Schools

P-25 Organizational Chart - FOR IDENTIFICATION ONLY

P-26 Disposition Form - Home Instruction - FOR IDENTIFICATION ONLY

P-27 Home Instruction Form - Request for Services - FOR IDENTIFICATION ONLY

P-28 Disposition Form - Home Instruction - FOR IDENTIFICATION ONLY

P-29 Disposition Form - Home Instruction - FOR IDENTIFICATION ONLY

P-30 Unidentified memorandum - FOR IDENTIFICATION ONLY

P-31 Lester Vincenti to Dr. J. Kenneth Watts dated 1/26/99

For Respondent:

R-1 Timesheet 1/1/99 to 16/99

R-2 Timesheet 1/7/99 to 1/20/99

R-3 Timesheet 1/21/99

R-4 Canceled check dated 1/25/99

R-5 Canceled check dated 1/29/99

R-6 Canceled check dated 2/12/99

R-7 Canceled check dated 10/15/99

R-8 Job Description of Alternative Education School Principal

R-9 Collective Bargaining Agreement 1995 – 1998

R-10 Motion to Approve Termination of Harold Morrison

LESTER VINCENTI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION *ET AL.*,	:	DECISION
RESPONDENTS.	:	
	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. On October 6, 2000, petitioner submitted a request for an extension of time within which to file exceptions due to his intent to secure transcripts of the hearing. Petitioner was granted an extension until October 16, 2000 to file exceptions. Subsequently, on October 19, 2000, petitioner requested that he be granted a "stay" for filing exceptions until he obtained the transcripts. Petitioner was granted a second extension for filing exceptions until December 2, 2000. As a result, an extension of the 45-day statutory period for the Commissioner's review and issuance of a final decision, from November 9, 2000 until December 26, 2000, was requested by the Commissioner and granted by the OAL on November 2, 2000. On November 28, 2000, petitioner was granted a third extension to file exceptions until December 18, 2000 because he had not yet obtained the transcripts. This necessitated that the Commissioner seek another extension from the OAL for issuance of the final decision until January 25, 2001, which was granted on December 6, 2000. Petitioner

ultimately filed exceptions, dated January 17, 2001 and received by the Commissioner on January 19, 2001, on an untimely basis pursuant to the requirements of *N.J.A.C.* 1:1-18.4.[1,2]

Upon thorough review of the record, the Commissioner agrees with and adopts as his own the recommendation of the Administrative Law Judge (ALJ) dismissing the Petition of Appeal. Even granting *arguendo* that petitioner's representation of the underlying facts is true, as a matter of law, he cannot prevail on the merit of his claims. The record clearly establishes, and the petitioner does not dispute, that *he was never approved for employment or otherwise appointed by the Board of Directors of the Essex County Educational Services Commission (ECESC) as a social studies teacher at the Essex Campus program to fill the teaching position held by Harold Morrison; nor did petitioner ever receive or execute a written employment contract with the ECESC.*

It is well established that the statutory authority to employ teaching staff members rests solely and exclusively with a board of education (*N.J.S.A.* 18A:27-1 and *N.J.S.A.* 18A:27-4.1), or as herein, a board of directors of an educational services commission (*N.J.S.A.* 18A:6-65). By the explicit wording of *N.J.S.A.* 18A:27-1, no teaching staff member may be appointed

---

[1] In each of the letters to petitioner granting him an extension within which to file exceptions, he was informed of the date by which the exceptions had to be filed and that, pursuant to *N.J.A.C.* 1:1-18.4, any request for further extension had to be filed prior to the date the exceptions were due. No request for further extension was received prior to December 18, 2000, the last due date established for exceptions. A letter dated December 20, 2000 was filed by petitioner in which he states:

> As usual, the OAL has failed to timely prepare and deliver the last requested materials for our use in this matter in preparing our exceptions to [the ALJ]'s absurd recommendations. It appears that that agency is incapable of administering their responsibilities herein with any degree of certainty or decency.
>
> With this latest example of improper conduct on the part of the NJ OAL, we have determined to prepare our [exceptions] memorandum to your agency without awaiting the audiotapes we requested months ago. Same will be forthcoming shortly and we intend to raise as additional issues beyond those already raised, the interminable institutional bias and prejudice of the NJ OAL along with the continued misconduct of [the ALJ] and his cronies, respondents' counsel, including but not limited to the latest deprivations connected to [the ALJ]'s appointment to the Superior Court bench in Essex County, New Jersey.

[2] The Commissioner notes that the exceptions filed by petitioner, to the extent that they do not reiterate prior arguments and rely on prior submissions, contain a myriad of allegations against the OAL, such as "dormant animosity", "degradation and inappropriate conduct" on the part of OAL staff, matters which are properly raised before the OAL pursuant to *N.J.A.C.* 1:1-3.2.

except by a recorded roll call majority vote of the full membership of the board. This is true even in circumstances, such as herein, where it is alleged that a board's administrator(s) provided assurances of employment to an individual which were relied upon by that individual.

Therefore, as found by the ALJ, even accepting *arguendo* that petitioner's allegations are true, that Principal Watts offered him employment to fill Mr. Morrison's position and assured him that an employment contract would immediately be provided under the terms set forth in the Initial Decision, this would not entitle petitioner to the relief he seeks in this matter. Rather, the holding of the Commissioner in *Brennan v. Board of Education of the City of Pleasantville*, 1977 *S.L.D.* 1059, applies herein. That holding states, *inter alia,* that:

> The Commissioner cannot agree that the Board is estopped from asserting that no contract of employment existed between it and petitioner. *The law is clear that boards alone can appoint teaching staff members.*
>
> "No teaching staff member shall be appointed except by a recorded roll call majority vote of the full membership of the board of education appointing him." *N.J.S.A.* 18A:27-1
>
> An examination of the record reveals that the Board committed itself not at all to petitioner, but that petitioner mistakenly relied on the opinions and assurances of the Board's administrators in concluding that a commitment had been made. Such reliance was misplaced, since opinions and assurances cannot stand in the stead of deliberate Board action. *The Board alone has the ultimate authority to decide the employment of teaching staff members.* *** (emphasis supplied) (at 1061-1062)

See also *Fanego v. State-Operated School District of the City of Jersey City*, Hudson County, decided by the Commissioner June 14, 1999; *Vernon v. Holmdel Board of Education*, 1990 *S.L.D.* 852; and *Cutler et al. v. Bd. of Ed. of Parsippany-Troy Hills*, 1990 *S.L.D.* 725, *aff'd* State Board 751; *Rotondo v. Carlstadt-East Rutherford Reg. High School District*, 276 *N.J. Super.* 36, 39 (App. Div. 1994).

Moreover, to be valid, an employment contract must be adopted by the board. *Bolger v. Board of Education of Keansburg*, 1979 *S.L.D.* 94, *aff'd State Board* 99, *aff'd,* N.J.

Superior Court, Appellate Division, 1980 *S.L.D.* 1478. *See also Fanego, supra,* a case in which it was held that the petitioner did not have an enforceable contract of employment because the state superintendent[3] never approved the petitioner's appointment and the terms of a contract were never consummated.

Accordingly, for the reasons stated in the Initial Decision as amplified above, Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: JAN 25 2001

Date of Mailing: JAN 25 2001

[3] In a State-operated school district, the state superintendent assumes to the power of a board and makes all personnel determinations relative to the employment, transfer and removal of all officers and employees, professional and nonprofessional, subject to the approval of the Commissioner or his designee. (*N.J.S.A.* 18A:7A-42(3))

[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.

23-01

EDU # 3954-99
C # 23-01
SB # 9-01

LESTER VINCENTI,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION, ET AL.,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, January 25, 2001

For the Petitioner-Appellant, Lester Vincenti, pro se

For the Respondent-Respondent, John H. Watson, Esq.

Lester Vincenti (hereinafter "appellant"), a teacher of social studies, filed a petition of appeal with the Commissioner of Education alleging that the Board of Education of the Essex County Educational Services Commission (hereinafter "Board") had improperly terminated his employment. On January 5, 2001, the Commissioner dismissed the petition, concluding that the appellant had not demonstrated his entitlement to the relief sought.

On February 26, 2001, the appellant filed a notice of appeal to the State Board of Education. Pursuant to N.J.A.C. 6A:4-1.11(a), the appellant's brief in support of his appeal was due on March 19, 2001, 20 days after he filed his notice of appeal. The

appellant requested a 30-day extension for filing his appeal brief, which request was opposed by the counsel for the Board.[1]

On March 8, 2001, the appellant filed an application for an extension until April 9 in which to file his appeal brief. He subsequently amended his application so as to seek an extension until 30 days from the date of the determination of his request. The Board filed a letter brief in opposition thereto.

By letter dated March 23, 2001, the Director of the State Board Appeals Office ("Director") notified the appellant that, upon review of the papers submitted, the Legal Committee had denied his request for an extension. Under the circumstances, the appellant was given until April 9 to file a brief in support of his appeal. The Director also informed the appellant that his failure to file a brief by that date would result in referral of this matter to the Legal Committee for consideration of the effect of his failure to perfect the appeal and that the State Board could dismiss an appeal on its own motion as the result of an appellant's failure to file a brief.

Due to a typographical error, the letter of March 23 was mailed to an incorrect post office box. As a result, a corrected letter was sent to the appellant at his proper address on April 4, and the due date for his brief was extended until April 16.

The appellant, however, failed to file a brief by that date. The appellant has still failed to file a brief in support of his appeal, more than seven weeks after the extended deadline for such filing. Nor has he offered any explanation for his failure to file. As a result, we dismiss the appeal in this matter for failure to perfect. N.J.A.C. 6A:4-1.12(a).

---

[1] Requests for extensions of time without the consent of all parties may be granted only by leave of the Legal Committee of the State Board. N.J.A.C. 6A:4-1.5(c).

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).

June 6, 2001

Date of mailing JUN 08 2001

25-01

VELMA BROWN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

JAN 26 2001

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO: EDU 11495-97

AGENCY DKT. NO: 423-10/97

VELMA BROWN,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,

Respondent.

Robert T. Pickett, Esq., for petitioner

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

Record Closed: December 11, 2000 Decided: December 12, 2000

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

This matter was transmitted to the Office of Administrative Law (OAL) on December 9, 1997, 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 Stipulation of Settlement.

Having reviewed the contents of the attached Stipulation of Settlement, **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 Stipulation of Settlement 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.

12/12/00
DATE

JEFFREY A. GERSON,
Administrative Law Judge

Receipt Acknowledged:

12-15-00
DATE

Debbie Antanaitis /gg
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 15 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/g

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

DEC 11 2 15 PM '00

SILLS CUMMIS RADIN TISCITMAN
EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07~02-5400
(973) 643-7000
Attorneys for State Operated
School District of the City of Newark

COMMISSIONER OF EDUCATION
OAL Docket No. **EDUOR 11495-97N**
Agency Ref. No.423-10/97

Velma Brown,

Petitioner,

STIPULATION OF SETTLEMENT, WAIVER AND RELEASE

—vs-

State-Operated School District for the City of Newark,

Respondent.

The State-Operated School District of the City of Newark ("Newark" or "District") and Velma Brown ("Petitioner" or "Brown") agree to the following terms in full resolution of this matter:

WHEREAS, Brown disputes the basis for the increment withholding for the 1997-1998 school year, and

WHEREAS, Brown retired as of June 30, 1998, and

WHEREAS, the parties further agree that it is in the public interest to enter into this

agreement in resolution of said charges in order to avoid the uncertainty and expense of litigation,

NOW, THEREFORE, the parties agree as follows:

1. The District agrees to remove from Ms. Brown's employment record documentation referencing the withholding of her 1997-98 increment and to reflect Ms. Brown as having retired in good standing effective June 30, 1998.

2. Upon approval of this Agreement, Brown will withdraw her appear of the 1997-1998 increment withholding, with prejudice.

3. This agreement is subject to the approval of the State District Superintendent.

4. The parties enter this agreement voluntarily and without coercion, after consultation with their respective counsel.

Robert T. Pickett, Esq., Attorney
For Petitioner VELMA BROWN
Dated:

Irene L. Maxwell

State-Operated School District
of the City of Newark
By:
Dated: 12/7/00

OAL DKT. NO. EDU 11495-97
AGENCY DKT. NO. 423-10/97

VELMA BROWN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, 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.

COMMISSIONER OF EDUCATION

Date of Decision: JAN 26 2001

Date of Mailing: JAN 26 2001

26-01

BOARD OF EDUCATION OF THE TOWNSHIP OF PLUMSTED, OCEAN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
E.J.M. AND W.L.M.,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning school district sought, pursuant to statute and the district's written policy, tuition from respondents for a portion of the time their children attended petitioner's schools prior to respondent's being domiciled in the petitioning district. Respondents argued that, although they signed a form when enrolling their children agreeing to pay tuition for their children beginning November 1, 1999 if they were not domiciled in the district, because they were domiciled in the petitioning district for the majority of the 1999-2000 school year, they should not have to pay any tuition.

The ALJ determined that petitioner was entitled to tuition in the amount of $726.38 pursuant to *N.J.S.A.* 18A:38-1(b)(2) and the district's written policy.

The Commissioner affirmed the decision of the ALJ for the reasons set forth therein.

JAN 26 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2429-00

AGENCY DKT. NO. 104-3/00

BOARD OF EDUCATION
OF THE TOWNSHIP OF PLUMSTED,

Petitioner,

v.

E.J.M. & W.L.M.,

Respondents.

Wayne J. Oppito, Esq., for petitioner

E.J.M. & W.L.M., respondents, pro se

Record Closed: November 22, 2000 Decided: December 8, 2000

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

STATEMENT OF THE CASE

Petitioner Board of Education of the Township of Plumsted (BOE), citing N.J.S.A. 18A:38-1, demands that respondents E.J.M. and W.L.M. pay tuition for the period when they were not domiciled in the district but their children attended school in the BOE's system. Respondents contend that, because they were domiciled in the district for most of the 1999-2000 school year, they are not liable for the tuition.

PROCEDURAL HISTORY

Consistent with N.J.S.A. 18A:38-1(b)(2), during the BOE's November 15, 1999, meeting, respondents were afforded an opportunity to be heard on the matter of their domicile and liability for tuition and the BOE determined that respondents were not domiciled in the district and that they were liable. The BOE then notified respondents of its determination and the amount due, etc. The respondents refused to pay the tuition and, on March 27, 2000, the BOE's petition for relief and the respondents' answer were filed with the Commissioner of the Department of Education. N.J.S.A. 18A:38-1(b)(2). The Commissioner deemed the matter a contested case and transmitted it to the Office of Administrative Law (OAL), where on April 4, 2000, it was filed. N.J.S.A. 18A:6-9; N.J.S.A. 52:14B-2(b). The case was assigned to me, and, on November 22, 2000, after an unsuccessful settlement conference, it was heard in the OAL, Trenton. I refer to respondents by initials to avoid possible embarrassment to their children.

FINDINGS OF FACT

Respondents are the parents of two children: N.M., born August 15, 1989, and A.M., born October 1, 1990.

Prior to the 1999-2000 school year, respondents owned a single-family residence in Hamilton Township, Mercer County, where they and their children were domiciled, and their children attended the Hamilton Township public schools.

The respondents contracted to purchase a single-family home in the BOE's district (which has a New Egypt post office address). Settlement was scheduled for July 15, 1999, so respondents expected to acquire title and move to the BOE's district before the start of the 1999-2000 school year. However, in June 1999, Joseph and Sharon Keirns, the sellers, notified the respondents that their next home would not be ready by July 15, 1999. Respondents, represented by an attorney, and the Keirnses entered into a use and occupancy agreement whereby, on July 15, 1999, the Keirnses would convey title, but they would continue to reside in the home until September 30, 1999, and they would pay to the respondents $1,800 monthly rent (an amount

approximately equal to the monthly payment for the respondents' mortgage and related costs for the home). During this period, the respondents expected to continue to reside in their Hamilton Township home.

Respondents wished to avoid disrupting their children's education for the 1999-2000 school year, so instead of starting their children in the Hamilton Township school system, they decided to register them and enter them in the BOE's school system. On or about August 5, 1999, W.L.M. appeared at the BOE offices for that purpose and, consistent with the BOE's usual practice, the BOE officials presented her with information and domicile verification forms. W.L.M. completed and signed the verifications, thereby acknowledging that district taxpayers should not pay for the education of children not domiciled in the district; representing that her family resided in the district, as shown by her July 15, 1999, deed attached to the verifications; and agreeing that, if by November 1 of that school year they did not reside in the district, she would pay tuition for the children according to a per diem rate shown on the forms. R-1.

Respondents' children entered the BOE's school system for the 1999-2000 school year. However, the Keirnses notified the respondents that their next home would not be ready by September 30, 1999, and respondents and the Keirnses agreed to extend the use and occupancy agreement to October 31, 1999. Thereafter, the Keirns notified the respondents that their next home would not be ready by October 31, 1999, and respondents and the Keirnses agreed to extend the use and occupancy agreement to November 1999. That is, in November 1999, the respondents continued to eat, sleep, etc., and be domiciled in Hamilton Township.

The BOE notified respondents that, on November 15, 1999, they could be heard on the matter of their domicile and liability for tuition and, on that date, E.J.M. appeared and explained his circumstances and requested that the BOE extend to November 20, 1999, the period for which he would not be liable for tuition. The BOE then notified respondents that it had denied the request and that it had determined that they were liable for tuition. By letter dated November 21, 1999, E.J.M. expressed disappointment with the determination, etc. R-3.

On November 20, 2000, the Keirnses moved into their new home and the respondents moved their domicile from Hamilton Township to the BOE's district.

By letter dated November 24, 1999, the BOE notified respondents that it had determined that they were liable for $726.38, which is 75 percent of the tuition for school days in November up to November 20, 1999, and that they could pay that amount in three payments of $242.13 each, due December 15, 1999, January 15, 2000, and February 15, 2000. P-1; see also P-3; P-4.

In a follow-up letter, the BOE notified the respondents that it had not received their payment and that, to avoid further collection action, they should submit payment. P-2. By letter dated March 6, 2000, E.J.M. responded to the BOE's attorney's letter, representing that he intended to appeal from the BOE's determination and requesting that the BOE withhold collection action until the appeal was completed. R-2.

CONCLUSIONS OF LAW

The State, by way of local school districts, provides "for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children in the State between the ages of five and eighteen years." N.J. Const. art. VIII, § 4, ¶ 1.

N.J.S.A. 18A:38-1 states, in pertinent part:

> Public schools shall be free to the following persons over five and under 20 years of age:
>
> a. Any person who is domiciled within the school district; . . .
>
> (2) If the superintendent . . . 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 and the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, 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 or the child is not kept in the home of another person domiciled within the school district and supported by him

> gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, 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. If in the judgment of the commissioner the evidence does not support the claim of the parent or guardian, the commissioner shall assess the parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced. Nothing shall preclude a board from collecting tuition from the parent or guardian for a student's period of ineligible attendance in the schools of the district where the issue is not appealed to the commissioner.
>
> [Emphasis added.]

"Domicile" is defined as "1. A residence; a home. 2. One's legal residence." American Heritage Dictionary 550 (3d ed. 1996). Domicile has been described as "the place of [a person's] abode where he has the present intention of remaining and to which, if absent, he intends to return." Mercadante v. City of Paterson, 111 N.J. Super. 35, 39 (Ch. Div. 1970) (citation omitted), aff'd, 58 N.J. 112 (1971). "A person may have several residences or places of abode. However, he can only have one domicile at one time." Collins v. Yancey, 55 N.J. Super. 514, 520 (Law Div. 1959). Between residences, factors used to identify the domicile include: (1) the physical characteristics of each residence, (2) the time spent and things done in each residence, (3) other persons found in each residence, (4) the person's mental attitude about each residence, and (5) whether, when absent, the person has an intention to return. Mercadante, supra, 111 N.J. Super. at 39-40. Acts, statements and documents may be relevant in determining domicile.

Consistent with the usual presumption that public entities act lawfully, reasonably and in good faith and consistent with N.J.S.A. 18A:38-1 specifically, in these circumstances, respondents bear the burden of proof by a preponderance (the greater weight) of the competent and credible evidence that the BOE's determination was incorrect and that they were domiciled in the district.

Prior to November 20, 1999, respondents held title to a single-family home in the BOE's district, but they agreed that the Keirnses could continue to occupy the home, accepting rent for that occupancy. Respondents kept their personalty, ate, slept, etc., and were domiciled in Hamilton Township, but transported their children for attendance in the BOE's school system. Only after the BOE notified respondents that they were liable for tuition, i.e., on November 20, 1999, did respondents move their domicile to the BOE's district. Respondents argue that, consistent with N.J.S.A. 18A:38-1(d), since the home in the BOE's district became their "all-year-round dwelling place within the district for one year or longer," they are not liable for tuition. However, that subsection of the statute refers to school children whose parents or guardians are "residing temporarily" in the district, circumstances not present here. Respondents are governed by N.J.S.A. 18A:18-1(b)(2) and they have not met their burden of proof that, during relevant times, they were "domiciled" in the district. Therefore, they are liable for tuition. (Respondents should also note that the BOE's demand is substantially below the amount that could be demanded under applicable statutes.)

ORDER

The BOE's claim is **GRANTED** and the respondents are **ORDERED** to pay $726.38 to the BOE.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a 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, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 1, 2000
DATE

JOHN R. TASSINI, ALJ

Receipt Acknowledged:

12-13-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 14 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

For Petitioner:

P-1 Letter from BOE to respondents, November 24, 1999

P-2 Letter from BOE to respondents, January 4, 2000

P-3 BOE policies

P-4 BOE Verification of Residence forms

For Respondents:

R-1 Verifications of Residence, completed by respondent, August 5, 1999; Deed, July 15, 1999

R-2 Letter from respondents, March 6, 2000

R-3 Letter from respondents, November 21, 1999

WITNESSES

For Petitioner:

Joann Holman
W.L.M.

For Respondents:

E.J.M.

OAL DKT. NO. EDU 2429-00
AGENCY DKT. NO. 104-3/00

BOARD OF EDUCATION OF THE TOWNSHIP OF PLUMSTED, OCEAN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
E.J.M. AND W.L.M.,	:	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 concurs with the Administrative Law Judge's finding that respondents were not domiciled in petitioner's school district prior to November 20, 2000. He further concurs that petitioner acted within the scope of its authority and consistent with its policies and procedures in assessing tuition against respondents for their children's attendance in district schools prior to that date.

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed

therein. Pursuant to *N.J.S.A.* 18A:38-1, the Commissioner directs that respondents reimburse petitioner for tuition in the amount of $726.38.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: JAN 26 2001

Date of Mailing: JAN 26 2001

* 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.

27-01

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

JAN 26 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3815-99
AGENCY DKT. NO. 399-9/98

BERNARD HARRIS,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY,
Respondent.

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

Charlotte Kitler, General Counsel, for respondent

Record Closed: December 11, 2000 Decided: December 13, 2000

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

Initially, this matter was one of thirty-one consolidated cases filed with the Commissioner of Education ("Commissioner") on August 31, 1998. The multi-count petition alleged the wrongful withholding of the increment of petitioner, Bernard Harris ("Harris"). On September 21, 1998, the District filed its answer. Subsequently, on October 29, 1998, the Commissioner forwarded all thirty-one cases to the Office of Administrative Law ("OAL") for hearing as a contested case under OAL Dkt. No. EDU 9812-98.

A telephone prehearing conference was held on all thirty-one cases on March 9, 1999. During that conference, the issues were isolated. Since each petitioner's situation involved different factual circumstances and different witnesses, the consolidated cases were divided into separate cases for convenience of hearing.

A hearing was scheduled in the Harris case, designated OAL Dkt. No. EDU 3815-99, on February 24 and 25, 2000. The hearing scheduled for that date was adjourned at the request of counsel for petitioner and rescheduled to October 16 and 17, 2000. On that date, settlement conferences were held, and the matter was rescheduled for a telephone status conference on October 30, 2000. A telephone conference was held on that date, during which the parties indicated that a settlement had been reached and the hearing was not rescheduled.

The parties have agreed to settle this matter and have prepared the attached Stipulation 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.

The above settlement also withdraws petitioner's petition filed under the caption *Baker, et al. v. Jersey City School District* (12 count) OAL Dkt. No. EDU 11830-99, Agency Dkt. No. 285-9/99. Count 12 of the aforementioned case is hereby **WITHDRAWN.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 13, 2000
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

12-15-00
DATE

Debbie Contrastis
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 15 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

CHARLOTTE KITLER
General Counsel
State-Operated School District
of Jersey City
346 Claremont Avenue
Jersey City, New Jersey 07305
(201) 915-6231
Attorney for Respondent

BERNARD HARRIS, Petitioner, v. STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY Agency Dkt. No. 399-98 OAL Dkt. No. EDUOR 3815-99 STIPULATION OF SETTLEMENT

This Agreement is entered into as a resolution of the within matter regarding the appeal of the petitioner from the withholding of his increment for the 1998-99 school year. The parties hereby agree to an amicable resolution of the within matter as follows:

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

2. The respondent shall restore petitioner's increment for the 1998-99 school year retroactively.

3. The petitioner Bernard Harris withdraws his petition in the within matter

4. The petitioner shall also withdraw the petition which he filed from the withholding of his increment for the 1999-2000 school year, which petition was filed under the caption *Baker et als. v. Jersey City School District* (twelfth count) and bears Agency Docket No.

285-9/99 and OAL Docket No. EDUOR 11830-99.

5. The petitioner acknowledges that he has had the right and opportunity to discuss all aspects of this Stipulation with his attorney prior to signing it, that he has read and fully understands all of the terms of this Stipulation, and that he has entered into this Stipulation knowingly and voluntarily, without coercion or duress.

6. It is understood that this Stipulation will take effect upon its approval by the Administrative Law Judge and by the Commissioner of Education.

Bernard Harris
BERNARD HARRIS

DATED: 11/21/00

PHILIP FEINTUCH, Esq.
Attorney for Petitioner

DATED: 11/22/00

CHARLOTTE KITLER, Esq.
Attorney for Respondent

DATED: 12/8/00

OAL DKT. NO. EDU 3815-99
AGENCY DKT. NO. 399-9/98

BERNARD HARRIS,	:	
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 the parties' compliance with the terms of the settlement.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: JAN 26 2001

Date of Mailing: JAN 26 2001

* The Commissioner duly notes that settlement term 4 stipulates petitioner's agreement to withdraw the petition he filed appealing the withholding of his 1999-2000 increment, captioned *Baker et al. v. State-Operated School District of the City of Jersey City*, Agency Dkt. No. 285-9/99, OAL Dkt. No. EDUOR 11830-99, and cautions that timely submission of such withdrawal is expected upon issuance of the final decision in the instant matter.

28-01

28-01

MARYANN LORD AND THE SUSSEX-WANTAGE EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE SUSSEX-WANTAGE REGIONAL SCHOOL DISTRICT, SUSSEX COUNTY,	:	
RESPONDENT.	:	

JAN 26 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9095-00

AGENCY DKT. NO. 251-7/00

MARYANN LORD AND THE SUSSEX-WANTAGE EDUCATION ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF SUSSEX-WANTAGE, SUSSEX COUNTY,

Respondent.

Mary J. Hammer, Esq., for petitioner
(Bucceri & Pincus, attorneys)

Brian T. Giblin, Esq., for respondent
(Giblin & Giblin, attorneys)

Record Closed: December 11, 2000 Decided: December 12, 2000

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

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on September 28, 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.

A telephone prehearing conference was scheduled for December 13, 2000. Prior to the conference, 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.

Dec 12, 2000
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

12-15-00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 15 2000
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

DEC 11 12 03 PM '00

BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(973) 773-5665
Counsel for Petitioners

MARYANN LORD and the SUSSEX-WANTAGE EDUCATION ASSOCIATION,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioners, v.	:	Agency Ref. No. 251-7/00 O.A.L. Dkt. No. EDU 9095-00N
SUSSEX-WANTAGE REGIONAL BOARD OF EDUCATION,	:	
Respondent.	:	**STIPULATION OF SETTLEMENT**

The above captioned matter having been settled by the parties hereto as follows:

The Sussex-Wantage Regional Board of Education agrees to credit to the sick bank of Maryann Lord five (5) half days.

The matter is therefore dismissed with prejudice and without costs.

GIBLIN & GIBLIN, ESQS.

By: Brian T. Giblin
Attorney for Respondent

BUCCERI & PINCUS, ESQS.

By: Mary J. Hammer
Attorney for Petitioners

OAL DKT. NO. EDU 9095-00
AGENCY DKT. NO. 251-7/00

MARYANN LORD AND THE SUSSEX-WANTAGE EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE SUSSEX-WANTAGE REGIONAL SCHOOL DISTRICT, SUSSEX COUNTY,	:	
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: JAN 26 2001

Date of Mailing: JAN 26 2001

29-01

#29-01R

353-98R
(107-97)

DIANE SWAIM AND MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	SYNOPSIS

Petitioning Education Association and its president asserted that the Board's action granting early tenure to two principals was arbitrary and capricious. In the 1997 Initial Decision, the ALJ dismissed the petition as moot. The Commissioner, however, determined to remand the matter to OAL to determine whether the Board acted within its authority in creating, and then rescinding, a policy to confer tenure upon all principals who had maintained continuous employment in the position of principal in the District for 24 months. Thus, the Commissioner reversed the finding that the matter was moot because the individuals in question achieved tenure, finding that issues existed of public importance which are capable of repetition while evading review. On remand, the ALJ determined that a board has the authority to shorten the period of time required for the acquisition of tenure if done for the general category of all such employees, regardless of how limited that category may be; that a board could rescind such a policy if the new requirement is uniform for all employees of the category; and that no notice of such a resolution is required if performed at a regularly scheduled meeting pursuant to the OPMA. The Commissioner determined that the ALJ did not render either factual findings or credibility assessments as to the seminal issue in this matter, *i.e.*, the intent of the Board in undertaking its actions and whether, in light of the circumstances existing in this matter, its actions exceeded the scope of its authority. Thus, the Commissioner again remanded the matter to OAL for supplementation of the record and further findings sufficient to address these concerns.

On second remand, the ALJ concluded that the Board acted within its authority in creating and then rescinding a resolution to confer early tenure. Its actions were not arbitrary, capricious or unreasonable. Citing the Supreme Court decision in *Rall*, the ALJ determined that a board has the power to pass such a resolution if it applies to the whole category of employees, regardless of the number of individuals within that job category. Moreover, just as in *Rall*, the resolution remains valid until the board adopts another rule of general application. As to notice of the resolution, no notice of such resolution is required.

The Commissioner adopted the findings and determination in the Initial Decision as his own. The Commissioner concluded that the Board's action to establish a shorter period for the grant of tenure for its principals, and its subsequent action to change the tenure qualifying period back to the presumptive three-year statutory period, grandfathering the principals lawfully tenured by its prior resolution, was within its discretionary authority. (*N.J.S.A.* 18A:28-5; *Rall*) The Commissioner further concurred with the ALJ that petitioners failed to produce sufficient evidence to substantiate their allegation that the Board acted in bad faith.

January 26, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6705-98

AGENCY DKT. NO. 394-10/95

DIANE SWAIM AND MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,

Respondent.

Robin M. Messing, Esq., for the petitioners (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Douglas Kovats, Esq., for the respondent (Kenney, Gross & McDonough, attorneys)

Record Closed: April 2, 2000 Decided: October 27, 2000

BEFORE **KATHRYN A. CLARK**, ALJ:

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

The Middletown Township Board of Education passed a resolution on July 25, 1995, shortening the period of time required for all school district principals to obtain tenure. Instead of the statutory period of three years (*N.J.S.A.* 18A:28-5), tenure would be granted to all

principals who had "24 months of full-time service as Principal in the School District". Of the 17 principals in the school district, there were only two non-tenured principals in the district at the time of this resolution: Dr. Antonia Martinez and Dr. Alan Feuer. Both principals had at least 24 months of service, yet less than three years. By way of this resolution, both principals obtained tenure immediately.

One month later, the Board again changed its policy with regard to granting tenure to principals. On August 22, 1995, it passed a second resolution, stating that it "is now of the opinion that the reduced period of tenure is no longer in the best interests of the District." The resolution restored the time period for acquisition of tenure by principals to the statutory period of three years. The resolution noted that any principal who acquired tenure pursuant to the July 25, 1995 resolution would remain tenured. In essence, Dr. Martinez and Dr. Feuer were grand fathered as tenured principals.

Petitioners Diane Swaim and the Middletown Township Education Association (MTEA) appealed and, on November 17, 1995, this matter was transmitted to the Office of Administrative Law for hearing and 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.

At a prehearing conference of February 13, 1996, hearing dates of June 10 and 11, 1996 were set. Before that, on June 4, 1996, respondent moved to dismiss the portion of the petition that concerned Dr. Martinez, since she had served three years and was entitled to statutory tenure, N.J.S.A. 18A:28-5. The motion was granted.

The hearing was conducted on June 10 and 11, 1996. The matter of the standing of the petitioners was raised, and the President of the MTEA, Diane Swaim, who was also a taxpayer of the School District, was granted standing individually. The record closed following submission by the parties of written summations on December 9, 1996.

The initial decision (EDU 10691-95) concluded that the petition did not present a contested case, as defined in N.J.A.C. 1:1-2.1, because the two individuals at issue had achieved tenure by operation of N.J.S.A. 18A:28-5 during the pendancy of the case. Petitioners filed

exceptions, and the Commissioner of Education remanded the matter for a determination of whether the Board acted within its authority in creating, and then rescinding, such a policy conferring early tenure. The Commissioner of Education also wanted additional findings on the intent of the Board in "undertaking" its actions, and whether its actions were arbitrary, capricious or unreasonable.

The parties agreed to rely on the transcripts of the June 10, 1997 hearing, together with the evidence submitted.

DECISION

The Board acted within its authority in creating and then rescinding a resolution to confer early tenure. Its actions were not arbitrary, capricious or unreasonable.

The board has the authority to shorten the period of time required for the acquisition of tenure if done for the general category of all such employees, regardless of how limited that category may be. Likewise, it could rescind such a policy if the new requirement is uniform for all employees of the job category. Additionally, no notice of such a resolution is required if performed at a regularly scheduled meeting, pursuant to the Open Public Meetings Act. The Board surpassed the notice requirements in publishing its agenda for the meeting that stated that "formal action" would be taken on "personnel" items.

LEGAL DISCUSSION

The statutory provision governing the grant of tenure to teachers and principals provides that:

> The services of all teaching staff members employed in the positions of . . . principal . . . shall be under tenure during good behavior and efficiency . . . after employment in such district or by such board for:
>
> (a) Three consecutive calendar years, *or any shorter period which may be fixed by the employing board for such purposes* . . .

[*N.J.S.A.* 18A:28-5 (emphasis added).]

The petitioner argues that the school board's actions were arbitrary, capricious and in bad faith. Specifically, she argues that although the statute allows for a shorter period of time to be set for principals to obtain tenure, here it was wrongly done for the sole benefit of two individuals. Additionally, she argues that the resolution was passed without proper notice.

In *Rall v. Board of Educ. of Bayonne*, 54 *N.J.* 373 (1969), a city board shortened the length of time required for a superintendent to achieve tenure to 6 ½ months. This was done by resolution, just as in the present case. The purpose of the resolution was to confer tenure upon Dr. Rall, the then-acting superintendent. He had assumed his post under a contract which was two years and eleven months in length, short of the three years required for tenure under the statute. After 6 ½ months, the board stated that Dr. Rall had efficiently performed his duties since commencement of the contract and thus rescinded his contract and granted him tenure by unanimous vote. Two years later, prior to the date on which Dr. Rall's original contract was supposed to end, the board adopted a second resolution rescinding the former resolution and declaring the original contract to be the only valid and subsisting contract. The board declared that when Dr. Rall's contract expired the post would be vacant. It resolved that the prior resolution was void, "because it deprived the present board of such discretion, because it attempted to usurp the present board's legal duty and obligation, and because it violated the public policy of the State by denying the citizens of Bayonne the benefits of the probationary period required by statute to precede the acquisition of tenure by a school superintendent." *Rall v. Board of Educ. of Bayonne*, 104 *N.J. Super.* 236 (App. Div. 1965).

The Appellate Division held that the first resolution granting early tenure to Dr. Rall was void. It interpreted the statutory phrase that allows for boards to shorten the length of time required to achieve tenure as applying only to actions where the length of time is shortened for all present and future members of the job category, not a select individual. "The intent was plainly not to authorize *exemptions* from the three-year probationary term on an *ad hoc* basis in individual cases, as was so obviously done in the present instance." *Id.* at 243.

The NJ Supreme Court reversed. It stated that the board's actions were not undertaken arbitrarily or in bad faith, but in the true belief that the form of resolution was a proper legal method of accomplishing its purpose. "Under the circumstances we think the legislative act of the Board - the resolution - should be construed broadly to do what it was intended to do, *i.e.*, meet and satisfy the requirement of the statute. Therefore, we hold that the resolution shortened the period for acquisition of tenure for superintendents of schools generally - not just for Dr. Rall . . . That rule now prevails and will continue to do so unless and until a board of education adopts another rule of general application fixing a different tenure qualifying period." *Rall, supra,* 54 *N.J.* at 377. It mattered not to the Court that Dr. Rall was the only person in the particular job category of superintendent.

In the present case, the board adopted a resolution for the general category of principals. There were only two principals within the job category that were not tenured, and both were mentioned by name in the resolution. It is apparent from *Rall,* that the board has the power to pass such a resolution if it applies to the whole category of employees, regardless of the number of individuals within that job category. Just as in *Rall,* the resolution remains valid until the board adopts another rule of general application. In the present action, the board adopted a second resolution changing the time period for acquiring tenure back to three years. This action is valid pursuant to the *Rall* decision.

The petitioner additionally urges that the first resolution be deemed void as arbitrary and in bad faith due to the board's alleged lack of notice of such resolution. She cites *Thomas v. Board of Educ. of Morris Twp.*, 89 *N.J. Super.* 327 (App. Div. 1965), aff'd 46 *N.J.* 581 (1966), for the proposition that tenure decisions constitute some of the most vital and responsible duties a board of education must perform, and a board cannot exercise its discretion to shorten the tenure period in an arbitrary or capricious fashion. Rather, boards must act in good faith when making such decisions.

Whether proper notice was given to the board members and the general public is a question of fact for Your Honor. At first blush, it appears that the facts in *Thomas* are distinguishable from the present. In *Thomas*, four minority board members in a politically charged community had no notice of the proposed contract alteration action. Here, there was at

least some notice of "personnel" items that would be discussed, along with notice that "formal action" would be taken on such items.

In *Thomas, supra,* a school district superintendent was extended a two year contract by the board. After 8 ½ months, on October 18, 1962, the board adopted a resolution revoking the first contract and giving the superintendent (Dr. Thomas) a three year contract. Thus, Dr. Thomas would achieve tenure by the terms of the contract since its time period, coupled with the time already served in the position, would extend beyond the statutory three year tenure requirement. But before the conclusion of Dr. Thomas' second year, the board (composed of several different members, including three newly elected members holding the seats of three defeated members of the past majority bloc) revoked the October 18, 1962 resolution. It declared that the resolution was against public policy, invalid and of no force and effect. The only valid and subsisting agreement was the original two year contract, according to the board's second resolution.

The court affirmed the State Board of Education's decision upholding the board's declaration that the October 18, 1962 resolution was invalid. It stated that there was substantial credible evidence in the record from which the State Board could have reasonably found the board's action on October 18, 1962 to be an abuse of discretion, arbitrary and contrary to public policy. *Id.* at 335. Such evidence showed that the decision to revoke the remainder of the two year contract and instead extend Dr. Thomas a three year contract (which in effect would guarantee him tenure) lacked the essential elements of notice, deliberation and fair opportunity to be heard. *Id.* at 334. The matter was privately discussed and planned in advance by the majority bloc of the board, without notice to the four other (minority) board members. A statement extolling Dr. Thomas' accomplishments was prepared in advance, along with the new, three year contract. On October 18, 1962 at the regular meeting of the board, two of the four minority members were present. These two members protested strongly when the proposed contract action was revealed. But although they voiced concerns that they had some "unanswered questions" regarding Dr. Thomas' performance, they were not provided an opportunity to ask such questions. Without further discussion the contract matter was moved, voted and adopted by a 5-2 vote. *Id.* at 330. When considered along with the current political backdrop of the community, in that three of the five majority members were up for reelection a few months later

(and were all defeated), the court held that the State Board could have reasonably found the board's action to be an abuse of discretion, arbitrary and contrary to public policy.

In the present case, there was no clear notice of the proposed resolution. But the agenda did list that "personnel" items would be discussed, and that "formal action" would be taken with regard to such items. Additionally, members of the board were not caught off guard in a political move as the minority board members were in *Thomas*, since the superintendent and the assistant superintendent had discussed possible changes in the tenure requirements for principals in the recent past at informal meetings. All members had ample opportunity to respond at the meeting. Only one member voted against the change, for reasons clearly stated and fully addressed.

It should be noted that the Appellate Division acknowledged in *Thomas, supra,* that "no statute, administrative rule or regulation requires the giving of notice to board members, or to the public, of matters to be considered at such a meeting." *Id.* at 334. This decision was prior to the adoption of the Open Public Meetings Act (OPMA), *N.J.S.A.* 10:4-6 *et seq.* Yet, the OPMA does not necessarily require detailed notice of agenda items. In *La Fronz v. Weehawken Educ. Ass'n*, 164 *N.J. Super.* 5 (App. Div. 1978), certif. den. 79 *N.J.* 491 (1979) the court held that the resolutions adopted concerning personnel were valid since the agenda published for the meeting included among its listed items of business the subject matter "personnel," which was "good and sufficient notice to cover these resolutions." *Id.* at 7. Additionally, it noted that pursuant to the OPMA, since the resolutions were adopted at a regular school board meeting, no further notice was required. *Id.*

N.J.S.A. 10:4-8(d), in defining "adequate notice" states: "Where annual notice or revisions thereof in compliance with section 13 of this act set forth the location of any meeting, no further notice shall be required for such meeting." Section 13 has been codified at *N.J.S.A.* 10:4-18, which describes regular meetings of a public body, and the requirement for publishing such a schedule for the year. It is undisputed that the resolution in question in the present case was proposed and adopted at a regularly scheduled school board meeting. Thus, it follows that no further notice was required of the items to be discussed. Additionally, the published agenda stating that "formal action" would be taken on "personnel" items apparently goes further than required in providing adequate notice.

From all evidence available, it appears that the Board's intent was to secure for the District the services of an able principal that it was afraid would be hired away by another district if not offered the security of tenure. Tenure has many advantages. It not only offers the employee security, it also can offer the employer the assurance of many more years of continued service of a desirable employee.

Here, the Board had nothing more it could offer Dr. Feuer – not a bonus, not additional money. So it moved up the date of his attaining tenure – and in doing so, the Board also benefited the other member of the "class," Dr. Martinez, who is also described as an excellent principal.

The board has the authority to shorten the period of time required for the acquisition of tenure if done for the general category of all such employees, regardless of how limited that category may be. Likewise, it could rescind such a policy if the new requirement is uniform for all employees of the job category. Additionally, no notice of such a resolution is required if performed at a regularly scheduled meeting, pursuant to the Open Public Meetings Act. The Board surpassed the notice requirements in publishing its agenda for the meeting that included "personnel" items.

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

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

10/27/00
DATE

Kathryn A. Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

10-31-00
DATE

Debbie Antamattis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 1 2000
DATE

Jeff S. Masin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NOS. EDU 2267-97, EDU 10691-95 (ON REMAND) AND EDU 6705-98 (ON REMAND)
AGENCY DKT. NO. 393-10/95

DIANE SWAIM AND MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record of this matter and the Initial Decision on Remand of the Office of Administrative Law have been reviewed. Petitioners' exceptions and the Board's reply thereto, filed in accordance with *N.J.A.C.* 1:1-18.4, were duly considered by the Commissioner in making his determination herein.

Petitioners except to the Initial Decision of the Administrative Law Judge (ALJ), stating that the facts as found by the ALJ do not support her conclusion. Rather, petitioners posit that the ALJ's findings are supportive of their claim that the Board's actions were arbitrary, capricious and in bad faith because the ALJ acknowledged that the Board's intent was to confer tenure on two individual principals whom it wanted to retain, but felt it had nothing more to offer to encourage them to stay with the District. This, petitioners assert, confirms that the Board misused its authority by granting tenure before the expiration of the statutory probationary period

to two individuals as a personal benefit. (Petitioners' Exceptions at 6-7) Citing *Pickering v. Bd. of Ed. of the Borough of North Plainfield,* 1987 *S.L.D.* 1393, 1402, remanded on other grounds by the Commissioner, 1987 *S.L.D.* 1408, petitioners argue that the grant of early tenure to an individual as a personal benefit is unlawful and that:

> The fact that these two individuals comprised the entire class of eligible employees at that particular moment does not change the fact that the Board's "intent", evident on the record and as found by the ALJ, was to benefit these individuals, as further confirmed by the subsequent resolution, barely three weeks later, rescinding the first resolution yet permitting the two individuals to be "grandfathered" in. (Petitioners' Exceptions at 7)

Petitioners support the gravamen of their argument that the Board exercised its authority in an arbitrary and capricious manner in order to confer the benefits of early tenure on two specific individuals, "and not to an open-ended class of current and future principals," (*ibid.*) by citing to Board Member Scaduto's testimony:

> ...I do like the opportunity to evaluate someone as long as I possibly could before I put them in a position where I may not have that flexibility. *However, taking administration's recommendations into consideration and my own personal experience in dealing with Mr. Feuer and Mrs. Martinez, I see no reason why, at this time, I could not, in all conscience, vote for an early tenure* ***of these two individuals.*** P-11; *see* also P-6 (emphasis in text) (*Id.* at 7-8)

Moreover, petitioners aver that the inappropriateness of the tenure resolution is underscored by the fact that Board President Stokes expressly advised Board members that he had been informed that the tenure resolution would not create a precedent, which petitioners interpret as meaning that it would never be applied to anyone other than Dr. Feuer and Dr. Martinez. (*Ibid.*) Further, petitioners submit, the "immediate preparation" of the rescinding resolution, which grandfathered Dr. Feuer and Dr. Martinez, confirms that the Board's intent was

never to change the statutory tenure period "for *all* principals *present and future*." (emphasis in text) (*Id.* at 9) Citing *Roberts v. Bd. of Ed. of Hudson County Area Vocational-Technical School District*, 1984 *S.L.D.* 999, 1003, *aff'd* State Board 1984 *S.L.D.* 1026, where "the board resolution was invalidated because 'the resolution made it perfectly clear that the grant of tenure *was to individuals and the rescission resolution confirmed that such was the intent of the Board,'*" (emphasis in text), petitioners assert that the Board in this instance similarly acted in bad faith. Petitioners charge that, by shortening the tenure period for two individual principals and then "immediately" rescinding the resolution so that it would not apply to any new principal selected as a result of interviews for an existing vacancy that were proceeding, the Board confirmed that its intent, like that in *Roberts,* was the grant of early tenure to two individuals. (Petitioners' Exceptions at 9)

Petitioners further object to the ALJ's failure to make specific findings of fact as required by the Administrative Procedures Act (APA), *N.J.S.A.* 52:14B-1 *et seq.*, and in light of the Commissioner's remand, which expressly directed the ALJ to make such factual findings. Petitioners argue that the requirements of the APA, as interpreted by the Courts, dictate that an initial decision must include findings of fact, conclusions of law and a sufficient explanation of how those findings of fact and conclusions of law led to that decision, such as would permit meaningful appellate review of that decision. (*Id.* at 11) Petitioners posit that the Initial Decision contains no mention of any pertinent facts in response to the Commissioner's remand other than two newly added paragraphs on page eight, which are notable in their failure to refer to specific facts underlying the findings. Petitioners urge that, to rectify this error, the Commissioner should exercise his authority to "modify" the Initial Decision by making the

factual findings overlooked by the ALJ. (Petitioners' Exceptions at 12) In this regard, petitioners set forth a detailed recitation of proposed findings of fact which they aver should be made by the Commissioner, and which lead to the inevitable conclusion that the Board's actions in the within matter should be invalidated as unlawful. (*Id.* at 13-20)

In reply, the Board submitted a two-page letter stating that it will rely on its trial memorandum of June 20, 1996, a letter submitted to the ALJ on October 3, 1997 and its June 10, 1998 letter to the Commissioner in lieu of a more formal response to petitioners' exceptions. In its two-page letter, the Board posits that it should come as no surprise that the ALJ's decision is so similar to her original decision in view of the limited record petitioners presented at trial, much of which, it argues, was "incompetent" evidence. The Board objects to petitioners' suggestion that the Commissioner make independent findings of fact, stating that the Board objected to the tapes and transcripts provided by petitioners at hearing as failing to satisfy the Residuum Rule. The Board also argues that any deficiencies in the findings of facts are the result of the inadequate record presented in petitioners' case at the hearing. (Board's Reply Exceptions at 2)

Upon careful and independent review of the record in this matter, which includes a transcript of the hearing below[1] and the Initial Decision on Remand, the Commissioner determines that the findings of fact by the ALJ in her decision on remand are sufficient so as to fairly resolve this matter. In so finding, the Commissioner rejects petitioners' argument that the Initial Decision does not satisfy the Commissioner's remand.

[1] It is noted that the record contains a transcript of the June 10, 1996 hearing.

Initially, the Commissioner agrees with the ALJ's analysis and conclusions rejecting petitioners' claim of a violation of the Open Public Meetings Act. [2]

Further, the Commissioner notes that the governing statute, *N.J.S.A.* 18A:28-5, provides boards of education with the authority to shorten the time period for the acquisition of tenure if it applies to an entire category of its employees, regardless of the number of employees in that category, and permits boards to subsequently act to fix a different tenure qualifying period or restore the statutory qualification period. *See Rall v. Board of Ed. of the City of Bayonne*, 54 *N.J.* 373, 377 (1969).

In this instance, the Board adopted a resolution on July 25, 1995, establishing a two-year qualifying period for its principals, stating that:

> BE IT RESOLVED by the Board of Education of the Township of Middletown that in accordance with the provisions of *N.J.S.A.* 18A:28-5, the time period within which *any* Principal of Schools in the Middletown Township School District may attain tenure is hereby fixed at 24 months of full-time service as Principal in the School District; and WHEREAS, the Board of Education of the Township of Middletown, in accordance with the provisions of *N.J.S.A.* 18A:28-5, hereby fixes the time period of 24 months of full-time service within which *any* principal of schools in the district may attain tenure as principal; and WHEREAS, Alan M. Feuer is presently employed as Principal of Schools at Middletown High School North within the School District and has been so employed since July 1, 1993, which is in excess of these 24 months; and WHEREAS, Antonia Martinez is presently employed as Principal of Schools at Middletown Village School within the District and has been so employed since February 19, 1993, which is in excess of 24 months;

[2] The Commissioner notes that petitioners did not object to the ALJ's findings and conclusions in their exceptions to the Initial Decision, stating:

> This and the immediately preceding fact are not intended to question the Board's compliance with the requirements of the Open Public Meetings Act, despite the emphasis placed on analysis under that statute by the Initial Decision. Instead, these facts show that the resolutions at issue were handled in a manner contrary to usual practice as an indication that the Board's intent was in bad faith, arbitrary or capricious. (Petitioner's Exceptions, Footnote 6)

> THEREFORE, BE IT RESOLVED by the Board of Education of the Township of Middletown that Alan M. Feuer and Antonia Martinez by virtue of the aforementioned Resolution have acquired tenure in the School District of the Township of Middletown as principals of schools and they shall continue to serve as Principals of Schools within the District with all rights and benefits accorded to tenured employees. (emphasis added) (Exhibit P-3)

Accordingly, notwithstanding the fact that there were only two principals who qualified for the grant of tenure under the 24-month provision, as named in the resolution, the Commissioner concludes that the July 25 resolution complies with *N.J.S.A.* 18A:28-5 and *Rall, supra*, since the resolution specifically provides for tenure to an entire category of teaching staff members, *i.e.*, to *any* principals who *may attain* 24 months of full-time service in the District.

Although petitioners vigorously advance the argument that the Board's "immediate" reinstatement of the three-year statutory period for the acquisition of tenure for its future principals, with a grandfather clause for the two newly tenured principals, less than a month later, demonstrates that the Board acted in bad faith, the Commissioner notes that neither *N.J.S.A.* 18A:28-5 nor *Rall, supra*, establishes, or even suggests, a minimum acceptable time frame wherein a board may subsequently act to fix a different qualifying period or restore the statutory period for general application to the category of employees affected by an earlier resolution. Thus, mere proximity of the effectuating resolutions in situations of this type cannot, in itself, serve to establish bad faith on the part of a board.

In the instant matter, in its rescinding resolution of August 22, 1995, the Board states that it "is now of the opinion that the reduced period of tenure is no longer in the best interests of the District***." (Exhibit P-8) The Commissioner concurs with the ALJ that petitioners have failed to produce sufficient evidence to substantiate their allegation that the

Board acted in bad faith in reaching this determination. In particular, the Commissioner notes that the Board was acting on the recommendation of the District's administration, who explained that the July 25 resolution granting early tenure was applied to a class whose then-current members had been employed in the District and had been observed for a period of time, as contrasted to the situation with newly hired principals whom the Board would not have had the same opportunity to observe. (*Tr.* at 80)

Accordingly, the Commissioner concludes that the Board's action to establish a shorter period for the grant of tenure for its principals, and its subsequent action to change the tenure qualifying period back to the three-year statutory period, grandfathering the principals lawfully tenured by its prior resolution, constituted a reasonable exercise of its discretionary authority consistent with *N.J.S.A.* 18A:28-5 and *Rall, supra.* The Initial Decision is, therefore, affirmed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: JAN 26 2001

Date of Mailing: JAN 26 2001

[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.

(SB)29-01

SB #29-01

IN THE MATTER OF THE REVOCATION OF :
THE CHARTER OF THE RUSSELL ACADEMY :
CHARTER SCHOOL, ESSEX COUNTY. :

STATE BOARD OF EDUCATION

DECISION

Decision on motion by the State Board of Education, November 7, 2001

Decision on motion by the Commissioner of Education, August 30, 2001

Decided by the Commissioner of Education, August 10, 2001

For the Appellant, Algeier, Tosti & Woodruff (Robert M. Tosti, Esq., of Counsel)

For the Participant Commissioner of Education, Allison Eck, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

This is an appeal from a determination made by the Commissioner of Education on August 10, 2001 to revoke the charter of the Russell Academy Charter School ("Charter School" or "School") effective August 30, 2001. The appeal was filed by the newly constituted Board of Trustees of the School (hereinafter "appellant").[1]

[1] According to the appellant, the former Board of Trustees was replaced on the evening of August 10, 2001, following receipt by the School's CEO of the Commissioner's decision revoking the charter. As set forth in the appellant's appeal brief:

> The parents and staff of Russell Academy were prepared for an argument that night with the former Board, hoping to persuade them that it was in the best interests of everyone involved for them to resign. But that confrontation never materialized. Only three members of the Board showed up at Russell Academy that evening....Before the meeting even started, when the Board members heard rumors of what had happened and what was planned for the evening's meeting, each and every Board member present that night voluntarily left the building. Before the

In his decision, the Commissioner concluded that the Charter School was not operating in compliance with its charter, statutes and regulations, finding that the School "has failed to make reasonable progress to resolve substantive issues in fiscal and programmatic areas including its governance structure, the staffing of certified instructional personnel, and fiscal compliance. In addition, findings of the most recent site visit on July 31, 2001 to assess the preparedness of the school in its second year of operation to open its doors for students revealed that the school continues to violate provisions in its charter and is not operating in accordance with applicable state statutes and regulations." Commissioner's Decision, slip op. at 1.

The specific deficiencies cited by the Commissioner included: The Board of Trustees had failed to act on critical issues related to the operation of the School, including the selection process and hiring of a lead person, faculty and staff, the review of the curriculum, and the implementation of an accountability plan that provides adequate means to demonstrate academic progress; had failed to employ and retain a fully certified instructional staff; had failed to maintain a stable enrollment as evidenced by increasingly high numbers of student withdrawals; had failed to develop, review or adopt critical school policies and procedures; did not utilize the prescribed Generally Accepted Accounting Principles; and had not submitted a budget for the 2001-02 school year.

> evening's agenda could even be discussed, it was moot. The entire former Board of Trustees of Russell Academy walked out on the school in its darkest hour. There was no question they had abandoned their posts. Having no board members left to vote to accept the resignations, the parents voted unanimously to do so. They immediately elected a new Board....

Appeal Brief, at 3.

On August 14, 2001, the appellant filed the instant appeal to the State Board. The appellant contends that the former Board of Trustees "is the entity almost entirely responsible for [the Charter School's] current predicament." Appeal Brief, at 2. While acknowledging that "significant deficiencies existed" at the School, the appellant contends that "[n]ow that the former Board has left Russell Academy, it seems clear that there is a significant core of dedicated parents that will stop at nothing to keep their school." Id. at 4. The appellant requests that the charter be reinstated and that the School be placed on probationary status for 90 days so as to provide the newly constituted Board of Trustees with the opportunity to correct the deficiencies and to reopen the School in January or September 2002.

The appellant also filed motions with the Commissioner seeking reconsideration of his decision and a stay.

On August 30, 2001, the Commissioner denied the appellant's motions. Initially, the Commissioner expressed "serious concerns with respect to whether the 'newly elected' Board of Trustees has standing to bring this action." Commissioner's Decision of August 30, 2001, slip op. at 1. Observing that the appellant had indicated in its motion for reconsideration that "[o]n the evening of August 10, 2001, the Board of Trustees in existence at that time effectively resigned their positions and a new board was elected and seated as planned," the Commissioner found that:

> [t]here is nothing in the materials provided by petitioner to explain the meaning of the statement 'effectively resigned.' There is also nothing to substantiate that the new Board was duly elected pursuant to the provisions of the charter. However, given that the timeframe for the rendering of this decision does not permit the development of a sufficient factual record to resolve this issue, I am assuming, solely for purpose of argument, that petitioner has standing to file these motions so as to enable me to consider the merits of

> the applications presented on behalf of the Russell Academy Charter School.

Id.

Upon review of the School's arguments and supporting documentation, the Commissioner concluded that a stay of revocation and reconsideration of his decision would not be appropriate in this instance. Specifically, the Commissioner found that:

> the deficiencies identified in my letter of August 10, 2001 are long-standing, not quickly or easily remediable, and sufficiently serious to preclude the school's continued operation pending appeal and further attempts at correction. Although it appears that the school has attempted to address the deficiencies identified in my revocation letter, I note that the ability to employ and retain a fully certified staff continues to elude the Russell Academy. As the President of the newly elected Board of Trustees noted in her verification on August 28, the staffing situation has once again changed since the motions were filed on August 23. Moreover, there is no indication that a budget has been prepared for the 2001-2002 school year. Additionally, the Board's assurances that everything will be different with the new Board of Trustees overseeing the school is, at best, speculative. In this regard, I note that petitioner does *not* dispute the cumulative findings that led to the decision to revoke its charter, but merely seeks a 90-day probationary period to correct its deficiencies while continuing in operation. Under these circumstances, I cannot find that petitioner will likely prevail on the merits of its appeal, or that students, parents and staff, who have been on notice of the impending revocation, will suffer greater harm by having to make alternative arrangements for the next school year than they would by remaining in a school that has proven seriously and persistently deficient, and which would still face likely closure, perhaps in the middle of an academic year.
>
> Given the precariousness of its staffing situation, the lack of a properly developed budget and the uncertainty that the school will be able to retain students in this unstable environment, I find that petitioner has failed to demonstrate that it will be able to provide the quality educational program to which students are entitled by law or that the Russell Academy Charter School will be able to correct its

> deficiencies in a timely and responsible manner so as to comply with its charter and applicable statutes and rules. Accordingly, I cannot in good conscience allow the school to continue operating, pending disposition of the merits of petitioner's appeal.

Id. at 3-4 (emphasis in original).

With respect to the appellant's contention that the newly constituted Board of Trustees had authorized actions and funding to address the major concerns expressed by the Commissioner in his decision of August 10, the Commissioner found that "actions taken in one evening to correct persistent, long-standing substantial deficiencies do not persuade me that my decision to revoke the charter of the Russell Academy Charter School was incorrect." Id. at 4.

On September 20, 2001, the Commissioner filed a motion with the State Board for leave to participate in this matter, which was granted on November 7.

After a thorough review of the record, we affirm the Commissioner's decision to revoke the School's charter. Like the Commissioner, we are assuming arguendo that the appellant, the newly constituted Board of Trustees, has standing to file this appeal so as to permit us to consider the merits of this matter.

N.J.S.A. 18A:36A-17 provides that "[t]he commissioner may revoke a school's charter if the school has not fulfilled any condition imposed by the commissioner in connection with the granting of the charter or if the school has violated any provision of its charter." Pursuant to N.J.A.C. 6A:11-2.4(b):

> The Commissioner may revoke a school's charter following review by the Department of Education for one or more of the following reasons:
>
> 1. Any condition imposed by the Commissioner in connection with the granting of the charter which has not been fulfilled by the school; or

2. Violation of any provision of its charter by the school.

3. Failure of the remedial plan to correct the conditions which caused the probationary status.

The record before us fully documents the deficiencies cited by the Commissioner and substantiates the seriousness of those deficiencies, and we find nothing in any of the materials submitted by the appellant that would counter those findings.

In affirming the Commissioner's decision, we reject the appellant's contention that the School should be placed on probationary status for 90 days so that the newly constituted Board of Trustees would have the opportunity to correct the School's problems and prepare to reopen. Under the circumstances, and given the nature and gravity of the ongoing deficiencies demonstrated on the record, we find that providing such a probationary period would not be appropriate. We stress, in addition, that if the Charter School were permitted to reopen following such probationary period, students who had attended the School until its charter was revoked and who are now attending school elsewhere would again be uprooted if they choose to return to the Charter School. See In the Matter of the Revocation of the College Preparatory Academy Charter School, decided by the State Board of Education, October 3, 2001.

Accordingly, for the reasons expressed by the Commissioner in his decisions of August 10 and 30, 2001, as well as those expressed herein, we affirm the Commissioner's determination to revoke the charter of the Russell Academy Charter School.

December 5, 2001

Date of mailing DEC 07 2001

(SB) 29-01

SB #29-01

IN THE MATTER OF THE REVOCATION OF :
THE CHARTER OF THE RUSSELL ACADEMY :
CHARTER SCHOOL, ESSEX COUNTY. :

STATE BOARD OF EDUCATION

DECISION ON MOTION

Decided by the Commissioner of Education, August 10, 2001

For the Appellant, Algeier, Tosti & Woodruff (Robert M. Tosti, Esq., of Counsel)

For the Participant Commissioner of Education, Allison Eck, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

The motion filed by the Commissioner of Education for leave to participate in this matter is granted.

November 7, 2001

Date of mailing NOV 08 2001

30-01

BETTY McLENDON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RED BANK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 29, 2001

OAL DKT. NO. EDU 10653-99
AGENCY DKT. NO. 320-10/99

BETTY McLENDON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RED BANK, 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 Acting 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: 1/29/01

Date of Mailing: 1/29/01

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

January 29, 2001

OAL DKT. NO. EDU 03813-99
AGENCY DKT. NO. 399-9/98

MARTHA LEFKOWITZ,	:	
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 Acting 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: 1/29/01

Date of Mailing: 1/29/01

32-01

BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
F.G., *et al.*,	:	DECISION
RESPONDENTS.	:	

January 29, 2001

OAL DKT. NO. EDU 5905-97
AGENCY DKT. NO. 199-6/97

BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
F.G., *et al.*,	:	DECISION
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 Acting 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 Rucetti

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 1/29/01

Date of Mailing: 1/29/01

33-01

WALTER JOSEPH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 29, 2001

OAL DKT. NO. EDU 3814-99
AGENCY DKT. NO. 399-9/98

WALTER JOSEPH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT 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 Acting 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: 1/29/01

Date of Mailing: 1/29/01

34-01

BRIAN VILLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
EDWIN GUTIERREZ, BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 29, 2001

OAL DKT. NO. EDU 8865-99
AGENCY DKT. NO. 209-7/99

BRIAN VILLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
EDWIN GUTIERREZ, 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 Acting 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 Rucci

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 1/29/01

Date of Mailing: 1/29/01

35-01

JOSEPH MARSELLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 29, 2001

OAL DKT. NO. EDU 11817-99
AGENCY DKT. NO. 323-10/99

JOSEPH MARSELLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT 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 Acting 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: 1/29/01

Date of Mailing: 1/29/01

36-01

MARLENE SHARPE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF SUSSEX COUNTY VOCATIONAL TECHNICAL HIGH SCHOOL, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

January 29, 2001

OAL DKT. NO. EDU 11349-99
AGENCY DKT. NO. 194-7/99

MARLENE SHARPE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF SUSSEX COUNTY VOCATIONAL TECHNICAL HIGH SCHOOL, 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 Acting 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: 1/29/01

Date of Mailing: 1/29/01

37-01

37-01 E

ADVANCE ELECTRIC COMPANY, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF MONTGOMERY TOWNSHIP, SOMERSET COUNTY AND BML PRODUCTIONS, INC.	:	DECISION ON MOTION
RESPONDENTS.	:	

JAN 29 2001

1/10/01

#577922
Maeve E. Cannon, Esq.
HILL WALLACK
202 Carnegie Center
Princeton, NJ 08543-5226
(609) 924-0808

ADVANCE ELECTRIC COMPANY, INC.,	BEFORE THE NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
Petitioner,	EDU OAL Dkt. No. 10444-00S
v.	HONORABLE ROBERT S. MILLER, ALJ
MONTGOMERY TOWNSHIP BOARD OF EDUCATION and BML PRODUCTIONS, INC.,	
Respondents.	**ORDER OF STAY**

THIS MATTER having been brought before the Department of Education on December 22, 2000 on emergent application by Hill Wallack, attorneys for Petitioner Advance Electric Company, Inc., and on Notice to Respondents Montgomery Township Board of Education and BML Productions, Inc.; and the Commissioner of the Department of Education having transferred this matter to the Office of Administrative Law for disposition pursuant to the "Administrative Procedure Act", *N.J.S.A.* 52:14B-1 et seq.; and upon the appearance of the parties on December 29, 2000 at the Office of Administrative Law, and after careful consideration of the papers submitted and the oral argument of the parties on Petitioner's application for stay of contract performance and implementation,

IT IS HEREBY ORDERED on this 8th day of January, 2001, that the performance and implementation of the contract awarded by the Montgomery Township Board of

Education to BML Productions, Inc. pursuant to Rebid # B01-49, for the replacement and installation of stage lighting and a dimming control system for the Montgomery Township High School be stayed from December 29, 2000 forward until final disposition of this dispute, based upon the reasons set forth on the record by the Honorable Robert S. Miller, ALJ, on December 29, 2000; and

IT IS FURTHER ORDERED that this matter shall be scheduled for hearing at the next available date before this forum.

This ORDER shall be served upon the parties within 10 days.

DATE: January 8, 2001

Honorable Robert S. Miller, ALJ

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

January 8, 2001
DATE

ROBERT S. MILLER, ALJ

OAL DKT. NO. EDU. 10444-00
AGENCY DKT. NO. 453-12/00

ADVANCE ELECTRIC COMPANY, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF MONTGOMERY TOWNSHIP, SOMERSET COUNTY AND BML PRODUCTIONS, INC.	:	DECISION ON MOTION
RESPONDENTS.	:	

The record of this emergent matter, including the Administrative Law Judge's (ALJ) Order and an audio cassette tape of the hearing conducted at the Office of Administrative Law (OAL) on December 29, 2000 have been reviewed. Although respondents were provided ten days to submit exceptions to the ALJ's recommended Order to stay the performance and implementation of the within contract awarded by the Board to BML Productions, Inc., no exceptions were received.

This emergent matter concerns the award of a contract by the Board for the replacement and installation of stage lighting and a dimming control system for its high school auditorium. Neither party disputes that the bid specifications required that the "bidder be qualified as a 'Commercial Electrical Contractor (C-047)', with 'theatrical stage equipment installation experience (C-112)', 'pre-qualified to perform this type of work in the State of New Jersey' ***." (Memorandum in Support of Petitioner's Application for Stay of Contract at 1) As to the likelihood that it will succeed on the merits of its claim, petitioner asserts that it was the

lowest responsible and responsive bidder for the Board's project, in that its bid was in compliance with these specifications, while neither of the other two bidders, including the successful bidder, BML Productions, Inc., is a licensed commercial electrical contractor. Moreover, assuming *arguendo* that BML Productions, Inc., was not required to possess a C-047 licensing classification (*i.e.*, licensing as a commercial electrical contractor), but could, instead, use a licensed electrical subcontractor to perform the work, its bid is still non-responsive because it did not name the subcontractor in its bid, pursuant to *N.J.S.A.* 18A:18A-18.[1]

The Board counters that it was advised by the Division of Building and Construction, Department of Treasury, that these noted specifications were partially in error, in that the bidder need *not* possess a C-047 classification, as long as it was qualified to install stage equipment. Thus, the Board selected BML Productions, Inc., which was the lower of the two bidders who presented the qualifications recommended by the Division of Building and Construction, and whose bid was substantially lower than petitioner's. To this, petitioner replies that case law has clearly established that material terms of bid specifications, such as those herein, cannot be waived by the Board. (Petitioner's Memorandum at 17)

Upon careful and independent review of petitioner's application for emergent relief, which has been delegated to her for review pursuant to *N.J.S.A.* 18A:4-34, the Assistant Commissioner concurs with the ALJ that petitioners have met the standard set forth in *Crowe v. DeGoia*, 90 *N.J.* 126 (1982) for obtaining emergent relief. Here, the Assistant Commissioner takes note of the Board's admission that its specifications required the bidders to be qualified as a commercial electrical contractor, as well as the Board's failure to dispute petitioner's contention that BML's supplementation of its bid was in violation of *N.J.S.A.* 18A:18A-18.

[1] Petitioner underscores that "[t]he specifications are also clear that the *bidder* must hold this [electrical contractor] status, *not* a subcontractor." Thus, it reasons that BML's subsequent attempt to supplement its bid by adding the use

Additionally, the Assistant Commissioner is mindful of petitioner's claim that it will be irreparably harmed without the grant of a stay since, as an unsuccessful bidder, the law precludes it from obtaining damages, even if the award to BML is determined to have been improper. Further, the Assistant Commissioner notes that although the Board asserts there are "some safety issues" with respect to the present auditorium lighting which compel immediate performance of the contract, no specific danger was identified. Neither does the Board present any facts to defeat petitioner's claim that a stay of this contract is unlikely to impact negatively on the delivery of the District's core curriculum. (Petitioner's Memorandum at 19)

Accordingly, petitioner's Motion for Emergent Relief is granted and the matter is ordered returned to the OAL for further proceedings on the merits of petitioner's claims.

IT IS SO ORDERED.[2]

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: JAN 29 2001

Date of Mailing: JAN 30 2001

---

of a licensed electrical subcontractor was illegal. (emphasis in text) (Petitioner's Memorandum at 5, 6)

[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.

40-01

40-01R

IN THE MATTER OF THE TENURE	:	
HEARING OF HATTIE BLACK,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION ON REMAND
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	

February2,2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
ORAL INITIAL DECISION
SETTLEMENT
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DKT. NO. EDU 7556-00
Agency Dkt. No. 36-9/98
(EDU 11665-98 On Remand)

I/M/O OF THE TENURE HEARING OF HATTIE BLACK, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY

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

James M. Weinberg, Esq., for respondent
(Weinberg and Weinberg, attorneys)

Record Closed: December 13, 2000 Decided: December 18, 2000

BEFORE **EDITH KLINGER**, ALJ:

The parties appeared before me on December 13, 2000 and placed a settlement agreement upon the record. The terms of the settlement are as follows:

1. Respondent, Hattie Black, will retire from her employment immediately.
2. The District will expedite the processing of her retirement benefits insofar as possible.

3. The District will restore her pay and benefits for the period from January 1, 2000 to July 1, 2000. She waives her claim to any other remuneration.
4. Payment will be made consistent with the Commissioner's approval of this settlement.
5. The District will return to her all of her personal items which it is able to locate.
6. Respondent understands that the Commissioner may refer this matter to the State Board of Examiners for possible action on her certificates. *IMO the Tenure Hearing of Lenore M. Allen*, SB# 38-00.
7. This settlement meets the standards set forth in *In re Cardonick* and should be approved.
8. This settlement fully disposes of all outstanding issues between the parties.

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

TRANSCRIPT

Jd. Klinger: All right. We are on the record and we will start with appearances.

Weinberg: James Weinberg on behalf of Hattie Black.

Maxwell: Cherie Maxwell on behalf of the State-Operated School District for the City of Newark.

Judge: Do I understand that you have resolved this matter?

Maxwell: Yes.
Weinberg: Yes.

Judge: And that you want to put the agreement on the record. Is that correct?

Weinberg: Correct.

Judge: Who is going to start on the record?

Maxwell: Okay, Your Honor, I will indicate what I understand to be the terms which will be that Ms. Black will retire from the district immediately. That the district will restore the pay that has been withheld which covers the period from January to June of this past year in terms of back pay. Ms. Black, to my understanding, has been made aware as required by *In re Cardonick* that this issue does not preclude the Commissioner referring the issue of license certification to the State Board of Examiners. The district agrees, in addition to rendering the back pay, to processing in an expedited fashion, Ms. Black's pension, documents and application for retirement.

Is there anything that I missed?

Weinberg: Judge, Your Honor, we could make mention that just should be put on the record that there are some items of personal property belonging to Ms. Black which we believe are outstanding. A list will be submitted to counsel for the district and they will endeavor to look for those items to the extent that they are in the school from which Ms. Black was principal.

Maxwell: That's correct, Your Honor, and to the extent that we locate any items that are Ms. Black's personal effects we will get them to her.

Judge: But, this is not a condition of settlement. I mean they will be returned as available.

Weinberg: That's correct.

Judge: If they are not still there - that does not affect the settlement.

Weinberg: Yes, that's correct.

Judge: Fine, as long as it is understood that this will be carried out insofar as possible.

Is there anything else that should be incorporated in the understanding?

Maxwell: I guess for purposes of the record, I should indicate that with respect to the nature of the charges that were before Your Honor that, before we began the hearing, the district was going to make a motion to amend the charges to dismiss basically the charges having to deal with purchasing items for the school, I believe that it's specifically Charge 2 of the tenure charges. So, I think that's important to note on the record because, based upon further investigation by the state investigators and the school district investigators, we were not able to proceed with respect to those charges. So that, I think its important for purposes of knowing what it is that we are resolving.

Judge: Anything else?

Weinberg: Actually, there is.

Judge, can we have one moment.

Judge: All right - we are off the record.

* * *

Judge: All right - we are back on the record.

Weinberg: There is one last provision which will be that the district will certify or shall certify that from February 11, 1998 through today's date, should be considered as administrative leave with pay for pension purposes.

Maxwell: We need to keep it as it is.

Weinberg: Why keep it as . . .

Maxwell: No, that 120 day period.

Weinberg: Okay, that's fine, and additionally . . .

Maxwell: That Ms. Black waives an entitlement to lost wages for the salary lost during the 120 days suspension of that period previously served, and that was the 1998 school year.

Now, I would just like to note for the record also that placing her on administrative leave with pay through today's date, that the payment would be consistent with the Commissioner's return of the settlement agreement pursuant to the tenure statutes.

Judge: This is a waiver for pay for that 1998 . . .

Maxwell: That's correct

Judge: . . . and then payment should be made after that consistent with the Commissioner's rejection of the settlement . . .

Maxwell: Yes.

Judge: Anything else?

Would you like to have your client testify?

Weinberg: Actually, Ms. Black was represented throughout the pendency of your tenure case, is that correct?

Black: Yes.

Weinberg: You have heard the settlement that has just been placed on the record?

Black: Yes, I have.

Weinberg: And, prior to just putting this on the record today, you were aware of some of the conditions that we did put on the record today, correct? Some of the issues you had previously resolved or entered into an agreement with the State-Operated School for the Newark District, correct?

Black: Yes.

Weinberg: And we are back in court because the Commissioner of Education had rejected that settlement, right?

Black: Right.

Weinberg: And now we have some clarification that we believe should enable the Commissioner to be able to accept the agreement between the parties, and further as far what's been placed on the record today, is that your understanding as to the essential terms of the

settlement agreement between, for you and the Newark School District.

Black: What I don't understand is you said I retired effective to date, but I can only retire at the end of the month.

Weinberg: The agreement being entered into today.

Black: Yes, we agreed to enter into a agreement.

Weinberg: You feel that you can't for pension purposes submit a retirement . .

Black: December the 31st

Weinberg: Judge, that wouldn't necessarily be my opinion, however, I ask . . .

Maxwell: Can I ask a question? Is it possible that your retirement could be effective today, is that acceptable to you?

Black: No, it can't because I have already checked with Trenton and I can only retire at the end of the month, effective the first of each month.

Maxwell: If the first day that the Division of Pension would approve was today, would that be . . . I understand that you have been advised differently, but if they would approve it, the first day that they are able to approve it, is that acceptable to you?

Black: Okay, I've already been through this. I can go down and retire today, but it would not be effective until the end of the month, do you understand what I'm saying?

Maxwell: Okay, but you could retire today?

Black: I can retire any time; but when they accept it or when they process it will be effective - it will be as if I retired December 31 - it will be effective January 1. If I retire any time in January, it won't be effective until the first of the next month.

Weinberg: Your retirement is effective, as far as this case is concerned, as part of the agreement, today. Do you understand that?

Black: Right.

Maxwell: You will no longer be an employee with the district as of today.

Judge: And your pension will start whenever your pension starts but your employment will terminate as of today.

Weinberg: We'll try to get your pension as soon as we can get your pension...

Judge: And if it's the first of next month, than so be it. If it can be arranged - if possible, the district can do it.

The employment will cease . . .

Black: I understand that. So that means that I will be without benefits and everything else until January.

Maxwell: I don't believe that's true because your benefits are also paid monthly so your benefits would have been paid for this month already.

Black: And I won't be compensated until about 3 or 4 months later. And that's the problem.

Weinberg: Ms. Black are you aware that as part of this settlement there is a lump sum check that's going to be coming to you for approximately January 2000 to June 30, 2000.

Black: What about the 22nd of this month?

Maxwell: What is the magic of the 22nd?

Black: That would give me the opportunity to get in another check and then I would be ready for my pension . . .

Judge: I can't continue this. I just cannot continue this. I think that we should be ready to go forward with a hearing tomorrow. This is not right. Be prepared to go to hearing tomorrow morning.

Weinberg: Will you consider allowing me to answer my client's questions perhaps? I mean we are down to the last one item.

Judge: I don't think so. I mean if you can resolve it, but I just don't think it's going to resolve. I think there will be a series of questions, and I don't want to waste time doing this. This is a waste of everyone's time. If it's resolved, it's resolved. And, if it's going to be a lump sum check, I can't, I can't continue this.

Weinberg: Ms. Black doesn't understand one thing, which perhaps I can explain to her . . .

Judge: If you can explain, you can just go off the record with Ms. Black. If there is anything else, then we do not have a meeting of the minds to issue a settlement and I don't plan to continue. I don't want to force you into a settlement. I just don't want to continue something

which is not leading to a settlement. You can have a few minutes and see if you can straighten that out. If you cannot straighten it out, then be prepared to come in tomorrow.

Weinberg: Thank you, Your Honor.

Judge: We are off the record.

* * * *

Judge: All right you have had this opportunity to conference with Ms. Black and you have explained things to her satisfactorily. I think there was some issue as to when compensation would cease. That is, not the back compensation but the present compensation.

Weinberg: Ms. Black had raised the point as to when is the effective date of her retirement, and as far as this agreement is concerned, today is the day of her retirement.

For purposes of pension, Ms. Black is correct, and the confusion is that they don't process it until the end of the month which is separate and apart from what we're doing here today, which is resolving the matter between the parties so I believe that should suffice in terms of resolving this.

Judge: That explains it to your satisfaction?

Black: I understand . . .

Judge: You may not love it but you understand what you're going to get and what you are not going to get. That's what concerns me. Okay. As long as you understand that.

Is there anything else. Mr. Weinberg explained everything to you and you understand what all these things mean?

Black: Yes.

Judge: And you agree to them?

Black: I guess.

Judge: Well, that's what a settlement is. Both sides are a little unhappy and that makes a good settlement.

Is there some other question?

Weinberg: Nothing else.

Maxwell: No, nothing else.

Judge: Is this going to be put in writing or should I, perhaps, have a transcript made of this?

Weinberg: You can put this in writing since we had a form which doesn't need to change all that much.

Maxwell: I would prefer not to wait. It takes a long time to transcribe.

Judge: We can have this transcribed and place the settlement on the record so that the terms are whatever is on the record. I prefer to do that.

All right then I guess that concludes the hearing. Thank you all very much.

Both Parties: Thank you, Your Honor.

END OF THE TRANSCRIPT

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.

I, Cynthia Brown, certify that the foregoing is a true and accurate transcript , to the best of my ability, of Judge Edith Klinger's oral decision rendered in the above matter on December 13, 2000.

December 18, 2000
DATE

Cynthia Brown
CYNTHIA BROWN, Secretary

December 18, 2000
DATE

Edith K. Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

Dec. 22, 2000
DATE

D.M. Centanaites/fe
DEPARTMENT OF EDUCATION

DEC 29 2000
DATE

Mailed to Parties:
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

OAL DKT. NOS. EDU 7556-00 AND EDU 11665-98 (ON REMAND)
AGENCY DKT. NO. 36-9/98

IN THE MATTER OF THE TENURE	:	
HEARING OF HATTIE BLACK,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION ON REMAND
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	

The record, Settlement, accompanying transcript of proceedings conducted at the Office of Administrative Law and the Initial Decision issued by the Administrative Law Judge 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. 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: 02/02/01

Date of Mailing: 02/02/01

43-01

IN THE MATTER OF THE TENURE	:	
HEARING OF MORRIS KIMBLE,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
TRENTON, MERCER COUNTY.	:	DECISION ON REMAND
_____	:	

February 7, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 06386-00S (EDU 06227-99S REMANDED)

AGENCY DKT. NO. 174-6/99

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

Petitioner,

v.

MORRIS KIMBLE,

Respondent.

Thomas W. Sumners, Jr., Esq., for petitioner (Sumners, George & Dortch, attorneys)

Robert M. Schwartz, Esq., for respondent

Record Closed: December 26, 2000 Decided: December 27, 2000

BEFORE **JEFF S. MASIN**, ACTING CHIEF ALJ:

This matter arises from the filing of tenure charges with the Commissioner of Education on June 30, 1999, by The Trenton Board of Education ("petitioner") against Morris Kimble ("respondent") alleging conduct unbecoming a tenured employee and other just cause. The allegations are contained in a Statement of Tenure Charges filed with the Commissioner of Education dated June 1, 1999. The matter was transmitted to the Office of Administrative Law ("OAL") on July 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 agreed to settle this matter and prepared a Settlement Agreement, which was incorporated into an Initial Decision Settlement dated April 28, 2000, OAL DKT. NO. EDU 06227-99S. On June 15, 2000, the Commissioner of Education issued a decision remanding that initial decision to the OAL for supplementation of the record and modification of the settlement terms.

The parties prepared the attached fully executed Settlement Agreement, which appropriately addresses in detail the concerns expressed by the Commissioner of Education in his decision of June 15, 2000.

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 in this administrative forum 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.

December 27, 2000
DATE

JEFF S. MASIN, ACTING CHIEF ALJ

Receipt Acknowledged:

12/29/00
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 2 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

mjm
Attachment

In the Matter of Tenure Charges Against Morris Kimble, School District of the City of Trenton, Mercer County	**)BEFORE THE COMMISSIONER OF)EDUCATION, STATE OF NEW JERSEY)) Agency Docket No.174-6/99)) SETTLEMENT AGREEMENT**

THIS SETTLEMENT AGREEMENT is made between the Petitioner, Board of Education of the City of Trenton, ((hereinafter referred to as the "Board"), and the Respondent, Morris Kimble, (hereinafter referred to as "Respondent").

WHEREAS, the Board filed tenure charges with the Commissioner of Education, having Agency Docket No. 174-6/99, and OAL Docket No. EDU 6227-99S; and

WHEREAS, the tenure charges allege conduct unbecoming by the Respondent during the 1997-1998, 1998-1999 school terms, whose allegations include but are limited to:

1. The early release of a student during the 1997-1998 school term without proper authorization;
2. Failure to take steps to discipline the Holland Middle School disciplinarian for allowing the early release;
3. Failure to insure that Holland Middle School staff were adequately made aware of the Board's early dismissal policy;
4. Failure to meet with and respond to parental concerns as cited on February 18, 1998;

5. Failure to submit in a timely fashion the program proposal on two occasions for the Board meeting agenda items during the 1997-1998 school term;
6. Arriving to work late, as set forth in a memo dated October 31, 1997;
7. Failing to submit the Holland Middle School budget plan in the designated format on February 11, 1999;
8. Arriving late to two principal meetings on February 19, 1999 and March 5, 1999;
9. Failing to provide access to the Holland Middle School by a Trenton Times reporter in accordance with Board policy and administrative directives;
10. Failing to insure adequate instruction on March 3, 1999 when many members of the Holland Middle School staff attended the funeral of another Holland Middle School staff member;
11. More generally, failing to follow Board policies and administrative directives; and

WHEREAS, the Respondent has denied all of the aforementioned allegations; and

WHEREAS, the Respondent has been employed by the Board for a period of 29 years; and

WHEREAS, the Respondent has not until now had any tenure charges and or increment denials brought against him during his service of employment with the Board; and

WHEREAS, the Respondent intended to present credible evidence to refute the charges against him; and

WHEREAS, the parties recognize that there are strengths and weaknesses with respect to each of their positions; and

WHEREAS, litigating this matter would have been over a prolonged period of time causing great expense and disruption to the Board; and

WHEREAS, the outcome of this matter was uncertain; and

WHEREAS, the parties have agreed to an expeditious resolution of this matter intended to save both parties the cost and uncertainty of continued litigation and to avoid further disruption to the Trenton School District;

NOW, THEREFORE, in consideration of the forgoing, the parties agree to resolve the within matter based upon the following terms:

1. Petitioner agrees to dismiss the tenure charges against the Respondent.
2. The Respondent shall be returned to employment with all back pay and emoluments owed from June 28, 1999, when Respondent was suspended without pay as a result of the certification of these charges. Upon his return of employment, the Respondent shall be assigned to the title of "*principal on assignment*" to central administration.
3. Upon his return to employment, the Respondent shall be compensated and receive all benefits he is entitled to as a principal, per the TASA Collective Bargaining Agreement with Board. As of July 1, 2000, Respondent shall be entitled to any increase in compensation and benefits which may be negotiated by TASA and the Board.
4. The Respondent agrees to submit a letter of retirement effective at the conclusion of the school day, June 30, 2001;
5. The parties agree and covenant that neither they, nor any person, organization, or other entity on their behalf will file any charge, claim, and/or lawsuit against the other based upon any facts set forth in the tenure charges or any facts arising from the tenure charges;

6. The Petitioner agrees to pay Respondent upon his retirement, for all accumulated sick days, vacation days and personal leave days be accrued in accordance with the Collective Bargaining Agreement between the Trenton Administrators and Supervisors Association (TASA) and the Board, as amended in or about June, 1999. At the conclusion of the 1999-2000 school term, Respondent accumulated 319 sick days. In addition, pursuant to the Collective Bargaining Agreement, the Respondent is entitled to an additional 18 sick days for the 2000-2001 school term. In addition, at the conclusion of the 1999-2000 school term, the Respondent had accrued 21.5 personal business days and he is entitled to an additional 4 personal business days for the 2000-2001 school term, making for a total of 25.5 days. The Respondent also accrued 60.5 vacation days at the conclusion of the 1999-2000 school term and he is entitled to an additional 20 vacation days upon the conclusion of the 2000-20001 school term, making for a total of 80.5 vacation days as of June 30, 2001. It is understood that if t' Respondent utilizes any of the aforementioned accumulated sick, days, vacation days and/or personal leave days, they shall be subtracted from the total number of days owed at the time of Respondent's retirement.
7. The per diem rate at which Respondent's accumulated sick days, personal business days and vacation days shall be paid shall be $445.00. As an accommodation to the Board of Education, the Respondent agrees to accept payment of the aforementioned accumulated sick days, personal business days and vacation days in six equal installments consisting of $35,000 each. The first payment is to be made on July 1, 2001, and payments to continue each July 1st. thereafter, with the last payment to be made on July 1, 2006. In the event that the Respondent becomes deceased, then said payments shall be made payable to his estate;

8. The Petitioner and the Respondent agree that this Agreement resolves their entire dispute and that with this Agreement the Petitioner, including is agents, employees and officers, and the Respondent each shall refrain from making any comments about the other;
9. The Respondent and the Petitioner expressly acknowledge they they each have agreed to each and every term of this Agreement, that each of the terms and conditions of this Agreement have been fully explained and that the execution of this Agreement is being made voluntarily knowingly and with the advice of counsel.
10. As set forth above in paragraph 4, the Respondent and the Board have agreed to mutually release and forever discharge each other from any and all claims which was or could have been asserted which relate to the matter now pending before the Commissioner of Education, having OAL Docket No. EDU 6227-99S and Agency Docket No. 174-6/99.
11. All of the terms of this Agreement are deemed material.
12. The parties understand that this Agreement is contingent upon the approval of the Administrative Law Judge, Jeff S. Masin and the Commissioner of Education, and if such approval is denied, the terms and contents of this Agreement shall not be admissible in any legal administrative proceeding of any nature, and will be without prejudice to their positions in such proceedings, and that in such event the parties may again attempt to settle the matter in a manner which is satisfactory to the Commissioner of Education.
13. The parties request that the tenure hearing be held in abeyance in order to obtain the approval of this Settlement Agreement by Administrative Law Judge, Jeff S. Masin and the Commissioner of Education.

3.e

IN WITNESS WHEREOF, the parties have caused this Agreement to be duly executed as of the day and year first above written.

DATED:

Abdul-Malik Ali
ABDUL-MALIK ALI, PRESIDENT
TRENTON BOARD OF EDUCATION

Charles Milewski
~~ANGELIA ELLIS~~, SECRETARY
TRENTON BOARD OF EDUCATION
CHARLES MILEWSKI, ACTING

DATED: 12/4/00

Morris Kimble
MORRIS KIMBLE
RESPONDENT

Robert M Schwartz
ROBERT M SCHWARTZ, ESQ.
ATTORNEY FOR RESPONDENT

OAL DKT. NOS. EDU 06386-00 and EDU 06227-99 (ON REMAND)
AGENCY DKT. NO. 174-6/99

IN THE MATTER OF THE TENURE	:	
HEARING OF MORRIS KIMBLE,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
TRENTON, MERCER COUNTY.	:	DECISION ON REMAND
	:	

The record, Settlement Agreement, 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 Agreement, as modified, because the issues raised in the Commissioner's June 15, 2000 decision have been adequately addressed. Consequently, the Commissioner determines that the settlement terms 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).

Accordingly, 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: 2/7/01

Date of Mailing: 2/7/01

44-01

MABEL MOUNT,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF TINTON FALLS, MONMOUTH COUNTY,

RESPONDENT,

AND

DEBORAH DE GRASSI, MICHELE TRIO, NILSA MONTANER AND DEBORAH MRUZ,

INTERVENORS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, a tenured secretary, challenged her layoff after her position was abolished, arguing that she is entitled to a position held by a nontenured secretary, specifically identifying four positions held by nontenured secretaries to which she claimed an entitlement. The respondent Board denied that petitioner possessed the requisite skills for any of the identified positions and argued that its determination to lay off petitioner, and refusal to offer her any of the four identified positions, should be affirmed.

The ALJ determined that petitioner should have been offered a secretarial position within the District that was held by a nontenured secretary when her position was abolished. The ALJ further concluded that the duties performed by petitioner and the intervenors were very similar, and that, absent a showing by respondent that the duties of the nontenured secretaries were so specialized or unique that petitioner could not perform the duties, which respondent failed to do, petitioner was entitled to one of the positions.

The Commissioner affirmed the determination of the ALJ with modification. While agreeing that petitioner is entitled to one of the secretarial positions held by three of the intervenors, the Commissioner determined that she is not entitled to the position of the fourth intervenor, because the position of Clerical Assistant for District Services/Special Programs and Projects is not secretarial. Finally, the Commissioner held that the Board may exercise its discretion in selecting the secretarial position to be offered petitioner.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 120-00

AGENCY DKT. NO. 381-12/99

MABEL MOUNT,

Petitioner,

v.

TINTON FALLS SCHOOLS

BOARD OF EDUCATION,

MONMOUTH COUNTY,

Respondent,

AND

DEBORAH DEGRASSI, MICHELE TRIO,

NILSA MONTANER AND DEBORAH MRUZ,

Intervenors.

Gail Oxfeld Kanef, Esq., for petitioner (Balk, Oxfeld, Mandell & Cohen, attorneys)

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

Stephan B. Hunter, Esq., for intervenors (Klausner, Hunter & Rosenberg, attorneys)

Record Closed: November 17, 2000 Decided: December 29, 2000

BEFORE **KATHRYN A. CLARK**, ALJ:

This matter involves a secretary who was laid off from Tinton Falls School District as a tenured Transportation/Attendance Coordinator. Petitioner claims that the Board of Education improperly retained a non-tenured person to perform many of the same duties she performed, in violation of her tenure rights. She has identified 4 individuals as holders of positions to which she claims she may be entitled. These 4 individuals moved to intervene[1]. Their motion was granted.

The issue in this matter is this, were petitioner's tenure rights violated?

STATEMENT OF FACTS

Petitioner, Mable Mount, was hired by the respondent, Tinton Falls Schools Board of Education, as a full time employee in 1990. At that time, petitioner held the title of Transportation/Attendance Coordinator. In July, 1995, respondent reduced Ms. Mount's position to half time and renamed her position Transportation Secretary. Ms. Mount was paid according to the negotiated secretarial salary guide, taking into account her half time status, at least as far back as 1995. On December 31, 1999, respondent abolished the Transportation Secretary position. As a result, Ms. Mount's employment with the Tinton Falls Schools Board of Education was terminated. Respondent does not contest petitioner's tenure status as a secretary.

While employed with Tinton Falls, Ms. Mount's primary responsibility was organizing and scheduling the transportation program for the Tinton Falls district. This responsibility included preparing the actual bus routes for the district, including the accommodation of the needs of several special education students pursuant to the special education laws and regulations, as well as providing for the transportation needs for after school functions such as class trips. Mr. Rocco Orlando, the interim business administrator for the Tinton Falls School District from 1994 through 2000 and the only witness to have worked directly with petitioner, affirmed this.

---

[1] Under the New Jersey's Administrative Code, "[a]ny person or entity . . . who will be substantially, specifically and directly affected by the outcome of a contested case may seek to intervene." *N.J.A.C.* 1:1-16.1(a). The party aspiring to intervene may file a motion for permission to do so at any time after the case has been initiated. *See N.J.A.C.* 1:1-16(a), (b).

Furthermore, Ms. Mount performed a bookkeeping function regarding the account of monies budgeted for the transportation department amounting to maintaining a budget for the department. This function included assisting with the preparation of bids for various transportation needs. In performing her duties, Ms. Mount used Microsoft Word and Excel programs as well as specialized software known as "Trips". Ms. Mount was required to prepare a number of reports in accordance with State requirements concerning transportation in the school district. Testimony indicated that she did interact with parents and students in answering transportation related questions and the accommodation of special education needs. In doing so, Ms. Mount did have occasion to work with the Special Services department in meeting these needs.

Finally, Ms. Mount's minor duties included maintaining a filing system, drafting spreadsheets, occasionally typing memoranda and photocopying various documents.

When employed full time as the Transportation/Attendance Coordinator from 1990 to 1995, Ms. Mount was also responsible for maintaining the employee attendance records for the district. The information was entered into a computer system that was connected with the payroll department for the district. This responsibility was eliminated when the position was reduced to part time in 1995.

There remain four secretarial positions, which embody the contested issue in this case. Each position is compensated according to the negotiated secretarial guide and each position was held by a non-tenured employee[2] at the time of Ms. Mount's termination[3].

[2] Deborah Mruz obtained tenure in May of 2000, but it was stipulated that she had not yet acquired tenure at the time of petitioner's termination.

[3] Ms. De Grassi, Clerical Assistant for District Services/Special Programs and Projects, was hired shortly after petitioner's termination. The position Ms. De Grassi now holds was contemplated prior to petitioner's termination, and, therefore, petitioner should have been offered the position at that time.

Nilsa Montaner was hired by the Tinton falls School District in April of 1998. She currently holds the title of Secretary to the Director of Special Services. The job description for that position (Exhibit J-3) states that the position requires general secretarial skills such as dictation, typing and word processing. Experience with child study team procedures is noted as "desirable." *Ibid.*

At the hearing, Richard Westler, Director of Special Services in Tinton Falls, testified as to the duties actually performed by Ms. Montaner as Secretary to the Director of Special Services. The testimony established that Ms. Montaner collects data and prepares reports by entering information regarding individual education plans for special education students. Further, Ms. Montaner compiles information regarding residency of special education students, develops a board agenda for the Director of Special Services, and schedules affirmative action committee meetings.

It was acknowledged by Mr. Westler, however, that the Secretary to the Director of Special Services has no authority to either set Board policy regarding special education, or make decisions regarding individual special education classifications of students. Also, the Secretary to the Director of Special Services does not have the authority to make decisions concerning residency matters, or to determine which matters are to be included in the board's agenda. Furthermore, the Secretary does not have any discretion concerning whether or when the affirmative action meetings are to take place. Finally, Ms. Montaner delegates work to the Secretary to the Director of Special Services, but does not evaluate this person. In essence, Ms. Montaner merely compiles specific information in order to present the information to the proper parties in such a form so that they may efficiently make decisions regarding the information.

The testimony further established that Deborah Mruz was hired in May of 1997, and Michele Trio was hired on September 8, 1999. Both individuals currently hold the position of Secretary to Special Services, and both individuals are currently serving on a half-time basis. Testimony by Mr. Westler established that the two half-time Secretaries to Special Services perform similar functions as described above regarding the Secretary to the Director of Special Services, Ms. Montaner. The only additional duties are the preparation of documents concerning county waivers. However, as above, these employees do not have any decision-making powers

on the determination about the propriety of applying for a county waiver. Again, the Secretaries to Special Services primarily compile specific information in order to facilitate the Director's assessment.

Most importantly, Mr. Westler testified that neither of the secretaries had any prior knowledge concerning either the special education laws or regulations, or the specialized reports and the specialized computer software used to prepare the reports. Ms. Mruz and Ms. Trio were essentially trained on the job.

Finally, Ms. Deborah De Grassi was hired soon after the petitioner's termination on December 31, 1999. Ms. De Grassi was hired as Clerical Assistant for District Services/Special Programs and Projects. Testimony from Mr. Rocco Orlando and Ms. Carol Moldan, the Superintendent for the Tinton Falls district, established that the basic functions performed by Ms. De Grassi consist of working with a computer program called "Time Plus" which organizes the district's after school program of the same name. The program currently involves 100 to 150 students, and Ms. De Grassi is responsible for collecting the tuition for the program and sending "dunning" notices when payments are late.

According to the testimony, Ms. De Grassi's position requires some bookkeeping skills which was characterized in testimony as requiring that the holder of the position posses at least a bachelor's degree in accounting, despite the lack of reference to that requirement in the job description (Exhibit J-5) developed by Ms. Molden herself. Ms. De Grassi does hold a bachelor's degree in accounting and the petitioner does not.

Both Mr. Westler and Ms. Molden stated at the hearing that, in their opinion, the petitioner was not capable of performing any of the four contested positions. However, it was also established that the petitioner never worked directly for either of the witnesses.

LEGAL ANALYSIS

School district secretaries are provided tenure protection pursuant to *N.J.S.A.* 18A:17-2(b), which states

> [a]ny person holding any secretarial ... position or employment under a board of education of any school district or under any officer thereof, after
>
> 1. The expiration of a period of employment of three consecutive calendar years in the district or such shorter period as may be fixed by the board or officer employing him, or
>
> 2. Employment for three consecutive academic years, together with employment at the beginning of the next succeeding academic year,...
>
> shall hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title.

However, tenure regarding secretaries has been treated much differently from the tenure afforded teaching staff members and school district janitors, as "no statute nor rule of the State Board of Education has ever been promulgated which provides tenured educational secretaries with a set of clearly delineated seniority rights or procedures governing dismissal when a reduction in force is effected by employing boards." *Sheridan v. Board of Educ. of the Township of Ridgefield Park, Bergen County*, 1976 *S.L.D.* 995, 997. As a result,

> a person employed as a secretary or as a clerk may acquire tenure, pursuant to *N.J.S.A.* 18A:17-2, but does not also acquire the same statutory right to seniority as do teachers, *N.J.S.A.* 18A:28-11 *et seq.*, or school janitors, *N.J.S.A.* 18A:17-4. ... The Commissioner of Education has only gone to the extent of ruling that the school secretary who has tenure and whose position is abolished would have preference to an appointment to another secretarial position over that of a person who has not acquired tenure as secretary.
>
> *[Lavine v. Board of Educ. of the City of Trenton, Mercer County*, OAL DKT. EDU 7586-82, (June 6, 1984) *adopted,* Comm'r of Education, (July 23, 1984)(citation omitted).]

In addition to the lack of statutory or regulatory provision concerning seniority, there has been no attempt to provide "categories of employment ... for secretaries[.]" *Sheridan, supra,* 1976 *S.L.D.,* at 997. Therefore, "a secretary in a school system does not acquire tenure to a specific office position in a particular school, but rather gains tenure as a secretary in the entire school system." *Mackey v. Board of Educ. of the Borough of Ridgefield, Bergen County*, 1983 *S.L.D.* 96, 103. As was recognized in the *Sheridan* case, the present tenure protections provided secretaries is quite like the tenure provisions for teachers in 1933 when they were "clothed with tenure but no categories of teachers and no seniority statutes nor rules had as yet been promulgated." *Id.,* at 998. In applying pre-seniority teacher cases to the secretary position, it is clear that

> the protection afforded by the [tenure] statute would be little more than a gesture if such board were held entitled to make that reduction by selecting for discharge teachers exempt by law there from, and retaining the non-exempt. If such a reduction be made at all, and a place remains which the exempt teacher *is qualified to fill*, such teacher is entitled to that place as against the retention of a teacher not protected by the statute.
>
> [Seidel v. Board of Educ. of Ventnor City, 110 *N.J.L.* 31, 33 (Sup. Ct. 1933).]

Therefore, it is clear that petitioner should have been offered a secretarial position within the district that was held by a non-tenured secretary at the time of her dismissal if she meets the requirements to fill it.

"[T]he entitlement of a tenured secretary to a position held by a nontenured secretary will be adjudged by the Commissioner to be viable only if the tenured secretary possesses the skills and necessary qualifications to efficiently perform the duties of such secretarial position." *Sheridan, supra*, 1976 *S.L.D.,* at 997. "[S]ecretarial employees are generalists who may be transferred more easily from one assignment to another." *Hibo v. Board of Educ. of the West Essex Reg'l School Dist.*, EDU 1226-96, at 10, Initial Decision, (November 12, 1997), *adopted,* Comm'r. (June 3, 1998) <http://lawlibrary.rutgers.edu/oal/search.html>. However, "title alone is not dispositive and actual duties should control over labels." *Id.* at 9.

Since it is clear that the duties previously performed by Ms. Mount were secretarial in nature, and it further appears that the duties performed by Ms. Mruz, Ms. Trio and Ms. De Grassi are very similar, it would appear that, absent a showing that "the duties assigned to other non tenured secretaries were so specialized or unique that petitioners would be incapable of satisfactorily performing them[,]" *id.* at 12, the Tinton Falls Board of Education violated petitioner's tenure rights by not offering her one of the contested positions.

CONCLUSION

As a secretary, petitioner is entitled to be offered another secretarial position within the district that was held by a non-tenured secretary at the time of her dismissal. The selection of the position to be offered is within the discretion of the Board of Education. Petitioner's appeal 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. 29, 2000
DATE

Kathryn A. Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

Jan. 02, 2001
DATE

DN Antanaitis/jc
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 3 2001
DATE

Jeff S. Masin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

DOCUMENTS IN EVIDENCE

Joint Exhibits:

J-1 Job Description for Transportation/Attendance Coordinator

J-2 Job Description for Transportation Secretary

J-3 Job Description for Secretary to the Director of Special Services

J-4 Job Description for Secretary to Special Services

OAL DKT. NO. EDU 120-00
AGENCY DKT. NO. 381-12/99

MABEL MOUNT,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF TINTON FALLS, MONMOUTH COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT,	:	DECISION
AND	:	
DEBORAH DE GRASSI, MICHELE TRIO, NILSA MONTANER AND DEBORAH MRUZ,	:	
INTERVENORS.	:	

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

In its exceptions, the Board reiterates its contention that petitioner is not able to perform either the functions of the Clerical Assistant for District Services/Special Programs and Projects position, or those of the secretarial positions in its Special Services Office. Underscoring that tenured secretaries do not have seniority rights, the Board reasons that it may select any tenured secretary to be eliminated when a reduction in force occurs. (Board's Exceptions at 1) The Board continues,

> Of course, we recognize that the rights of a tenured secretary are greater than those of a non-tenured secretary **IF, AND ONLY IF,** the tenured secretary can perform in the new position. The rights

> of a tenured secretary over non-tenured personnel are not absolute. The Board of Education may still retain a non-tenured secretary over a tenured secretary, if the latter does not have the qualifications or ability to perform the open position. If a Board of Education eliminates a tenured position (e.g. Transportation/Attendance Coordinator) and that person asserts tenure rights to a secretarial position for which he or she does not have the requisite skills, the Board need not retain that person. See *Hansen v. Bd. of Ed. of Maywood*, S.B. #51-89 (March 7, 1990). (emphasis in text) (Board's Exceptions at 2)

The Board next reviews the functions inherent in the positions, as noted *supra*, arguing that each job requires a knowledge base and set of skills which petitioner does not possess, and asserting that "it would be a disaster to put her in any of these positions." (*Ibid.*) Thus, it concludes that *Hansen, supra*, applies herein and the Initial Decision must be reversed.

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm the Initial Decision of the ALJ, with modification. At the outset, the Commissioner notes that the Board does not dispute that petitioner acquired tenure in the position of secretary. (Initial Decision at 2) Further, mindful that "a secretary in a school system does not acquire tenure to a specific office position in a particular school but rather gains tenure as a secretary in that entire school system" (*Mackey, supra,* at 1983 *S.L.D.* 105), the Commissioner finds that the record herein is sufficient to conclude that the duties assigned to the nontenured secretaries were not "so specialized or unique that [petitioner] would be incapable of satisfactorily performing them." *Hibo and Arillo v. Board of Education of the West Essex Regional School District, Essex County*, slip opinion at 12, decided by the Commissioner December 29, 1997, *aff'd* State Board June 3, 1998. Thus, the Commissioner concludes that petitioner has demonstrated an entitlement to one of the secretarial positions currently held by Intervenors Montaner, Mruz and Trio, since each was serving as a nontenured secretary in the

District at the time petitioner was subjected to the reduction in force.[1] However, the Commissioner cannot agree with the ALJ's conclusion that petitioner's tenure in the position of Secretary entitles her to hold the position of Clerical Assistant for District Services/Special Programs and Projects currently held by Ms. DeGrassi, since the record before him supports the conclusion that this position is not, by either title or function, a secretarial one. *See, Given v. Bd. of Ed. of East Windsor Regional School District*, 1978 *S.L.D.* 43, *aff'd* State Board of Education 46, *aff'd* Appellate Division 1979 *S.L.D.* 832.

Accordingly, the Initial Decision of the ALJ is modified as set forth herein. The Board may exercise discretion in selecting which of the secretarial positions, as identified above, shall be offered to petitioner.[2]

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 2/07/01

Date of Mailing: 2/07/01

[1] The ALJ concluded that the duties of Interveners De Grassi, Mruz and Trio were secretarial in nature. (Initial Decision at 8) Although the Initial Decision is silent as to the ALJ's conclusions about the duties of Montaner, it is clear from reviewing the record and the Initial Decision that the duties of Montaner were secretarial in nature.

[2] In accordance with *N.J.A.C.* 1:1-14.10(j), the Commissioner affirms the ALJ's Interlocutory Order of October 5, 2000 granting a motion to intervene on behalf of Deborah DeGrassi, Michele Trio, Nilsa Montaner and Deborah Mruz.

[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.

45-01

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

February 7, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3809-99
AGENCY DKT. NO. 399-9/98

BARBARA SPEHNER,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY,
Respondent.

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

Charlotte Kitler, General Counsel, for respondent

Record Closed: December 19, 2000 Decided: January 3, 2001

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

Initially, this matter was one of thirty-one consolidated cases filed with the Commissioner of Education ("Commissioner") on August 31, 1998. The multi-count petition alleged the wrongful withholding of the increment of petitioner, Barbara Spehner ("Spehner"). On September 21, 1998, the District filed its answer. Subsequently, on October 29, 1998, the Commissioner forwarded all thirty-one cases to the Office of Administrative Law ("OAL") for hearing as a contested case under OAL Dkt. No. EDU 9812-98.

A telephone prehearing conference was held on all thirty-one cases on March 9, 1999. During that conference, the issues were isolated. Since each petitioner's situation involved different factual circumstances and different witnesses, the consolidated cases were divided into separate cases for convenience of hearing.

A hearing was scheduled in the Spehner case, designated OAL Dkt. No. EDU 3809-99, on January 20 and 21, 2000. After several adjournments of scheduled hearing dates due to scheduling conflicts and possible rsolution of this matter, it was rescheduled for hearing on October 18 and 19, 2000. Settlement conferences were held, and during a telephone conference on October 30, 2000, the parties indicated that a settlement had been reached.

The parties have agreed to settle this matter and have prepared the attached Stipulation 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.

The above settlement also withdraws petitioner's petition filed under the caption *Barbara Spehner v. State-Operated School District of the City of Jersey City,* OAL Dkt. No. EDU 9340-00, Agency Dkt. No. 342-10/00.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (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.

1/3/01
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

1-5-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 9 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
RECEIVED
DEC 19 1 33 PM '00

CHARLOTTE KITLER
General Counsel
State-Operated School District
of Jersey City
346 Claremont Avenue
Jersey City, New Jersey 07305
(201) 915-6231
Attorney for Respondent

BARBARA SPEHNER, Petitioner, v. STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY Agency Dkt. No. 399-98 OAL Dkt No. EDUOR 3809-99 STIPULATION OF SETTLEMENT

This Agreement is entered into as a resolution of the within matter regarding the appeal of the petitioner from the withholding of her increment for the 1998-99 school year. The parties hereby agree to an amicable resolution of the within matter as follows:

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

2. The respondent shall restore petitioner's increment for the 1998-99 school year on a retroactive basis.

3. The petitioner withdraws her petition in the within matter.

4. The petitioner shall also withdraw the petition which she filed from the withholding of her increment for the 2000-01 school year, which petition bears Agency Docket No. 342-10/00.

5. The petitioner acknowledges that she has had the right and opportunity to discuss all aspects of this Stipulation with her attorney prior to signing it, that she has read and fully understands all of the terms of this Stipulation, and that she had entered into this Stipulation knowingly and voluntarily, without coercion or duress.

6. It is understood that this Stipulation will take effect upon its approval by the Administrative Law Judge and by the Commissioner of Education.

Barbara Spehner
BARBARA SPEHNER

DATED: December 7, 2000

PHILIP FEINTUCH, Esq.
Attorney for Petitioner

DATED: 12/8/00

Charlotte Kitler
CHARLOTTE KITLER, Esq.
Attorney for Respondent

DATED: 12/14/00

OAL DKT. NO. EDU 3809-99
AGENCY DKT. NO. 399-9/98

BARBARA SPEHNER,	:	
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 the parties' compliance with the terms of the settlement. *

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/07/01

Date of Mailing: 2/07/01

* The Commissioner duly notes that settlement term 4 stipulates petitioner's agreement to withdraw the petition she filed appealing the withholding of her 2000-2001 increment, which bears Agency Dkt. No. 342-10/00, and he cautions that timely submission of such withdrawal is expected upon issuance of the final decision in the instant matter.

46-01

IN THE MATTER OF THE TENURE	:	
HEARING OF PATRICIA A. COLEMAN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF SAYREVILLE, MIDDLESEX COUNTY.	:	

February 8, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6773-00
AGENCY DKT. NO. 308-9/00

SAYREVILLE BORO SCHOOL
DISTRICT, MIDDLESEX COUNTY,

Petitioner,

v.

PATRICIA A. COLEMAN,

Respondent.

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

Robert Cirafesi, Esq., for respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: December 11, 2000 Decided: January 3, 2001

BEFORE **ROBERT S. MILLER**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 20, 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 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.

January 3, 2001
DATE

ROBERT S. MILLER, ALJ

Receipt Acknowledged:

1-5-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 8 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

tmp

IN THE MATTER OF TENURE CHARGES AGAINST PATRICIA A. COLEMAN, TENURED TEACHING STAFF MEMBER IN THE SCHOOL DISTRICT OF SAYREVILLE, MIDDLESEX COUNTY, NEW JERSEY	:	**BEFORE THE COMMISSIONER OF EDUCATION** **OAL DOCKET NO.: 6773-00** **AGENCY DOCKET NO.: 308-9/00** **SETTLEMENT AGREEMENT**

THIS SETTLEMENT AGREEMENT made the 4th day of December, 2000, by and between the Board of Education of the Borough of Sayreville ("Board of Education") and Patricia A. Coleman, as executed below by the respective counsel for said parties to confirm the settlement placed upon the record before Administrative Law Judge Robert Miller on this date.

WHEREAS, a Statement of Tenure Charges and Statement of Evidence Under Oath had been filed with the Board of Education relating to certain conduct of Patricia A. Coleman, a teaching staff member employed by the Board; and

WHEREAS, the parties desired to settle said dispute.

NOW, THEREFORE, the parties by and through their attorneys confirm their agreement as follows:

1. Patricia A. Coleman has this date executed the letter annexed hereto as Exhibit "A" thereby resigning her tenured position with the Board of Education effective this date and announcing her intention to retire as of March 1, 2001. Patricia A. Coleman surrenders any tenure rights that she had with the Board of Education as of the date hereof.

2. The Board of Education shall pay to Patricia A. Coleman her gross salary less the standard payroll deductions as an employee of the Board (e.g., taxes, social security, pension, etc.) for the six month period between September 1, 2000 and February 28, 2001. Said payment of salary shall be made on the basis of the regular bi-monthly salary payments due Patricia A. Coleman through January 15, 2001 and further regular bi-monthly salary payments on January 30, 2001, February 15, 2001 and February 28, 2001.

3. The Board and its administrators shall take all necessary steps to assist Patricia A. Coleman with the processing of her application for retirement under the Teachers' Pension Annuity Fund.

4. Patricia A. Coleman shall continue to have the benefit of the health insurance coverage under the collective bargaining agreement in effect in the district through February 28, 2001 and shall also have the right to receive, if she qualifies, any benefits under that collective bargaining agreement due teaching staff members upon their retirement.

5. In consideration of the foregoing, Patricia A. Coleman has simultaneously executed the General Release attached hereto and made a part hereof as Exhibit "B".

KLAUSNER, HUNTER & ROSENBERG
Attorneys for Patricia A. Coleman

Dated: December 7, 2000

By: _____
Stephen Klausner

WILENTZ, GOLDMAN & SPITZER
Attorneys for Sayreville Board of Education

Dated: December 6, 2000

By: _____
Robert J. Cirafesi

EXHIBIT A

Patricia A. Coleman
P.O. Box 1301
Edison, New Jersey 08817

December 4, 2000

Michael Poll, Board Secretary
Sayreville Board of Education
P.O. Box 997
Sayreville, New Jersey 08872

Re: Termination of Employment and Retirement

Dear Mr. Poll:

Please accept this letter as written confirmation to the Board of Education of the termination of my employment and my intention to retire effective February 28, 2001.

Very truly yours,

Patricia A. Coleman

PATRICIA A. COLEMAN

#1902850 (084001.151)

EXHIBIT B

GENERAL RELEASE

For good and valuable consideration, Patricia A. Coleman ("Releasor") hereby releases and forever discharges the Board of Education of the Borough of Sayreville, its members, agents, administrators and employees ("Releasees"), from all actions, causes of action, claims and demands whatsoever, in law and equity, which Releasor had, now has, or hereafter can, shall or may have against Releasees or any of them regardless of whether said claims have been asserted or not, for, upon or by reason of any matter, cause or thing whatsoever, whether known or unknown, from the beginning of the world to the date hereof.

Patricia A. Coleman

PATRICIA A. COLEMAN

STATE OF NEW JERSEY)
:ss:
COUNTY OF Mercer)

On the 4th day of December in the year 2000, before me, the undersigned, a Notary Public in and for said State, personally appeared Patricia A. Coleman, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument, and acknowledged to me that she executed the same in her capacity, and that by her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Notary Public
Stephen E Klinder
Attorney at Law
State of New Jersey

#1902867 (084001.151)

OAL DKT. NO. EDU 6773-00
AGENCY DKT. NO. 308-9/00

IN THE MATTER OF THE TENURE	:	
HEARING OF PATRICIA A. COLEMAN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF SAYREVILLE, MIDDLESEX COUNTY.	:	

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

Upon careful and independent review of the record, the Commissioner cannot be satisfied that the proposed settlement meets the standards for review of settlements in tenure matters set forth in *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Initially, the Commissioner notes that it is well-established that, having once taken up the burden of tenure charges, the Board 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. *In the Matter of the Tenure Hearing of Kenneth Smith, School District of the City of Orange*, Essex County, decided by the Commissioner March 22, 1982, decision on remand June 16, 1983, *aff'd with modification* by the State Board of Education November 2, 1983, *aff'd* N.J. Superior Court, Appellate Division, January 30, 1986. *The present record contains no such explanation and analysis.* Moreover, the agreement does not indicate that respondent was 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 her certificate.

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.*

As emphasized by the Commissioner in *In the Matter of the Tenure Hearing of Corey Younger, State-operated School District of the City of Jersey City, Hudson County,* decided September 7, 1999 and *In the Matter of the Tenure Hearing of Elmena Jean, State-operated School District of the City of Newark, Essex County*, decided October 4, 1999, the mere fact that the terms of a proposed settlement in a tenure hearing matter call for the teaching staff member's resignation does not in and of itself assure that the *Cardonick* standards have been met, because the Commissioner's concern for the public interest extends beyond the boundaries of the particular district certifying the tenure charges.

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 Settlement Agreement, consistent with the concerns set forth above. If the parties are unwilling or unable to agree to a settlement consistent with the decision herein, the matter shall proceed to plenary hearing.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/8/01

Date of Mailing: 2/8/01

* 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.

(SB) 46-01

SB #46-01

IN RE THE ABBOTT V. BURKE :
IMPLEMENTING REGULATIONS :
ON SCHOOL FACILITIES, :
N.J.A.C. 6A:26. :

STATE BOARD OF EDUCATION

DECISION ON MOTION

For the Appellants, Education Law Center (David G. Sciarra, Esq. and Jennifer Weiser, Esq., of Counsel)

For the Respondent, Michael Lombardi, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

On November 14, 2001, the appellants filed a notice of appeal to the Appellate Division challenging the final agency rules governing educational facilities, N.J.A.C. 6:26, which were adopted by the State Board of Education on September 5, 2001 and became effective on October 1, 2001. The appellants also filed a motion with the State Board seeking an order pursuant to R. 2:5-3(c)(2) to abbreviate the record by waiving production of a transcript of the proceedings and comments before the Department of Education in the adoption of N.J.A.C. 6A:26. The motion is opposed by the Deputy Attorney General representing the State Board in the appeal now before the Appellate Division.

Review of the pertinent court rule which specifies what must be included in the record in matters on appeal to the Appellate Division indicates that the appellants are not required to produce a transcript of the public comment sessions in order to proceed with their appeal. See Baer, et al. v. Leo Klagholz, Commissioner of Education and

State Board of Education, decided by the State Board of Education, November 4, 1998.

Rather, R. 2:5-4(a) specifies that:

> The record on appeal shall consist of all papers on file in the court or courts or agencies below, with all entries as to matters made on the records of such courts and agencies, the stenographic transcript or statement of the proceedings therein, and all papers filed with or entries made on the records of the appellate court.

As we explained in Baer, supra:

> The State Board's public comment sessions are not required to be part of the administrative rulemaking process by the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. ("APA"), and the State Board does not routinely transcribe these sessions. While tape recordings of the sessions are available, only written comments submitted to the State Board, either in conjunction with public comment or submitted separately, are required by the Administrative Procedure Act and are considered by our agency during the adoption process. [Footnote omitted.] In short, the record in an appeal from the adoption of administrative rules would not ordinarily include a transcription of the State Board's public comment sessions. Hence, there is no need for the State Board to direct that the transcript be abbreviated pursuant to R. 2:5-3(c) in order to relieve the appellants of an obligation to produce transcripts of the public comment sessions.
>
> Similarly, R. 2:5-4 does not necessarily require the appellants to produce a transcript of the State Board meetings at which we considered the rules under challenge....

We therefore grant the appellants' motion to abbreviate the record.

Kathleen A. Dietz abstained.

January 2, 2002

Date of mailing JAN 04 2002

49-01

BOARD OF EDUCATION OF THE CITY OF ESTELL MANOR, ATLANTIC COUNTY,	:	
PETITIONER,	:	
V.	:	
NEW JERSEY STATE DEPARTMENT OF EDUCATION, BOARD OF EDUCATION OF THE TOWNSHIP OF WEYMOUTH, ATLANTIC COUNTY, BOARD OF EDUCATION OF ATLANTIC COUNTY SPECIAL SERVICES, AND MR. AND MRS. MICHAEL EINWECHTER, ON BEHALF OF C.E.,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENTS.	:	
	:	

February 9, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8205-00

AGENCY DKT. NO. 242-7/00

BOARD OF EDUCATION OF THE CITY OF ESTELL MANOR, ATLANTIC COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, BOARD OF EDUCATION OF WEYMOUTH, BOARD OF EDUCATION OF ATLANTIC COUNTY SPECIAL SERVICES, AND MR. & MRS. MICHAEL EINWECHTER, ON BEHHALF OF C.E.,

Respondents.

Beverly Sharps Muller, Esq., for petitioner

Kathleen Asher, Legal Assistant, for respondent NJ Department of Education

William Cappuccio, Esq., for respondent Weymouth Twp. Board of Education

John R. Armstrong, Esq. for respondent Atlantic County Special Services Board of Education

Record Closed: December 26, 2000 Decided: January 3, 2001

BEFORE **LILLARD E. LAW** , ALJ:

This matters was transmitted to the Office of Administrative Law on October 24, 2000, 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 a Resolution having been agreed to by the parties 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 Resolution 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.

3 January 2001
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

1/8/01
DATE

Debbie Castellanos/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 9 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

RESOLUTION OF THE ESTELL MANOR BOARD OF EDUCATION AND THE WEYMOUTH TOWNSHIP BOARD OF EDUCATION APPROVING THE SETTLEMENT OF #242-7/00 (CITY OF ESTELL MANOR BOARD OF EDUCATION, ATLANTIC COUNTY V. NJ DEPT. OF EDUCATION, WEYMOUTH TOWNSHIP BOARD OF EDUCATION, ET ALS)

WHEREAS, The Estell Manor Board of Education filed a Petition with the Commissioner of the New Jersey Department of Education contesting a determination that it was the district of residence for the minor child, C.E., and thus responsible for the child's educational costs; and

WHEREAS, the Board of Education of Weymouth Township and the Board of Education of Estell Manor have reached a settlement as to all issues arising out of said Petition; and

WHEREAS, both Boards of Education are in agreement that an amicable settlement is in the best interest of both districts; and

NOW, THEREFORE, BE IT RESOLVED on the 15th day of November, 2000, by the Estell Manor Board of Education and the Weymouth Township Board of Education, both in Atlantic County, State of New Jersey, as follows:

1. The costs for both districts, without State aid, for the minor child, C.E., are agreed to be the sum of $4,139.43.

2. Accordingly, there is due from each Board the sum of $2,069.71 each.

3. Any and all future tuition adjustments, whether positive or negative, shall also be divided equally between the districts.

4. Each Board shall release the other from any other claims not specified within the terms of this agreement.

5. This resolution shall take effect immediately upon passage.

CERTIFICATION

BY MaryAnn Clarke ATTEST BY _____

ON BEHALF OF ESTELL MANOR BOARD OF EDUCATION, ATLANTIC COUNTY, NEW JERSEY

DATE 11/15/00

BY Maggie Betz ATTEST BY Linda N. Jarvis

ON BEHALF OF WEYMOUTH TOWNSHIP BOARD OF EDUCATION, ATLANTIC COUNTY, NEW JERSEY

DATE 11-21-00

OAL DKT. NO. EDU 8205-00
AGENCY DKT. NO. 242-7/00

BOARD OF EDUCATION OF THE CITY OF ESTELL MANOR, ATLANTIC COUNTY,	:	
PETITIONER,	:	
V.	:	
NEW JERSEY STATE DEPARTMENT OF EDUCATION, BOARD OF EDUCATION OF THE TOWNSHIP OF WEYMOUTH, ATLANTIC COUNTY, BOARD OF EDUCATION OF ATLANTIC COUNTY SPECIAL SERVICES, AND MR. AND MRS. MICHAEL EINWECHTER, ON BEHALF OF C.E.,	:	COMMISSIONER OF EDUCATION
RESPONDENTS.	:	DECISION

The record, 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: 2/9/01

Date of Mailing: 2/9/01

48-01

BILLIE AIKENS, ELIZABETH FARLEY, KATHY HENDERSON, SHARON LEWICKI, NANCY RICHEDA, KAREN THURLOW, MICHELE VAN ORDEN, RITA WOOLEY, AND THE SUSSEX-WANTAGE EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE SUSSEX-WANTAGE REGIONAL SCHOOL DISTRICT, SUSSEX COUNTY,	:	
RESPONDENT.	:	

February 8,2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3079-00
AGENCY DKT. NO. 396-12/99

BILLIE AIKENS, ELIZABETH FARLEY, KATHY HENDERSON, SHARON LEWICKI, NANCY RICHEDA, KAREN THURLOW, MICHELE VAN ORDEN, RITA WOOLEY, AND THE SUSSEX-WANTAGE EDUCATION ASSOCIATION,
Petitioners,
v.
BOARD OF EDUCATION OF THE SUSSEX-WANTAGE REGIONAL SCHOOL DISTRICT, SUSSEX COUNTY,
Respondent.

Mary J. Hammer, Esq., for petitioners (Bucceri and Pincus, attorneys)

Brian T. Giblin, Esq., for respondent (Giblin & Giblin, attorneys)

Record Closed: December 11, 2000 Decided: December 18, 2000

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

This matter was initiated following the filing of a Verified Petition by petitioners alleging that the respondent Board of Education of the Sussex-Wantage Regional School District, Sussex County, violated *N.J.S.A.* 18A:30-2 regarding sick leave. The Department of Education transmitted the matter to the Office of Administrative Law where, on March 16, 2000, it was filed for hearing as a contested case. Subsequent to prehearing, settlement and status conferences with counsel on May 9, July 20 and September 28, 2000, respectively, the matter was scheduled to be heard on November 29, 2000. On November 28, 2000, petitioners' attorney advised that the matter had settled and thereafter submitted the attached Stipulation of Settlement setting forth the terms of agreement which the undersigned received on December 11, 2000.

Having reviewed the record and the terms of 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. 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.

December 18, 2000
DATE

Margaret M. Monaco
MARGARET M. MONACO ALJ

Receipt Acknowledged:

1-5-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 9 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

md

BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(973) 773-5665
Counsel for Petitioners

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

DEC 11 12 15 PM '00

BILLIE AIKENS, ELIZABETH FARLEY, KATHY HENDERSON, SHARON LEWICKI, NANCY RICHEDA, KAREN THURLOW, MICHELE VAN ORDEN, RITA WOOLEY and THE SUSSEX-WANTAGE EDUCATION ASSOCIATION,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
	:	AGENCY REF. NO. 396-12/99
	:	O.A.L. DKT. NO. EDU 03079-00
v.	:	
SUSSEX-WANTAGE REGIONAL BOARD OF EDUCATION,	:	
Respondent.	:	**STIPULATION OF SETTLEMENT**

The above captioned matter having been settled by the parties hereto as follows:

The Sussex-Wantage Regional Board of Education agrees to credit to the sick bank of each of the petitioners the following number of half days:

Billie Aikens	- 1-1/2
Elizabeth Farley	- 2-1/2
Kathy Henderson	- 1/1/2
Nancy Richeda	- 3-1/2
Karen Thurlow	- 1-1/2
Michele Van Orden	- 1/2
Sharon Lewicki	- 8
Rita Wooley	- 20-1/2
Joyce Phitts	- 5

The matter is therefore dismissed with prejudice and without costs.

GIBLIN & GIBLIN, ESQS.

By: Brian T. Giblin
Attorney for Respondent

BUCCERI & PINCUS, ESQS.

By: Mary J. Hammer
Mary J. Hammer
Attorney for Petitioners

BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(973) 773-5665
Counsel for Petitioners

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

DEC 11 12 15 PM '00

BILLIE AIKENS, ELIZABETH FARLEY, KATHY HENDERSON, SHARON LEWICKI, NANCY RICHEDA, KAREN THURLOW, MICHELE VAN ORDEN, RITA WOOLEY and THE SUSSEX-WANTAGE EDUCATION ASSOCIATION,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
v.	:	AGENCY REF. NO. 396-12/99 O.A.L. DKT. NO. EDU 03079-00
SUSSEX-WANTAGE REGIONAL BOARD OF EDUCATION,	:	
Respondent.	:	**STIPULATION OF SETTLEMENT**

The above captioned matter having been settled by the parties hereto as follows:

The Sussex-Wantage Regional Board of Education agrees to credit to the sick bank of each of the petitioners the following number of half days:

Billie Aikens	- 1-1/2
Elizabeth Farley	- 2-1/2
Kathy Henderson	- 1/1/2
Nancy Richeda	- 3-1/2
Karen Thurlow	- 1-1/2
Michele Van Orden	- 1/2
Sharon Lewicki	- 8
Rita Wooley	- 20-1/2
Joyce Phitts	- 5

The matter is therefore dismissed with prejudice and without costs.

GIBLIN & GIBLIN, ESQS.

By: Brian T. Giblin
Attorney for Respondent

BUCCERI & PINCUS, ESQS.

By: Mary J. Hammer
Attorney for Petitioners

OAL DKT. NO. EDU 3079-00
AGENCY DKT NO. 396-12/99

BILLIE AIKENS, ELIZABETH FARLEY, KATHY HENDERSON, SHARON LEWICKI, NANCY RICHEDA, KAREN THURLOW, MICHELE VAN ORDEN, RITA WOOLEY, AND THE SUSSEX-WANTAGE EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE SUSSEX-WANTAGE REGIONAL SCHOOL DISTRICT, SUSSEX COUNTY,	:	
RESPONDENT.	:	

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

Upon review, the Commissioner approves the settlement terms and adopts the 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: 2/8/01

Date of Mailing: 2/8/01

47-01

BOARD OF EDUCATION O F MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF SCHOOL FINANCE,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning Board challenged the determination of the Department that it was legally responsible for educating K.O., a child placed in an out-of-state facility by a State agency, for the 1997-98 school year.

The ALJ concluded that The Board had presented credible testimony to overcome the presumption that the address provided to the Department by DYFS for D.O., the mother of K.O., was correct, and concluded that the Board was not the responsible district for K.O.

The Commissioner affirmed the decision of the ALJ, holding that the presumption that information provided the Department by other State agencies for purposes of determining the district of residence of students is correct may be rebutted by credible evidence or testimony. The Commissioner agreed with the ALJ that the presumption of validity of the DYFS records in this case had been rebutted by the Board.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3200-98
AGENCY DKT. NO. 491-12/97

MORRIS HILLS REGIONAL DISTRICT BOARD OF EDUCATION,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF SCHOOL FINANCE,
Respondent.

Joanne L. Butler, Esq., for petitioner
(Schenck, Price, Smith & King, attorneys)

Arlene Goldfus Lutz, Deputy Attorney General, for respondent
(John J. Farmer, Jr., Attorney General of New Jersey, attorney)

Record Closed: November 17, 1999 Decided: December 22, 2000

BEFORE: **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal by a regional high-school district from the assessment of tuition costs for placement of a child in an out-of-state facility for the 1997-98 academic year. Under the State Facilities Planning Act of 1979, *N.J.S.A.* 18A:7B-1 to –13, the "district of residence" is responsible for the education of a child placed in an out-of-state facility by a state agency. New Jersey Department of Education ("Department") contends that

50-01

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

February 9, 2001

OAL DKT. NO. EDU 5137-97
AGENCY DKT. NO. 414-9/96

GEORGIA M. HENDERSON,	:	
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 Acting 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: 2/9/01

Date ofMailing 2/9/01

52-01

JOSHUA KEAVENEY, a minor by and through his guardian *ad litem*, SANDRA KEAVENEY; SHAWN RILEY, by and through his guardian *ad litem*, EDIE RILEY; CHRISTOPHER RIDGEWAY, ANTHONY RIDGEWAY, JONATHON GLASS AND DANIELLE GLASS, by and through their guardians *ad litem*, ARNETTA RIDGEWAY AND CHRISTOPHER GLASS; LOUIS GRACIA, TINA GRACIA AND ZACHARY GRACIA, by and through their guardian *ad litem*, DAWN GRACIA; ON BEHALF OF THEMSELVES AND ALL THE CHILDREN IN A CLASS OF "A" AND "B" NON-ABBOTT DISTRICTS LISTED BELOW: BUENA REGIONAL (ATLANTIC COUNTY), CLAYTON (GLOUCESTER COUNTY), COMMERCIAL TOWNSHIP (CUMBERLAND COUNTY), EGG HARBOR CITY (ATLANTIC COUNTY), FAIRFIELD TOWNSHIP (CUMBERLAND COUNTY), HAMMONTON (ATLANTIC COUNTY), LAKEHURST (OCEAN COUNTY), LAKEWOOD (OCEAN COUNTY), LAWRENCE TOWNSHIP (CUMBERLAND COUNTY), LITTLE EGG HARBOR (OCEAN COUNTY), MAURICE RIVER TOWNSHIP (CUMBERLAND COUNTY), OCEAN TOWNSHIP (OCEAN COUNTY), QUINTON (SALEM COUNTY), SALEM CITY (SALEM COUNTY), UPPER DEERFIELD (CUMBERLAND COUNTY), WALLINGTON (BERGEN COUNTY), AND WOODBINE (CAPE MAY COUNTY) SCHOOL DISTRICTS,

PETITIONERS,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, LEO KLAGHOLZ, COMMISSIONER OF THE NEW JERSEY STATE DEPARTMENT OF EDUCATION; ELIZABETH L. PUGH, NEW JERSEY DIRECTOR OF MANAGEMENTAND BUDGET; JAMES DIELEUTORIO, NEW JERSEY STATE TREASURER; AND CHRISTINE WHITMAN, GOVERNOR,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In a proceeding bifurcated by prior order of the Commissioner, petitioners sought to demonstrate that they had fully effectuated the provisions of the Comprehensive Educational Improvement and Financing Act of 1996 (CEIFA), so as to be able to proceed to the next phase of hearing wherein they would attempt to prove that they are unable to provide a thorough and efficient system of public education within the level of funding provided by that Act.

ALJ found that petitioners demonstrated entitlement to proceed, and Commissioner affirmed with clarification as to the scope of the second phase of hearing.

FEB 9 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. EDU 2637-00; EDU 2638-00; EDU 2639-00; EDU 2640-00; EDU 2641-00; EDU 2642-00; EDU 2643-00; EDU 2644-00; EDU 2645-00; EDU 2646-00; EDU 2649-00; EDU 2650-00; EDU 2651-00; EDU 2652-00; EDU 2654-00; EDU 2655-00; EDU 2656-00

AGENCY DKT. NOS. 53-3/98A; 53-3/98B; 53-3/98C; 53-3/98D; 53-3/98E; 53-3/98F; 53-3/98G; 53-3/98H; 53-3/98I; 53-3/98J; 53-3/98M; 53-3/98N; 53-3/98O; 53-3/98P; 53-3/98R; 53-3/98S; 53-3/98T

JOSHUA KEAVENEY, A MINOR BY AND THROUGH HIS GUARDIAN AD LITEM, SANDRA KEAVENEY; SHAWN RILEY, BY AND THROUGH HIS GUARDIAN AD LITEM, EDIE RILEY; CHRISTOPHER RIDGEWAY, ANTHONY RIDGEWAY, JONATHON GLASS AND DANIELLE GLASS, BY AND THROUGH THEIR GUARDIANS AD LITEM, ARNETTA RIDGEWAY AND CHRISTOPHER GLASS; LOUIS GRACIA, TINA GRACIA AND ZACHARY GRACIA BY AND THROUGH THEIR GUARDIAN AD LITEM, DAWN GRACIA; ON BEHALF OF THEMSELVES AND ALL THE CHILDREN IN A CLASS OF "A" AND "B" NON-ABBOTT DISTRICTS LISTED BELOW:

BUENA REGIONAL, CLAYTON, COMMERCIAL TOWNSHIP, EGG HARBOR CITY, FAIRFIELD TOWNSHIP,

OAL DKT. NOS. EDU 2637-00, EDU 2638-00, EDU 2639-00, EDU 2640-00, EDU 2641-00, EDU 2642-00, EDU 2642-00, EDU 2643-00, EDU 2644-00, EDU 2645-00, EDU 2656-00, EDU 2649-00, EDU 2650-00, EDU 2651-00, EDU 2651-00, EDU 2652-00, EDU 2654-00, EDU 2655-00 and EDU 2656-00

HAMMONTON, LAKEHURST, LAKEWOOD, LAWRENCE TOWNSHIP, LITTLE EGG HARBOR, MAURICE RIVER TOWNSHIP, OCEAN TOWNSHIP, QUINTON, SALEM CITY, UPPER DEERFIELD, WALLINGTON AND WOODBINE SCHOOL DISTRICTS,

Petitioners,

v.

NEW JERSEY DEPARTMENT OF EDUCATION: LEO KLAGHOLZ, COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF EDUCATION; ELIZABETH L. PUGH, NEW JERSEY DIRECTOR OF MANAGEMENT AND BUDGET; JAMES DIELEUTORIO, NEW JERSEY STATE TREASURER; AND CHRISTINE WHITMAN, GOVERNOR,

Respondents.

Frederick A. Jacob, Esq., and **Kathy Balin,** Esq., on behalf of petitioner (Jacob, Ferrigno and Chiarello, attorneys)

Thomas Russo, Deputy Attorney General, and **Kathleen Asher**, Law Assistant, on behalf of respondent (John J. Farmer, Jr., Attorney General of New Jersey, attorney)

Record Closed: December 8, 2000 Decided: December 26, 2000

BEFORE **SOLOMON A. METZGER,** ALJ:

Petitioners are seventeen (17) school districts that claim they cannot provide the "thorough and efficient" education mandated by the State Constitution with current funding levels. They liken their circumstances to those of the "Abbott districts" and hope to receive the special funding mandated by the New Jersey Supreme Court for those schools, *see Abbott v. Burke*, 149 *N.J.* 145 (1997) (*Abbott IV*); *Abbott v. Burke*, 153 *N.J.* 480 (1998) (*Abbott V*). The Department of Education (DOE) transmitted the matters to the Office of Administrative Law (OAL) as contested cases pursuant to *N.J.S.A.* 52:14B-1 to -15. The transmittal from the

Commissioner took the unusual step of bifurcating the hearing. Petitioners would first have to show that they spent existing funds appropriately under the Comprehensive Educational Improvement and Financing Act (CEIFA), *N.J.S.A.* 18A:7F-1 to -36. To quote directly from the Commissioner's letter:

> . . . the ensuing hearing shall be limited *solely* to whether each petitioning district has fully effectuated the provisions of CEIFA, including, at a minimum, those provisions, such as early childhood program aid, demonstrably effective school aid, and supplemental school tax reduction aid, which address disadvantages of the type alleged by petitioners and provide additional funds for remediation of such disadvantages, and whether each petitioning district has made the budgetary reallocations and other adjustments necessary to implement the programs envisioned by the law.
>
> [J-1.]

On completion of step one in the OAL the matters would be returned to the Commissioner for final agency action regarding this threshold issue. Those districts deemed to have fully satisfied the CEIFA would then return to the OAL for fact-finding on the ultimate question, *i.e.*, whether despite the effective use of current funding, they are nonetheless unable to deliver a thorough and efficient education.

The cases were heard over the course of some eighteen partial hearing days in October and November 2000 and the record closed on December 8, 2000, with receipt of the last post-hearing memorandum. The parties have produced a voluminous record and a limited dispute. Many of the relevant facts are generic to all the cases and are uncontested. I recount them here before moving on to individual districts.

Each district's budget was prepared through the combined efforts of its superintendent, business administrator, and associated staff, and was then reviewed and approved by the local board of education at a public meeting. The superintendents and business administrators of each

district testified credibly and largely without contradiction that budgets were prepared in accordance with all school law requirements.

Each district submitted all of the financial documentation required under the CEIFA to the office of the County Superintendent of Schools and to the DOE for review and approval. The documentation covers school years 1997/98 and 1998/99 and deals specifically with the categorical aid funds received from the DOE, such as early childhood program aid (ECPA), demonstrably effective program aid (DEPA), and distance learning network aid (DLNA). In each case the County Superintendent and the DOE have approved the budget without substantive adjustment.

Districts are also audited annually by outside independent accounting firms, *see N.J.S.A.* 18A:23-1 to -11. Each of the independent auditors presented at hearing was a certified public accountant and most had long experience in the field of public school auditing. Each was accepted as an expert without objection and each testified credibly and without challenge that the district(s) he audited complied with generally accepted accounting practices, met any separate federal or state accounting guidelines, and to a reasonable degree of accounting probability spent all funds, including CEIFA funds, lawfully. In some of the districts a few "nonmaterial" errors were found for a given audit year, but in each case the auditors testified that these were insignificant and once pointed out to the district were subsequently corrected. A few districts had "material" errors, but again the auditor in each instance testified that these were small mistakes that were corrected and that his opinion concerning the district's appropriate use of funds was not altered.

The DOE did not call a witness and was poorly positioned to challenge any of these opinions. Nevertheless, the Attorney General argues that all of the districts failed to satisfy what he understands to be a heavy burden of proof. When the Commissioner asked districts to show that they "fully effectuated" the CEIFA, they were to demonstrate that they made the best programmatic choices available and then used the money in the most efficient way possible. The Attorney General concedes that funds were spent lawfully, but believes that this is not enough.

Moreover, to establish these points petitioners should have generated operational audits to present at hearing alongside the financial audits that were produced. The argument is greatly strained and appears to grasp for an issue.

It should always be the goal of government to prioritize well and to execute precisely. That said, it is plain that any inquiry into expenditures at that level of expectation would quickly develop legitimate differences of opinion and measurement would require well-developed guidelines. The Attorney General acknowledged at hearing that he is unaware of any rule or directive that might channel the inquiry he urges. Rather he agrees that districts have leeway to expend CEIFA monies within certain broad categories of activity, and, with limited exceptions that will be discussed below, he agrees that these districts complied with existing rules. It is hard to posit that more is required. Thus, I read the Commissioner's letter to impose no greater burden than is contained within the current regulatory scheme. To say otherwise would launch a standardless inquiry that would likely run afoul of the CEIFA, *see N.J.S.A.* 18A:7F-4(b), -6, as well as the rulemaking provisions of the Administrative Procedure Act, *N.J.S.A.* 52:14B-1 to -12.

Parenthetically, despite the presence of each school superintendent and wide latitude in cross-examination, the Attorney General probed the question of programmatic decision-making lightly and uncovered nothing. A number of auditors were asked by the Attorney General to distinguish the term "operational audit" from the term "financial audit" and they endeavored to comply. Building upon these answers he suggests that this is what the Commissioner really wanted here. The difficulty, however, is that the term operational audit is nowhere defined or even referenced in the regulatory scheme. The auditors who testified for petitioners are in no position to announce policy for the Commissioner, or to speculate about what he might require in such an audit.

Beyond these overarching issues the DOE takes specific aim at a few districts for discrete problems. It asserts that the Buena Regional and Fairfield Township districts are not currently using ECPA money to serve all of the four- and five-year-olds for whom educational services are mandated by the 2001/02 school year. As such they are not using their money appropriately.

The argument is without substance. *N.J.S.A.* 18A:7F-16 allows districts to use ECPA money to establish a capital reserve for construction purposes, or for other "educationally meritorious programs," prior to the 2001/02 school year. As the DOE does not argue any illegality, this is an after-the-fact complaint about how Buena Regional and Fairfield are preparing for next year. It bears repeating that the County Superintendent and the DOE approved the Buena Regional and Fairfield budgets and that no witness came forward to say that these were improvidently endorsed.

The Attorney General argues that Hammonton, Fairfield, Lakehurst and Buena Regional use most of their DEPA money to fund salaries for general education teachers, to develop general education curriculum and purchase supplies. This is not entirely consistent with statutory language that directs DEPA money for instructional, school governance, and health and social service programs, *N.J.S.A.* 18A:7F-18(a). It should be noted that *N.J.S.A.* 18A:7F-18(b) directs the State Board of Education to adopt rules governing the use of DEPA, requires it to establish an "accounting mechanism" to assure that the money is spent appropriately, requires DOE approval for expenditures and allows for rescission of aid and monetary penalties should a district fail to use funds according to plan. The record is silent regarding any criticism by the DOE of the plans these districts submitted for the use of DEPA funds. If the Attorney General seriously believed that the CEIFA had been violated, he might have presented a witness to explain exactly how that is so and why his client approved these plans in the first instance. In the meantime independent auditors and school business administrators testified that all DOE guidelines for DEPA were scrupulously followed.

The Attorney General argues finally that the Wallington and Ocean Township school districts should be dismissed entirely from this action. Wallington receives no ECPA or DEPA money and Ocean Township only received ECPA for 1998/99, has been getting decreasing DEPA amounts and is not getting it at all in the current school year. As no measurement can be made of how effectively they are using this aid, they cannot satisfy the Commissioner's criteria for phase one of the hearing. I do not agree. All of the petitioners are here arguing that they cannot provide a "thorough and efficient" education with current State aid funding levels.

Wallington and Ocean Township ought not to be cut off precipitously because the two-step hearing leaves them with less to show in step one.

Based on the foregoing I conclude that each petitioning district has established by a preponderance of the credible evidence that it is using CEIFA funding appropriately and is entitled to proceed to the next phase of hearing. 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.

DATE / /

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

12/27/00

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 29 2000

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/caa

APPENDIX

List of Witnesses for Buena Regional

For Buena Regional:

Michael S. Garcia
George F. Sharp
Edward Kennedy
Thomas Kearney
Diane D. DeGiacomo

For Respondent:

None

List of Exhibits for Buena Regional

For Buena Regional:

BR-A	1997-1998 Budget
BR-B	1998-1999 Budget
BR-C	1999-2000 Budget
BR-D	2000-2001 Budget
BR-E	1997-1998 Budget Documentation for CCCS Implementation
BR-F	1998-1999 Budget Documentation for CCCS Implementation
BR-G	1999-2000 Budget Documentation for CCCS Implementation
BR-H	1997-1998 Staff Development Master List
BR-I	1998-1999 Staff Development Master List
BR-J	1999-2000 Staff Development Master List
BR-K	2000-2001 Budget Documentation for CCCS Implementation
BR-L	1997-1998 Early Childhood Plans
BR-M	1998-1999 Early Childhood Plans
BR-N	1999-2000 Early Childhood Plans
BR-O	2000-2001 Early Childhood Plans
BR-P	Synopsis of Audit Report, June 30, 1998
BR-Q	Synopsis of Audit Report, June 30, 1999
BR-R	1997-1998 Demonstrably Effective Program Aid Plan
BR-S	1998-1999 Demonstrably Effective Program Aid Plan

BR-T	1999-2000 Demonstrably Effective Program Aid Plan
BR-U	2000-2001 Demonstrably Effective Program Aid Plan
BR-V	District Statement of Planned Uses of Distance Learning Network Aid 1997-1998, 1998-1999, 1999-2000 and 2000-2001
BR-W	Buena Regional School District Five-Year Technology Plan, 1997-2002
BR-X	Buena Regional School District Biennial Technology Plan, 1999-2001
BR-Y	Buena Regional School District Bond Offering Statement
BR-Z	Technology Literacy Challenge Fund
BR-AA	Job Description for Technology Specialist and Technology Coordinator
BR-BB	Title VI - Class Size Reduction Act

Audit Reports:

BR-CC	Buena Regional-Comprehensive Annual Audit Report, June 30, 1997
BR-DD	Buena Regional-Comprehensive Annual Audit Report, June 30, 1998
BR-EE	Buena Regional-Comprehensive Annual Audit Report, June 30, 1999
BR-FF	Department of Education Fiscal Operations Audit, September 1, 1997 through August 31, 1998

For Respondent:

None

List of Witnesses for Clayton Board of Education

For Clayton:

Glen Walton
Geraldine Carroll
John Horchak, III

For Respondent:

None

List of Exhibits for Clayton Board of Education

For Clayton:

C-A	Budget 1997-98

C-B	Budget 1998-99
C-C	Budget 1999-2000
C-D	Budget 2000-2001
C-E	Local Improvement Plans
C-F	Staff Development Reports
C-G	Early Childhood Five-Year Plan
C-H	Early Childhood Budget 1998-2000
C-I	Early Childhood Budget 2000-2001
C-J	Demonstrably Effective Budget 1998-2000
C-K	Demonstrably Effective Budget 2000-2001
C-L	Distance Learning Network Aid 1998-2000
C-M	Distance Learning Network Aid 2000-2001
C-N	Technology Plan 1997-99
C-O	Revised Technology Plan 1998-2002
C-P	Violence, Vandalism Report 1997-2000
C-Q	Clayton Place Budget
C-R	Computer Inventory
C-S	Job Descriptions: *TECHNOLOGY COORDINATOR AND LIBRARIAN*
C-T	Discipline Report
C-U	School-to-Career, *LEARN TO SERVE AMERICA, COMMUNICATIONS ACADEMY AT CLAYTON*
C-V	Test Scores

Audit Reports:

C-X	Clayton - Comprehensive Annual Audit Report, June 30, 1998
C-Y	Clayton - Comprehensive Annual Audit Report, June 30, 1999
C-Z	Clayton - Independent Auditor's Report on Administrative Findings, October 15, 1998
C-AA	Clayton - Independent Auditor's Report on Administrative Findings, October 28, 1999
C-BB	Clayton - State Monitoring Report, August 11, 1999

For Respondent:

None

List of Witnesses for Maurice River

For Maurice River:

Raymond Colavita

John Saparito
Dr. Ann E. Timmons

For Respondent:

None

List of Exhibits for Maurice River

For Maurice River:

MR-A	Not Admitted
MR-B	2000-2001 Budget
MR-C	1999-2000 Budget
MR-D	1998-1999 Budget
MR-E	1997-1998 Budget
MR-F	Early Childhood Program (non-Abbott)
MR-G	Early Childhood Five-Year Operational Plan
MR-H	Cumberland County Technology Plan
MR-I	1997 Maurice River Technology Plan
MR-J	1999 Maurice River Technology Plan
MR-K	Annual Financial Report for Fiscal Year Ended June 30, 1998
MR-L	Annual Financial Report for Fiscal Year Ended June 30, 1999
MR-M	Technology Coordinator Job Description

For Respondent:

None

List of Witnesses for Lawrence Township

For Lawrence Township:

Ralph J. Scazafabo
Samuel L. Delp, Jr.

For Respondent:

None

OAL DKT. NOS. EDU 2637-00, EDU 2638-00, EDU 2639-00, EDU 2640-00, EDU 2641-00, EDU 2642-00, EDU 2642-00, EDU 2643-00, EDU 2644-00, EDU 2645-00, EDU 2656-00, EDU 2649-00, EDU 2650-00, EDU 2651-00, EDU 2651-00, EDU 2652-00, EDU 2654-00, EDU 2655-00 and EDU 2656-00

List of Exhibits for Lawrence Township

For Lawrence Township:

L-A	Revised Technology Plan, 1997-2002
L-B	Letter from Commissioner of Education, dated March 5, 1999
L-C	New Jersey School Report Card, Elementary/Middle - 1998-99
L-D	1998 Report Card/Philadelphia Online
L-E	Early Childhood Program (non-Abbott), 1999-2000
L-F	Annual School District Budget Statement, 1999-2000
L-G	Revised Early Childhood Program Plan
L-H	Early Childhood Program and Five-Year Operation Plan
L-I	Early Childhood Program Aid
L-J	Demonstrably Effective Program Aid
L-K	Early Childhood Program and Demonstrably Effective Program Aid, 1997-98
L-L	Demonstrably Effective Program Aid
L-M	Budget Statement, 1997-98
L-N	Budget Statement, 1999-2000
L-O	Enrollment Projections
L-P	Budget Statement, 2000-2001

Audit Reports:

L-A	Demographic Study
L-B	Comprehensive Annual Financial Report, Fiscal Year Ended June 30, 1997
L-C	Comprehensive Annual Financial Report, Fiscal Year Ended June 30, 1998
L-D	Comprehensive Annual Financial Report, Fiscal Year Ended June 30, 1999

Audit Reports:

L-A	Auditor's Management Report on Administrative Findings, June 30, 1998
L-B	Auditor's Management Report on Administrative Findings, June 30, 1999

For Respondent:

None

List of Witnesses for Fairfield Board of Education

For Fairfield:

Samuel L. Delp, Jr.
Terry Van Zoren
Pamela N. Gatto

For Respondent:

None

List of Exhibits for Fairfield Board of Education

For Fairfield:

F-A	1997-1998 Budget
F-B	1998-1999 Budget
F-C	1999-2000 Budget
F-D	2000-2001 Budget
F-E	Early Childhood 1997-1998
F-F	Demonstrably Effective Program Aid
F-G	Early Childhood 1998-1999
F-H	Demonstrably Effective Program Aid
F-I	Early Childhood 1999-2000
F-J	Demonstrably Effective Program Aid
F-K	Detailed Appropriations
F-L	Advertised Appropriation 2000-2001
F-M	Demonstrably Effective Program Aid 2000-2001
F-N	Advertised Appropriation 1997-1998
F-O	State Audit
F-P	Technology Plan

Supplements:

F-A1	Annual School District Budget Statement Supporting Documentation, 2000-2001
F-B1	Early Childhood Program Aid Five-Year Operational Plan
F-C1	Demonstrably Effective Program Aid
F-E1	Budget, 1999-2000
F-F1	Budget, 2000-2001

F-J1	Technology Plan, 1998-2001

Audits:

F-A	Comprehensive Annual Financial Report, June 30, 1998
F-B	Auditor's Management Report on Administrative Findings, June 30, 1998

For Respondent:

None

List of Witnesses for Commercial Board of Education

For Commercial:

Barry L. Ballard
Raymond Colavita
Frank Badessa

For Respondent:

None

List of Exhibits for Commercial Board of Education

For Commercial:

C-A	In-Service Program Descriptions for 1999-2000
C-B	1997-1998 Budget
C-C	1998-1999 Budget
C-D	1999-2000 Budget
C-E	2000-2001 Budget
C-F	Plan for Spending Demonstrably Effective Program Aid
C-G	Plan for Spending Demonstrably Effective Program Aid
C-H	State of New Jersey Audit for July 1, 1997, to June 30, 1998
C-I	State of New Jersey Audit for June 30, 1998, to July 1, 1999
C-J	Independent Accountant's Audit 1997-1998
C-K	Independent Accountant's Audit 1998-1999
C-L	Independent Accountant's Audit 1999-2000
C-M	Commercial Township District Technology Plan 1997-2001

C-N	March 9, 1999, letter to NJDE Application Control Center
C-O	Challenge Grant Documentation
C-P	Class Size Reduction Grant Information
C-Q	Dr. Ritter's Certification for Commercial Township

Audit Reports:

C-R	Audit, July 1, 1997, to June 30, 1998
C-S	Audit, July 1, 1998, to February 17, 2000
C-T	Administrative Findings - Financial, Compliance and Performance for the Fiscal Year Ended June 30, 1998
C-U	Administrative Findings - Financial, Compliance and Performance for the Fiscal Year Ended June 30, 1999
C-V	Report of Examination

For Respondent:

None

List of Witnesses for Hammonton Town Board of Education

For Hammonton:

Michael S. Quneo
Robert P. Inverso
Michael Kopikowski

For Respondent:

None

List of Exhibits for Hammonton Town Board of Education

For Hammonton:

H-A	1997-1998 Budget
H-B	1998-1999 Budget
H-C	1999-2000 Budget
H-D	2000-2001 Budget
H-E	Early Childhood Program Aid One Year Operational Plan

H-F	Local Technology Plan
H-G	Technology Plan Approvals

Audit Reports:

H-A	Comprehensive Annual Financial Report, June 30, 1998
H-B	Comprehensive Annual Financial Report, June 30, 1999

For Respondent:

None

List of Witnesses for Lakehurst Board of Education

For Lakehurst:

Barry J. Parlimen
Thomas C. Calderone
Robert A. Holsert

For Respondent:

None

List of Exhibits for Lakehurst Board of Education

For Lakehurst:

L-A	1997-1998 Budget
L-B	1998-1999 Budget
L-C	1999-2000 Budget
L-D	2000-2001 Budget
L-E	1997-1998 QAAR
L-F	1998-1999 QAAR
L-G	1999-2000 Professional Development Activities
L-H	ECPA 5 Year Operational Plan
L-I	ECPA 1999-2000 Operational Plan Annual Update
L-J	ECPA 2000-2001 One Year Operational Plan
L-K	DEPA 1999-2000 School Based Operational Plan
L-L	DEPA 2000-2001 One Year Operational Plan
L-M	5 Year Technology Plan

L-N	NJTLCF Round III
L-O	1997-1998 Audit
L-P	1998-1999 Audit

For Respondent:

None

List of Witnesses for Lakewood Board of Education

For Lakewood:

Edwin W. Luick
Catherine Fuoto
William C. McNamara

For Respondent:

None

List of Exhibits for Lakewood Board of Education

For Lakewood:

LW-A	In-Service Program Descriptions for 1999-2000
LW-B	1997-1998 Budget
LW-C	1998-1999 Budget
LW-D	1999-2000 Budget
LW-E	2000-2001 Budget
LW-F	Plan for Spending Early Childhood Program Aid
LW-G	Plan for Spending Demonstratively Effective Program Aid
LW-H	Independent Accountant's Audit 1996-1997
LW-I	Independent Accountant's Audit 1997-1998
LW-J	Independent Accountant's Audit 1998-1999
LW-K	Lakewood Township District Technology Plan 1997-2001
LW-L	Class Size Reduction Grant Information
LW-M	Dr. Cannava's Certification for Lakewood Township
LW-N	Sylvan Learning Systems Contract
LW-O	2001 Core Curricula Staffing

For Respondent:

None

OAL DKT. NOS. EDU 2637-00, EDU 2638-00, EDU 2639-00, EDU 2640-00, EDU 2641-00, EDU 2642-00, EDU 2643-00, EDU 2644-00, EDU 2645-00, EDU 2646-00, EDU 2649-00, EDU 2650-00, EDU 2651-00, EDU 2652-00, EDU 2654-00, EDU 2655-00 AND EDU 2656-00
AGENCY DKT NOS. 53-3/98A, 53-3/98B, 53-3/98C, 53-3/98D, 53-3/98E, 53-3/98F, 53-3/98G, 53-3/98H, 53-3/98I, 53-3/98J, 53-3/98M, 53-3/98N, 53-3/98O, 53-3/98P, 53-3/98R, 53-3/98S AND 53-3/98T

JOSHUA KEAVENEY, a minor by and through his guardian *ad litem*, SANDRA KEAVENEY; SHAWN RILEY, by and through his guardian *ad litem*, EDIE RILEY; CHRISTOPHER RIDGEWAY, ANTHONY RIDGEWAY, JONATHON GLASS AND DANIELLE GLASS, by and through their guardians *ad litem*, ARNETTA RIDGEWAY AND CHRISTOPHER GLASS; LOUIS GRACIA, TINA GRACIA AND ZACHARY GRACIA, by and through their guardian *ad litem*, DAWN GRACIA; ON BEHALF OF THEMSELVES AND ALL THE CHILDREN IN A CLASS OF "A" AND "B" NON-ABBOTT DISTRICTS LISTED BELOW: BUENA REGIONAL (ATLANTIC COUNTY), CLAYTON (GLOUCESTER COUNTY), COMMERCIAL TOWNSHIP (CUMBERLAND COUNTY), EGG HARBOR CITY (ATLANTIC COUNTY), FAIRFIELD TOWNSHIP (CUMBERLAND COUNTY), HAMMONTON (ATLANTIC COUNTY), LAKEHURST (OCEAN COUNTY), LAKEWOOD (OCEAN COUNTY), LAWRENCE TOWNSHIP (CUMBERLAND COUNTY), LITTLE EGG HARBOR (OCEAN COUNTY), MAURICE RIVER TOWNSHIP (CUMBERLAND COUNTY), OCEAN TOWNSHIP (OCEAN COUNTY), QUINTON (SALEM COUNTY), SALEM CITY (SALEM COUNTY), UPPER DEERFIELD (CUMBERLAND COUNTY), WALLINGTON (BERGEN COUNTY), AND WOODBINE (CAPE MAY COUNTY) SCHOOL DISTRICTS,

PETITIONERS,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, LEO KLAGHOLZ, COMMISSIONER OF THE NEW JERSEY STATE DEPARTMENT OF EDUCATION; ELIZABETH L. PUGH, NEW JERSEY DIRECTOR OF MANAGEMENTAND BUDGET; JAMES DIELEUTORIO, NEW JERSEY STATE TREASURER; AND CHRISTINE WHITMAN, GOVERNOR,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by respondents, as were replies by petitioners, pursuant to the provisions of *N.J.A.C.* 1:1-18.4. These have been duly considered by the Commissioner in rendering his determination herein. [1]

Upon careful consideration, the Commissioner concurs with the ALJ that all petitioners have made a sufficient showing of entitlement to proceed to the second stage of hearing in this matter; that is, to allow the opportunity for each petitioning district to attempt to prove that it is unable to provide a thorough and efficient system of public education ("T&E") within the level of funding established by CEIFA.

However, the Commissioner must clarify the ALJ's comments, endorsed by petitioners both at hearing and in reply exceptions, suggesting that the only appropriate standard for determining whether a district has made full use of the monies generated by CEIFA is whether its expenditure of such funds is lawful and consistent with sanctioned budgetary practices and efficiency standards.

While this may have been an appropriate level of inquiry for the first phase of hearing, it cannot be deemed controlling in the second. Where a petitioning district is, as here, seeking additional, extraordinary funding over and above that provided to other districts in the State, the effectiveness of its programmatic and fiscal allocation decisions cannot be presumed, or even inferred, from the fact that its expenditures have been lawful or its proposed budget has been approved for thoroughness and efficiency by the county superintendent of schools pursuant to Section 5 of CEIFA – any more than a district's status as fully certified precludes a demonstration, as several of the petitioners herein will now seek to make, that the district is, in

[1] It is noted that, due to the commonality of issues addressed by the ALJ, a single Initial Decision was issued for the first phase of the hearing in these matters. However, there has been no order of consolidation in regard to them.

fact, not providing T&E despite such certification. Assessment of a board's compliance with State goals and standards in its exercise of local discretionary authority is a process fundamentally different from the critical examination of programs and expenditures necessary to resolve a claim of Constitutional deficiency. For the latter, each petitioning district must first prove that deficiencies do, in fact, exist, and second, that these cannot be remedied by different programmatic and fiscal choices within the framework of current law and funding levels.[2]

Accordingly, the recommendation of the ALJ that all petitioners proceed to the next phase of hearing in this matter is affirmed as clarified above.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of decision: FEB 9 2001

Date of mailing: FEB 9 2001

[2] Given the difference in scope between the first and second phases of hearing in these matters, nothing herein precludes respondents from renewing, in the second phase of hearing, their motion to admit petitioners' responses to interrogatories into evidence.

[3]This decision, as a final determination of the Commissioner, 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.

51-01

LOUIS ORAVSKY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

February 9, 2001

OAL DKT. NO. EDU 0388-97
AGENCY DKT. NO.7-1/97

LOUIS ORAVSKY,	:	
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 Acting 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: 2/9/01

Date of Mailing: 2/9/01

53-01

THEARTIS GIVENS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

February 13, 2001

OAL DKT. NO. EDU 1080-99
AGENCY DKT. NO. 534-11/98

THEARTIS GIVENS,	:	
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 Acting 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: 2/13/01

Date of Mailing: 2/13/01

54-01

HILDA PARKER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

February 13, 2001

OAL DKT. NO. EDU 415-96
AGENCY DKT. NO. 469-12/95

HILDA PARKER,	:	
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 Acting 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: 2/13/01

Date of Mailing: 2/13/01

55-01

STACEY GOLDMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASCACK VALLEY REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

February 13, 2001

OAL DKT. NO. EDU 9216-98N
AGENCY DKT NO. 387-8/98

STACEY GOLDMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASCACK VALLEY REGIONAL 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 Acting 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: 2/13/01

Date of Mailing: 2/13/01

56-01

RUBY J. JOHNSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

February 13, 2001

OAL DKT. NO. EDU 4327-99
AGENCY DKT. NO. 73-4/99

RUBY J.JOHNSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE 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 Acting 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: 2/13/01

Date of Mailing: 2/13/01

57-01

M.G. AND M.G., on behalf of minor child, A.G.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	
	:	

February 15, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
DENYING EMERGENT RELIEF
OAL DKT. NO. EDU 208-01
AGENCY DKT. NO. 20-1/01

M.G. AND M.G., ON BEHALF OF MINOR CHILD, A.G.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON,
Respondent.

Christopher M. Manganello, Esq., for petitioners

Joseph F. Betley, Esq., for respondent (Capehart & Scatchard, attorneys)

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

The petitioners seek an order reversing the decision of the Washington Township Board of Education to expel A.G. and further ordering that A.G. be enrolled in the respondent district and that interim relief in the form of immediate placement in the respondent district also be ordered.

Certain facts are not in dispute and reveal the context of the case. A.G. is a sixteen-year-old boy. He has an accommodation plan under Section 504 of the Rehabilitation Act of 1973.

A.G. was expelled from Washington Township High School effective August 15, 2000, following two positive drug tests. The petitioners had filed an appeal of the expulsion on July 7, 2000 before the Commissioner of Education. The Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case including a request for emergent relief, pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13.

Jeff S. Masin, Acting Chief ALJ, after an emergent hearing, denied the petitioners' application for emergent relief on August 10, 2000. Judge Masin ordered the matter to plenary hearing as soon as possible.

A plenary hearing was held on September 7, 8 and 13, 2000. As a result of the hearing and by two orders dated September 19, 2000, Judge Masin dismissed the special education portion of the case and dismissed the petitioners' challenges to A.G.'s expulsion.

The petitioners filed exceptions to Judge Masin's decision with the Commissioner on October 12, 2000. The Commissioner affirmed in part and reversed in part the initial decision. In his decision of November 6, 2000, the Commissioner directed the respondent Board to readmit A.G. and to determine, after considering pertinent factors including available alternative educational options, whether expulsion should be the appropriate result under all of the circumstances present.

On Wednesday, December 6, 2000, the Board conducted a hearing. The parties have markedly different views as to what occurred at the hearing. However, there is a transcript of the hearing available to me. Exhibit E.

On December 15, 2000, the petitioners received the Board's decision dated December 13, 2000. A.G. was again expelled. At the hearing of December 6, the Board presented two witnesses, Rosemarie Farrow and Jack McGee. The petitioner produced testimony from Sally Anne Bickford, Ph.D.

There was considerable disagreement as to what the scope of Bickford's testimony should be. The hearing ended abruptly, each side blaming the other for the breakdown.

At hearing on the motion for emergent relief, the petitioners argue that their expert was not allowed to testify because the Board decided that attention deficit hyperactivity disorder (ADHD) testimony was not pertinent. While the petitioners agree that Bickford may have gone off on a tangent, she did testify on areas pertinent to the hearing. Yet the Board says that A.G.'s ADHD is not pertinent.

What the appropriate educational option for A.G. could have been is important. The Board's mere threat to end the meeting was inappropriate, arbitrary and capricious. A limiting instruction to the witness would have been appropriate.

The two Board witnesses in no way expanded on what had been presented at the first hearing. They recited the facts that A.G. had failed two drug tests. Neither Board witness seemed willing to look at anything that had occurred after the first expulsion hearing. The petitioners argued that they agreed to homebound instruction because A.G. needs some structure in his life. However, the Board is not meeting even the minimum requirement for home instruction.

The Board argues that the petitioners had knowledge as early as December 14 that the Board had decided to reaffirm its earlier decision to expel A.G. for violation of the Board's Substance Abuse Policy (policy). The Board also asserts that the decision to terminate the hearing on December 6 was made by the petitioners, not the Board. The decision to terminate the hearing seems to have been motivated by the failed attempt to reargue the issue of manifestation determination through the testimony of Bickford rather than addressing the issue of alternative educational placements. The Board insists that consideration of alternative educational placements was the only issue returned by the Commissioner of Education. The petitioners, however, looked upon the Commissioner's decision as an opportunity to challenge the underlying decision to discipline A.G. The transcript contains several instances of disagreement between counsel as to whether the questions directed to Bickford were appropriate.

DISCUSSION

In his initial decision and order, both dated September 19, 2000, Judge Masin found that the matter was not a special education matter and found that, based on the circumstances, the Board's decision to require that A.G. be tested was supported by a reasonable suspicion that A.G. was under the influence of drugs. In fact, the Board would have been remiss if it failed to follow the direction of *N.J.S.A.* 18A:40A-12. Judge Masin also determined that although the hearing process before the Board was flawed to some extent, it was clear that the flaws did not rise to the level of causing the Board to act arbitrarily.

Judge Masin observed that the Board moved to expel A.G. after he received fair warning by way of suspension following the first positive drug test. That warning included the clear direction that A.G. had to refrain from marijuana use and that A.G. would be subject to random testing. Nevertheless, when subjected to a random test, A.G. again tested positive for marijuana. Judge Masin determined that the Board did not act arbitrarily given the strong State policy against drugs in school and the Board's own policy.

Importantly, the Commissioner determined that A.G. was properly referred for a medical examination when a staff member observed symptoms suggesting drug use and advised the assistant principal of the same. The Commissioner also found that the decision to expel A.G. was not compelled by its policy. Because the Commissioner believed that the Board had not considered all pertinent factors, including other options such as alternative education programs, the Commissioner directed the Board to readmit A.G. and to determine whether expulsion was the appropriate remedy under all the circumstances.

Early in the course of the December 6, 2000 hearing, the Board made clear that the Board was assembled to consider whether expulsion was the appropriate penalty, not whether A.G. violated the Board's policy. The Board also did not waive any rights to appeal the Commissioner's decision.

Rosemarie Farrow, Executive Assistant Principal, stated that upon the original recommendation regarding A.G. and expulsion, the high school administration recommended

and continues to recommend an expulsion on the grounds that A.G. tested positive for being under the influence on December 21, 1999. The subsequent recommendation and assessment dictated that A.G. was to undergo intensive drug therapy, at least three times a week. That was not done. On a subsequent random drug testing, February 22, A.G. tested positive. At that point, it was revealed that A.G. had not engaged in a single day of the required therapy and counseling. The administration thereupon recommended that A.G. be expelled from the high school as is provided in the Board's policy.

The high school administration did consider other options. One was whether or not A.G. would qualify for an extended day program. Looking at the types of students and the types of needs that program addresses, the administration did not believe A.G. met the criteria for the extended day program.

The administration also looked at other alternative school programs, particularly one in Glassboro. On rare occasion, the high school administration has recommended for that program students who at least show an indication of an ability to engage in a serious rehabilitation program. Based on the indications received from A.G., that is his failure to engage in the required therapy and counseling and to adhere to school policy of not engaging in drug activity, the administration did not believe he would qualify for that program either. The administration still stands by the recommendation to expel.

Further testimony indicated that on the day after A.G. tested positive the second time, his parents were able to enroll him in a therapeutic program including counseling and drug therapy. After the first positive drug test, when A.G. returned to school on January 6, the assistant principal and a counselor met with A.G. and his mother. At that time, the school personnel presented all of the results of assessments that had been done. Also at that time, Mrs. G. and A.G. were told about the intensive, three-day a week therapy and counseling that they were to engage in. They signed papers indicating their knowledge of the requirement. That day and for the next five days when A.G. was under internal suspension, he met with a counselor.

At the January 6 meeting, the G.s were treated as all other parents in a similar circumstance. They were provided a list of the various programs that are available to them.

There are several programs within the immediate region and most of the fees are offered on a sliding scale. A full page of available locations was given to the G.s.

After the second positive test, A.G. had at least gone to seek treatment. The administration still recommended expulsion, however. There was a sixty-three-day period between the first positive drug test and the second. In that period, A.G. should have been receiving an intensive counseling and therapy regimen, none of which was engaged in, and no apparent attempt was made to work on rehabilitation, to work on changing behavior patterns and to deal with other issues. It was not until the second positive drug test that an attempt was made to cooperate in that therapy. Even then, there was nothing of significant length or significant quality. The school administration believed that, on the basis of the time during which therapy could have occurred and counseling could have occurred that the administration should have seen some attempt to alter behavior. Seeing none, and then seeing a second positive drug test, the administration decided not to change its recommendation to expel.

The second drug test was an indication of a severe problem of behavior that would not have qualified A.G. for a recommendation for the extended day program.

The principal, Jack McGee, testified that he has a long-term relationship with the Gloucester County Alternative School. Students are placed there only where there is a very strong desire to work through drug issues and drug problems. The school will not accept students, even if a school district wants to place them there, if the students do not in fact have a high level of desire to do the work that would be appropriate, that is, intensive counseling and behavior therapy in addition to academic work.

McGee stated clearly that a student would have to show a high level of desire to participate in an alternative program before McGee could recommend the student for an alternative program.

The testimony of the petitioners' expert did attempt to go behind A.G.'s infractions. Among other things, she stated she hoped the hearing would be "somewhat broader" and would include an examination of what could have been considered in reaching a decision to expel. By

that, the witness stated she meant a presenting medical condition, impulsivity and other factors. At this point, the Board's attorney appropriately interjected and stated that the focus of the hearing was whether or not expulsion is an appropriate remedy, but going into the issue of attention deficit disorder in an attempt to explain the underlying drug usage would be inappropriate. Counsel appeared to agree and questioning resumed. The petitioners' counsel then asked Bickford if she thought the fact that attention deficit disorder is present would be relevant to whether or not A.G. should have been expelled following a second positive drug test. The Board's counsel again attempted to focus Bickford's testimony. The petitioners' counsel, not the petitioners' witness, stated that the petitioners believe the Commissioner's directive to consider pertinent factors under the circumstances of the case includes consideration of the fact that A.G. is a student with an accommodation plan because of his attention deficit disorder. There was further disagreement between counsel as to appropriate areas of testimony and the hearing was adjourned at 8:30 p.m. with no further testimony from Bickford taken.

The petitioners argue that A.G. will suffer irreparable harm if relief is not granted, that the legal right under his claim is settled, that he is likely to prevail on the merits and that when the equities are balanced, he will suffer greater harm than the Board if the relief is granted. *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). The Board argues *contra*.

The petitioners assert that A.G. is being denied his right to a free and appropriate public education by the expulsion. The Board notes that the petitioners knew on December 14, 2000, that the Board had decided to reaffirm its prior decision to expel A.G. However, the petition claiming irreparable harm and seeking emergent relief was filed more than a month later. Nevertheless, homebound instruction will be delivered for those days between the Commissioner's decision and the Board's decision reaffirming the expulsion. A.G. is not a special education student and is over sixteen. Therefore, the Board has no obligation to educate him.

The petitioners assert that the legal right underlying their claim is settled and the Board's termination of the December 6, 2000 hearing is further support for this. The Board argues that the decision to terminate the hearing was, in fact, the petitioners'. They tried to reach behind the two positive drug tests rather than addressing the issue of alternative educational placement.

Importantly, the question of whether A.G.'s attention deficit disorder was a contributing factor in the underlying drug use was the subject of a previous manifestation determination meeting attended by the parents, teachers, administrators and members of the Board's child study team (CST) in March 2000.

On the same point, the petitioners urge that there was insufficient evidence presented at the hearing to allow the Board to follow the Commissioner's directive. Only two witnesses were presented. Both recommended expulsion. Their testimony was essentially the same as their testimony at the first Board expulsion hearing. The petitioners believe the principal failed to apprehend the considerations the Commissioner required him to evaluate when determining whether or not to recommend expulsion. The petitioners also argue that the principal focused too much on the requirement of a high level of desire on the part of the pupil to participate in a meaningful program.

The Board failed, in the petitioners' eyes, to look at pertinent factors surrounding the expulsion and whether, under all the circumstances, there was a conclusion other than expulsion.

Finally, when the equities are balanced, the petitioners believe that A.G. will suffer greater harm than the respondent would suffer if A.G. were reinstated. The Board does not agree and insists that the entire matter was given due consideration.

In deciding a motion of this type, especially in consideration of the scant factual record, I am required to make all inferences that fairly may be made in favor of the party not the maker of the motion. On the first element, I agree that harm befalls any student not participating in an appropriate educational program. Here, the harm is not irreparable. Homebound instruction continues and, if the petitioner is successful, he will be reinstated in attendance at the high school or in another appropriate placement. Time, of course, would be lost. Yet the harm cannot be described as irreparable.

It is by no means clear that the right underlying the petitioners' claim is settled. A.G. twice tested positive for marijuana in clear violation of the Board's policy. This is not a mindless

zero tolerance policy. A.G. was given a second chance and more after the first infraction. He appears not to have taken advantage of what was offered.

This ties directly to the next element, likelihood of prevailing on the merits. Although there is strong disapproval of expulsion as a remedy, it is not wrong in all cases. On the record developed to this point, it is by no means clear that the petitioners are likely to prevail on the merits. Nor can I say that they will not prevail on the merits.

Balancing the equities fails to yield a sure conclusion. The school has a legitimate interest in keeping its schools and student body drug-free. A.G., despite clear violation of policy, may still deserve consideration for further education, even if not in the regular secondary program.

In consideration of the foregoing, the motion for emergent relief is **DENIED**. It is so **ORDERED**. The judge notes that the matter is appropriate for plenary hearing and recommends that plenary hearing be scheduled as soon as possible. Therefore, expeditious review by the Commissioner of Education is requested.

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.

FEB 0 7 2001
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

jh

OAL DKT. NO. EDU. 208-01
AGENCY DKT. NO. 20-1/01

M.G. AND M.G., on behalf of minor child, A.G.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER 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 (OAL), the Initial Decision and the Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner affirms the Order denying emergent relief, as he concurs with the ALJ's determination that petitioners have not satisfied the requirements necessary for the granting of such extraordinary relief as set for the in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Most particularly, petitioners have failed to establish that the legal right underlying their claim is settled or that they have a reasonable likelihood of prevailing on the merits of this case. In that the ALJ's decision indicates that the Board is continuing to provide A.G. with homebound instruction and, therefore, A.G. has not been deprived of educational services at this point in time, the Commissioner similarly concludes irreparable harm has not been demonstrated here. To the extent that the parties' submissions or hearing testimony expressed any doubt as to

the Board's continuing obligation in this regard, the Commissioner hereby directs that the Board provide such homebound instruction until the ultimate conclusion of this matter on its merits.

Accordingly, the within application for emergent relief is hereby denied. As contemplated by the ALJ, this matter is being returned to the OAL for plenary hearing to be scheduled as expeditiously as possible.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/15/01

Date of Mailing: 2/15/01

* 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*

57-01

EDU #208-01
C # 57-01
SB # 8-01

M.G. and M.G., on behalf of minor child, A.G., :

PETITIONERS-RESPONDENTS, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY, :

RESPONDENT-APPELLANT. :

STATE BOARD OF EDUCATION

DECISION

Decision on motion by the Commissioner of Education, February 15, 2001

Decision on motion by the Commissioner of Education, March 8, 2001

For the Respondent-Appellant, Capehart & Scatchard (Joseph F. Betley, Esq., of Counsel)

For the Petitioners-Respondents, Christopher M. Manganello, Esq.

The petitioners filed a petition with the Commissioner of Education challenging the action by the Board of Education of the Township of Washington (hereinafter "Board") expelling their son, A.G., from school following two positive drug tests. The petitioners also requested emergent relief, seeking to have their son placed back into school in the district immediately. On February 15, 2001, the Commissioner denied the petitioners' application for emergent relief, but directed the Board to provide home instruction to A.G. until the ultimate determination of this matter on the merits.

On February 27, 2001, the Board filed the instant appeal to the State Board of Education from that portion of the Commissioner's decision ordering it to provide home instruction to A.G. pending a final determination on the merits.

On March 8, 2001, the Commissioner denied the Board's Motion for Reconsideration/Clarification or Stay of his February 15, 2001 decision.

Pursuant to N.J.A.C. 6A:4-1.11(a), the Board's brief in support of its appeal to the State Board was due on March 19, 2001, 20 days after it filed its notice of appeal. The Board, however, failed to file a brief by that date. By letter dated March 23, 2001, the Director of the State Board Appeals Office notified the Board of its failure to file a brief and informed it that this matter was being referred to the Legal Committee of the State Board for consideration of its failure to perfect the appeal.

The Board has still failed to file a brief in support of its appeal, more than six weeks after the filing deadline. Nor has the Board offered any explanation for its 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 2, 2001

Date of mailing MAY 4 2001

58-01

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

SYNOPSIS

Petitioning Board sought to sever its sending-receiving relationship with respondent Board with respect to its 7th and 8th grade students. Respondent contested severance and, alternatively, requested that regionalization of the two Districts or a regionalization study be ordered in its demand for relief.

Upon completion of the hearing, the ALJ initially determined that the doctrines of laches and waiver barred application of the Commissioner's 1981 Order in this regard. The ALJ determined to deny severance of the sending-receiving relationship, concluding that petitioner failed to meet its burden of proving that severance would not have a substantial negative impact on the education offered by, and finances of, the affected Districts, the quality of education or the racial composition of the pupil population of the Districts. Finally, the ALJ concluded that mandated regionalization, or a regionalization study, is not appropriate in this case, as regionalization of these two Districts could not accomplish desegregation of the Dover schools.

The Commissioner affirmed the decision of the ALJ with modification. Initially, the Commissioner agreed that the 1981 Order of the former Commissioner was no longer valid and could not serve as a basis to permit severance. While agreeing that severance of the sending-receiving relationship for the 7th and 8th grade students should be denied because there would be a substantial negative impact on the racial balance and on the quality of education in both Districts, the Commissioner did not agree that it had been established that severance would result in a substantial negative financial impact or a substantial negative impact on the educational programming in either District. Finally, the Commissioner rejected Dover's request for mandated regionalization of the two Districts for grades pre-K through 12, noting that the request was not properly before him because it was not raised in a petition or cross-petition, and that he nonetheless agreed with the ALJ that Dover failed to produce any evidence or proofs demonstrating that regionalization of these two Districts would alleviate segregation and is otherwise legally warranted.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1147-99

AGENCY DKT. NO. 546-12/98

BOARD OF EDUCATION OF THE TOWNSHIP OF MINE HILL,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF DOVER,

Respondent.

Paul H. Green, Esq., appearing for Petitioner
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Lester Aron, Esq., appearing for Respondent
(Sills, Cummis, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: July 7, 2000 Decided: October 4, 2000

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

Petitioner Mine Hill Board of Education is requesting the Commissioner of Education to permit the return, for education in their home district, of Mine Hill seventh

and eighth grade students who are currently educated at the Dover Middle School in the Respondent Dover Public Middle School district pursuant to a sending-receiving agreement. Mine Hill also sends it ninth through twelfth grade students to Dover High School; Petitioner does not seek to alter the existing sending-receiving relationship with respect to those ninth through twelfth grade high school students.

Mine Hill and Dover are contiguous communities in Morris County. The Mine Hill school district operates a pre-kindergarten through sixth public school program. The Dover school district operates a pre-kindergarten through twelfth program and receives students from both Mine Hill and Victory Gardens.[1] For several decades, the seventh through twelfth grade students of Mine Hill have attended the Dover public schools.

Mine Hill filed this petition with the Commissioner of Education seeking the right to withdraw its seventh and eighth grade pupils from the Dover Middle School and return them to Mine Hill School expanded for such purpose by adding sufficient classroom space. Its voters have approved a referendum for such purposes.

Dover, which operates one middle school with a pupil population of approximately 400 students, seeks to retain the Mine Hill students within its seventh and eighth grade programs.

PROCEDURAL HISTORY

Petitioner originally sought approval for the return of its seventh and eighth students by way of a petition of appeal to the Commissioner of Education filed in July, 1980. Although the matter first appeared to have been resolved through a stipulation of dismissal filed on August 8, 1980, the Dover Board of Education, by letter dated October 29, 1980, raised with the Commissioner the impact of withdrawal on Dover's minority population. Mine Hill responded and the Commissioner directed, by Order

[1] Victory Gardens is not a party to this action.

dated December 15, 1980, that the matter be remanded to the Office of Administrative Law (OAL).

In a February 9, 1981 decision, an Administrative Law Judge (ALJ) determined that no contested case existed at that juncture; therefore, the matter was transmitted back to the Commissioner. In a decision dated May 29, 1981, the Commissioner considered the issues presented and approved Mine Hill's request subject to several requirements, including undertaking a building program to close the Hattie Rice School in Mine Hill and to provide a single facility at the district's Canfield Avenue School. Mine Hill then served Dover with a Notice of Intent dated June 10, 1981, advising that Mine Hill intended to sever the sending-receiving relationship for grades seventh and eighth on June 30, 1984, provided that the building programs and other stipulations of the Commissioner's order had been carried out.

Dover did not challenge Mine Hill's determination. Subsequently, in 1982, the referendum to raise the funds needed to construct the facilities to house the seventh and eighth grades at the Canfield Avenue School, was conducted pursuant to the Order of the Commissioner; it was defeated. Petitioner has continued to send its seventh and eighth grade pupils to the Dover Middle School.

This petition was filed on or about December 7, 1998. On December 8, 1998, the voters of Mine Hill approved a referendum authorizing the issuance of bonds to finance the expansion of the Canfield Avenue School to include construction of seventh and eighth grade classrooms if the Petitioner should succeed in this petition. Respondent filed an answer on or about December 23, 1998.

The contested case was then forwarded to the OAL and the undersigned was assigned to hear the dispute. A prehearing conference by telephone was held with counsel for the two parties and a prehearing order was issued on June 4, 1999. Hearings were held on December 7, 8, 15, 16, 21, 22, 29, 1999 and January 11, 31, and February 28, 2000.

At the close of the hearing, both counsel requested the opportunity to provide written briefs and summations and a briefing schedule was set; the record closed on July 7, 2000.

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) Mine Hill has an area of approximately three square miles and Dover has an area of approximately 2.7 square miles.

(2) In 1980 Mine Hill had a population of 3325. In 1992 Mine Hill had a population of 3330. This represents a change of .2 percent. During the same period, Dover had a population change from 14,681 to 14,849 which represents a population change of 1.1 percent.

(3) The 1996 census population estimated for Mine Hill was 3435. The Dover 1996 census population estimated was 15,312.

(4) The Mine Hill minority population breaks down as follows:

Black	.4 percent;
Hispanic	6 percent;
Asian	2.7 percent;
American Indian	.02 percent;
White (remaining population)	90.9 percent.

(5) The minority background of the Dover community is as follows:

Black	6 percent;

Hispanic	39.8 percent;
Asian	1.92 percent;
American Indian	1.18 percent;
White (remaining population)	52 percent.

(6) In 1999 the Mine Hill total assessed property valuation was $214,496,328. Dover's assessed property valuation was $692,207,336 in 1999. Both municipalities have stable tax bases with no significant growth anticipated.

(7) As of 1997, the average home in Mine Hill was assessed at $137,000 while the average home in Dover was assessed at $159,500.

(8) The Mine Hill public school district has one elementary school, the Canfield Avenue School, serving grades pre-kindergarten through six. Mine Hill is the only Morris County district which does not educate its own seventh and eighth graders.

(9) Dover operates a school district of kindergarten through twelfth grades within the boundaries identical to the municipality. It educates seventh through twelfth grade students on a receiving basis from Mine Hill and also receives students from Victory Gardens. Both the Dover community and Dover school district have a substantial minority population, the single largest group being Hispanic. The Dover district is categorized as a B district by the Department of Education based on the relative wealth of individual communities. The B district is the second lowest economic grouping.

(10) Dover is unusual in Morris County for its high minority population and low relative wealth. The average individual income for Morris County $45,000; in Dover it is $15,000.

(11) In October 1999, Mine Hill had a total of 359 pupils including special education students enrolled in grades kindergarten through sixth. Dover, on the other hand, had a kindergarten through twelfth grade enrollment of 2407.5 students, including special education students.

(12) The 1999 enrollment in Dover included 53 seventh and eighth grade pupils from Mine Hill and 79 ninth through twelfth students from Mine Hill. Mine Hill is categorized by the Department of Education as a FG district, based on the relative wealth of individual communities.

(13) This sending-receiving relationship began in 1923 when Mine Hill separated from Randolph Township and was incorporated as an independent municipality. At that time, the Mine Hill public school district was established and commenced operation as a kindergarten through eighth school district. Because it lacked high school facilities within the district, Mine Hill established a sending-receiving relationship for its high school students with the Town of Dover pursuant to predecessor statute of *N.J.S.A.* 18A:38-11.[2] Ninety-six percent of Mine Hill high school aged students attend Dover High School.

(14) In 1963, Mine Hill and Dover agreed that Mine Hill's seventh and eighth grade students would also attend school in Dover.

(15) In 1981, the Mine Hill Board sought to withdraw its seventh and eighth students from Dover and return them to Mine Hill. Written communication occurred between the districts and also at the State Department of Education. Dover expressed no objection to the proposal; the Commissioner issued an Order directing that the Mine Hill students be permitted to withdraw under certain specified circumstances. The

[2] There are, however, a number of high school students from Mine Hill who attend Roxbury High School which is closer to certain portions of Mine Hill.

Commissioner's Order, dated June 1, 1981, required Mine Hill to meet three criteria requirements:

a) Develop, in conjunction with representatives of the Dover Board, a plan for shared extra-curricular activities for seventh and eighth grade students, to be submitted to the Morris County Superintendent of Schools for approval;

b) Develop a curricular and programmatic document to demonstrate the comparability with the program the seventh and eighth graders then provided in Dover to the County Superintendent of Schools for approval; and

c) Close the inadequate Hattie Rice Elementary School and expand the Canfield Avenue Elementary School to provide for the needs of both kindergarten through sixth students as well as the return of the seventh and eighth grade students.

(16) In 1982, the voters of Mine Hill defeated a referendum which sought approval of the capital cost necessary to meet the Commissioner's facility requirement. Because the community of Mine Hill did not support a referendum to expand the Canfield Avenue School seventh and eighth grade students neither of the other two requirements outlined by the Commissioner in his 1981 Order were implemented.

(17) In 1986, another referendum was held at which time the voters of Mine Hill approved construction only to expand the Canfield Avenue School. As a result the Hattie Rice School was closed and Mine Hill's seventh and eighth grade students continued to attend Dover Middle School.

(18) In 1989, Dr. Ernest Palestis became Superintendent of Schools in Mine Hill; in 1990, he recommended to his Board that the seventh and eighth grade students be returned to Mine Hill; he also recommended that high school aged students remain at Dover High School through the negotiation of an additional long-term contract. No action was taken by the Mine Hill Board of Education.

(19) The parties ultimately negotiated a sending-receiving contract dated July 7, 1993, expiring on June 30, 2000. The contract makes no distinction between seventh and eighth grade students attending Dover Middle School and ninth through twelfth grade students attending Dover High School. There is no distinction between grade levels at the time a renewal is to be negotiated.

(20) In the late 1980s and specifically in 1989, various efforts were made by Mine Hill to explore means by which the Mine Hill Middle School students could be returned to Mine Hill.

(21) A building advisory committee established in June 1996 issued a recommendation to the Mine Hill Board to establish a pre-kindergarten through eighth program at the Canfield School. Mine Hill proceeded to hire the experts necessary to establish the feasibility of withdrawing the Mine Hill seventh and eighth graders from Dover.

(22) In early 1998, Dover filed a petition with the Commissioner of Education seeking designation as a special needs district which would result in influx of state funding to the district.

(23) As a result of the filing of the petition for certification as a special needs district (or "Abbott District") Mine Hill Board of Education decided to withhold tuition payments to Dover. Subsequently, Mine Hill was advised

that it could not withhold tuition payments. This advice came from the Morris County Superintendent of Schools as well as an Assistant Commissioner of Education.

(24) On October 6, 1998, Mine Hill Board of Education voted to file the instant petition with the Commissioner.

(25) A bond referendum for construction on the Canfield Avenue School was scheduled for December 8, 1998. The State approved the holding of the referendum with the condition that there would be two separate questions on the ballot. One question was to be directed toward construction for grades pre-kindergarten through sixth; the second question was to be directed toward construction for grades seventh and eighth. The amount contained in the proposed referendum for seventh and eighth grade expenditures were $800,000.

(26) The referendum was approved on December 8, 1998, the day after this petition was filed.

(27) There are a significant number of Mine Hill students who complete the sixth grade at Canfield Avenue School but who do not enroll in seventh grade at Dover Middle School. The survival ratio[3] of the sixth and seventh grades, from Mine Hill to Dover is approximately 70 percent. Because of the low survival ratio from sixth to seventh grades, enrollment predictions are uncertain. Moreover, it is impossible to calculate class sizes for the seventh and eighth grade programs at Mine Hill, since that program is still in the planning stage. The average class size in the Dover Middle School for the five major subject classes ranges between 22 and 24 students.

[3] See discussion below at p. 30.

(28) With regard to staffing, Mine Hill anticipates including a science teacher, who may be shared with elementary students, a language arts teacher, a social studies teacher, and a math teacher at the proposed Middle School. In addition, the district anticipates hiring a reading teacher, a new special education teacher, and special area teacher which, at the time of hearing, was undefined. The actual roll and pupil contact for the reading teacher, the special education teacher and the special teacher was not yet defined.

(29) Staffing at Dover includes 41 professionals including two administrators, two guidance counselors, one-half time each of psychologist, social worker, nurse, librarian, other, and 35 classroom teachers. The staff provides both the curricular and extra-curricular program for approximately 400 students who comprise the seventh and eighth grades at the Dover Middle School.

(30) Each of the districts offers the required core courses for the seventh and eighth grades. In addition, each offers in various combinations elective courses for their seventh and eighth grade students. These courses are enrichment or exploratory courses which complement the core curriculum.

(31) In Dover, core courses are given for the full school year.

(32) In Dover, core curriculum offerings at advanced levels are available for highly talented students. For example, algebra one is taught at the high school level for talented students, which may permit them to waive the normal algebra one course in high school if they pass an entrance exam at the beginning of ninth grade.

(33) All other core subjects are taught in homogeneous groupings at three different levels which gives the student the opportunity to learn with other

students of comparable ability and provides the chance for particularly talented students to be in an advanced level class.

(34) Dover Middle School students participate in the Rogate Program which is affiliated with the John Hopkins University and provides academically talented students the chance to engage in additional special learning opportunities beyond those provided in the regular curriculum.

(35) Dover Middle School provides extensive programs of special education and support services. Its special education program has multiple components including mainstreaming, resource center, and self-contained classes.

(36) Dover Middle School also offers additional support to students who require it. For example, students who have just arrived into the United States or who have little or no knowledge of English, are placed in a full bilingual program for the first year, then are transitioned into mainstream classes for most core courses but continue to receive language arts in the bilingual program in the second year and by the third year such students are fully transitioned into the mainstream program.

(37) At the time of the hearing, the Mine Hill curriculum had not been approved. Although Mine Hill represents that it has distinct advantages such as offering language arts/literature in a combined block rather than as two separate courses, which would enable the teachers to work together providing for team teaching and better integrated course offering, the efficiency of the actual program cannot be assessed.

(38) The Mine Hill program has a particular emphasis on technology including the provision of access to lap top computers, a file server and smart board which can be transferred from room to room and each individual

classroom in the current Canfield Avenue School has cable television and laser disks capability. In addition, computers are used in both art and music.

(39) There is no way to be certain as to the way in which the program, which is in the planning stage, will be implemented. Technology support and infusion for every course including distance learning, Website support, teacher command center with laser disc player, VCR, smart board, cable television and lap top computers for students are among the advantages proposed to be offered by Mine Hill.

(40) Current extra-curricular activities at the Canfield Avenue School in Mine Hill presently include intramural sports such as jogging, floor hockey, and gymnastics, the school newspaper, a literary magazine, the year book, a talent show, a school play and certain other clubs. Mine Hill anticipates extending these activities to the seventh and eighth grades. There is, at this time, no firm provision for athletic teams in Mine Hill.

(41) In Dover, in addition to nonathletic extracurricular activities such as the builders club, debate/forensics, geography, jazz band, the junior national honor society, peer leadership, Rogate, school dances, school newspaper, school play, a seventh grade trip to Stokes, student leadership, a Washington, D.C. trip for eighth graders and the year book, there are athletic activities including, soccer, cross country, basketball, wrestling, softball, track and field, and intramurals.

(42) Dover Middle School's ratio was 11.1 pupils per teacher. Assuming an enrollment of 75 students and six teaching staff members the Canfield Avenue School would have a ratio of 12.5 students per teacher for grades seventh and eighth. Both schools provide an instructional day which is five hours and twenty minutes in length.

(43) During the Springs of 1996, 1997 and 1998, test results show that 100 percent of Mine Hill students attending Dover Middle School performed at the advanced proficient or proficient level in the three subject areas tested by the Early Warning Test, reading, mathematics, and writing.

(44) In 1998-99, the new Grade Eight Proficienal Assessment (GEPA) was taken by eighth graders throughout the state. Mine Hill scored 100 percent at advanced proficient or proficient in language arts in comparison to a State average of 78 percent. Mine Hill students also scored 76.9 in advanced proficient or proficient in mathematics, compared to a 62 percent average for the State.

(45) In 1997-98, the students of Dover at Dover Middle School performed at either the advanced proficient or proficient levels in reading at 98.4 percent, mathematics at 91.8 percent, and in writing 91.7 percent. These results were comparable to the prior two years. With respect to the GEPA results for Dover, 87.1 percent of the student accomplished advanced proficient or proficient in language arts and 54 percent accomplished proficient or advanced proficient in mathematics.[4]

(46) On December 19, 1997, the Dover Board of Education filed a verified petition for declaratory and injunctive relief with the Commissioner of Education seeking to obtain status as a special needs district. If the Commissioner found Dover to be a special needs district, it would receive millions of extra dollars in state aids. The petition was filed because of the superintendent's extreme concern about the district's ability to meet new State mandates requiring full day kindergarten of pre-kindergarten programming.

[4] These figures are for the overall Dover Middle School population, not just the Dover students.

(47) The petition had little likelihood of success, since special needs districts are required to have a high minority population and limited financial resources, placing students in a precarious position; such schools have a record, over an extended period of time of producing educational results that proved students were not learning. It was established that Dover was at or above the top level of pupil results of standardized tests compared to Abbott Districts.

(48) Dover withdrew the petition when an alternative funding source became available.

DISCUSSION AND CONCLUSION

The issues to be resolved in this matter are:

1. Is the 1981 order by the Commissioner of Education, granting Petitioner's request for return of its seventh and eighth grades still valid if the conditions outlined in the order are only now being met?

2. What standards should be applied in determining whether to grant the relief sought in the petition, since the statute speaks solely in terms of sending-receiving relationship in the high school?

3. Will there be a substantial negative impact on racial composition, education or finance in either of the two districts if severance were to occur?

4. Should these two districts be ordered to regionalize; or, in the alternative, should they be directed to engage in a regionalization study?

A. *The 1981 Order of the Commissioner*:

Petitioner seeks permission to terminate its currently existing sending-receiving relationship with the Board of Education of Dover. Mine Hill requests the withdrawal of its seventh and eighth grade pupils only, for it wants its high school students to continue attending school in Dover's district. Dover opposes severance and seeks, instead, an order to regionalize, or, in the alternative an order directing a feasibility study for regionalization.

Mine Hill originally sought approval for the withdrawal of its seventh and eighth grade students in July of 1980. Dover acceded to Mine Hill's request subject to the conditions that Mine Hill be required to provide Dover with two years' notice of the date of partial termination and that Mine Hill be forbidden from terminating the agreement once classes have commenced for any school year. (P-6 at 2; P-17 at 2.) The Mine Hill Board approved Dover's requests; both school boards executed a Stipulation of Dismissal and Mine Hill withdrew its petition. (P-17 at 2.) However, because considerable correspondence exchanged between the school boards and other offices regarding the racial distributions of the school districts, the Commissioner remanded the case to the OAL. The ALJ determined that a contested case did not exist and transmitted the matter back to the Commissioner. *Id.* at 3-4.

On May 29, 1981, the Commissioner entered an order granting Mine Hill's request to withdraw its seventh and eight grade students subject to the following requirements:

1. The Mine Hill Board of Education shall, in conjunction with representatives of the Dover Board of Education, develop a plan for such shared curricular and/or extracurricular activities and programs for grades 7 and 8 as shall ensure a more fluent integration of said pupils into the grades 9-12 high school program of the Dover Public Schools. Such plan shall be

submitted to the Morris County Superintendent of Schools for his approval.

2. The Mine Hill Board of Education shall submit to the Morris County Superintendent of Schools for his approval such curricular and programmatic documentation as shall be necessary to demonstrate a comparability of program to that which Mine Hill seventh and eighth grade pupils presently receive within the Dover Public Schools.

3. The Mine Hill Board of Education shall undertake a building program which shall accomplish the result of closing the presently inadequate Hattie Rice Elementary School which shall meet the curricular and programmatic needs of those grades presently housed in the Hattie Rice School and those seventh and eighth grade pupils to be returned to the district by virtue of the granting of the instant Petition.

[P-6 at 4.]

The Commissioner retained jurisdiction over the case and provided that once the Morris County Superintendent of Schools had been supplied assurances that all conditions were satisfied, a date for withdrawal would be specified.

Mine Hill held a referendum in 1982 seeking approval from its citizens to raise funds for the construction of the facilities needed for the seventh and eighth graders. The community did not approve the referendum. Without the necessary revenues to expand the Canfield Avenue School (which accommodated grades kindergarten through six), Mine Hill was unable to satisfy the requirements stipulated in the Commissioner's Order.

A referendum was held in 1986 to fund construction of the facilities at the Canfield Avenue School. This referendum was passed, but it only dealt with the

expansion of the school's core facilities, such as a library, to support the kindergarten through six grades—not grades seven and eight. Accordingly, as of 1986, Mine Hill still had not met the terms enunciated in the Commissioner's order.

In the early 1990's, Mine Hill and Dover engaged in negotiations for a sending-receiving contract. The negotiations culminated in a seven-year contract. It was dated July 7, 1993 with an expiration date of June 30, 2000. (Exh. P-23.) Prior to this written agreement, the parties had not had a formal contract.[5] Mine Hill wanted the contract to expire in the year 2000 inasmuch as the debt it incurred from the 1986 referendum would be paid by that year.

In 1996, Mine Hill established an *ad hoc* citizens' committee, known as the Alternative Education Committee ("Committee"), to investigate its educational options. One of the options examined by the Committee was regionalization with other Morris County school districts. The Committee also studied charter schools and school vouchers. While its review concentrated on high school grades, *i.e.* nine through twelve, some review of the middle school was performed as well.[6] It should be noted that, while the committee was critical of the high school, it praised the middle school. (R-13, p. 44). This committee recommended that the district not seek severance.

Mine Hill subsequently formed a Building Expansion Advisory Committee. This committee recommended the implementation of a pre-kindergarten through eighth grade program at the Canfield Avenue School and the holding of a referendum to provide for the additional facilities. Mine Hill retained the professionals needed to prepare a study of the feasibility of withdrawing its seventh and eighth grade pupils from Dover. Mine Hill held a referendum on December 8, 1998, which was approved. The

[5] In Mine Hill's reply brief, it alleges that a prior written contract regarding Mine Hill and Dover's sending-receiving relationship had been executed during the 1970's. (See Petitioner's Reply-Brief dated July 5, 2000 at 1-2.) However, since this document was not entered into evidence and is not part of the record in this case, the statement that the parties had not had a formal contract prior to the one entered into in 1993 is appropriate. Nonetheless, resolution of the issues raised herein does not turn on the existence of a present or previous sending-receiving contract between the parties.

[6] A copy of the report submitted by the Committee is included in the record as Exhibit R-13. It is entitled "An Exploration Of Educational Options For Our Students In Grades 7 Through 12."

voters authorized the issuance of bonds to improve and expand the facilities at the Canfield Avenue School. On that same date, Mine Hill petitioned the Commissioner for permission to terminate its sending-receiving relationship with Dover for its seventh and eighth graders.

Mine Hill argues that the Commissioner's 1981 order is still valid and should be applied herein to permit Mine Hill to withdraw its seventh and eighth grade students from Dover. Dover disagrees and avers that based on the doctrines of laches, waiver and estoppel, Petitioner is barred from using the 1981 order.

Laches is an equitable defense asserted where neglect or omission to assert a right over a period of time causes prejudice to an adverse party. *Enfield v. FLW, Inc.*, 256 *N.J. Super.* 502, 520 (Ch. Div. 1991), *aff'd,* 256 *N.J. Super.* 466 (App. Div.), cert. denied, 130 *N.J.* 9 (1992). The delay in enforcing a known right must be unexplained and inexcusable and it must prejudice the party claiming it. *Gladden v. Public Employees' Retirement Sys.,* 171 *N.J. Super.* 363, 370-71 (App. Div. 1979); *Allstate Ins. Co. v. Howard Sav. Institution,* 127 *N.J. Super.* 479, 489 (Ch. Div. 1974).

The State Supreme Court addressed the doctrine of laches in an education context in *Lavin v. Board of Educ. of the City of Hackensack*, 90 *N.J.* 145 (1982). *Lavin* involved a petitioner's claim for employment credit as a teacher based on her prior military service. Because she asserted her claim nine years after her employment began, the Board of Education argued that laches barred her claim. The Supreme Court agreed and quoted the following from *Atlantic City v. Civil Serv. Comm'n,* 3 *N.J. Super.* 57, 60 (App. Div. 1949):

> Laches in a general sense is the neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done. More specifically, it is inexcusable delay in asserting a right.

> 'Long lapse of time, if unexplained, may create or justify a presumption against the existence or validity of plaintiff's right and in favor of the adverse right of defendant; or a presumption that if plaintiff was ever possessed of a right, it has been abandoned or waived, or has been in some manner satisfied; or that plaintiff has assented to, or acquiesced in, the adverse right of defendant; or a presumption that the evidence of the transaction in issue has been lost or become obscured, or that conditions have change since the right accrued; or a presumption that the adverse party would be prejudiced by the enforcement of plaintiff's claim.'
>
> [*Lavin*, 90 *N.J.* at 151-52 (citations omitted); see also *Windsor Card Shops, Inc. v. Hallmark Cards, Inc.*, 957 *F. Supp*. 562, 568 (D.N.J. 1997) stating that laches, "similar to a statute of limitations, bars claims that were neglected for an unreasonable and unexplained length of time"). (Citations omitted)].

A court should consider and weigh the length of the delay, reasons for the delay, and change in conditions of either or both parties. *Id.* at 152. The length of the delay alone or combined with the other elements may result in laches. *Id.* "It is because the central issue is whether it is inequitable to permit the claim to be enforced that generally the change in conditions or relations of the parties coupled with the passage of time becomes the primary determinant." *Id.*

In the matter herein, the lengthy passage of time in conjunction with the changing conditions of both parties justify a finding barring Petitioner from using the Commissioner's 1981 order.

Knowledge and delay are prerequisites to the application of the doctrine of laches. *C.R. v. J.G.* 306 *N.J. Super.* 214, 239 (Ch. Div. 1997). Petitioner seeks to enforce an order issued almost eighteen years prior to the filing of the instant petition. Petitioner knew it had permission back in 1981 to terminate its sending-receiving relationship with Dover regarding its seventh and eighth grades. Yet, because of its inability to obtain approval from its community to raise the requisite funds, Petitioner

was unable to satisfy the three conditions established by the Commissioner. The delay is extensive and inexcusable inasmuch as the actions of the school board and its citizens are intertwined. The voters defeated the 1982 referendum. The 1986 referendum, which was approved, dealt only with funding the expansion of facilities for the kindergarten through six grades. It was not until December of 1998 that the citizens of Mine Hill approved the funding necessary to accommodate the seventh and eighth grade pupils.[7] In the interim, Petitioner continued sending its students entering the seventh and eighth grades to Dover and executed a seven-year sending-receiving contract with Respondent.

Moreover, the conditions of the parties have changed. Both Mine Hill and Dover have, unsurprisingly, experienced changes within the past eighteen years in the areas of State requirements, test results, and facilities. More importantly, changes have occurred regarding the size and ethnic composition of the student body in each of the districts. For example, in 1980, Mine Hill's then Superintendent of Schools projected that a 7.2% increase would occur in minority enrollment in Dover by the 1987-88 school year as a result of the withdrawal of Mine Hill's seventh and eighth graders. The enrollment would increase from 53.3% to 60.5%. (Petitioner's Brief dated May 30, 2000 ("Petitioner's Brief") at 8.) According to the report of one of Mine Hill's experts, Dr. Savitt, as of October 1998, Dover's ethnic composition was comprised of 256 minority students out of a total enrollment of 382 (excluding special education students), resulting in a 67% minority percentage. (Petitioner's Brief at 33; P-3 at 10.) Thus, according to Petitioner's own findings, Dover had a minority rate of 53.3% in 1980 and a rate of 67% in 1998.[8] According to Respondent's expert, this demonstrates a significant change which has occurred in the Dover school district. Furthermore, Mine Hill concedes that its own minority school population has increased. "Indeed, if anything has changed dramatically, it is the amount of diversity in Mine Hill itself. As demonstrated by P-54, Mine Hill has gone from a district whose students were 95% white in 1981 to one which today has a 23% student minority population." (Petitioner's

[7] The citizens authorized the issuance of $4,000,000 in bonds for the facilities for the kindergarten though six grades and $800,000 for facilities for the seventh and eighth grades. (Petitioner's Brief dated May 30, 2000 at 14.)

Brief at 40.) These changes demonstrate that the circumstances present in 1981 no longer exist.

Laches should be applied in an individualized manner in particular cases and its availability depends on weighing the peculiar facts of the case. *Lavin,* 90 *N.J.* at 157-58 (Pashman, J. dissenting) is applicable in this case. Consequently, I **FIND** that the Commissioner's 1981 order is outdated and no longer valid. Based on the length of time that has transpired between the issuance of the Commissioner's order and the filing of the instant petition, *i.e.* almost eighteen years, and the change in conditions of both parties involved, I **FIND** that the doctrine of laches is applicable in this case.

Waiver refers to "the intentional relinquishment of a known right." *West Jersey Title & Guar. Co. v. Industrial Trust* Co., 27 *N.J.* 144, 152 (1958). Waiver must be voluntary and must imply "an election by the party to dispense with something of value, or to forego some advantage which he might, at his option, have demanded and insisted on." See *Amir v. D'Agostino*, 328 *N.J. Super.* 141, 160 (Ch. Div. 1998), *aff'd*, 328 *N.J. Super.* 103 (App. Div. 2000). The intention to waive does not have to be manifestly expressed; it may be inferred from the circumstances. *Goodpasture v. Goodpasture,* 115 *N.J. Super.* 189, 198 (Ch. Div. 1971). A waiver may be present when a party engages in conduct that reveals an intent to relinquish a right or acts inconsistently with its assertion. *English Feedlot, Inc. v. Norden Lab., Inc.,* 833 *F. Supp.* 1498, 1504 (D. Colo. 1993).

As described above, in 1981 Mine Hill obtained an order from the Commissioner granting it permission to withdraw its seventh and eighth grade students from Dover, provided that certain specifications were met. Not until late in 1998, when the matter herein commenced, did Mine Hill raise its claim that the order should be applied. Prior to that time, Mine Hill consistently sent its seventh and eighth grade pupils to be educated in Dover's district. In fact, in 1993, it entered into a formal written contract

[8] Of course, both percentages include seven and eighth grade students from Mine Hill.

with Dover regarding the sending-receiving relationship they shared. This agreement set forth in pertinent part:

> WHEREAS, Mine Hill desires to send its middle and senior high school pupils, grades 7 through 12, to Dover Middle and High Schools and to designate Dover Middle and High Schools as the schools for attendance of Mine Hill Township pupils pursuant to the provisions of *N.J.S.A.* 18A:38-11 *et. seq.* and in accordance with the terms set forth herein; and
>
> [T]he parties desire to enter into this agreement to create a "sending-receiving" relationship pursuant to the provisions of *N.J.S.A.* 18A:38-11 *et. seq.*

[P-23 at 1.]

Paragraph seven of the agreement provides that Mine Hill and Dover agreed to commence negotiations to consider renewal of the agreement for an additional term. *Id.* at 5.

During the 1990's, Mine Hill also explored other options for its seventh and eighth grade students. It established the *ad hoc* citizens' committee and reviewed options such as regionalization.

The express language of the contract demonstrates a waiver. Notwithstanding full knowledge of the Commissioner's order issued in 1981, Mine Hill voluntarily engaged in negotiations with Dover in the early 1990's and thereafter voluntarily executed a sending-receiving agreement with it. The agreement was set to expire in June 30, 2000 unless the parties renewed it for a further term. Furthermore, Mine Hill explored other options such as regionalization. These actions reasonably demonstrate that Petitioner acted inconsistently with and intended to relinquish its previously held right. Accordingly, I **FIND** that Petitioner waived the right granted by the 1981 Order of the Commissioner.

The State Supreme Court has defined equitable estoppel as:

> The effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might otherwise have existed ..., as against another person, who has in good faith relied upon such conduct, and has been led to change his position for the worse...

[*County of Morris v. Fauver*, 153 *N.J.* 80, 104 (1998) (Citations omitted).]

The doctrine is invoked when one party changes its position in reliance on the conduct of another party and the repudiation of that conduct would prejudice the relying party. *Amir,* 328 *N.J. Super.* at 160. The party asserting it may rely on conduct, inaction, or representations of the actor. *Miller v. Miller*, 97 *N.J.* 154, 163 (1984). A vital factor is that the relying party suffer a detrimental change. See also *Pitak v. Bell Atl. Network Servs., Inc.,* 928 *F. Supp.* 1354, 1367 (D.N.J. 1996); *Fairken Assoc. v. Hutchin,* 223 *N.J. Super.* 274, 280 (Law Div. 1987).

Dover contends that Mine Hill's inactions and contrary actions regarding the Commissioner's 1981 order led it to assume in its financial and educational planning that the relationship between the two districts would continue. (Respondent's Brief dated May 26, 2000 at 36.) Dover makes this claim while discussing the estoppel doctrine in its Conclusions of Law, but does not support it with specific evidence. The State Board of Education has declared that sending-receiving relationships between school districts are not intended to provide additional revenue for receiving districts to expand facilities or programs.

> [T]he statutory scheme was designed to make unused facilities available to students from districts that lack facilities and ... tuition payments to the receiving district are intended to permit receiving districts to accommodate students from the sending districts without additional cost to them. The statutory scheme was not intended to create a revenue source for districts, to subsidize the expansion of facilities

> and programs for the benefit of the receiving district, or to protect the receiving district's citizens from tax increases.
>
> [*Board of Educ. of the Tp. of Cranbury v. Board of Educ. of the Tp. of Lawrence*, 1987 *S.L.D.* 2580, 2587, appeal dismissed, A-4253-86T1 (App. Div. April 22, 1988)].

Moreover, Dover was aware that its sending-receiving contract would terminate in June 2000 and should have planned accordingly.

Inasmuch as it does not appear that Dover suffered a detrimental change or was prejudiced because of reliance on Mine Hill's conduct, I **FIND** that equitable estoppel is inapplicable in this case. Nonetheless, based on the finding that the doctrines of laches and waiver are applicable, I **CONCLUDE** that the Commissioner's 1981 order is no longer valid.[9]

B. *Applicable Standards*

There are few decisions addressing the withdrawal of elementary school pupils because the vast majority of sending-receiving relationships statewide are at the high school level. The cases that do exist, however, apply *N.J.S.A.* 18A:38-13 to determine if withdrawal is appropriate.

This issue is addressed directly in the case of *Board of Educ. of the Twp. of Maurice River v. Board of Educ. of the Buena Regional Sch. D*ist., 1982 *S.L.D.* 1270, *aff'd.* by the Commissioner of Education, 1982 *S.L.D.* 1285. In *Maurice River*, petitioner sent some of its elementary and high school students to schools in Buena Township pursuant to an informal sending-receiving relationship. For the 1981-82 school year, Maurice River and Buena Regional entered into a formal sending-receiving contract. Maurice River agreed to send 18 elementary pupils and four high school pupils to the

[9] It should also be noted that there is nothing in the record which indicates that all three of the conditions precedent were met by Mine Hill, since there is no evidence demonstrating that Mine Hill, in conjunction with Dover developed a plan for such shared curricular and/or extracurricular activities for middle school grades as shall insure a more fluent integration of these students into Dover High School.

Buena Regional School District. Maurice River subsequently decided to terminate the sending-receiving relationship with Buena Regional and applied to the Commissioner for permission to dissolve the relationship. The ALJ identified two distinct issues:

1. Whether there is good and sufficient reasons to approve Maurice River Township Board of Education's application to withdraw its kindergarten through eighth grade pupils from a sending-receiving arrangement with the Board of Education of the Buena Regional School District?

2. Whether there is good and sufficient reason to terminate the sending-receiving relationship between the Boards of Education of Maurice River Township and Buena Regional with regard to its high school pupils in grades ninth through twelfth?

Id. at 1271-72.

The ALJ had to determine what standard to apply to each issue. With respect to the termination of the kindergarten through eighth grade relationships, the ALJ noted that while *N.J.S.A.* 18A:38-13 only mentioned withdrawal from sending-receiving relationships at the high school level, it was the applicable standard for both issues. Specifically, the ALJ held:

> The court observes that the statute addresses only a change or withdrawal of high school pupils in a sending-receiving relationship and that it is silent with respect to such relating to elementary pupils. In any event, the controlling statute, for the determination of this matter, is found at *N.J.S.A.* 18A:38-13.

Although a different statute as then written required a different standard to be met to permit severance, that change is not relevant to the issue under consideration.[10] Based upon the affirmance of the Commissioner, it is clear that *N.J.S.A.* 18A:38-13

contains the applicable standard regarding the termination of an elementary sending-receiving relationship.

In *Board of Educ. of the Borough of Kinnelon v. Board of Educ. of the Borough of Riverdale, State Board of Education* #21-83, (April 4, 1984), *aff'd. Dkt.* #A-3857-83T2 (App. Div. February 8, 1995), the Board of Education of Kinnelon entered into a sending-receiving contract with the Riverdale Board of Education on October 19, 1960. In the contract, Riverdale agreed to send its seventh through twelfth grade students to Kinnelon commencing in the 1962-63 school year.

After executing another contract in 1976, wherein Riverdale specifically agreed to send its seventh and eighth grade students to the Kinnelon Middle School, Riverdale resolved to withdraw its seventh and eighth grade students from the sending-receiving relationship prior to the expiration of the contract.

The State Board of Education had to decide the standard to be applied to withdrawals at the seventh and eighth grade level. It held that *N.J.S.A.* 18A:38-13 was the applicable statute for withdrawals at the elementary level. The Board concluded that the Commissioner had erred in holding that *N.J.S.A.* 18A:38-13 was inapplicable. See *Id.* at 6.

The State Board specifically held that *N.J.S.A.* 18A:38-13 applies to the withdrawal of seventh and eighth grade students and is not limited to high school students. See *Id.* at 9. The State Board held that Riverdale had demonstrated good and sufficient reason for the withdrawal and it was entitled to terminate the sending-receiving relationship with Kinnelon. *Kinnelon*, like *Maurice River*, also holds that *N.J.S.A.* 18A:38-13 contains the applicable standard governing the withdrawal of seventh and eighth grade students.

[10] At the time of *Maurice River*, the petitioner was required to demonstrate that there was "good and sufficient" reason for withdrawal from a sending-receiving relationship.

Although the standards provided by the legislature in *N.J.S.A.* 18A:38-13 have since changed, the statute still applies to elementary withdrawals. The concerns raised by the withdrawal of a district from a sending-receiving relationship are the same at all grade levels. In *Maurice River* and *Kinnelon*, primary concerns were the financial and educational impact on students in the two districts. See *Maurice River*, 1982 *S.L.D.* at 1281 (holding that withdrawal of elementary students would be permitted because it would be financially and educationally beneficial); *Kinnelon*, slip op. at 10 (permitting withdrawal based on the educational interests of all students involved and the cost effectiveness). Financial concerns and effects on the quality of education are two of the three standards expressed in *N.J.S.A.* 18A:38-13 today.

Moreover, the facts of this dispute and the behavior of these parties indicate they perceive that *N.J.S.A.* 18A:38-13 is controlling.

For example, on November 12, 1997, James S. Rothschild, Jr., attorney for Mine Hill, wrote the Commissioner requesting a meeting to discuss withdrawing Mine Hill's seventh and eighth grade students from the sending-receiving relationship with Dover on a "fast track" basis. (See P-30). Assistant Commissioner of Education, John M. Sherry responded by letter dated December 3, 1997. (See P-31).

Sherry's letter stated that withdrawal on a "fast track" basis would not be possible. Additional information would be necessary before severance could even be considered. Specifically, the Assistant Commissioner stated that the districts would have to provide a study regarding the racial impact of withdrawal because the "[s]tatute requires that the withdrawal of students from a sending-receiving relationship shall not significantly disrupt the racial composition the receiving district." This language comes directly from *N.J.S.A.* 18A:38-13. Assistant Commissioner Sherry understood that *N.J.S.A.* 18A:38-13 contained the applicable standard regarding the withdrawal of Mine Hill's seventh and eighth grade students. Sherry's letter also stated that the Districts must provide a study regarding the "impact of withdrawal on the demographics of the

remaining seventh and eighth grade students in Dover." Again, this requirement comes directly from *N.J.S.A.* 18A:38-13.

Dr. Renee' Rovtar, the Morris County Superintendent of Schools, also expressed that *N.J.S.A.* 18A:38-13 contained the relevant standard for the withdrawal of seventh and eighth grade students. Ms. Fischer and Dr. Palestis met with Rovtar to discuss the potential withdrawal of Mine Hill's seventh and eighth grade students. At this meeting, Rovtar informed both Superintendents that withdrawal of seventh and eighth grade students would only be possible if the three criteria set forth in the statute were satisfied. Thus, two state education officials knew that *N.J.S.A.* 18A:38-13 was the statute governing the proposed withdrawal of seventh and eighth grade students by Mine Hill. Because the concerns raised by a district's withdrawal from a sending-receiving relationship are the same at all grade levels, as well as on the facts of this dispute, and the interpretation of the legislation by the Department of Education, I **CONCLUDE** that *N.J.S.A.* 18A:38-13 should and does continue to apply to the withdrawal of any sending-receiving relationship.

C. *Substantial Negative Impact*

The controlling statute provides that a sending-receiving relationship may only be severed by application to the Commissioner, who shall grant such application only after determining that certain criteria have been met. Specifically, the district seeking severance

> shall prepare and submit a feasibility study, considering the educational and financial implications for the sending and receiving districts, the impact on the quality of education received by pupils in each of the districts, and the effect on the racial composition of the pupil population of each of the districts. The Commissioner shall make equitable determinations based upon consideration of all the circumstances, including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils, and the effect on the racial composition of the pupil population of the districts. The Commissioner shall grant the requested change in

> designation or allocation if no substantial negative impact will result there from.

[*N.J.S.A.* 18A:38-13].

It is worth noting from the outset that the Supreme Court has determined that this is not a traditional balancing statute wherein benefits and detriments are weighed against each other to determine the ultimate issue. "[T]he act lays out a series of factors to be considered by the Commissioner as part of a feasibility study including: the educational (offerings) and financial (budgetary) implications for *both* districts, the impact on the quality of education in *both* districts, and the effect on the racial composition of the pupil population in *both* districts." Moreover, the focus of inquiry must be on whether there is a substantial negative impact in any one of the three categories of education, finance, or racial composition. If there is, severance must be denied. *Englewood Cliffs v. Englewood*, 257 *N.J. Super.* 413, 462 (App. Div. 1992) (Citation omitted) (Emphasis in the original).

With this legal underpinning in mind, I turn to the issue of whether granting severance will have a substantial negative impact on either or both of the two districts. As required by the statute, Mine Hill, as the district seeking to sever the relationship, sought and obtained a feasibility study which took into consideration the educational and financial implications for both districts, the impact on the quality of education received by pupils in each district and the effect on racial composition of the pupil population of the districts. *N.J.S.A.* 18A:38-13. The *Original Guidelines Report*, dated September, 1998, (P-2) represents the initial study conducted by Dr. Savitt, who has had educational experience as a teacher, building administrator, college instructor, superintendent of schools and consultant. He also has extensive experience serving as an educational consultant to many school districts. There is also the *Guidelines Updated Report*, (P-3) dated November, 1999, which Dr. Savitt testified was merely a one year update of the information contained in the original report.

In order to project pupil enrollment in each of the two districts, Dr. Savitt employed the "cohort survival method." This method involves going back five years for each district and using actual enrollment numbers to determine the percentage of students proceeding from each grade to the next. Those five years are then averaged and a percentage, the survival ratio, is determined for anticipated student movement from grade to grade. These ratios are then applied from the current year forward for the next five years. This method of calculation allows for the development of a reasonable projection of total enrollment during the upcoming five-year period. Respondent's experts agreed that Dr. Savitt's testimony was an accurate description of the cohort survival method calculating future pupil enrollment.

Analysis of the data presented in the Guidelines Reports, specifically Charts 3 and 4 in both, however, discloses incorrectly performed calculations. See T 12/8/99, pp. 81-89.[11] For example, Respondent's expert demonstrated that the calculation from prekindergarten to kindergarten in Chart 3 was wrong. In each year the 48 students in prekindergarten should have been projected to 66, not 54, as the Guidelines Reports reflect. There are other errors in calculation which, while Dr. Savitt acknowledged them, were never explained. Instead, Dr. Savitt said he would need time to review the information. Since his testimony was part of Petitioner's early case in December 1999, and the last day of hearing, devoted to rebuttal by Petitioner was at the end of February 2000, and there has been no explanation or rehabilitation of the testimony, a reasonable inference to be drawn is that the numerous errors were, at minimum, calculation errors; I do so **FIND**.

Petitioner asserts that Respondent's experts, Dr. Galinsky and Dr. Iannacone greatly exaggerated the impact of the calculation errors they found and that the statement that these errors rendered all of the subsequent numbers useless is incorrect. Petitioner further asserts that the only errors found were at the prekindergarten and kindergarten level and, although the "errors would ripple across the subsequent years", during the five year period of the study this ripple would end at the

[11] T + date refers to transcript of that date.

fifth grade and . . . could have no impact on the numbers of pupils involved in the seventh and eighth grades in the anticipated severance years." (PRB, p. 19).

Petitioner's argument fails for several reasons. First of all, these calculations are the basis for projection of student enrollment and are also used in coming to a determination with respect to the financial implications of the severance. Even assuming, *arguendo*, that they have no impact on grades seven and eight in the event that severance were to be granted, they represent a sloppiness and lack of precision and attention to detail which undermines the validity of the conclusions. Moreover, Petitioner's statement that the errors are merely found in the prekindergarten and kindergarten figures is not supported by the evidence. Dr. Galinsky specifically testified that he did not have the time or inclination to redo all the projections. (T 12/8/99, p. 89). Accordingly, it is not clear whether the remaining calculations are accurate.

I **FIND** that the Original and Updated Reports by Guidelines on behalf of Mine Hill are tainted by the calculation errors contained therein. I further **FIND** the projections of enrollment as well as those employed to project financial implications to be unreliable; consequently, I ascribe no weight to them. I **CONCLUDE**, therefore, that with respect to the criteria of racial composition and financial implications, Petitioner has failed to sustain the burden of proof.

With respect to Petitioner's assertion that the evidence demonstrates numerous errors on the part of Respondent's experts as well, review of the record discloses that the errors Petitioner sought to establish were, in fact, matters of judgment. For example, Petitioner challenged Dr. Galinsky's failure to use background information in his feasibility study from the report of the Mine Hill Alternative Education Committee. The omitted information, consisting of less than complimentary statements about Dover Schools were made by the committee, composed of Mine Hill citizenry. Clearly, the decision to use or not, such information, which is primarily about the Dover High School, in this case about severance of the seventh and eighth grades, is a matter of judgment and relevance. Moreover, it is not the foundation on which the rest of

Respondent's case is built as are the calculations of Dr. Savitt. Finally, the errors and omissions were acknowledged and addressed as Petitioner points out, on direct as well as cross examination.

More importantly, Respondent's expert, Dr. Iannacone, showed the logical progression of the enrollment changes in his testimony. He explained in detail how he arrived at his figures. Using the 1998-99 school year as a starting point, Dr. Iannacone averaged the prior six years of racial data for both Mine Hill and Dover. He demonstrated that substantial percentage decreases in white population would be caused by the withdrawal of Mine Hill seventh and eighth grade students and concluded that there would be an actual 7.3 percent increase in the minority population if Mine Hill was permitted to withdraw in school year 1998-99. In absolute terms, the number of white students would decrease from 133 to 90, a 32.3 percent reduction.

Dr. Iannacone also proved that the actual decrease in minority pupils, were it to occur in 1999-2000, is eight percent. In absolute terms, the number of white students would decrease from 107 to 67, a 37.3 percent reduction. The projected decrease in minority pupil population, should a withdrawal occur in 2002-2003, the last year of the Original Guidelines Report, is 7.2 percent. Finally, in order to compare with the Guidelines Update (P-3) his analysis extended to school year 2003-2004, (R-27). Based upon Dr. Iannacone's calculations, I **FIND** that the racial breakdown by 2003-2004 would result in an increased minority population of 7.22 percent. In absolute terms, the number of white students would decrease from 182 to 125, a 31.3 percent reduction. I further **FIND** that the actual change in racial composition is between seven and eight percent in any given year of the study.

Dr. Iannacone also presented projections of the racial composition of the proposed Mine Hill Middle School. Granting of severance would result in a projected population consisting of 84.3 percent White, with the remaining 15.7 percent as follows: 3.3 percent Black, 7.9 percent Hispanic and 4.5 percent Asian. (R-8, p. 43). In contrast, Dover Middle School projected student population would be predominantly

minority, consisting of over 72 percent minority, with the breakdown as follows: 10.2 percent Black, 59.5 percent Hispanic, 2.8 percent Asian.

Respondent's experts testified that the Mine Hill students comprise a disproportionately high number of those in the most challenging sections of the courses given,[12] as well as in some of the extracurricular activities for academically gifted students. Dr. Galinsky offered the benefit of his experience as Superintendent of the Morris School District in Morristown, New Jersey and as a mediator and facilitator in the Englewood case, with respect to the feelings of inferiority engendered by severance on the part of those left behind in the receiving district. Another of Respondent's experts, Dr. Iannacone, also served as superintendent in two school districts in New Jersey. In addition, he did significant work in 1972 with James Coleman who, at the time, was completing the second phase of his study dealing with the impact of race in segregation, desegregation and the quality of education. Petitioner dismisses this testimony as irrelevant because, in this case, the Mine Hill students are not being withdrawn; they will merely be retained in district while those already attending Dover Middle School will complete their studies there. Moreover, according to Petitioner, most of the grades at the Canfield Avenue School in Mine Hill have diverse populations and testimony demonstrated that tolerance education exists in the school.

Petitioner fails to consider, however, that the children who will be affected by the changes in both districts do not live in a vacuum. This is a long standing sending-receiving relationship; the students are well aware of it. To believe that the "symbolic loss" a term defined in the Englewood decision as that sense of inferiority engendered in those left behind which effects the motivation of children to learn, would not occur, is simply unrealistic. *Englewood v. Englewood Cliffs,* 257 *N.J. Super.* 413, 444. (Citations omitted). Moreover, Petitioner's remarks that there is no demonstrated application of Dr. Coleman's research on the impact of segregated schools on high school age African-American students to the facts of this case is a self-serving conclusory assessment for which Petitioner, who bears the burden here, offered no

[12] See discussion below relating to educational implications.

support. Finally, the testimony of Dr. Galinsky with respect to "symbolic loss" was based, in fact, on his own experiences in Morristown and Englewood, which he cited as examples of places where the effort to withdraw students still adversely impacts those remaining in those districts today.

Petitioner also stresses that there will be opportunities for tolerance education and pupil interaction in the school. The fact that such opportunities must be artificially provided through a formal curriculum program, speaks volumes about the lack of meaningful, daily, personal interaction with ethnically diverse peers. Of significance, as well, is the concern that approximately 15 percent of minority students who would comprise a portion of the student population in Mine Hill, may, because of the small absolute numbers involved, become isolated. The projections show that the absolute number of Black, Hispanic or Asian remaining in the Mine Hill district for seventh and eighth grade ranges between zero to three in each of the six years of the projection. Indeed, there are years in which there may be one Black or one Asian. When considered in context with Dr. Galinsky's testimony of the extraordinary integrated cafeteria at Dover Middle School and the effort and leadership required to attain such a circumstance, it is reasonable to infer that isolation of minority students will be a very real problem if severance were to be granted.

Of ultimate concern especially to Dover, too, is the resultant loss of peer role models, should severance be granted. Dr. Galinsky also testified that the higher achieving members of the higher socio-economic group often provide the role models and motivations for others, to achieve academic success and to realize greater educational opportunity. Dr. Galinsky described educational research studies establishing that goal-oriented values are more frequently represented in higher socio-economic communities. This comported with his own professional experiences in Morristown and Englewood. Mine Hill students, along with high-achieving Dover students, provide role models for other, less academically successful students. Over time, lower achieving students can "pick up" on the value of academic goals and the opportunities they present for students in later life. These role models will be lost

because, as noted elsewhere, Mine Hill students represent a disproportionate number of higher achieving students. Notably, Petitioner failed to address there very real concern in its submission.

Review of the educational offerings of both districts demonstrates that Dover has a well established program which, according to Dr. Galinsky, includes, of course, the core curriculum requirements as well as opportunities for enrichment for gifted children in such areas as band and music, chorus, modern science and world issues. There are 15 or 16 different opportunities for enrichment at Dover Middle School, as well as exploratory classes in grades seven and eight in the areas of physical education, health, math lab, technology, industrial arts, world languages and computers.

Dover Middle School also provides a wide variety of opportunities to meet the individual needs of the children requiring special education services and assistance for those who need academic support in terms of basic skills. Dover Middle School also has an excellent bilingual and English as a second language program, as well as a comprehensive after school program which includes sports programs, builder's club, debating, geography, honor society, peer leadership and the Rogate program. (T of 12/8, pp. 18-19)

Dr. Galinsky also testified about the instructional process at Dover Middle School, which he described as "the most recommended middle school strategies that [he knew] of." He further commented that in both his superintendencies in Morristown and Paramus, he had had excellent middle schools, but he felt that Dover is closer to the ideal model than those for several reasons. First, as a middle school, Dover has been able to attract and keep people who are fully certified in the specific subject areas. Second, Dover has been able to provide an opportunity for daily consultation about every student among teachers and ancillary personnel for the sole purpose of getting to know each individual student. Because these middle school years are so challenging due to the many changes young people are going through at the time, this kind of daily

opportunity to evaluate each student is, according to Dr. Galinsky, "outstanding." (T of 12/8, pp. 21-22).

Petitioner seeks to distinguish this case from *Englewood Cliffs,* which concerned high school students, while in the instant case, the students are seventh and eighth graders. Petitioner notes that these children are going through major transitions and have to face the additional traumatic experience of leaving their nurturing neighborhood school for a much larger environment. There was, however, no testimony to support the conclusion, stated for the first time in Petitioner's brief, that the movement from elementary school to the Middle School was traumatic. On the other hand, Dr. Galinsky did testify that the middle school provides a transition link between the nurturing environment of the elementary school and the more demanding, impersonal environment of the high school. He characterized the middle school years as challenging because of the changes young people are going through.

Dr. Galinsky spent the major portion of four school days at Dover Middle School and one of the most notable things he observed was finding a cafeteria in which self-segregation, by ethnic group, which typically occurs was *not* occurring at Dover Middle School. He attributed this success to the philosophy, caring, and leadership of the principal. (T of 12/8, pp. 23).

Dr. Palestis testified at length to the proposed Mine Hill Middle School curriculum which he developed in consultation with District staff and parents. (P-5). The curriculum incorporates, but goes well beyond, the State core curriculum requirements.

Each course includes a brief section composed of the title, grade level, minutes of instruction per week, and number of weeks the course is taught per year. These are followed by detailed sections explaining the course description/philosophy; course outline; course objectives (including core curriculum standards and cross-content workplace readiness skills); methods of instruction to be employed; assessment/evaluation of pupil progress; instructional materials used; technology

support and infusion; community support, partnerships and resources; parent support and involvement; and support for students with diverse needs. The core courses are followed by electives, which are enrichment or exploratory courses to augment the core curriculum.[13]

With respect to extracurricular activities, Mine Hill anticipates extending and expanding the activities of the elementary school, such as intramural sports, school newspaper and literary magazine, yearbook, talent show, school play and clubs into the middle school. As noted above, although Mine Hill has affirmed that it would explore with Dover additional options, which the 1981 order had required as a condition precedent to severance, that has not been done. The self-serving conclusion that joint dances or trips would be readily achievable and the area of co-curricular cooperation could be reviewed does little to persuade that no more than cursory thought has been given to the development of the extracurricular program. In 1981, the Commissioner deemed such a program to be so important to the development of smooth transition between eighth grade in Mine Hill and ninth grade in Dover, that he made the development of an extracurricular plan a condition to be met before severance could occur.

Mine Hill asserts that its proposed curriculum offers distinct advantages to those of Dover. Among these advantages are the block programming of language arts/literacy, providing the opportunity for team teaching and a better integrated course offering, a full semester of Spanish in both seventh and eighth grades, a core course in technology and computers, visual and performing arts, technology support and infusion for every course. Assuming *arguendo* that Mine Hill's curriculum does offer distinct advantages over that of Dover, this is not relevant to the resolution to be made here. Moreover, review of both programs demonstrates that the difference between them is one of judgment and preference, not one of quality.

[13] It should be noted that these are all proposals and that, at the time of hearing, this curriculum had been submitted to the County Superintendent for approval which had not been received at that time.

Dr. Galinsky found the Mine Hill curriculum to be ambitious, although he expressed reservations about the ability to deliver all that was proposed. Dr. Palestis testified at length as to the planned implementation of the curriculum as well as the fact that Mine Hill will have the resources to effectuate its plan; the problem, however, is that the proposal is still just that: a proposal, which has some rather large gaps in it. For example, there are several references in Petitioner's brief to exploring and expanding extracurricular activities. (Pb, p. 24, p. 50). However, this issue has only been addressed in rather vague, tenuous terms in Petitioner's case.

Another vagary of Mine Hill's proposal, according to Dr. Galinsky, is whether the district will be able to attract qualified teachers certified in the various subject areas to teach on middle school level, especially when the pool of teachers will be relatively small and there is no high school. In addition, as Respondent correctly points out, the specific details of those positions to be filled have not yet been established.

The record is replete with references to the efforts which will be made to implement the curriculum as proposed and I do find the testimony of Dr. Palestis, who testified at length about the implementation, to be sincere and forthright.

Dr. Galinsky also testified about how Mine Hill Middle schoolers have integrated into the Dover Middle School system and the course and co-curricular activities in which they are involved, in numbers disproportionate to their numbers in the general student population. They are "over-represented" in the most challenging classes. For example, the grade eight level one classes[14] are designed for the most academically talented students. At the time of the hearing 13 of 82, 16 percent, were from Mine Hill. If those 13 were not to participate, the result for Dover Middle School, would be either two sections of 35, a number which is approximately one third more than that which is considered an appropriate class size, or the cost of keeping three much smaller sections.

[14] There are three sections of core subject classes at Dover Middle School.

Dr. Galinsky testified about many special academic opportunities in Dover Middle School for high achieving students. First, he described the Rogate program which is affiliated with Johns Hopkins University. That program, recognized throughout the country, provides special learning opportunities for students who have unusual academic abilities. Second, algebra is available to eight grade students. If passed successfully, a student is exempted from high school algebra. Third, Dover Middle School runs three levels of core academic courses, grouping the students by their ability. As a result, there are many opportunities for specially talented students to flourish in the Dover Middle School. Such opportunities as these will not be available to Mine Hill students if severance is permitted.

Based on the evidence, I **FIND** that the established educational offerings of Dover Middle School are comprehensive, diverse and offer a broad spectrum of educational opportunity. I further **FIND** that the educational offerings proposed by Mine Hill are equally comprehensive, but not so diverse as to offer as broad a spectrum of educational opportunity.

Citing the high quality of Dover Middle School's academic and extracurricular program, Dr. Galinsky was concerned about the multiple impacts of the loss of Mine Hills students. He first cited the possible restriction of the academic and extracurricular programs currently being run in the Dover Middle School.

Dr. Galinsky and Mr. DeLorenzo, the principal of Dover Middle School, each described how the student body in Dover Middle School is completely integrated while sitting in the cafeteria eating lunch. Dr. Galinsky compared this to his personal experience at Morristown High School. He expressed great pleasure at the ability of all of the students at the Middle School to accept one another and benefit from the differences and attributed the extraordinary success to the leadership in Dover, specifically in the Middle School. For all these reasons, severance would result in a substantial negative educational impact on the Dover students if Mine Hill students were withdrawn, according to Dr. Galinsky.

Even if Mine Hill turns out to be a relatively good educational environment, it still can not provide nearly the range of academic and extracurricular opportunities provided in Dover. Although the number of Mine Hill students originally projected to attend the anticipated seventh and eighth grade was never large, (P-2), it became substantially smaller when the projection changed from 80 additional students to 16 (P-3). This averages approximately two additional pupils per grade. Instead of being exposed to a larger, more widely diverse, fully functioning departmental middle school, the students withdrawing to Mine Hill will be subject to a small team teaching environment with limited opportunity for personal interaction with ethnically diverse peers.

The impact on the racial/ethnic composition are so intertwined in this case as to be inseparable. I **FIND**, therefore, based on the foregoing, particularly the increase in the minority population to over 72 percent with the concomitant reduction in White population at Dover Middle School, the extraordinary imbalance of the resulting middle school population in Mine Hill, the risk of isolation to the small number of each of the different minorities in the projected Mine Hill Middle School, and the loss of peer role models that the granting of severance will have a substantial negative impact on the racial composition of and educational opportunities available in both districts.

The third factor to be considered is whether the proposed withdrawal results in a substantial negative financial impact in either or both districts. Respondent asserts that, because of a discrepancy of 25 percent in the projected cost of building the new accommodations for the Mine Hill Middle School,[15] in the absence of expert evidence as to the cost of building a seventh and eight grade addition, Mine Hill has failed in proving there would be no substantial negative financial impact. Mine Hill attempts to explain the discrepancy by characterizing the additional $200,000 as a contingency available to cover additional cost. The conclusory statement that the district is confident, based on projections of the architect and construction manager that will meet

[15] Mr. Yaniro, Petitioner's witness, testified on cross examination that the figure presented in the referendum was $800,000, while the feasibility study cites the cost as $600,000.

the target cost of $600,000, is not a sufficient basis on which to make the determination that there will not be a substantial negative financial impact on Mine Hill. Accordingly, I **FIND** that Petitioner has not demonstrated that there will be no substantial negative financial impact on the District.

Petitioner also asserts that the tax impact on the average Dover home will average about $74 per year during the phase out. Respondent asserts that the taxpayer/owner of an average home[16] will have to pay $152 more each year by the 2003-2004 school year, just for the loss of money due to the withdrawal. While neither of these two figures represents a substantial increase, it must be noted that these are averages; there will be some for whom the cost will be more. Dover's financial expert testified that in 1996, the per capita income in Dover was $15,185 and the average family income was $30,000, while in Morris County the per capita income was $41,018. Although Dover's financial expert concluded that the increased cost to the average homeowner would be a substantial negative impact, there are no figures in the record to support Dover's proposition that this is an incredibly difficult financial situation and some significant portion of the population does not even have [the average] amount of money available to meet its financial burden. Accordingly, I **FIND** that although there will be a negative financial impact on Dover, the district has not demonstrated that it will be substantial.

Based on the foregoing finding that severance will result in a substantial negative impact on racial composition and educational opportunity in both districts, I **CONCLUDE** that this petition should be denied.

D. *Regionalization*

Regionalization involves the formation of a new school district, comprised of two or more districts and governed by a nine member regional Board of Education on which

[16] The average home in Dover costs about $159,500. The total property tax bill was $4,451.

the representation is apportioned according to statutory requirements. *N.J.S.A.* 18A:13-1 *et seq.*

In the case at bar, Dover requests that the Commissioner direct kindergarten to twelfth regionalization of the Dover and Mine Hill School districts. Such regionalization would result in the transfer of control of both districts to a regional, nine member Board of Education. Among the advantages cited are the elimination of fiscal and administrative expenses which are repetitive and unnecessary, an enhanced degree of representation for Mine Hill on the regional board and the opportunity to operate a "unified board." Moreover, complete articulation between all of the elementary schools and Dover Middle School would be accomplished, and the savings realized could be focused on the students rather than Board or administrative expenses.

It has been held that regionalization of school districts is available to accomplish desegregation of schools. *Englewood Cliffs*. In this case, however, it is clear from the record that no real purpose would be served by imposing regionalization on the parties since, without Mine Hill students the school population of Dover Middle School is approximately 65 percent minority and, although there may be a slight difference in the high school numbers, it is not substantial enough to balance the white/minority ratio. I **FIND** that directed regionalization is not appropriate in this case.

In the alternative, Dover seeks an order to conduct a study of the feasibility of regionalization. Again, the minority population in the Dover schools is so high as to be relatively unaffected, for purposes of desegregation, by the small number of Mine Hill students so that desegregation would be feasible by regionalizing only the two districts. Moreover, without any testimony or other evidence in the record about neighboring districts, it is impossible to determine which should be included in a study which goes beyond the boundaries of the two parties herein.

I **FIND**, therefore, that there is insufficient evidence in the record on which to base an order for a feasibility study of regionalization. Accordingly, I **CONCLUDE** that the petition for an order for feasibility study of regionalization should be denied.

ORDER

Accordingly, it is hereby **ORDERED** that this petition for severance be and hereby is **DENIED**; it is further **ORDERED** that Dover's application for a direction that regionalization occur be and hereby is **DENIED**; it is further **ORDERED** that the request for a regionalization feasibility study 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.

October 4, 2000
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

10-6-00
DATE

Debbie Antamarkis /gs
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 10 2000
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Witnesses

Robert Savitt, Ph.D.

Dr. George Iannacone

Evan S. Gillingham

Steven G. Block

Dr. Harry A. Galinsky

Dr. Ernest Palestis

Mr. Vincent Yaniro

Charles DeLorenzo

Margaret Fischer

Exhibits

For Petitioner:

P-1	Resume of Dr. Savitt
P-2	Feasibility Study, Mine Hill Twp., September 1998
P-3	Updated Feasibility Study, Mine Hill Twp., November 1999
P-4	Public School Enrollment by grade, race and sex, Town of Dover, October 15, 1998
P-5	Binder - Mine Hill BOE Middle School Curriculum
P-6	Order of the Commissioner, May 29, 1981
P-7	Pupil's Schedule
P-8	Resume of Vincent Yaniro
P-9	Dover Estimated Cost Per Pupil for Tuition
P-10	Fall 1998 Enrollment – Demographic Report
P-11	Dr. Palestis' Resume

P-12	Minutes from Dover BOE Meeting
P-13	Initial Decision
P-14	Letter, Snow from Polis (phonetic)
P-15	Letter, Snow from Grossman, November 4, 1980
P-16	Order of Remand, December 12, 1980
P-17	Order of February 6, 1981
P-18	Letter, Dover BOE from Brennan, June 10, 1981
P-19a	Superintendent Annual Evaluation
P-19b	Letter, Ms. Fischer from Dr. Palestis, November 8, 1989
P-20	Letter, Dr. Palestis to Ms. Fischer, July 19, 1990
P-21	Letter, Ms. Fischer from Dr. Palestis, August 10, 1990
P-22	The Randolph Reporter newspaper article re: Mine Hill closely monitoring Dover facilities project, August 23, 1990
P-22a	Letter, Dover BOE from Louis Crnarich, November 27, 1979
P-22b	Letter, Mr. Crnarich from R. Paul Muni, December 6, 1979
P-22c	Minutes, October 5, 1987
P-23	Sending-Receiving Agreement, July 7, 1993
P-24	Letter, Ms. Fischer from Dr. Palestis, October 26, 1994
P-25	Daily Record newspaper article re: Mine Hill may quit Dover Schools
P-26	Letter, Ms. Fischer from Dr. Palestis, March 29, 1996
P-27	Letter, Mr. Crnarich from Ms. Fischer, June 27
P-28	Letter, Dr. Leo F. Klagholz from Dr. Palestis, October 30, 1997
P-29	Letter, Dr. Palestis from Deborah N. Antanaitis, November 7, 1997
P-30	Letter, Dr. Klagholz from James S. Rothschild, Jr., Esq., November 12, 1997
P-31	Letter, Mr. Rothschild from John M. Sherry, December 3, 1997
P-31a	Petition for Declaratory Injunctive Relief
P-32	Letter, Ms. Fischer from Dr. Palestis, March 12, 1998
P-33	Letter, Ms. Fischer from Dr. Palestis, April 14, 1998
P-34	Letter, Ms. Fischer from Dr. Palestis, June 2, 1998
P-35	Letter, Ms. Fischer from Dr. Palestis, August 26, 1998
P-36	Letter, Ms. Fischer from Dr. Palestis, September 29, 1998

P-37 Letter, Dr. Rene Rovtar from Dr. Palestis, October 19, 1998
P-38 Letter, Dr. Rovtar from Dr. Palestis, October 19, 1998
P-39 Fax, Dr. Palestis from Fred Vanderhoof, October 27, 1998
P-40 Letter, Dr. Palestis from Mr. Mike Azzara, November 5, 1998
P-41 Extract of Mine Hill Twp. BOE Minutes, November 9, 1998
P-42 Letter, Dr. Palestis from Mr. Azzara, November 24, 1998
P-43 Letter, Mr. Azzara from Dr. Palestis, November 30, 1998
P-44 Letter, Staff from Ms. Fischer, December 22, 1998
P-45 Closed Session Minutes, January 12, 1998
P-46 Letter, Ms. Fischer from Dr. Palestis, January 12, 1999
P-47 Memo, Board Member from Dr. Palestis, February 18, 1999
P-48 Letter, Community and Parents from Dr. Palestis, February 25, 1999
P-49 Letter, Dr. Palestis from Dr. Klagholz, March 12, 1999
P-50 Letter, Dr. Rovtar from Dr. Palestis, March 26, 1999
P-51 Letter, Dr. Palestis from Dr. Rovtar, April 2, 1999
P-51a Memo, Ms. Fischer from Andy Provence, February 2, 1999
P-52 Grades 7^{th} & 8^{th} Tuition Trends
P-53 Enrollment Reports
P-54 Minority Tabulations
P-55 Minority Tabulations
P-56 Canfield Avenue School Grade 7^{th} Schedule
P-57 Canfield Avenue School Grade 8^{th} Schedule
P-58 Letter, Dr. Klagholz from Russell Schumacher, Esq., July 28, 1995
P-59 Letter, Mr. Schumacher from Ms. Antanaitis, August 1, 1995
P-60 Mine Hill BOE Special Meeting, October 5, 1998
P-61 10-Year Tax Impact Chart for School Construction
P-62 Architectural Drawing
P-63 Graph Population of Mine Hill K-6
P-64 Mine Hill Twp. NJ Municipal Data Book
P-65 Town of Dover NJ Municipal Data Book
P-66 Summary of GEPA Results

For Respondent:

R-1	Assumption of Guidelines Update, 1998-99
R-2	Information from Guidelines Update, November 1999
R-3	Application for State School Aid, Town of Dover, 2000-2001
R-4	Application for State School Aid, Town of Dover, Fall 1999
R-5	Application for State School Aid, Township of Mine Hill, Fall 1999
R-6	Chart for Dover
R-7	Dr. Galinsky's Resume
R-8	Study of Potential Impact
R-9	Dr. Galinsky's Affidavit with attachments, December 9, 1997
R-10	Chart 1 Summary Statistics
R-11	Dover Middle School GEPA Results for 1999
R-12	Letter, Daniel Schlein, Esq. from Ms. Antanaitis, October 12, 1999
R-13	Binder - Alternative Education Committee Report
R-14	Letter, Colleague from Dr. Palestis, February 5, 1996
R-15	Mine Hill Twp. Conference Meeting – Minutes, June 8, 1998
R-16	Letter, Mr. & Mrs. Dennis Kannaley from Rick Losey, November 6, 1998
R-17	Board President's Report
R-18	Letter, NJ School Board Ass'n. from Dr. Palestis, May 27, 1998
R-19	Breakdown of 1997 and 1998 EWT score results
R-20	Dr. Iannacone's Resume
R-21	Packet - Dover Enrollment Documents, September 1998 – October 1998
R-22	Packet - Mine Hill Enrollment Documents, October 1993 – October 1998
R-23	Fall Report 1981 Dover Current Enrollment Data
R-24	Dover Middle School Enrollment Report, October 15, 1999
R-25	Racial Balance Impact, 1999-2000
R-26	Projected Racial Impact, 2002-2003
R-27	Projected Racial Impact on Dover Middle School

R-28	Chart of Dr. Savitt's testimony
R-29	Mr. Gillingham's Resume
R-30	Mr. Block's Resume
R-31	EWT Test Grade 8, 1995, Dover vs. Abbott districts
R-31	Dover and Abbott District EWT/HSPT Test Scores
R-32	Mr. DeLorenzo's Resume
R-33	Pictures of Dover Middle School
R-34	Dover Middle School Student/Parent Handbook
R-35	Book -entitled "Schools in the Middle", May/June 1999
R-36	Ms. Fischer's Resume
R-37	Letter, Ms. Fischer & Mr. Vanderhoof from Mr. Snow, July 14, 1989
R-38	Letter, Ms. Fischer & Mr. Vanderhoof from Mr. Ellis, April 27, 1992
R-39	Letter, Ms. Fischer from Dr. Rovtar, January 20, 1999
R-40	Letter, Ms. Fischer & Mr. Vanderhoof from Mr. Hespe, April 12, 1999
R-41	Memo, Mr. Vanderhoof from Marlene Aurilia, March 26, 1998
R-42	Handwritten Note, Ms. Fischer from Dr. Rovtar, November 3, 1999
R-43	Response, Dr. Klagholz from the State of NJ Attorney General's Office to the Abbott Petition, January 16, 1998
R-44	Memo, Dover BOE from Ms. Fischer, re: Abbott Petition, November 15, 1999
R-45	Extract of the Minutes - Dover BOE Meeting, November 16, 1999
R-46	Minutes of Executive Session No. 1, January 20, 1998

OAL DKT. NO. EDU 1147-99
AGENCY DKT NO. 546-12/98

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

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Mine Hill's exceptions were filed in accordance with *N.J.A.C.* 1:1-18.4. Extensions of time were granted for Dover's reply and cross-exceptions and Mine Hill's reply to cross-exceptions and both were filed in conformance with such extensions.

PARTIES' EXCEPTIONS

Mine Hill's five exceptions to the Initial Decision, which in large measure are reiterative of its post-hearing submission arguments advanced before the Administrative Law Judge (ALJ), are presented below:

EXCEPTION I

THE INITIAL DECISION INCORRECTLY DETERMINED THAT THE COMMISSIONER'S 1981 ORDER IN THIS CASE IS NO LONGER VALID.

Mine Hill first argues that the ALJ erred in determining that, based on the doctrines of laches and waiver, the Commissioner's 1981 Order is no longer valid. With respect to the doctrine of laches, it posits that, although the ALJ recognized that "laches is an equitable defense that may be asserted where neglect or omission to assert a right over a period of time causes prejudice to an essential party ([Initial Decision at] 18)," she erroneously concluded that the mere passage of time and change in the conditions of the parties were sufficient justification for interposing this particular defense. (Mine Hill's Exceptions at 3) Mine Hill cites *Allstate v. Howard Savings Inst.*, 127 *N.J. Super.* 479 (Ch. Div. 1974) for the proposition that an additional essential requisite to the application of this defense is a demonstration that the delay at issue resulted in prejudice to the other party. Definitive confirmation of the necessity of this additional element, Mine Hill claims, was provided in *Lavin v. Hackensack Board of Education*, 90 *N.J.* 145 (1982), wherein "the [Court made a] crucial statement [regarding] the lodestar determination to be made in this context: 'Inequity, more often than not, will turn on whether a party has been misled to his harm by the delay.'" (Mine Hill's Exceptions at 4, citing *Lavin* at 153) Noting that the ALJ, when determining that equitable estoppel was inapplicable in this matter, so found because Dover suffered no prejudice or detrimental change as a result of Mine Hill's conduct, Mine Hill contends that laches is inapplicable for the same reason. (*Ibid.*)

Mine Hill further argues that even assuming, *arguendo*, that a mere change in the parties' positions could serve to justify the invoking of laches, conditions here have not changed to such an extent so as to justify invalidation of the Commissioner's 1981 Order. Even accepting the validity of the conclusion that Dover's minority population would increase by 7.22% in 2003-04 with the withdrawal of Mine Hill's 7th and 8th graders, it asserts "this is precisely the impact which the Commissioner of Education considered and approved in his 1981 decision."

(Mine Hill's Exceptions at 4) Moreover, Mine Hill argues, it must have been clear at the time of the Commissioner's decision that the minority population of Dover was steadily increasing and, presumably, would continue to do so. Upon a careful review, Mine Hill asserts, the Commissioner then determined that an impact on the minority population should not preclude the withdrawal of Mine Hill's middle grades. It speculates that key to the Commissioner's 1981 decision was a recognition of the fact that this severance was atypical from those usually found in sending-receiving cases in that Mine Hill's high school students would continue to attend Dover High School, a consideration which it urges should continue to be recognized today. Consequently, Mine Hill advances, "the circumstances have not changed so dramatically from those considered in 1981 as to constitute a level of prejudice sufficient to justify imposing the equitable defense of laches." (Mine Hill's Exceptions at 5)

Mine Hill additionally takes exception to the ALJ's conclusion that its delay in satisfying the Commissioner's 1981 prerequisites was "inexcusable." (*Id.* at 6) In this regard it again contends, as noted below, that it made ongoing attempts and efforts to "follow up on the steps needed to implement the Commissioner's decision" but a critical precondition to definitive action was passage of a referendum to secure the necessary funds to construct additional facilities. (*Ibid.*) It advances that "[b]efore the District could expect to successfully accomplish this task it had to first pay down a good portion of the bonds issued after the 1986 referendum, and needed to await a favorable political climate for a new referendum." (Mine Hill's Exceptions at 8) Consequently, it asserts, since earlier action by the District was precluded by these constraints, good cause for the delay here has been demonstrated. (*Ibid.*)

Likewise, Mine Hill urges that the Commissioner reject the ALJ's conclusion that it intentionally waived its rights with regard to the exercise of the 1981 Order by continuing to

send its middle school pupils to Dover, entering a sending-receiving agreement, or establishing a committee in 1996 to investigate other options. Citing to *West Jersey Title & Guaranty Co. v. Industrial Trust Co.*, 27 *N.J.* 144, 152 (1958), Mine Hill maintains that it is well-established that "[w]aiver requires 'a clear, unequivocal, and decisive act of the party showing such a purpose or acts amounting to an estoppel on his part.'" (Mine Hill's Exceptions at 8) Mine Hill argues that its continuing to send its 7th and 8th graders to Dover in the absence of any viable option, its justifiable inability to fulfill the conditions set forth in the Commissioner's Order, or establishment of a committee to explore other potential options, mainly as they pertained to the high school student issues, cannot be construed as unequivocal acts manifesting an intent to relinquish its rights under the Order. (Mine Hill's Exceptions at 8) Rather, Mine Hill proffers, "[o]nly by formally moving to enter into a regional arrangement could Mine Hill be deemed to have waived its rights under the Commissioner's order." (*Ibid.*)

In response, Dover advances that the ALJ properly determined that the facts of this case warranted the application of laches. Dover points out that, contrary to the urging of Mine Hill, pursuant to *Lavin v. Hackensack Bd. of Educ.*, 90 *N.J.* 145 (1982), "laches is 'the neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done. More specifically, it is inexcusable delay in asserting a right.'" (Dover's Reply Exceptions at 1, citing *Lavin*, at 151) Dover urges that, in making a determination as to the applicability of laches, "courts should consider 'the length of the delay, reasons for the delay, and changing conditions of either or both parties.'" (*Ibid.*, citing *Lavin*, at 152) In that the central issue in such a determination is consideration of "whether it is inequitable to enforce the claim, 'the change in conditions or relations of the parties coupled with the passage of time becomes the primary determinant.'" (*Ibid.*, citing *Lavin* at 153) Prejudice or

change in position, Dover asserts, are essentially issues in estoppel and neither of these should operate to prevent the application of laches. In support of its position, Dover cites *Lavin.* at 152, specifically "holding that the length of the delay alone or combined with other elements may result in laches." (Dover's Reply Exceptions at 2) Here, Dover argues, Mine Hill was given permission to withdraw its 7th and 8th graders from its sending-receiving relationship with Dover upon satisfaction of three conditions. Today, almost 19 years after the Commissioner's Order in 1981, not only do the three prerequisites to withdrawal remain unsatisfied, but Mine Hill has not made any significant attempt to fulfill them, other than a single failed referendum in 1982, which failure, the ALJ correctly notes, "is attributable to the Board insofar as the actions of a school board and its citizens are intertwined." (Dover's Reply Exceptions at 1, citing the Initial Decision at 16-18, 20) Additionally, Dover asserts, conditions of the parties have significantly changed since the Commissioner's Order was entered in 1981. Specifically, there have been dramatic changes in the size and racial compositions of both districts; state requirements and test results have been modified; Dover has made changes in staffing, budgets, facilities and programs in order to facilitate the accommodation of Mine Hill students; and, finally, severance of the sending relationship is opposed by Dover here, which was not the case in 1981. (Dover's Reply Exceptions at 1-2)

Neither are Mine Hill's exception "excuses" for its failure, over a 19-year period, to satisfy the prerequisites specified in the Commissioner's 1981 Order justification for its "inaction and inability to adhere to the mandates of the order." (*Id.* at 2) Again, failure of its citizens to pass the 1982 referendum cannot be viewed as a valid excuse. Moreover, failure to successfully pass this one referendum does not explain or excuse Mine Hill's limitation of its 1986 referendum to the kindergarten through 6th grades or its failure to even attempt another

referendum until 1998. Interestingly, Dover argues, although Mine Hill blames high interest rates and the political climate for its failure to fulfill the prerequisites of the 1981 Order, two of these prerequisites totally unaffected by either interest rates or the political climate, also remain unsatisfied. (*Ibid.*)

In conclusion on this point, Dover advances:

> Mine Hill had the right to withdraw its students from Dover pursuant to the 1981 order provided that certain criterion were satisfied. Mine Hill waited seventeen years to assert its rights under this order when it filed this petition in 1998, and, almost 19 years later, the prerequisites set forth in the order still remain unfulfilled. This is exactly the type of inexcusable delay that mandates the application of the doctrine of laches. Mine Hill has been unable to assert one justifiable excuse as to why it failed to fulfill the criterion or to assert its rights. (*Id.* at 2-3)

Consequently, Dover urges the Commissioner to uphold the ALJ's conclusion that enforcement of the 1981 Order is barred by laches, as such order is "outdated and no longer valid." (*Id.* at 3, citing the Initial Decision at 21)

Dover next charges that Mine Hill has failed to advance any "credible arguments" to explain why the ALJ erred in concluding that the 1981 Order is barred by waiver. Clearly, it posits, Mine Hill's entering into a formal contractual sending-receiving relationship 12 years after the 1981 Order and its exploration of regionalization some 14 years subsequent to the entry of this Order amply evidence that it "voluntarily and intentionally relinquished the rights granted in the 1981 order." (Dover's Reply Exceptions at 4)

EXCEPTION II

THE INITIAL DECISION INCORRECTLY DETERMINED THAT N.J.S.A. 18A:38-13 IS DIRECTLY APPLICABLE TO THIS MATTER.

Mine Hill's advancements here are essentially a verbatim recitation of its post-hearing submission arguments presented to the ALJ, again urging that *N.J.S.A.* 18A:38-13 is by

its very terms applicable only to severance of high school sending-receiving relationships. Consequently, it proffers, adjustment of elementary sending-receiving relationships can be accomplished by the Commissioner through the exercise of his inferred and incidental powers which provides him more flexibility in granting the severance, in that he may recognize those factors favoring granting the request "unhindered by any limitations in the statute." (Mine Hill's Exceptions at 17)

Mine Hill additionally seeks to discredit the ALJ's reliance on the perceptions of various Department of Education officials that *N.J.S.A.* 18A:38-13 was, indeed, applicable in this instance. Such a determination, it states, can only be based on a reasoned analysis of the law, not on the actions or "perceptions" of these individuals. Mere assumptions as to the applicability of a particular statute do not render it applicable as a matter of law. (*Id.* at 19)

Dover, in response, states that, notwithstanding petitioner's contention that a less stringent standard should be applied to withdrawals at the elementary level, the ALJ correctly recognized that the Commissioner, State Board and the Appellate Division have made it clear that *N.J.S.A.* 18A:38-13 is, in fact, the applicable standard. *See Board of Education of the Township of Maurice River v. Board of Education of the Buena Regional School District,* 1982 *S.L.D.* 1270; *Board of Education of the Borough of Kinnelon v. Board of Education of the Borough of Riverdale*, decided by the State Board April 4, 1984, *aff'd* Docket #A-3857-83T2 (App. Div. February 8, 1985) (Dover's Reply Exceptions at 6) The rationale for such a conclusion, also recognized by the ALJ, is equally as clear, since the concerns raised by a withdrawal, *i.e.,* impact on educational quality, financial issues, and racial composition in the respective districts, are identical irrespective of the grade level at issue. (*Id.* at 7)

EXCEPTION III

THE INITIAL DECISION INCORRECTLY DETERMINED THAT RETURNING MIDDLE SCHOOL STUDENTS TO MINE HILL WILL HAVE A SUBSTANTIAL NEGATIVE IMPACT ON THE RACIAL COMPOSITION OF THE DISTRICTS.

Mine Hill begins by reiterating its advancement that because this matter is not a "high school" severance as contemplated by *N.J.S.A.* 18A:38-13, the Appellate Division's decision in *Englewood Cliffs, supra,* strictly applied here by the ALJ to find substantial negative racial impact, is inapplicable. Moreover, it theorizes, the instant case is atypical from any withdrawal case previously presented in that the issue involved here is one concerning impact on minority composition, primarily a national origin, Hispanic students, rather than race. Mine Hill argues that, although such minority impact may be relevant under some circumstances, there is no specific statute which requires its consideration here. Because Dover and Mine Hill had essentially identical percentages of black students in 1998-99, 6% and 5.2%, respectively, Mine Hill suggests "there is technically little or no racial impact whatsoever from a withdrawal of Mine Hill students." (Mine Hill's Exceptions, footnote at 20)

Further, even assuming, *arguendo*, that a finding of no substantial negative racial impact is requisite to granting this particular severance and that national origin minority impact is included in this categorization, Mine Hill proposes that the ALJ's conclusions in this regard be rejected by the Commissioner. Mine Hill challenges the ALJ's factual and credibility findings with respect to this issue, charging that these were a result of her discounting the testimony and evidence offered by its experts, while accepting as valid that submitted by Dover's experts without due consideration to the record as a whole and the unique aspects of this matter.[1] As

[1] Mine Hill's exceptions repeatedly attempt to categorize this matter as one unlike any other considered by the Commissioner in that: 1) this is the first elementary severance where racial impact has been raised as an issue; 2) because this is an elementary severance, *N.J.S.A.* 18A:38-13 and cases such as *Englewood Cliffs, supra,* are inapplicable; and 3) it is not an actual severance, *per se*, since Mine Hill will simply retain its elementary students

examples, it advances that the ALJ's determination that calculation errors in Dr. Savitt's feasibility study student enrollment projections were so egregious as to render all of his projections unreliable, leading her to dismiss them out of hand, was "an overreaction and is not justified." (Mine Hill's Exceptions at 21) Mine Hill proffers that its financial expert specifically testified that the error occurred at the lower grade levels and had no impact on enrollment figures for grades 6, 7, or 8. (Mine Hill's Exceptions at 20-21) Moreover, Mine Hill argues, the bottom-line differences between Dr. Savitt's calculations of the minority enrollment percentages for 2003-04 compared to 1998-99 and Dover's expert's, when utilizing Dr. Savitt's methodology, are so minimal as to be insignificant. Dr. Savitt found a 1% increase in the minority enrollment in grades 7 and 8 during this period, with the overall resultant minority percentage moving from 67% to 68%. Dover's expert

> shows the non-minority population dropping from 33% to 29%, while the minority population increases from 67% to 71%.***
>
> However, whether the impact is 1%, 4% or 7.22%, petitioner submits that, as the Commissioner acknowledged in 1981, under the circumstances of this case the minority impact should not trump Mine Hill's right to educate its own seventh and eight graders.*** (Mine Hill's Exceptions at 22)

Mine Hill also questions the ALJ's acceptance of the figures provided by Dover's experts, charging that these individuals used a six-year averaging period, rather than the generally accepted five-year period, specifically "to inflate the appearance of the potential minority impact of a severance." (*Id.* at 21) Moreover, it claims that the ALJ's conclusion that errors in Dover's report were merely errors in judgment neglects to recognize that "the record is replete with references to what were characterized as 'typographical errors,' especially in

---

for two additional years, with its high school students continuing to attend Dover High School. (Mine Hill's Exceptions at 23)

Dr. Iannacone's testimony." (*Ibid.*) Mine Hill further objects to the ALJ's acceptance of Dover's experts' theories that Dover students would feel "left behind" or "rejected" and would suffer from symbolic loss by Mine Hill's removal of its students. The experience of these experts in developing such theories, it proposes, was achieved in relation to high school severance cases and it does not automatically follow that such experience is relative or applicable at the middle school level. Moreover, because Mine Hill's students are not permanently leaving Dover but are, in fact, just going there two years later than they do now, such conclusions are obviated. (Mine Hill's Exceptions at 23-24)

Mine Hill "most strenuously" objects to the ALJ's conclusion that its minority students would experience isolation if severance were to be granted. (*Id.* at 27) It points to Exhibits P- 54, P-55 and P-63 as proof that the District is becoming more diverse, with its minority population currently at 23% and trending upward. (*Ibid.*) Mine Hill argues that the ALJ's conclusion that 7th and 8th grade minority students in its school would range between zero to three is belied by the District's demographic breakdown which indicates that the numbers of minority pupils will exceed this range. (*Id.* at 27-28) Also, when compared to all of Morris County, there would not be extraordinary imbalance in Mine Hill's middle school. It may well be that Mine Hill is less diverse than Dover, but "its student population is by no means homogeneous." (*Id.* at 28) Mine Hill cites *Board of Education of the City of Winfield v. Board of Education of the City of Rahway,* Commissioner's Decision of March 2, 2000, for the proposition that although severance from a diverse district in order to pursue a sending-receiving relationship with a non-diverse one would result in substantial negative impact, such would not be the case with a severance to attend a *less diverse* district. (*Ibid.*) Finally, Mine Hill charges that the ALJ discounted the testimony of its witness, Dr. Palestis, regarding the psychological

advantages of providing students an additional two years in their home district before transitioning them to Dover. (*Id.* at 24)

To the extent that the Initial Decision finds educational impact due to the withdrawal of Mine Hill students from Dover's most challenging classes or activities, Mine Hill proffers that there was no evidence introduced that any courses would have to be eliminated due to the loss of a modest number of Mine Hill students, arguing:

> Similarly, Dover does not explain why it could not have three sections of 22 or 23 students for its Grade 8 Level 1 classes, or three sections of 20 or 21 for Grade 7, nor is there any reason why the Honors Algebra class could not be maintained as two sections. No specifics are provided as to the alleged impact on special services, nor are we told whether the District, as would be likely given the near-capacity enrollment levels at the Middle School, is currently unable to place all of its existing special education population due to space limitations. There is also no explanation of how the loss of Mine Hill pupils would impact a Band program with 73 pupils, an Honor Society with 61 pupils, or the loss of six out of 26 Rogate participants. Clearly, these programs could continue to function. As to impact on sports teams, the only evidence presented pertained to girls' cross-country, and no other programs were cited. (*Id.* at 25)

As to negative impact in Mine Hill, it argues, "[e]ven assuming *arguendo* that Mine Hill may not be able to provide the range of academic and extracurricular opportunities that Dover does ([Initial Decision at] 40), this is not in itself dispositive." (*Ibid.*) It again cites *Winfield, supra,* this time for the proposition that "bigger is better" is not the measure of whether a district can offer a meaningful education. Mine Hill concludes its argument in this regard with a presentation of what it terms are numerous advantages of its proposed curriculum testified to by Dr. Palestis, some of which, it posits, were even acknowledged by the ALJ in her decision. (*Id.* at 25-27)

In response, Dover advances that it is well-established that the factual findings and credibility determinations of the ALJ, as the individual who had the opportunity to hear testimony firsthand and observe the demeanor of the witnesses, must be given great weight by the Commissioner. (Dover's Reply Exceptions, citations omitted, at 8) Even aside from this precept, Dover argues that it is obvious that the ALJ's findings and credibility assessments are more than well grounded in the record. In considering racial impact on Mine Hill, the ALJ's decision accorded no weight to the projection figures of Dr. Savitt not only because of significant calculation errors, but additionally because the underlying methodology he used to determine that severance would have no substantial negative impact was improper. Specifically, it avers:

> Dr. Savitt used the Cohort Survival Method to determine the overall impact of withdrawal on each individual racial category. ([Initial Decision at] 30) The Cohort Survival Method is an appropriate method to determine the projected *overall* student enrollment. ([Initial Decision at] 30) However, it is not a proper means of determining the potential of withdrawal on each *individual* racial classification. (emphasis in text) (Dover's Reply Exceptions at 8)

Also, Dover asserts, Mine Hill's contention that Dr. Savitt's calculation errors were limited to only the earliest years is not supported in the record. Even assuming, *arguendo*, that such was the case, the calculations of the early years are the foundation from which projections of future years are made and, as such, errors in the early-year calculations taint all subsequent projection figures. (*Id.* at 10) By comparison, Dover's experts painstakingly explained the process by which they arrived at their projection figures which found that the change in racial composition would fall between 7 and 8% in any of the measured years. (*Id.* at 9) Finally, Dover contests Mine Hill's advancement that Dover's experts, when using Dr. Savitt's methodology, calculated only a 4% impact as a consequence of withdrawal. Rather, it submits, Exhibit R-28 evidences

that its expert found a 6% impact when using this particular methodology as opposed to the 1% found by Dr. Savitt. (*Id.* at 10)

With respect to substantial negative educational impact, Dover proposes that the ALJ correctly found that "the established educational offerings at Dover Middle School are 'comprehensive, diverse and offer a broad spectrum of educational opportunity,' [while] Mine Hill's proposed program, on the other hand, is simply a proposal. ([Initial Decision at] 38)" (Dover's Reply Exceptions at 10) Dover charges that Mine Hill has failed to advance any compelling argument to refute the ALJ's finding of substantial negative educational impact but, instead, merely attacks her factual determinations in this regard.

EXCEPTION IV

THE ALJ ERRED IN DETERMINING THAT PETITIONER DID NOT PROVE IT WOULD INCUR NO SUBSTANTIAL NEGATIVE FINANCIAL IMPACT.

Although the ALJ correctly decided that severance would have no substantial negative financial impact on Dover, Mine Hill charges that she erroneously concluded that Mine Hill had failed to prove no substantial financial impact on that District because of the difference between the $600,000 cost of constructing the addition to its school for the 7th and 8th grades and the $800,000 requested for this purpose in the referendum. (Mine Hill's Exceptions at 30) It contends that hearing testimony establishes that the cost of construction remains $600,000. While the additional $200,000 requested in the referendum was intended for "contingent costs," this money could also be used to finance furniture or educational equipment. (*Ibid.*) Even if this additional $200,000 ended up being fully utilized, when amortized over a bond term of 20 years, it asserts that this cost would have an inconsequential effect on the financial calculations presented in the feasibility study. Moreover, Mine Hill claims that even if the eventual cost of the construction project did, under a worst case scenario, end up being $800,000, pursuant to the

recently enacted Educational Facilities Construction and Financing Act, *P.L.* 2000, *c.*72, Mine Hill anticipates that it would be eligible for State aid equaling 40 percent of this amount, thereby reducing actual cost to the District to $480,000, well below the $600,000 contained in the financial projections here. (*Ibid.*) Consequently, Mine Hill urges the Commissioner to find that no substantial negative financial impact would inure to Mine Hill as a result of severance.

In rejoinder, Dover proposes that the ALJ appropriately concluded that Mine Hill, which had the burden of persuasion to establish that there would be no substantial negative impact on Mine Hill from severance, had failed to meet its burden. In so determining, it argues, the ALJ properly weighed testimony of witnesses and decided that Mine Hill had "failed to adequately explain the disparity between the figure in the referendum and the lower figure in the feasibility study presented at the hearing. ([Initial Decision at] 40-41)." (Dover's Cross-Exeptions at 15) Dover posits that it is well-established that such credibility determinations are entitled to due deference by the Commissioner. (*Ibid.*) Dover also challenges Mine Hill's assertion that an increase of $200,000 to the cost of the renovation project, even when amortized over 20 years, would have a "negligible effect" on the financial impact to the District from severance. Not only is the record devoid of any evidence to support such a contention, it argues, common sense dictates that an increase of 33% to the cost of the project would inevitably produce a dramatic financial impact. (*Ibid.*) Finally, Dover objects to Mine Hill's advancement that, pursuant to the Educational Facilities Construction and Financing Act, it would receive state aid which would ameliorate any potential negative financial impact. Dover posits that this argument was raised for the first time in Mine Hill's exceptions and, therefore, because it was not addressed at hearing, is unsupported by evidence in the record, and the ALJ was not

afforded an opportunity to make factual findings as to its validity, it is unpersuasive and must be discounted here. (*Ibid.*)

EXCEPTION V

PETITIONER'S RIGHTS UNDER ARTICLE FOURTEEN OF THE FEDERAL CONSTITUTION HAVE BEEN DENIED BY THE DECISION OF THE ALJ WHICH RELIES UPON ETHNIC PROFILING TO DENY SEVERANCE OF THE MIDDLE SCHOOL SENDING-RECEIVING RELATIONSHIP; THE FACTS OF THIS CASE DO NOT SHOW THE EXISTENCE OF A COMPELLING STATE INTEREST OR A NARROWLY TAILORED REMEDY.

Mine Hill avers that in determining that the granting of severance in this matter would result in substantial negative impact on both Mine Hill and Dover, the ALJ so concluded based on factual findings relating to racial/ethnic factors; specifically, the minority population in Dover Middle School would increase while the white population would be reduced, the middle school population in Mine Hill would be imbalanced, there was risk of isolation of the projected small number of minorities in the proposed Mine Hill 7th and 8th grades, and there would be loss of peer role models. (Mine Hill's Exceptions at 32) In essence, it argues, the ALJ found that if severance were denied, racial/ethnic diversity would be furthered. (*Ibid.*) Mine Hill charges that the ALJ's decision in this regard "denies severance through application of a racial classification which denies the Petitioner and its Middle School students equal treatment under the United States Constitution***," in violation of the equal protection clause of Section 1 of the Fourteenth Amendment to the United States Constitution. (Mine Hill's Exceptions at 32, citing *Adarand Constructors, Inc. v. Pena*, 515 *U.S.* 200, 224 (1995))

Mine Hill asserts that any racial classification which subjects a person to unequal treatment must be justified under the strictest judicial scrutiny. (*Id.* at 33) This standard, it avers, requires that "a legislative enactment or administrative action must be both justified by a compelling government interest and narrowly tailored to serve that interest in order to stand."

(citations omitted) (*Ibid.*) Although cognizant of the Court's decision in *Englewood Cliffs Bd. of Educ. v. Englewood Bd. of Ed.*, 257 *N.J. Super.* 413 (App. Div. 1992), *aff'd. substantially on o.b.*, 132 *N.J.* 327 (1993), *cert. denied,* 510 *U.S.* 991 (1993), where the Court questioned whether strict scrutiny was the applicable standard, Mine Hill urges that the facts in this matter and the law as it has developed since *Englewood* dictate that the strict scrutiny standard of review is dictated here. (Mine Hill's Exceptions at 33) In support of this argument, Mine Hill cites to a number of recent federal affirmative action cases which involved the use of weighted lotteries for admission to schools or the setting aside of a certain number of seats for admission based on race or ethnicity in order to promote racial balance or diversity. Mine Hill argues that the Courts in these cases determined that such actions must be reviewed under the strict scrutiny standard of review and in application of this test found the policies unconstitutional because they represented mechanisms for racial balance which were not narrowly tailored to serve a compelling state interest. (Mine Hill's Exceptions at 33-38) Here, Mine Hill avers, its 7th and 8th grade students are being prevented from attending school in Mine Hill "because of the ethnic composition of its student body and that of Dover's, in order to promote ethnic balancing." (*Id.* at 38) It contends that there is no compelling state interest which justifies Dover continuing to retain the attendance of Mine Hill's middle school pupils in Dover's schools. As such, Mine Hill posits, failure to grant severance of this sending-receiving relationship deprives Mine Hill's students of their equal protection rights under the Fourteenth Amendment. (*Id.* at 39)

In response, Dover strongly urges that, procedurally, the Commissioner should not consider this argument, as it was neither raised at hearing or in post-hearing submissions nor is there any evidence whatsoever in the record with regard to this issue. (Dover's Reply Exceptions at 11) Assuming, *arguendo*, that Mine Hill's contention here is considered, Dover

contends that, substantively, it is preposterous. It points out that *N.J.S.A.* 18A:38-13, a valid state statute governing the severance of sending-receiving relationships, mandates that race be considered in determining whether withdrawal will be allowed. (*Ibid.*) Case law, Dover asserts, further solidifies that racial composition is an essential factor in determining whether withdrawal should be permitted. (*See Jenkins v. Morris Township School District,* 58 *N.J.* 483 (1971); *Englewood Cliffs, supra.)* Dover advances that Mine Hill's assertion that race should not be a consideration in assessing whether withdrawal should be allowed is essentially suggesting that a state statute is unconstitutional and requests that the Commissioner of Education strike it down, an action which is clearly outside the jurisdictional authority of the Commissioner. (Dover's Reply Exceptions at 12)

Dover further contends that Mine Hill's reliance on federal affirmative action cases to support its advancement here is misplaced as these cases are inapposite to this matter. Here, it contends, the ALJ does not classify anyone by race but, rather, follows the dictate of the statute and considers racial composition as one of the factors in determining whether withdrawal is permissible. (*Ibid.*) Moreover, Dover notes that the Appellate Division in *Englewood Cliffs, supra*, which was affirmed by the New Jersey Supreme Court, specifically held that "[i]t is only the *per se* use of race as a determinant which creates a classification subject to strict scrutiny under the Fourteenth Amendment...The United States Constitution does not prohibit states from taking race into account in educational decisions." (Dover's Reply Exceptions at 12, citing *Englewood Cliffs* at 468) Rather, Dover argues, the Court in *Englewood Cliffs* found that "if any classification is being created attendant to withdrawal, it is a geographical classification which does not rise to the level of strict scrutiny. *See id at 469****." (Dover's Reply Exceptions at 12) Consequently, Dover advances that Mine Hill's argument "that strict scrutiny should apply and

that considering race attendant to withdrawal violates the Equal Protection Clause is unsupported and contrary to the authorities on point." *(Ibid.)*

Dover further points out that Mine Hill incorrectly asserted that racial considerations were the only factor preventing withdrawal in this matter. In fact, Dover argues the Initial Decision additionally found that such withdrawal was precluded by substantial negative educational impact in both Districts and Mine Hill's failure to establish no substantial negative financial impact in that District. (Dover's Reply Exceptions at 12)

Finally, in this regard, even if strict scrutiny were applicable here, Dover maintains that standard would be satisfied in this matter. It cites to *Englewood Cliffs, supra,* wherein it claims that the Court noted that a desire to maintain a racial and ethnic balance in schools is a compelling state interest, and, considering the impact of withdrawal on the racial composition of the Districts, refusing to permit withdrawal is a narrowly tailored means of achieving this goal. (Dover's Reply Exceptions at 12-13, citing *Englewood Cliffs,* 257 *N.J. Super.* at 470-71)

Dover submits two cross-exceptions:

CROSS EXCEPTION I

THE ALJ OMITTED FINANCIAL IMPACT AS A REASON TO DENY SEVERANCE AND INCORRECTLY DETERMINED THAT THERE WOULD BE NO SUBSTANTIAL NEGATIVE FINANCIAL IMPACT ON DOVER CAUSED BY WITHDRAWAL

Dover charges that, although recognizing that *N.J.S.A.* 18A:38-13 requires that severance be denied if a substantial negative financial impact would inure to either or both Districts, and despite her valid finding that Mine Hill had failed to meet its burden of establishing that withdrawal would not have such a consequence in that District, the ALJ improperly neglected to conclude that severance was precluded for financial impact reasons as

well. (Dover's Cross-Exceptions at 14) Moreover, Dover strongly objects to the ALJ's conclusion that negative financial impact on Dover would not be substantial, arguing:

> As stated by Dover's financial expert and as recognized in the Initial Decision, the per capita income in Dover in 1996 was $15,185, as compared to the average income of $45,000 in Morris County, and the average gross family income was $30,000. ([Initial Decision at] 41). When state and federal income taxes, social security, medicare, and unemployment are deducted from these figures, the disposable income available to the average family in Dover is significantly less. Out of this net income, the average family needs to pay property taxes, averaging $4,451.00; food; mortgage; insurance; transportation; and the other obligations that come with running a family. In essence, simply by looking at the above-referenced figures in the record, the average family in Dover has very little expendable cash. (Dover's Cross-Exceptions at 14)

Notwithstanding that the ALJ's decision failed to resolve whether the annual cost to Dover citizens would be $74 as argued by Mine Hill or $152 as advanced by Dover's experts, even accepting, *arguendo*, the lower figure as accurate, this increase represents a significant financial impact for families earning an average gross income of $30,000 per year. (*Ibid.*) As such, Dover urges that the Commissioner add substantial financial impact to his reasons for denial of severance.

In response, Mine Hill proffers that a specific finding as to whether the impact of severance to the average Dover taxpayer would be $74 or $152 annually is inconsequential, as its expert found that the resulting difference equates to only $6.17 per month. (Mine Hill's Response to Dover's Cross-Exceptions at 2) Given that Dover offered "general conclusions," based on per capita and average family income data which was four years old, with respect to the taxpayers' ability to afford the projected increase, the ALJ rightly concluded that the evidence did not support a determination that the projected increase would pose an "incredibly difficult" financial burden for a significant number of the citizens. (*Ibid.*) More importantly, it argues:

> [T]he projections assumed that the full impact of the tuition loss would be passed on to the taxpayers. This need not be the case. Both parties' financial experts testified that it is not uncommon for a district, when faced with a loss of tax revenue such as occurs when a municipality reduces the levy amount following a budget defeat, to trim its expenditures accordingly. An alternative is to apply unappropriated free balance. Dover has been receiving increasing amounts of State financial assistance over the past several years and has consistently been running surpluses in excess of $1 million, even after expending $700,000 for various capital projects. While this surplus is within State guidelines, Dover could apply some of it to reduce the tax impact and apparently still have sufficient surplus for future years. (*Id.* at 2-3)

Citing the State Board's decision in *Board of Education of the Township of Cranbury v. Board of Education of the Township of Lawrence*, 1987 *S.L.D.* 2580 and *Washington Township Board of Education v. Upper Freehold Regional Board of Education et al.*, 1989 *S.L.D.* 2010, Mine Hill contends that mere negative financial impact is insufficient to preclude severance, and that such impact "on the receiving district must border on the catastrophic" to provide justification for denial on this basis. (*Id.* at 4) It contends that Dover has not established any "definite and tangible impact" other than the loss of tuition, or in any way shown that such loss would have a significant impact on its ability to maintain its educational programs. (*Ibid.*) Mere speculation about the effect of a moderate increase on its citizens cannot supplant this required showing.

CROSS-EXCEPTION II

THE ALJ IMPROPERLY REFUSED TO ORDER REGIONALIZATION, OR, AT THE VERY LEAST, A REGIONALIZATION STUDY

Dover claims the ALJ's decision not to order regionalization or a regionalization study is inconsistent with applicable law and public policy. Specifically, Dover proposes that the ALJ rejected regionalization, as she concluded, "it would not accomplish desegregation of

schools. ([Initial Decision at] 42)" (Dover's Cross-Exceptions at 16) It argues that, pursuant to *Englewood Cliffs, supra*, desegregation is not the sole justification for regionalization. Rather "regionalization may be permitted to implement the state's educational policies." (*Ibid.*) Dover notes that over the years, the Department of Education has encouraged districts to regionalize, even providing economic incentives to certain districts so inclined. Here, it advances, the obvious advantage to regionalization would be the elimination of unnecessary duplicative fiscal and administrative costs attendant to operating separate districts, allowing the savings to go where they are most beneficial – the districts' students. Dover proffers that it would be "difficult to imagine a better educational policy [within the intendment of the *Englewood Cliffs* Court] than creating additional funds to be used for students." (*Ibid.*) Consequently, Dover suggests, notwithstanding the ALJ's conclusion that regionalization would not end segregation, it should, nonetheless, be ordered, as it advances a legitimate educational policy. In the alternative, Dover opines that, at a minimum, a regionalization study, which the ALJ similarly rejected as insufficient to eliminate segregation in the schools, should be ordered to ascertain whether it is a viable option for the Districts and the extent to which it would further educational policy. (*Ibid.*)

In reply, Mine Hill counters that an order to regionalize by the Commissioner is not appropriate here. Prior to the State Board's decision in *Englewood Cliffs*, 1990 *S.L.D.* 1720, it posits that the Commissioner interpreted the Supreme Court's decision in *Jenkins, supra,* holding that he had the power to order cross-district regionalization, as confining such authority to instances where regionalization was of districts which were, in effect, a single community. In *Englewood Cliffs,* Mine Hill submits, the State Board ruled "that the 'one community' limitation would not prevent it from crossing district lines where it *has been demonstrated* that such a remedy was *necessary* to vindicate state constitutional rights and policies – in that case the

policy against segregation – where to do so was reasonable, feasible and workable. *Id.* at 1747." (emphasis in text) (Mine Hill's Reply to Cross-Exceptions at 5) Mine Hill asserts that, upon the State Board's review in *Englewood Cliffs*, it did not order regionalization, but ultimately upheld the Commissioner's recommendation that a regionalization study be accomplished. In upholding the Appellate Division's affirmance of the State Board's decision in *Englewood Cliffs*, including the directive for the conduct of a regionalization study, Mine Hill notes that the Supreme Court very clearly stressed:

> We neither express nor imply any position or opinion on the regionalization issue itself, and specifically emphasize that our affirmance of the authority of the State Board of Education to undertake such a regionalization study must not be taken to express or imply any view of the Court on the administrative or judicial power to require inter-district regionalization. 132 *N.J.* 327, 329 (1993). (Mine Hill's Reply to Cross-Exceptions at 5-6)

Consequently, Mine Hill argues that if, indeed, power exists to order inter-district regionalization, it is abundantly apparent that such authority could only be acted upon "in order to vindicate constitutional rights and policies." (*Id.* at 6) Here, it proposes, Dover has not brought any evidence to the record indicating a violation of any policy or right. Neither has it established that regionalization is "feasible or workable," nor does the record support its assertion that students would serve to benefit from any additional funds. (*Ibid.*) In requesting that the Commissioner order regionalization, Mine Hill submits, Dover had the burden of specifically identifying a constitutional violation and to demonstrate how such violation would be remedied by regionalization, a burden which it has unmistakably failed to satisfy. (*Ibid.*)

As to Dover's request that a regionalization study be directed, Mine Hill advances that Dover has presented no demonstration of what such a study, involving only these two Districts, could accomplish. Mine Hill claims that it has previously investigated regionalization

and concluded that such an undertaking would have to be on a much broader scale than only with Dover to effectively address outstanding issues. (*Id.* at 7) In that Dover has not made any credible showing sufficient to justify the expense of a regionalization study for the parties and the State, Mine Hill urges the Commissioner to adopt the ALJ's conclusion in this regard.

COMMISSIONER'S DETERMINATION

Upon independent review and consideration of the full record in this matter, which includes transcripts of the ten days of hearing conducted at the OAL,[2] the Commissioner determines to affirm the ALJ's recommended decision with modification as detailed below.

1981 ORDER

Initially, the Commissioner is in full agreement with the ALJ that enforcement of the May 29, 1981 Order of the then-Commissioner granting Mine Hill's request to withdraw its 7th and 8th grade students from Dover is no longer valid. The Commissioner concurs with the ALJ's cogently presented analysis (Initial Decision at 15-24) leading her to the conclusion that, pursuant to the doctrine of laches (*Lavin, supra*), the lengthy passage of time, in combination with the changing conditions of the parties that occurred in this matter, justifies barring the enforcement of the Commissioner's 1981 Order.[3] [4] The Commissioner similarly agrees that

[2] Hearing dates were December 7, 8, 15, 16, 21, 22, and 29, 1999, January 11, and 31, 2000 and February 28, 2000.

[3] Notwithstanding Mine Hill's exceptions to the contrary, "[i]t is because the central issue [in determining the applicability of laches] is whether it is inequitable to permit the claim to be enforced, that generally the change in conditions or relations of the parties coupled with the passage of time becomes the primary determinant." *Lavin* at 152, 153.

[4] The Commissioner is compelled to comment on Mine Hill's exception argument here which attempts to place untoward significance on a claim that the projected increase in minority enrollment of 7.2% here is essentially the same as that projected in the matter approved by the Commissioner in 1981, thus, evidencing that conditions have not appreciably changed during this interim period. Such argument not only fails to recognize the circumstantial differences in this matter as opposed to those existing at the time of the 1981 Order, as detailed in the ALJ's decision, but additionally neglects to reflect the impact of the modification of the governing statute and the evolution, clarification and refinement of educational law and policy which has developed through decisions of the Commissioner, State Board and the Courts in this area during this interim period. Consequently, merely equating percentage changes in minority composition present in 1981 to those claimed to exist at this time, absent full review

Mine Hill took affirmative action during this period which expressly, or at the very least inferentially, reasonably demonstrated an intent to relinquish its rights under the 1981 Order.

APPLICABLE STANDARD

The Commissioner next determines that the provisions of *N.J.S.A.* 18A:38-13 are applicable in this matter, but for the reasons detailed below rather than those contained in the Initial Decision. He first recognizes that *N.J.S.A.* 18A:38-13, on its face, indicates that provision's application to those instances involving "changes of designation or allocation and apportionment of pupils to *high schools,*" leaving applicability at any other grade level unaddressed. (emphasis supplied) The Commissioner believes that such language, or absence thereof, does not reflect a purposeful intent of the Legislature to omit or exempt elementary level relationships from the statutes's dictates but, rather, is reflective of the fact that sending/receiving relationships at the elementary level are relatively rare in this State and, as such, their existence was most likely never contemplated when the statute was being drafted.

Notwithstanding, it can be argued that, due to the absence of specific applicability language, this particular provision, in and of itself, may not be read to encompass situations involving severance requests of elementary level relationships. Nonetheless, as Mine Hill's exceptions correctly recognize, the Commissioner most assuredly possesses the responsibility and authority, pursuant to his broad inferred and implied powers (*See Jenkins, supra,* 58 *N.J.*

---

and consideration of all attendant circumstances at both points in time, is a meaningless exercise. As just one example of circumstantial differences, Dover's Post-hearing Brief claims that the district is extraordinarily different from what it was in 1981:

> Exhibit R-23 shows the racial breakdown of Dover students in that year. The document reflects that the combined seventh and eighth grade population was fifty-five percent (55%) white and forty-five percent (45%) minority. In comparison, by 1998-99, the student population had shifted to thirty-two and one half percent (32.5%) white and sixty-seven and one half percent (67.5%) minority. This is a change of twenty-two and one half percent (22.5%). Dover went from a slight majority of white students to a significant majority of non-white students. (Dover's Post-hearing Brief at 46)

at 483) to determine whether and under what conditions elementary level sending-receiving severance can be granted. *Board of Education of the Borough of Kinnelon v. Board of Education of the Borough of Riverdale, Morris Co.*, decided by the State Board April 4, 1984, *aff'd* Appellate Division #A-3857-83T2.

In his consideration of a standard under which these particular matters should be examined, the Commissioner specifically rejects Mine Hill's suggestion that elementary level severance requests should be reviewed on some less restrictive standard than that required for all other severance request matters. Sound educational policy militates against such an approach, as the Commissioner firmly believes that, as was aptly recognized by the ALJ, "[t]he concerns raised by the withdrawal of a district from a sending-receiving relationship are the same at all grade levels." (Initial Decision at 27) Consequently, the only rational approach to deciding identical, important educational issues is to impose uniform standards, irrespective of the grade level involved and, therefore, the Commissioner directs that the requirements contained in *N.J.S.A.* 18A:38-13 are applicable here. Even absent the Commissioner's adoption of this standard, the record establishes that Mine Hill's own actions confirm that it voluntarily subjected itself to the terms of *N.J.S.A.* 18A:38-13 in this matter. The formal written contract which Mine Hill executed with Dover in 1993 in pertinent part specifies:

> WHEREAS, Mine Hill desires to send its middle and senior high school pupils, grades 7 through 12, to Dover Middle and High Schools and to designate Dover Middle and High Schools as the schools for attendance of Mine Hill Township pupils pursuant to the provisions of *N.J.S.A.* 18A:38-11 *et seq.* and in accordance with the terms set forth herein; and
>
> [T]he parties desire to enter into this agreement to create a "sending-receiving" relationship pursuant to the provisions of *N.J.S.A.* 18A:38-11 *et. seq.*
> (Initial Decision at 22, quoting from Exhibit P-23 at 1)

Mine Hill's contention with respect to the inapplicability of *N.J.S.A.* 18A:38-13 in the instant case, because this matter deals with elementary rather than high school grades, and its claims that this is not a "true" severance since Mine Hill will just retain its elementary students for two additional years, with its high school students continuing to attend Dover High School, are wholly without merit. Mine Hill entered a sending-receiving agreement which included 7th and 8th grade middle school students pursuant to a statute which, by its terms, also confines its authorization to the "high school" level. By entering the contract pursuant to *N.J.S.A.* 18A:38-11 and adopting it as the operative law for the agreement, Mine Hill implicitly recognized and accepted that *any* alteration of such agreement was subject to the terms of *N.J.S.A.* 18A:38-13.

EQUAL PROTECTION ARGUMENT

As to Mine Hill's exception argument that, in considering race attendant to determining whether to grant withdrawal, the ALJ violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the Commissioner finds that even if this argument were validly before him, *i.e.*, having been briefed and argued below, rather than having been raised for the first time in Mine Hill's exceptions in violation of *N.J.A.C.* 1:1-18.4, he concurs with Dover's reply exceptions here that such an assertion is without merit. As advanced by Dover in this regard, an examination of racial impact is mandated by a valid legislative statutory enactment governing the alteration of sending-receiving relationships, negation or modification of which is outside the jurisdictional purview of the Commissioner of Education. Moreover, as Mine Hill's exceptions here obviously recognize, the Fourteenth Amendment Equal Protection claim, as it pertains to sending-receiving severance matters, was previously addressed and resolved by the Court in *Englewood Cliffs, supra*, wherein it concluded, after an exhaustive review, that such a charge was not viable. Mine Hill has not

introduced any relevant case law, credible facts or evidence which would serve to alter or obviate application of the *Englewood Cliffs* Court's reasoned resolution of this particular issue to the instant matter. Indeed, the Commissioner finds the Court's observation in that matter equally fitting here:

> invocation of the Fourteenth Amendment here turns that constitutional provision "on its head." The Fourteenth Amendment and its New Jersey counterpart are meant to shield our citizens against state sanctioned racial discrimination. To suggest that they prohibit a state from applying a statute, specifically addressed to remedying the educationally pernicious evils of white flight, racial imbalance and *de facto* segregation in the schools is, at best, cynical. (*Englewood Cliffs, supra*, 257 *N.J. Super.* at 473)

SUBSTANTIAL NEGATIVE IMPACT

The Commissioner next turns to the statutorily mandated considerations attendant to determining whether the requested severance can be granted.

In considering Dover's exception request for a finding of significant financial impact in connection with the requested severance, the Commissioner concludes that such a finding is not possible based on the record before him. Dover first justifies its request by virtue of the ALJ's finding, on Page 41 of her Initial Decision, that Mine Hill had not demonstrated that there will be no negative financial impact on that District. The Commissioner observes that the ALJ apparently had two reasons for arriving at such a finding. First, she had previously concluded that Mine Hill's projections of enrollment contained in its Feasibility Study, Exhibit P-2 and Updated Feasibility Study, Exhibit P-3, which it employed to project financial implications attendant to severance, were flawed and unreliable and she, thus, ascribed no weight to them. (Initial Decision at 30-31) A second reason advanced for her finding was that Mine Hill had not adequately explained the discrepancy between its feasibility study assertion that the cost

of making the necessary construction modifications to the Canfield Avenue School to allow accommodation of its 7th and 8th graders was $600,000, while the monetary amount sought in its referendum for this purpose was $800,000. (Initial Decision at 40-41) Dover urges that, based on the ALJ's finding, Mine Hill, which had the burden of persuasion in this regard, failed to sustain its burden and, therefore, severance must be denied for financial impact reasons. The Commissioner observes that both the Initial Decision and Dover's arguments reflect confusion as to the proper allocation of the burden of proof in sending-receiving severance request cases. Particularly instructive in this regard is the State Board's clarification of this issue in *Board of Education of the Borough of Merchantville, Camden County v. Board of Education of the Township of Pennsauken, Camden County v. Board of Education of the Borough of Haddonfield, Camden County*, State Board of Education Decision on Motion, decided on September 5, 1990, wherein, in pertinent part, it found:

> [A]lthough the ultimate burden of persuasion is on the party seeking termination, that party is not required to prove that no substantial negative impact will result from termination as part of its case in chief.
> ***
> [W]e find that the initial burden of production on the petitioning party may be met by production of a feasibility study as required by the statute and the submission of appropriate proofs as to where its children are to be educated upon severance of the sending-receiving relationship. *See Absecon Bd. of Ed. v. Pleasantville Bd. of Ed.*, decided by the State Board of Education, October 7, 1988. Obviously, the feasibility study must address, at a minimum, all of the areas specifically set forth in the statute, and petitioner must establish in the proceedings the factual basis underlying the study so as to withstand challenge by the party contesting termination. Once the petitioning board has met its initial burden of production, the burden shifts to the party contesting termination to go forward with evidence that termination will result in a negative impact.***
> ***
> The allocation of the burden of production delineated above does not shift the ultimate burden of persuading the Commissioner that termination is mandated or warranted. That burden remains on the

> petitioning party. However, where a petitioner has met its initial burden of production in proceedings under *N.J.S.A.* 18A:[38]-13, ***the claim by the respondent that termination will have a substantial negative impact is in the nature of an affirmative defense. Thus, it is appropriate that the party asserting that claim bear the burden of showing that a negative impact outweighing any positive benefits of termination will result. (Slip Opinion at 2, 5-6)

Here, the Commissioner's review persuades him that Mine Hill has fulfilled its burden of production, within the intendment of the State Board's directive in this regard, notwithstanding certain technical mathematical miscalculations in its projections of student enrollment contained in its feasibility studies. On the other hand, the record is devoid of competent, credible evidence to substantiate the allegations and apparent speculations of Dover that substantial negative financial impact will ensue in Mine Hill from the granting of severance. Thus, the Commissioner concludes that Dover has failed to meet *its* burden in this regard.

Dover's second reason for requesting a finding of significant negative financial impact here, *i.e.*, that the ALJ incorrectly determined that such a resultant condition was not established for Dover, must, likewise, be rejected for Dover's failure to satisfy its evidentiary burden. Dover's arguments and advanced proofs in this regard are solely confined to the tax increase consequences severance would visit on what it takes great pains to portray as an already economically distressed citizenry. The State Board, however, has made it clear that mere loss of tuition revenue and the impact of such loss on taxes for a district's citizens is simply insufficient, in and of itself, to support a claim of significant financial impact. *See Board of Education of the Township of Cranbury v. Board of Education of the Township of Lawrence*, 1987 *S.L.D.* 2580. Here, Dover has made no demonstration that loss of Mine Hill tuition revenue would impair the district's ability to provide its students with a thorough and efficient education, frustrate the fulfillment of its educational goals and objectives, or result in any other definite, tangible

negative consequence for the District. (*Cranbury, supra*) As such, Dover has failed to satisfy its requisite burden of proof necessary to compel a finding of significant financial impact.

Turning to examination of racial impact, the Commissioner's thorough review of the record, together with his consideration of all the circumstances of this case, compels him to agree with the ALJ that Mine Hill's request for severance must be denied because of the substantial negative racial and concomitant educational quality impacts that would result if termination were approved.

Preliminarily, the Commissioner is compelled to comment on Mine Hill's exception argument which attempts to "technically" move this matter outside the prescriptions of *N.J.S.A.* 18A:38-13 because the issue involved here is "minority" composition, specifically, Hispanic students, rather than "race" as expressly addressed in the statute. Such a distinction is fallacious and finds no support in either the logical intendment of the statute or subsequent decisions of the Commissioner, State Board and the Courts interpreting this statutory provision. It is axiomatic that New Jersey's strong policy advancing equal educational opportunity and decrying discrimination and segregation in its public schools is constitutionally derived. As noted by the Supreme Court in *Booker v. Board of Education of the City of Plainfield*, 45 *N.J.* 161, 174 (1965), "*Article* 1, *paragraph* 5 of the 1947 *Constitution* ***provides that '[n]o person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, ***nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin.'" It is fully evident that in developing laws and policies effectuating this constitutional directive, use of the particular nomenclature "racial" by the Legislature, the Courts, the State Board or the Commissioner is a rubric term which must be interpreted consistent with the dictates of the Constitution, as

encompassing *all* protected "minority groups." To accept Mine Hill's restrictive interpretation would be tantamount to suggesting that there is a State interest in safeguarding the rights of only one of the constitutionally enumerated groups at the expense of the others.

The Commissioner next finds and determines that he ascertains no cause to question or disturb the ALJ's factual findings and conclusions in this regard as it is fully evident that these are well grounded in the record. It is likewise evident that the record provides no cause to challenge the weight ascribed to the evidence or credibility assessments made by the ALJ. Moreover, contrary to the protestations of Mine Hill, the Commissioner finds the ALJ's application of the precepts of the Appellate Division in *Englewood Cliffs* with respect to racial impact and educational quality fully appropriate, since guidance gleaned from that decision is directly relevant to understanding why severance must be denied here.

The Commissioner accepts the legitimacy of the ALJ's finding on page 32 of the Initial Decision that permitting severance in this matter would result in an actual change in racial composition in Dover's Middle School of between 7 and 8% in any given year of the study here.[5] [6] (See Exhibits R-8 (page 50), R-25, R-26 and R-27.) Also particularly disconcerting are the projections of the effect severance would have on the student racial composition of both districts. Specifically, the student population of the proposed Mine Hill Middle School is projected to be 84.3 % White, with the remaining 15.7 % distributed as follows: 7.9 %Hispanic, 4.5 % Asian and 3.3 % Black. (Initial Decision at 32) In sharp contrast, the projected student

[5] It is noted that in two places in the second full paragraph on page 32 of the Initial Decision, at line 1 and line 3, there are typographical errors which refer to a "decrease" in minority pupils which should be corrected to read "increase."

[6] As an example, the Commissioner notes that the 1999-2000 enrollment of Mine Hill 7th and 8th grade students in Dover indicates that the total number of Mine Hill students in these grades was 51, of which 40 were white and 11 were minority. (Exhibit R-24) If withdrawal had occurred in that year, the percentage of minority enrollment remaining in Dover would have increased from 73% to 81%. (Exhibit R-25)

population of Dover Middle School would be predominantly minority (more than 72%), broken down as follows: 59.5 % Hispanic, 10.2 % Black, and 2.8 % Asian. (See R-8, page 46; Initial Decision at 32-33.) Although, as recognized by the State Board, "there [is] no fixed balance between racial and national origin groupings that, from an educational perspective, can be considered ideal for all communities," s*ee Englewood Cliffs, supra,* at 448, the Commissioner concludes that the changes in minority composition which would inure from severance here cannot be termed insignificant from either a statistical or an educational viewpoint. Rather, it is quite evident that permitting severance here would, at a minimum, serve to exacerbate disparity in the national origin/minority groupings in Dover's student population. Similarly, the Commissioner adopts as valid the ALJ's observations at pages 33-34 of her decision with regard to the substantial negative "symbolic loss" impact that removal would have on the quality of education at both Dover and Mine Hill. The Appellate Division in *Englewood Cliffs* recognized that the concepts of racial composition and quality of education are inherently "intertwined," stating "[t]hese are not isolated factors. They are different sides of the same coin." (at 464) Further explication of the interrelationship of these factors was provided by the State Board when it clarified that:

> [E]ducational considerations are primary in eliminating school segregation. The elimination of racial imbalance is not to be sought as an end in itself but because such imbalance stands as a deterrent and handicap to the improvement of education for all. *Englewood* at 449, quoting from New Jersey State Board of Education, A statement of Educational Policy, November 5, 1969.

Consequently, the Commissioner, as did the ALJ, finds that, "based on the foregoing, particularly the increase in the minority population to over 72 percent with the concomitant reduction in White population at Dover Middle School, the extraordinary imbalance of the resulting middle school population in Mine Hill, the risk of isolation to the small number of each

of the different minorities in the projected Mine Hill Middle School, and the loss of peer role models that the granting of severance will have a substantial negative impact on the racial composition of and educational [quality] available in both districts." (Initial Decision at 40)

Finally, turning to Mine Hill's advancement that, notwithstanding that racial balance and diversity are important considerations, nonetheless, these must be balanced against the District's basic right to educate its own students and, under the circumstances of this case, permit severance for this purpose. This particular argument was specifically rejected by the Appellate Division in *Englewood Cliffs, supra*, wherein it found:

> [L]ike parental choice, home rule and local control must yield to the fulfillment of the educational and racial policies in the constitution and statutes of this State. at 477.

Notwithstanding the Commissioner's concurrence with the ALJ regarding the existence of substantial negative racial and educational quality impacts in this matter, he does not similarly support the ALJ's conclusion that the record sustains a finding of significant negative impact with respect to educational *programming*. The Commissioner observes that neither *N.J.S.A.* 18A:38-13 nor applicable case law contemplates an examination of the type of education Mine Hill students would receive at the Canfield Avenue School vis-à-vis what they are presently receiving in Dover, with Mine Hill having to establish that it will provide a superior program. In other words, the question here is not a program comparison to decide which one is better for Mine Hill students. Rather, the focus must be on potential negative impact if Mine Hill is allowed to withdraw from its long-term relationship. Bearing in mind the proper allocation of the burden of proof in these matters (see previous discussion under financial impact), the Commissioner finds that Dover has not sustained its burden. As recognized by the ALJ, Mine

Hill's proposed curriculum (see Exhibit P-5) "incorporates, but goes well beyond, the State core curriculum requirements." (Initial Decision at 36)

Specifically:

> Each course includes a brief section composed of the title, grade level, minutes of instruction per week, and number of weeks the course is taught per year. These are followed by detailed sections explaining the course description/philosophy; course outline; course objectives (including core curriculum standards and cross-content workplace readiness skills); methods of instruction to be employed; assessment/evaluation of pupil progress; instructional materials used; technology support and infusion; community support, partnerships and resources; parent support and involvement; and support for students with diverse needs. The core courses are followed by electives, which are enrichment or exploratory courses to augment the core curriculum.
>
> With respect to extracurricular activities, Mine Hill anticipates extending and expanding the activities of the elementary school, such as intramural sports, school newspaper and literary magazine, yearbook, talent show, school play and clubs into the middle school.*** (*Id.* at 36-37)

The Commissioner notes that it is not surprising that a proposal for the creation of a new middle school would have some problems or "gaps," but it is expected that these would be eliminated through refinement and improvement as the proposal was implemented. Consequently, his review persuades him that Mine Hill's advancement here satisfies its burden of production on this issue and, therefore, it became incumbent on Dover to affirmatively demonstrate substantial negative educational impact in Mine Hill, a burden which is not satisfied by the mere introduction of speculative observations, *i.e.*, the proposal has gaps and may be overly ambitious or the questioning of Mine Hill's ability to fully deliver what it proposes, its ability to attract and hire experienced teachers, or its ability to achieve co-curricular cooperation with Dover or another district. In considering potential impact in Dover, Mine Hill's proffered

advancements indicate that the removal of the relatively small number of its students involved here could have no consequential effect on Dover's ability to provide its students with a thorough and efficient education. Dover, in this regard, has failed to bring forward any evidentiary demonstration that its educational offerings would be negatively impacted by severance but, rather, offers only conjecture as to the general *possibility* of loss of program opportunity or restrictions of some programs. As such, the Commissioner finds and determines that Mine Hill's requested severance could not be denied on the basis of substantial negative program impacts in either district as none have been established by Dover.

REGIONALIZATION ORDER/STUDY

Finally, the Commissioner agrees with the ALJ that the within record fails to advance a sufficient presentation of facts or evidence to support a conclusion that there is a need for either directed regionalization, or the ordering of a regionalization feasibility study and, Therefore, Dover's requests in this regard must be denied.[7] [8]

CONCLUSION

Accordingly, the recommended decision of the OAL is affirmed, as modified above. Mine Hill's request for severance of its sending-receiving relationship with respect to its

[7] In addition, the Commissioner notes that Dover's request for regionalization was made in the demand for relief in its answer to the petition. Because this request was not made in a petition or cross-petition, it is not properly before the Commissioner for adjudication even if Dover had presented necessary facts and evidence to support such a request.

[8] The Commissioner declines to reach Mine Hill's exception advancement with respect to whether or under what conditions the Commissioner, State Board or the courts may order inter-district regionalization as such a discussion, in light of his within determination here, is unnecessary to the resolution of the instant matter.

7th and 8th grade middle school students is hereby denied in that such severance would result in substantial negative racial and educational quality impact.

IT IS SO ORDERED.[9]

COMMISSIONER OF EDUCATION

Date of Decision: 2/15/01

Date of Mailing: 2/15/01

[9] 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.

58-01

EDU #1147-99
C # 58-01
SB # 12-01

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

Decided by the Commissioner of Education, February 15, 2001

For the Petitioner-Appellant, Schwartz, Simon, Edelstein, Celso & Kessler, L.L.P. (Paul H. Green, Esq., of Counsel)

For the Respondent-Respondent, Sills, Cummis, Radin, Tischman, Epstein & Gross (Lester Aron, Esq., of Counsel)

This is an appeal from a determination of the Commissioner of Education which adopted the initial decision of the Administrative Law Judge ("ALJ") with modification and denied the request of the Board of Education of the Township of Mine Hill (hereinafter "Mine Hill") to withdraw its 7th and 8th grade middle school students from the Dover School District, where they had been attending school since 1963. The ALJ had determined that the doctrine of laches and waiver barred the application of an order issued by the Commissioner in 1981 that would have permitted withdrawal had the Mine

Hill Board met certain conditions. The ALJ further found that N.J.S.A. 18A:38-13 provided the applicable standard for deciding the matter, but concluded that, under that standard, Mine Hill had failed to meet its burden of proving that withdrawal would not have a substantial negative educational, financial or racial impact on the affected districts. The ALJ also rejected Dover's request for K-12 regionalization or a regionalization study on the grounds that the Dover School District would not be desegregated by such regionalization.

The Commissioner adopted the ALJ's determination that the Commissioner's 1981 order was not enforceable. While recognizing that N.J.S.A. 18A:38-13 by its terms applied only to sending-receiving relationships at the high school level, he found that the language of the statute "[did] not reflect a purposeful intent by the Legislature to omit elementary level relationships from the statute's dictates." Commissioner's Decision, slip op. at 73. Invoking his implied powers and relying on the State Board's decision in Board of Education of the Borough of Kinnelon v. Board of Education of the Borough of Riverdale, decided by the State Board of Education, April 4, 1984, aff'd, Docket #A-3857-83T2 (App. Div. 1985), the Commissioner directed that the requirements of N.J.S.A. 18A:38-13 were applicable. Under that standard, the Commissioner found that, although Dover had not established that there would be a substantial negative financial impact or a substantial negative impact on the educational programming of either district if withdrawal were permitted, there would be a substantial negative impact on the racial balance and the quality of education in both districts. Hence, the Commissioner adopted the ALJ's conclusion that Mine Hill should not be granted

permission to withdraw its 7th and 8th grade students from Dover. Similarly, he agreed that Dover's request for regionalization should be denied.

Mine Hill appealed, contending that the Commissioner's 1981 order is valid and enforceable. It further contends that the requirements of N.J.S.A. 18A:38-13 should not be strictly applied to sending-receiving relationships at the elementary level and that withdrawal of its 7th and 8th grade students would not result in a negative racial impact sufficient to override its right to educate its own students. Mine Hill also argues that the Commissioner's determination denies its rights under the Fourteenth Amendment of the United States Constitution because it is based on a racial classification.

We agree with the ALJ and the Commissioner that the Commissioner's 1981 order is not enforceable and, for the reasons expressed in their decisions, we affirm the Commissioner's determination of that issue. However, for the reasons that follow, we reverse the Commissioner's determination that the requirements of N.J.S.A. 18A:38-13 are applicable to sending-receiving relationships at the elementary level, and we remand the matter to him in order that he may review the matter under the appropriate standard.

As the Commissioner recognized, N.J.S.A. 18A:38-13, by its express terms, applies only to sending-receiving relationships at the high school level. Under the statutory scheme, a district board that does not have high school facilities must designate a high school outside the district for its students. Specifically, N.J.S.A. 18A:38-11 provides that:

> The board of education of every high school district which lacks high school facilities within the district and has not designated a high school or high schools outside of the district for its high school pupils to attend shall designate a

> high school or high schools of this state for the attendance of such pupils.

N.J.S.A. 18A:38-13 provides in pertinent part that:

> No such designation of a high school or high schools and no such allocation or apportionment of pupils thereto, heretofore or hereafter made pursuant to law shall be changed or withdrawn, nor shall a district having such a designated high school refuse to continue to receive high school pupils from such sending district except upon application made to and approved by the commissioner....

Similarly, N.J.S.A. 18A:38-13.1 (students permitted to complete secondary education in receiving district subsequent to severance after five year period), N.J.S.A. 18A:38-15 (attendance at special high school courses in another district), N.J.S.A. 18A:38-16 (attendance at evening high school in another district) specify by their terms that they apply to the high school level. In contrast, N.J.S.A. 18A:38-8, which authorizes district boards having necessary accommodations to receive students from other districts that do not have sufficient accommodations and provides that they may be required to do so by order of the State Board, does not include any such limitation. See also N.J.S.A. 18A:38-8.1 and N.J.S.A. 18A:38-8.2 (representation of sending district on board of receiving district). Likewise, N.J.S.A. 18A:38-19 concerns tuition for students of "any school district" and N.J.S.A. 18A:38-20 relates to the term of agreements where district boards "furnishing elementary and high school education" to students of another district provide additional facilities. See also N.J.S.A. 18A:38-21 (termination of such agreements). Finally, N.J.S.A. 18A:38-21.1, which provides for termination of sending-receiving relationships under specified conditions, applies to "any board of education which sends students to another school district."

Given that the express terms of N.J.S.A. 18A:38-13 are clear and unambiguous, we must follow them. Further, any doubt as to the intent of the Legislature in enacting this statute is eliminated by consideration of the Statement of the Senate Education Committee which accompanied the bill that amended the statute at issue in 1986. In its Statement, the Senate Education Committee stressed that:

> ...this bill only applies to sending-receiving relationships at the high school level.

Senate Education Committee Statement to Assembly Bill 2072, October 2, 1986. (Emphasis added.)

The Committee then added that:

> Currently there are 83 districts in the State which receive pupils from 147 sending districts. Of these, 15 send pupils for all grades and a handful send pupils for grades 7-9. Most of the relationships are for high school pupils in grades 9-12. A sizeable majority of these sending districts are located in the shore area.

Id.

Hence, both the express terms of the statute and the legislative history clearly indicate the Legislature's intent that N.J.S.A. 18A:38-13 apply only to sending-receiving relationships at the high school level. Further, the Committee Statement clearly indicates that the Legislature was well aware of the fact that not all sending-receiving relationships were at the high school level when it determined that N.J.S.A. 18A:38-13 would continue to apply only to those relationships at the high school level.

Nor does our decision in Board of Education of the Borough of Kinnelon v. Board of Education of the Borough of Riverdale, supra, provide a basis for applying the standards of N.J.S.A. 18A:38-13 to sending-receiving relationships at the elementary level. In Kinnelon, Riverdale had been sending its students in grades 7 through 12 to

Kinnelon High School. However, when Kinnelon constructed a new middle school, Riverdale's 7th and 8th grade students were housed in the new middle school along with Kinnelon's 7th and 8th grade students. Riverdale then determined to withdraw its 7th and 8th grade students from Kinnelon's middle school and to educate them in its own school. Kinnelon sought a declaratory judgment from the Commissioner as to the applicability of several statutes, including N.J.S.A. 18A:38-13. The Commissioner found that N.J.S.A. 18A:38-13 did not control the sending-receiving relationship as to grades 7 and 8 and held that termination of the relationship as to those grades depended on whether any unreasonable financial hardship would result to either district and whether termination would be contrary to the educational interests of all the students involved.

The State Board reversed the Commissioner's decision. In doing so, it found that when the 7th and 8th grade students began attending the middle school rather than Kinnelon High School, a change in the allocation of Riverdale's students to Kinnelon High School occurred and that, with this change in allocation, N.J.S.A. 18A:38-13 became controlling. It was in this context that the State Board rejected Riverdale's contention that it had not been required to obtain the Commissioner's approval pursuant to N.J.S.A. 18A:38-13 before withdrawing its 7th and 8th grade students from Kinnelon and in which the State Board invoked its implied powers.

Hence, the critical factor in the State Board's determination that N.J.S.A. 18A:38-13 was controlling in that case was that all of the students who were attending school in Kinnelon had originally been attending Kinnelon High School. In stark contrast to that case, the 7th and 8th grade students in the case now before us were never part of the high school. Given the Legislature's clear expression of its intent when it amended

the statute subsequent to our decision in Kinnelon, as well as the express terms of the statute, we cannot hold that N.J.S.A. 18A:38-13 is controlling of sending-receiving relationships other than those at the high school level.

However, our conclusion that N.J.S.A. 18A:38-13 is not controlling in this case does not mean that Mine Hill is free to withdraw its 7th and 8th grade students without approval. Although the agreement between the districts that Dover would receive Mine Hill's 7th and 8th grade students is not supported by the authority conferred by N.J.S.A. 18A:38-11, it was authorized by N.J.S.A. 18A:38-8.[1] Again, that statute provides:

> The board of education of any school district having necessary accommodations may receive, or may be required to receive by order of the state board, pupils from another district not having sufficient accommodations, at rates of tuition fixed as in this article provided.

In contrast to those relationships formed under N.J.S.A. 18A:38-11, the Legislature has not established any statutory criteria for withdrawal from relationships formed pursuant to N.J.S.A. 18A:38-8. Nor have we been able to identify any decisional law that provides such criteria. However, given our responsibility for the general supervision and control of public education in this state, N.J.S.A. 18A:4-10, and that of the Commissioner, N.J.S.A. 18A:4-23, we could not allow such withdrawals to occur at the discretion of the sending district. In this respect, we stress that although the Commissioner has held that a district has the discretion to withdraw its elementary level students from a sending-receiving relationship, he has approved such withdrawal only after finding that no unreasonable financial hardship would result and that such withdrawal would not be contrary to the educational interests of the students involved.

[1] We note that the 1993 contractual agreement between the parties specifies that the sending-receiving relationship between the districts was being established pursuant to N.J.S.A. 18A:38-11 et seq. However such specification cannot expand the scope of the statutes that was established by the Legislature.

Board of Education of the Township of Haddon v. Board of Education of the Borough of Collingswood, decided by the Commissioner of Education, 1966 S.L.D. 207. That being the case, we remand this matter to the Commissioner in order that he may in the first instance identify those circumstances under which withdrawal from a sending-receiving relationship at the elementary school level should be permitted and to ascertain whether such circumstances are present in this case.

We retain jurisdiction.

August 1, 2001

Date of mailing AUG 02 2001

59-01

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
PAUL VARANO,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Board sought order requiring respondent industrial arts teacher to submit to a psychiatric examination pursuant to *N.J.S.A.* 18A:16-2. Respondent did not comply with the Board's directive for said examination and was suspended with pay.

The ALJ found that the evidence presented in the certification and evaluations of the Board demonstrated the deterioration of respondent's classroom performance and his defiant or nonresponsive attitude and behavior represented a serious deviation from the norm. The ALJ concluded that the Board had sufficient reason to require the psychiatric examination. Thus, the ALJ concluded that the Board had the right under *N.J.S.A.* 18A:6-2 to request that respondent have a psychiatric examination and that he must comply. The ALJ noted that the Board should consider bringing tenure charges if respondent does not comply with the order.

The Commissioner adopted the findings and determination in the Initial Decision as his own and directed respondent to undergo a psychiatric evaluation within 30 days of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5203-00
AGENCY DKT. NO. 88-3/00

BOARD OF EDUCATION OF THE
TOWNSHIP OF IRVINGTON,
Petitioner,
v.
PAUL VARANO,
Respondent.

Ronald C. Hunt, Esq., appearing for petitioner
(Hunt, Hamlin & Ridley, attorneys)

Paul Varano, *pro se*, non-appearance

Record Closed: December 4, 2000 Decided: December 22, 2000

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Board of Education (Board) seeks an order requiring respondent teacher to submit to a psychiatric examination. The Department of Education transmitted the matter to the Office of Administrative Law (OAL) on May 26, 2000. By letter dated May 26, 1999, the Board sought to have Mr. Varano undergo a psychiatric

evaluation pursuant to *N.J.S.A.* 18A:16-2. Respondent has refused to undergo such evaluation and remains suspended with pay during this period. On April 18, 2000, the Board moved before the Commissioner for an order compelling the psychiatric examination. On April 24, 2000, Mr. Varano asked the Department of Education for an extension of time to find another attorney. Further efforts of the OAL to schedule a date for a hearing were not successful. Ultimately, the matter was scheduled for a hearing on the motion on December 4, 2000. At that hearing, the attorney for the Board appeared but neither petitioner nor any representative appeared. The Board's attorney requested that the motion be decided on the papers.

FACTS

The following facts were certified by the Board and were not contested on the record. Respondent Paul Varano is an industrial arts teacher who has been employed at the Irvington School District for over 18 years, teaching primarily grades 5 through 8. Beginning in 1995, Mr. Varano's performance as a teacher was subject to bad evaluations particularly criticism for chronic lateness and absenteeism. During the 1998-99 school year, the Board denied Mr. Varano's employment and salary adjudgment increments. The record contained poor evaluations of Mr. Varano's teaching and interactions with students and colleagues. For example, a clinical observation was made on November 3, 1998 by William C. Calloway, Jr. of the industrial arts class consisting of 11 students. The students were eating potato chips, the blackboard had no objective, all machines were covered with plastic, Mr. Varano sat at his desk the entire period and did not have his plan book. Mr. Varano stated to the evaluator that the wood was not in a safe place and to stop playing games. Mr. Varano talked to the students but no teaching lesson occurred. At the end of the class, Mr. Varano indicated that if the room remained in the same way, the same situation would happen the next day.

On May 26, 1999, Peter E. Carter, District Superintendent, sent Mr. Varano a certified letter requesting that he undergo a psychiatric evaluation for the following reasons:

1. Exhibiting an inability to teach and relate subject matters to students, as well as an inability to maintain control of the students in the classroom which have been assigned responsibility on a consistent basis.

2. Blatant and continuous disregard of contractual obligation to attend weekly faculty meetings.

3. Exhibiting passive or non-responsive attitude and behavior when addressed by supervisors on a regular basis.

4. Failed to utilize supplies and materials for instructions.

On May 31, 1999, by way of an answer to the superintendent's letter, petitioner responded by saying

1. It was Mr. Gamba-adminisration who created those dastardly situations in order to "set me up." Motive? Slander, for one, also jealousy, etc., etc., etc.

2. I have requested an attorney from the NJEA to contact you ASAP. I see nothing in your letter that I am responsible for.

3. Trump up reasons are over six months old!

Closing thought on your letter " I have never seen a document so crowded with infamous falsehoods and distortions . . . . I never imagine . . . . was capable to utter." Comment made after the sneak attack on Pearl Harbor.

Mr. Varano has not complied with the Board's directive for a psychiatric evaluation and has been suspended with pay since the Board's letter.

LEGAL DISCUSSION AND CONCLUSION

A Board of Education may require psychiatric or physical examination of any employee "whenever in the judgment of the Board, an employee shows evidence of deviation from normal, physical or mental health." *N.J.S.A.* 18A:16-2. A Board of

Education may suspend a tenured teaching staff member with pay pending a physical or psychiatric examination. *N.J.S.A.* 18A:25-6. However, unless it certifies tenure dismissal charges to the Commissioner, a Board of Education lacks the authority to suspend a tenured teaching staff member without pay or otherwise reduce such person's compensation. *N.J.S.A.* 18A:6-10. See *Pleasantville City Bd. of Education v. Chambers,* 95 *N.J.A.R.* 2d (EDU) 291, 293.

The obligation of the Board to determine the fitness of its teachers stems from the Board's duty to protect the students under its charge from the reasonable possibility of the occurrence of harm. *Gish v. Board of Education of Borough of Paramus, 145 N.J. Super.* 96, *certif. den.* 74 *N.J.* 251 (1976). A teacher's fitness may not be measured "solely by his or her ability to perform the teaching function and ignore the fact that the teacher's presence in the classroom might, nevertheless, cause a danger of harm to the students for a reason not related to academic proficiency." *In re Tenure Hearing of Grossman*, 127 *N.J. Super.* 13, 32 (App. Div. 1974), certif. den. 65 *N.J.* 292. In this matter I **FIND** that the evidence presented in the certification and evaluations of the Board demonstrated the deterioration of Mr. Varano's classroom performance and his defiant or non-responsive attitude and behavior represented a serious deviation from the norm. Hence, I **CONCLUDE** that the Board had sufficient reason to require Mr. Varano to have a psychiatric examination. Based on the foregoing, I **CONCLUDE** that the Board has the right under *N.J.S.A.* 18A:6-2 to request Mr. Varano to have a psychiatric examination and the respondent must comply. For the respondent to have refused to comply for over a year, thus costing the taxpayers a great deal of money and undermining the authority of the Board, is disturbing. The Board should consider bringing tenure charges if Mr. Varano does not comply with this order.

ORDER

Based on the foregoing, I **ORDER** the respondent Paul Varano to undergo a psychiatric evaluation within 30 days.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (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 22, 2000
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

1-5-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 9 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

OAL DKT. NO. EDU 5203-00
AGENCY DKT. NO. 88-3/00

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
PAUL VARANO,	:	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,[1] the Commissioner agrees with the Administrative Law Judge's assessment that the evidence presented in the certification and evaluations of the Board demonstrate deterioration of respondent's classroom performance and that his defiant and nonresponsive attitude and behavior represent a serious deviation from the norm.

[1] The Commissioner notes that respondent's sole response to the petition consists of copies of correspondence between respondent and attorneys from two separate law firms and a cover letter which states in its entirety:

1. I do wish to request an extension pursuant to N.J.A.C. 6A:3-1.5, due to the bad faith effort of the NJEA lawyer's. See copies enclosed. I will be appealing to the president of the N.J.E.A. for honest representation.
2. For the record, I do dispute every complaint made by the Order to Show Cause for Emergent Relief. Dated 4/18/00.

Please return copy of same in the envelope provided. Thank you.

Accordingly, for the reasons expressed in the Initial Decision, respondent is directed to undergo a psychiatric evaluation within 30 days of this decision.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 2/16/01

Date of Mailing: 2/16/01

[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.

60-01

60-01R

PATSY N. MARINO, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

February 16, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2435-00
AGENCY DKT. NO. 19-1/97
(ON REMAND EDU 8580-98)

PATSY N. MARINO, Jr.,
Petitioner,
v.
WILLINGBORO BOARD OF EDUCATION,
Respondent.

Barbara E. Riefberg, Esq., on behalf of petitioner (Baron, Riefberg & Ward, attorneys)

James F. Schwerin, Esq., on behalf of respondent (Parker, McCay & Criscuolo, attorneys)

Record Closed: December 20, 2000 Decided: January 2, 2001

BEFORE **SOLOMON A. METZGER,** ALJ:

This matter is in the Office of Administrative Law on remand. The parties have now submitted a Stipulation of Settlement, which is annexed. Having reviewed the terms of the settlement and it appearing that it was entered into voluntarily and fully disposes of all issues in controversy, I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** 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.

1/2/01
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

1/4/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 5 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/caa

FILED
OFFICE OF ADMINISTRATIVE LAW
DEC 20 10 03 AM '00

BARON & RIEFBERG, P.A.
A Professional Corporation
1307 White Horse Road
Building F - Suite 600
Voorhees, New Jersey 08043
(609) 627-6000
Attorneys for Petitioner
Patsy N. Marino, Jr.

PATSY N. MARINO, JR.,	OFFICE OF ADMINISTRATIVE LAW
Petitioner,	
vs.	DOCKET NO.: EDU 8580-98 AGENCY REF. NO.: 19-1/97
WILLINGBORO BOARD OF EDUCATION	
Respondent.	Civil Action
	STIPULATION OF SETTLEMENT

This Stipulation of Settlement is made by and between Petitioner, Patsy Marino, Jr., and Respondent, Willingboro Board Education.

WHEREAS, Petitioner filed a Petition of Appeal with the Commissioner of Education alleging a violation of N.J.S.A. 18A:30-2.1; and

WHEREAS, the parties are desirous of amicably resolving and settling their differences;

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

1. Petitioner will reimburse the Willingboro Board of Education the sum of $1,407.00 representing three weeks of temporary disability benefits at the rate which applied to 1995 Workers' Compensation accidents which was $469.00 per week.

2. The payment by Petitioner will be made by payrol.

deductions in 13 equal installments of $100.00 and a final installment of $107.00.

3. At the conclusion of the aforementioned deductions, the Board of Education will restore 15 sick days to the Petitioner's sick leave account.

4. Petitioner waives any additional claims to benefits under N.J.S.A. 18A:30-2.1.

BARON, RIEFBERG & WARD, P.A.
Attorneys for Petitioner

DATED: 12/6/00

BY: _____
BARBARA E. RIEFBERG, ESQ.

PARKER, McCAY & CRISCUOLO, P.A.
Attorneys for Respondent

DATED: 12/7/00

BY: _____
JAMES F. SCHWERIN, ESQ.

OAL DKT. NOS. EDU 2435-00 AND EDU 8580-98 (ON REMAND)
AGENCY DKT. NO. 19-1/97

PATSY N. MARINO, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	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 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: 2/16/01

Date of Mailing: 2/16/01

61-01

BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION:
IN THE MATTER OF THE DISTRICT SUPPLEMENTAL AID APPLICATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

February 16, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6196-00

AGENCY DKT. NO. 243-6/00

BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION (IN THE MATTER OF THE DISTRICT SUPPLEMENTAL AID APPLICATION),

Respondent.

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

Michael Waters, Deputy Attorney General, for respondent (John Farmer, Attorney General of New Jersey, attorney)

Record Closed: January 19, 20001 Decided: January 22, 2001

BEFORE **LILLARD E. LAW,** ALJ:

These matters were transmitted to the Office of Administrative Law on August 3, 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 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

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.

22 January 2001
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

1-24-01
DATE

Deborah A. Gilmartin
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 25 2001
DATE

Jeff S. Masin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY, Petitioner, v. DAVID C. HESPE, COMMISSIONER OF EDUCATION OF NEW JERSEY, Respondent.	)	OAL DOCKET NO. EDUOT 06196-00S Agency Ref. No. 243-6/00 **CONSENT ORDER OF SETTLEMENT**

FILED
JAN 19 11 57 AM '01
STATE OF NEW JERSEY
ADMINISTRATIVE

Petitioner, Board of Education of the Pleasantville School District ("Petitioner"), through its Attorney, Nicholas Celso, III, Esq., (Nicholas Celso, appearing) and Respondent, New Jersey Department of Education ("DOE"), through its attorney, the Honorable John J. Farmer, Jr., Attorney General of the State of New Jersey (Michael C. Walters, Deputy Attorney General, appearing), hereby stipulate to the following terms of settlement:

1. On or about June 29, 2000, Petitioner filed a Petition of Appeal ("Petition") with the Commissioner of Education seeking review of the DOE's determinations with respect to Petitioner's requests for supplemental funding for the 2000-2001 school year under the Abbott v. Burke decisions and DOE regulations.

2. The Petition was subsequently transferred to the Office of Administrative Law as a contested case.

3. The parties thereupon entered into discussions to amicably resolve this matter in the public interest.

4. Based on those discussions, the DOE agreed that the Petitioner has demonstrated a need for 9.5 supervisor positions for the 2000-2001 school year in the following areas: Supervisor of Early

Childhood (PK-3)(½ position); Supervisor of Language Arts/Literacy (PK-8); Supervisor of Language Arts/Literacy (9-12); Supervisor of Science (PK-12); Supervisor of Mathematics (PK-12); Supervisor of Visual and Performing Arts/World Language (PK-12); Supervisor of Social Studies (PK-12); Supervisor of Students with Special Needs/Special Education/Bilingual/ESL/Gifted and Talented (PK-12); Supervisor of Business Education/Consumer Education/School-to-Careers/Technology Education/Technology Coordination/Library Media Services (PK-12); and Supervisor of Guidance and Health Services (PK-12).

5. DOE agrees to provide Petitioner with supplemental funding in the amount of $760,000 ($80,000 per position) for salary and benefits for the above-listed positions. Petitioner may anticipate revenue in the amount of $760,000 and record an accounts receivable in the 2000-2001 budget year of that same amount. The receipt of this additional amount of funds will occur in the 2001-2002 budget year subject to appropriation in the FY 2002 Appropriations Act.

6. The Petitioner agrees to dismissal with prejudice of the Petition 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(A), if petitioner is unable to implement the Department-approved programs, services and other expenditures due to fiscal constraints arising from budgeted Charter School payments.

8. 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

NICHOLAS CELSO, III, ESQ.
Attorney for Petitioner,
Board of Education of the
City of Pleasantville,
New Jersey

MICHAEL C. WALTERS, DAG

DATED: 12/14/00

NICHOLAS CELSO, III

DATED: 12/13/00

SO ORDERED THIS 19th DAY OF JANUARY 2001.

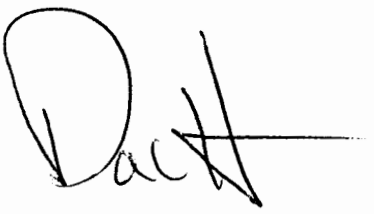
HONORABLE LILLARD E. LAW, A.L.J.

OAL DKT. NO. EDU 6196-00
AGENCY DKT. NO. 243-6/00

BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION: **IN THE MATTER OF THE DISTRICT SUPPLEMENTAL AID APPLICATION,**	:	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: 2/16/01

Date of Mailing: 2/16/01

63-01

DR. MICHAEL E. SCHREINER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARDS OF EDUCATION OF THE TOWNSHIP OF BERLIN, THE BOROUGH OF CHESILHURST, THE BOROUGH OF CLEMENTON, THE BOROUGH OF LINDENWOLD, THE BOROUGH OF PINE HILL, THE TOWNSHIP OF WATERFORD, AND THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,	:	DECISION
RESPONDENTS.	:	
	:	

February 20, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10052-99

AGENCY DKT. NO. 312-10/99

DR. MICHAEL E. SCHREINER,

Petitioner,

v.

BOARDS OF EDUCATION OF
THE TOWNSHIP OF BERLIN,
THE BOROUGH OF CHESILHURST,
THE BOROUGH OF CLEMENTON,
THE BOROUGH OF LINDENWOLD,
THE BOROUGH OF PINE HILL,
THE TOWNSHIP OF WATERFORD,
AND THE TOWNSHIP OF WINSLOW,

Respondents.

Melissa R. Vance, Esq., for petitioner

Betsey Bissett, Esq., for respondent Waterford Township Board of Education (Maressa, Goldstein, Birsner, Patterson, Drinkwater & Oddo, attorneys)

Emmett E. Primas, Jr., Esq., for respondent Chesilhurst Board of Education

Vita A. Gagliardi, Jr., Esq., for respondents Berlin Township, Clementon, Lindenwold, Pine Hill and Winslow Township Boards of Education (Porzio, Bromberg & Newman, attorneys)

Record Closed: January 5, 2001 Decided: January 9, 2001

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

Michael E. Schreiner, petitioner, alleged he is tenured in several positions in the Camden County Regional High School District Number One and that by operation of *N.J.S.A.* 18A:13-49 he enjoys rights to those same positions in each respondent district.

The matter was opened upon a petition for summary judgment to the Commissioner of Education, *N.J.S.A.* 18A:6-9. 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.

Counsel worked diligently over a period of 13 months and produced an amicable resolution that has been accepted by the petitioner and each board. The parties have prepared the attached agreement and copies of the resolutions of the boards adopting the agreement.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their authorized signatures and board resolutions;

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 further note the parties have agreed to waive the right to file exceptions and cross-exceptions.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 0 9 2001
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

1-11-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 12 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jh

WINSLOW TOWNSHIP BOARD OF EDUCATION

JOHN C. OBERG • BUSINESS ADMINISTRATOR

113 CENTRAL AVENUE
BLUE ANCHOR, NEW JERSEY 08037-9554

PHONE: 609-561-4102 FAX: 609-561-6378

November 14, 2000

Motion made by Mrs. Harvey, seconded by Mr. Pino with a unanimous roll call vote in favor to approve the following items (1 through 9) with regard to business and operations:

9. *Schreiner v. Board of Education of the Township of Berlin, et al.*

Resolved that the Board approves the settlement agreement in Schreiner v. Berlin Township Board of Education, et al. and agrees to be bound by same.

This is to certify that the above is a True copy of the motion adopted by The Board of Education of Winslow Township in regular session held on Monday, November 6, 2000.

John C. Oberg, Business Administrator/Board Secretary

3a

Seven voting yes and zero voting no. The motion carries.

5. Consideration to approve the QAAR. QAAR

A motion was made by Mr. Dougherty, seconded by Mrs. Glover, to approve item #5 as revised, and as listed in the Agenda.

Roll call vote: Mrs. DeTolla - yes, Mr. Dougherty - yes, Mrs. Glover - no, Miss Heins - yes, Ms. Hershman - yes, Mr. Smith - yes, and Mrs. Moncrief - yes.

Six voting yes and one voting no. The motion carries.

6. Discussion/consideration to approve settlement agreement in Schreiner v. Berlin Township Board of Education. Settlement Agreement

A motion was made by Mr. Dougherty, seconded by Miss Heins, to approve said agreement as discussed in Executive Session.

Roll call vote: Mrs. DeTolla - yes, Mr. Dougherty - yes, Mrs. Glover - yes, Miss Heins - yes, Ms. Hershman - yes, Mr. Smith - yes, and Mrs. Moncrief - yes.

Seven voting yes and zero voting no. The motion carries.

7. Discussion on salary parameters for new administrative personnel. Salary Parameters

Mrs. Moncrief said included in the Board folders was a chart of other schools. This gives the Board some kind of idea as to where we are, and where we think we may fall. She also wanted the Board to give some consideration to when they are bringing new staff on and setting up a whole different type of administrative structure. How do they want to do that? Regardless of the fact that they will be beginning negotiations soon, there are a whole bunch of employees coming in without benefit of those negotiations. So the Board needs to get some sense of where they stand on these issues.

Miss Heins said on the pages in the packets on salaries, to some extent it was helpful to see where we're not. But also, look at the districts. There doesn't seem to be any rhyme or reason to how they're paying people. She hoped our Board would be able to come up with a better plan.

Mrs. Moncrief said you have to have some level of comfort.

I hereby certify that this is a true copy of the Lindenwold Board of Education minutes.

Robert F. Wachter, Jr., School Business Administrator

I hereby certify that this is an exact copy of the October 30, 2000 Minutes of the Regular Business Meeting of the Pine Hill Board of Education.

Carol A Manuel 3899

OLD BUSINESS

Mr. O'Donnell stated that if we do not purchase a fire suppression system for the oven at the Bean School, we will remove the oven so we are not in violation. He stated that this also affects the oven which is to be installed in the Middle School.

Approval of Tree Removal

Motioned by Mrs. Oehrl, seconded by Mrs. Parker, to approve the removal of tree and stump located in front of the Child Study Team Office. Cost to be split with the Borough. Roll call vote. All in favor: Ms. Madeza, Ms. Narducci, Mrs. Parker, Mrs. Oehrl, Mrs. Thompson, Mr. Taylor (6-0-0)

Approval of Contracts

Motioned by Mr. Taylor, seconded by Ms. Narducci, to approval the contracts for Lower Camden County Personnel as discussed in the October 17, 2000 Executive Session. Roll call vote. All in favor: Ms. Madeza, Ms. Narducci, Mrs. Parker, Mrs. Oehrl. Abstain: Mrs. Thompson, Mr. Taylor (4-0-2)

Mr. O'Donnell stated that purchasing new emergency lights would be more cost effective than replacing all the batteries.

Mr. O'Donnell stated that he has not heard back from the Fire Marshall's Office, therefore, we are probably responsible to install emergency lights in the Child Study Team Office, at an approximate cost of $1000.00.

Approval to Purchase Emergency Lights

Motioned by Mrs. Oehrl, seconded by Mrs. Thompson, to purchase emergency lights for the Child Study Team Office at a cost not to exceed $1000.00. Roll call vote. All in favor: Ms. Madeza, Ms. Narducci, Mrs. Parker, Mrs. Oehrl, Mrs. Thompson, Mr. Taylor (6-0-0)

COMMITTEE REPORTS

Camden County School Boards Association

Mrs. Thompson stated that the next dinner meeting is scheduled for November 30, 2000, at the Camden County Technical School. The program's topic is "Student's Rights".

Home and School

Mrs. Thompson stated that their fund raiser went well. They will be having a bake sale during parent/teacher conferences. Ms. Mascioli distributed a letter sent to Home and School, requesting the purchase of items from the Five Year Facility Plan. She also stated that she has developed a form for teachers to use when requesting items to be purchased.

Municipal Alliance

Mr. Taylor stated that Fright Night was very successful. It was the largest crowd they ever had.

NJ School Boards Association

Mr. Taylor stated that the Delegates' Assembly is November 18th. Thirteen resolution are on the ballot, originally there were 30. He will advise on which resolutions will be passed.

Pine Hill Borough Liaison

Mrs. Parker stated that the Veteran's Day Ceremony will be at the park, beginning at 11:00 AM on November 11, 2000.

CLEMENTON BOARD OF EDUCATION

MINUTES OF THE BOARD OF EDUCATION MEETING HELD ON NOVEMBER 21, 2000

1. POSITION: SUBSTITUTE TEACHER
   a. NAME: Christy Brown
      CERTIFICATE: Camden County Substitute Teacher
      RATE OF PAY: $70.00 per diem

   b. NAME: Monique Thomas
      CERTIFICATE: Camden County Substitute Teacher (Pending)
      RATE OF PAY: $70.00 per diem

   c. NAME: Sandra DeBrielle-Lafferty
      CERTIFICATE: County Substitute Teacher Certificate (Pending)
      RATE OF PAY: $70.00 per diem

   d. NAME: Lauren Fabbri
      CERTIFICATE: County Substitute Teacher Certificate
      RATE OF PAY: $70.00 per day

2.. POSITION: SUBSTITUTE L.A.T.C.H. PROGRAM ASSISTANT
   NAME: Lynne Stang
   RATE OF PAY: $6.70 per hour
   NOTE: Mrs. Stang is currently employed as a Preschool Instructional Aide

5. Approve the settlement agreement in Schreiner vs. Berlin Township Board of Education, et. al. and agree to be bound by same.

6. Parental request to continue enrollment of two (2) students from December 8, 2000 through December 22, 2000.

7. The Greater Clementon Lions Club in conjunction with the Camden Optometric Eye Center would like to conduct a free eye screening program for students up to six (6) years of age. The screening is tentatively scheduled for the first week of December.

8. Approve the following individual to be placed on the Partners In Education Volunteer list:

   NAME: Lisa Costino
   ACTIVITY: Assisting in classrooms grades kindergarten through four

9. School Board Policies - First Reading:
   1. Policy #1330 - Use Of School Building And Grounds
   2. Policy #4145.1 - Tax Shelter Annuities

   NOTE: The Board policies will eventually be changed from letters to numbers

10. School/Community Activities
    a. Fifth Grade Trip
       LOCATION: Clementon Towers

I hereby certify the foregoing to be a true copy of the minutes of the Clementon Board of Education meeting held on November 21, 2000.

Carol Anne Visalli

Carol Anne Visalli, School Business Administrator/Board Secretary

AGREEMENT

THIS AGREEMENT is made and entered into this 20th day of December, 2000, by and between the

BERLIN TOWNSHIP BOARD OF EDUCATION, located at 234 Mt. Vernon Avenue, West Berlin, New Jersey 08091-1231;

CHESILHURST BOROUGH BOARD OF EDUCATION, located at 551 Edwards Avenue, Chesilhurst, New Jersey 08089-1115;

CLEMENTON BOROUGH BOARD OF EDUCATION, located at Audubon Avenue, Clementon, New Jersey 08021-4499;

LINDENWOLD BOROUGH BOARD OF EDUCATION, located at 1017 East Linden Avenue, Lindenwold, New Jersey 08021-1126;

PINE HILL BOROUGH BOARD OF EDUCATION, located at 1003 Turnerville Road, Pine Hill, New Jersey 08021-6526;

WATERFORD TOWNSHIP BOARD OF EDUCATION, located at 1106 Old White Horse Pike, Waterford, New Jersey 08089-1899;

WINSLOW TOWNSHIP BOARD OF EDUCATION, located at 113 Central Avenue, Blue Anchor, New Jersey 08037-1667;

HEREINAFTER referred to collectively as the **BOARDS** and

DR. MICHAEL E. SCHREINER, residing at 72 Greenleigh Drive, Sewell, New Jersey 08080, (hereinafter referred to as the "Superintendent").

WITNESSETH:

WHEREAS, Dr. Schreiner is the tenured superintendent of the Lower Camden County Regional High School District (LCCR);

WHEREAS, on or about May 12, 1998, the voters of the seven constituent districts voted to dissolve the Lower Camden County Regional High School District; and a dissolution date of July 1, 2001, has been set by the Commissioner of Education.

WHEREAS, Dr. Schreiner has filed a petition asserting tenure rights to the positions of superintendent, principal, assistant principal, and teacher pursuant to *N.J.S.A.* 18A:13-64;

WHEREAS, the Boards and Dr. Schreiner have engaged in negotiations concerning Dr. Schreiner's terms and conditions of employment after dissolution,

NOW THEREFORE, the foregoing Boards, as set forth above, and Dr. Schreiner, for the consideration herein specified, agree as follows:

1. TERM and DUTIES.

Dr. Schreiner shall cease his employment with the LCCR Board of Education upon dissolution. He shall be entitled to any and all benefits due and owing pursuant to his current employment contract with the LCCR Board of Education. The Winslow Township Board of Education, in its capacity as LEA for the dissolved LCCR, shall employ Dr. Schreiner in a pensionable position, namely, Director, Transition Activities, from July 1, 2001 through June 30, 2002. A mutually agreed upon job description shall be attached to this Agreement. Dr. Schreiner resigns from that position effective June 30, 2002, and relinquishes any and all tenure rights to any position in the constituent districts to which he may be entitled. Dr. Schreiner shall be available, upon mutual agreement, on an occasional consulting basis, if necessary , from July 1, 2002, through December 31, 2002, but shall not be formally employed or receive salary during

this period. Dr. Schreiner shall be considered a tenured employee during this one-year period, and his employment shall otherwise be governed by *N.J.S.A.* 18A:6-10.

2. COMPENSATION.

Dr. Schreiner shall receive his salary of $138,000 for the 2001-2002 school year. Dr. Schreiner shall receive as part of his compensation health insurance including dental, prescription and vision, AASA and NJASA membership, attendance at the NJSBA/NJASA Fall and Spring conferences, (and any conferences that Winslow as LEA may approve), use of cell phone, and expense reimbursement. Specifically excluded are leave time benefits.

Dr. Schreiner shall receive three lump sum payments of $50,000 on each of the following dates: January 1, 2002, January 1, 2003; and January 1, 2004, for a total of $150,000. If Dr. Schreiner dies before January 2, 2004, payment of any of the $150,000 yet unpaid shall be made to his estate.

It is anticipated that all monies will be paid out of the LEA funds from the dissolved regional; however, if there is any shortfall, the seven constituent districts shall be responsible proportionally in accordance with statute.

3. PAYMENT FOR SICK AND VACATION TIME.

The Boards agree that they will not challenge further any previously approved payments made to Dr. Schreiner by LCCR, specifically payments for accumulated sick and vacation leave. The parties acknowledge that funds are currently being held in escrow for Dr. Schreiner, and shall be released upon the approval of the settlement by the Commissioner of Education. If Dr. Schreiner shall die before the settlement is approved, payment shall be made to his estate.

4. MUTUAL RELEASE and INDEMNIFICATION.

A. Dr. Schreiner hereby agrees to release and forever discharge the Boards, its individual members, successors, assigns, and agents from any and all past, present, and future claims, suits, actions at law or in equity of any kind, in any forum that he may have against it, and agrees that execution of this Agreement shall serve as full and final satisfaction of same, except for any claims arising from a breach of this Agreement or any provision thereof. He will dismiss with prejudice presently pending before the Commissioner of Education.

B. The Board and its members hereby agree to release and forever discharge Dr. Schreiner from any and all past, present, and future claims, suits, tenure charges, actions at law or inequity of any kind, in any forum that it may have against him, and agrees that execution of the Employment Contract shall serve as full and final satisfaction of same, except for any claims arising from a breach of the Employment Contract or any provision thereof.

C. The mutual releases set forth herein are entered into voluntarily and willingly and without any duress or coercion. Both parties agree to be bound by their respective releases and agree that their respective successors shall be bound by the releases and all other provisions of the Employment Contract.

D. Specifically excluded from Dr. Schreiner's release is his right, upon cessation of employment with the Boards, to obtain continued medical coverage at his own expense as authorized by the Consolidated Omnibus Reconciliation Act of 1986 (COBRA), any rights he may have arising under the Teacher's Pension and Annuity Fund (TPAF) and related statutes and regulations, any rights he may have under the New Jersey Workers' Compensation Law, *N.J.S.A.* 34:16-1, *et seq.*, and any rights he may have in his individual capacity to assert any claim for personal injuries that may result and/or be discovered subsequent to the execution of the Employment Contract, caused by the negligent or intentional acts or omissions of the parties.

5. CONSULTATION WITH COUNSEL.

The parties represent that they have consulted with their respective attorneys before signing the Employment Contract and are fully satisfied with the advice received.

6. EXECUTION IN COUNTERPARTS and FACSIMILE SIGNATURES.

The Employment Contract may be executed in two (or more) counterparts, each of which counterparts, when executed and delivered, shall be deemed to be an original, and all of which counterparts, taken together, shall constitute but one and the same agreement. An original signature transmitted by facsimile shall be deemed to be an original for purposes of the Employment Contract.

7. APPROVAL BY THE COMMISSIONER.

The parties acknowledge that this Agreement is contingent upon the approval of the Commissioner of Education.

WHEREAS, duly authorized officers of the Boards have approved the terms and conditions of the Employment Contract; and,

WHEREAS, Dr. Schreiner has approved of the terms and conditions of the Employment Contract; and,

WHEREAS, this contract has been approved by the Boards of Education named above;

IN WITNESS WHEREOF, they set their hands and seals to the Employment Contract effective on the day and year first above written.

Witness — Vice President, Berlin Township Board of Education

Witness — President, Chesilhurst Borough Board of Education

Witness — President, Clementon Borough Board of Education

Witness — President, Lindenwold Borough Board of Education

Witness — President, Pine Hill Borough Board of Education

Witness — President, Waterford Township Board of Education

Witness — President, Winslow Township Board of Education

Witness — President, Chesilhurst Borough Board of Education

Witness — Dr. Michael E. Schreiner

DATED:

IN WITNESS WHEREOF, they set their hands and seals to the Employment Contract effective on the day and year first above written.

Witness	President Berlin Township Board of Education
Witness	President Chesilhurst Borough Board of Education
Witness	President Clementon Borough Board of Education
Witness	President Lindenwold Borough Board of Education
Witness	President Pine Hill Borough Board of Education
Witness	President Waterford Township Board of Education
Witness	President Winslow Township Board of Education
Witness	President Chesilhurst Borough Board of Education
Witness	Dr. Michael E. Schreiner

DATED:

IN WITNESS WHEREOF, they set their hands and seals to the Employment Contract effective on the day and year first above written.

Witness	President Berlin Township Board of Education
Witness	President Chesilhurst Borough Board of Education
Carol Ann Nisali Witness	James D. McNeil President Clementon Borough Board of Education
Witness	President Lindenwold Borough Board of Education
Witness	President Pine Hill Borough Board of Education
Witness	President Waterford Township Board of Education
Witness	President Winslow Township Board of Education
Witness	President Chesilhurst Borough Board of Education
Witness	Dr. Michael E. Schreiner

DATED:

IN WITNESS WHEREOF, they set their hands and seals to the Employment Contract effective on the day and year first above written.

Witness	President Berlin Township Board of Education
Witness	President Chesilhurst Borough Board of Education
Witness	President Clementon Borough Board of Education
Witness	President Lindenwold Borough Board of Education
Witness	President Pine Hill Borough Board of Education
Witness	President Waterford Township Board of Education
Witness	President Winslow Township Board of Education
Witness	President Chesilhurst Borough Board of Education
Witness	Dr. Michael E. Schreiner

DATED: 11-13-2000

3m

IN WITNESS WHEREOF, they set their hands and seals to the Employment Contract effective on the day and year first above written.

Witness	President Berlin Township Board of Education
Witness	President Chesilhurst Borough Board of Education
Witness	President Clementon Borough Board of Education
Witness	President Lindenwold Borough Board of Education
Witness	President Pine Hill Borough Board of Education
Witness	President Waterford Township Board of Education
Witness	President Winslow Township Board of Education
Witness	President Chesilhurst Borough Board of Education
Witness	Dr. Michael E. Schreiner

DATED:

IN WITNESS WHEREOF, they set their hands and seals to the Employment Contract effective on the day and year first above written.

Witness	President Berlin Township Board of Education
Witness	President Chesilhurst Borough Board of Education
Witness	President Clementon Borough Board of Education
Witness	President Lindenwold Borough Board of Education
Witness	President Pine Hill Borough Board of Education
Witness	President Waterford Township Board of Education
Witness	President Winslow Township Board of Education
Witness	President Chesilhurst Borough Board of Education
Witness	Dr. Michael E. Schreiner

DATED:

IN WITNESS WHEREOF, they set their hands and seals to the Employment Contract effective on the day and year first above written.

Witness	President Berlin Township Board of Education
Witness	President Chesilhurst Borough Board of Education
Witness	President Clementon Borough Board of Education
Witness	President Lindenwold Borough Board of Education
Witness	President Pine Hill Borough Board of Educat
Witness	President Waterford Township Board of Education
Witness	President Winslow Township Board of Education
Witness	President Chesilhurst Borough Board of Education
Witness	Dr. Michael E. Schreiner

DATED:

IN WITNESS WHEREOF, they set their hands and seals to the Employment Contract effective on the day and year first above written.

Witness	President Berlin Township Board of Education
Witness	President Chesilhurst Borough Board of Education
Witness	President Clementon Borough Board of Education
Witness	President Lindenwold Borough Board of Education
Witness	President Pine Hill Borough Board of Education
Witness	President Waterford Township Board of Education
Witness	President Winslow Township Board of Education
Witness	President Chesilhurst Borough Board of Education
Jane H Brown Witness JANE H. BROWN A Notary Public of New Jersey My Commission Expires June 12, 2001	Dr. Michael E. Schreiner Dr. Michael E. Schreiner

DATED:

18. Motion by Craig DeGeorge, seconded by James Giosa to approve the following resolution: Motion carried, voice vote, all voting yes

RESOLVED that the Board approves the settlement agreement in Schreiner v. Berlin Township, et al, and agrees to be bound by same.

19. Motion by Leonard DiTullio, seconded by Craig DeGeorge to pay bills as presented. Motion carried, poll vote, all voting yes.

Motion by Leonard DiTullio, seconded by Craig DeGeorge to adjourn the meeting. Motion carried, voice vote, all voting yes. Meeting adjourned 10:00 P.M.

OAL DKT. NO. EDU 10052-99
AGENCY DKT. NO. 312-10/99

DR. MICHAEL E. SCHREINER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARDS OF EDUCATION OF THE TOWNSHIP OF BERLIN, THE BOROUGH OF CHESILHURST, THE BOROUGH OF CLEMENTON, THE BOROUGH OF LINDENWOLD, THE BOROUGH OF PINE HILL, THE TOWNSHIP OF WATERFORD, AND THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,	:	DECISION
RESPONDENTS.	:	

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: FEB 20 2001

Date of Mailing: FEB 23 2001

65-01

JOEL MC GUCKIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NUMBER ONE, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

FEB 20 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10054-99
AGENCY DKT. NO. 288-9/99

JOEL MCGUCKIN,
Petitioner,
v.
BOARD OF EDUCATION OF LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NUMBER ONE, CAMDEN COUNTY,
Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Fagella & Nowak, attorneys)

Barry Chatzinoff, Esq., for respondent (Weinberg, McCormick, Chatzinoff & Zoll, attorneys)

Record Closed: January 16, 2001 Decided: January 23, 2001

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on November 16, 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 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.

Jan 23, 2001
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

1/29/01
DATE

Debbie Gramiccioni
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 30 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

WEINBERG, McCORMICK, CHATZINOFF AND ZOLL
A PROFESSIONAL ASSOCIATION
109 Haddon Avenue
Haddonfield, New Jersey 08033
(856) 795-1600
ATTORNEYS FOR RESPONDENT

JOEL McGUCKIN, Petitioner, v. BOARD OF EDUCATION OF LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NUMBER ONE, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION SETTLEMENT AGREEMENT CONSENT ORDER DOCKET NO. AGENCY DOCKET NO. 288-9/99

THIS MATTER having come before the Commissioner of Education on a Petition of Appeal filed by Petitioner, Joel McGuckin, by his attorneys, ~~Sahli, Sahli~~ Zazzali, Fagella & Nowak, Richard A. Friedman, Esquire appearing, and a response having been filed by Respondent, Lower Camden County Regional High School District Number One, by its attorneys, Weinberg, McCormick, Chatzinoff & Zoll, P.A., Barry Chatzinoff, Esquire, appearing, and the parties having reached an agreement with regard to all matters in dispute, and for good cause shown;

IT IS ON THIS 23rd day of January, 2000 ORDERED as follows:

1. Petitioner shall be entitled to be compensated as an Instructional Supervisor retroactive to September 1, 1999. Petitioner shall be entitled to back pay in the amount of $1,195 for the 1999-2000 school year.

2. For the 2000-2001 school year, Petitioner will be compensated as an Instructional Supervisor, with a Master's +30. For the 2000-2001 school year, this will entitle the Petitioner to the sum of $964 in addition to his present salary as a teacher.

3. It is anticipated that the Lower Camden County Regional High School District Number One will be dissolved as of June 30, 2001. In the event that the Lower Camden County Regional High School District Number One is not dissolved on June 30, 2001 and that there should be a 2001-2002 school year, Petitioner will continue to be compensated as an Instructional Supervisor +30 at the next step of the aforesaid salary guide.

4. Petitioner will receive the benefits associated with the Instructional Supervisor position. These benefits shall include the following:

A. Seniority credit;

B. Sick leave for ten month administrative employees as set forth in the negotiated agreement with the Lower Camden County Regional Principals and Supervisors Association;

C. Pension credit based on the additional income as agreed above. In the event that the Division of Pensions refuses to grant pension credit, Petitioner reserves the right to appeal the Division of Pensions' decision to the Board of Trustees of the Teacher's Pension and Annuity Fund;

D. Health insurance - no change in coverage options;

E. Three personal days;

F. Five days of bereavement leave for immediate family members and one day for non-immediate family members;

G. Vacation - there are no vacation days for ten month administrative employees. Petitioner will work until June 30th; and

H. Association Membership - Petitioner will be a member of the Lower Camden County Regional Principal's and Supervisor's Association.

5. Although Petitioner will be compensated as if in a Supervisory position, it is understood that Petitioner will not and has not performed the duties associated with the Supervisory position and the teaching duties assigned to him will be the same as those from the 1999-2000 school year. Petitioner will be obliged to follow all of the terms and conditions of employment for ten month employees as set forth in the Lower Camden County Regional Principal's and Supervisor's Association Management Team Agreement and shall receive no other benefit or compensation other than those set forth in this Settlement Agreement/Consent Order.

6. With regard to any claims that may be asserted by Petitioner in the matter of Lower Camden County Regional Education Association v. Berlin Township Board of Education et al, OAL Docket Number EDU962-00, Lower Camden County Regional High School District Number One takes no position with regard to the impact or relationship of this settlement with any claims that Petitioner has in that litigation. Petitioner is free to assert whatever claims that he feels are appropriate in that matter.

7. This Consent Order shall serve to settle any and all claims asserted by Petitioner in his Petition of Appeal and Petitioner hereby releases Respondent from any and all claims that he may have against Respondent.

M. KATHLEEN DUNCAN, ALJ

The undersigned hereby consent to both the form and content of the within Order.

RICHARD A. FRIEDMAN, ESQUIRE
ATTORNEY FOR PETITIONER

JOEL McGUCKIN, PETITIONER

BARRY CHATZINOFF, ESQUIRE
ATTORNEY FOR RESPONDENT

MICHAEL E. SCHREINER, Ed.D.
SUPERINTENDENT OF SCHOOLS

C:\clients\letters\LCC\McGuckin settlement order 11-6
December 15, 2000

OAL DKT. NO. EDU 10054-99
AGENCY DKT. NO. 288-9/99

JOEL MC GUCKIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NUMBER ONE, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Settlement Agreement/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. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: FEB 20 2001

Date of Mailing: FEB 23 2001

66-01

FLORENCE FRABIZIO,

PETITIONER,

V.

BOARD OF EDUCATION OF FARMINGDALE, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning administrative secretary challenged the Board's refusal to restore sick and vacation time for the period she was absent from work because of a temporary disability. The Board argued that the petition was not timely filed and challenged the restoration of sick and vacation time.

The ALJ determined that, because a judge of Workers' Compensation awarded petitioner temporary disability benefits, she is entitled, pursuant to statute, to receive full salary for a period not to exceed one year while temporarily disabled. The ALJ thus ordered that petitioner be restored all sick and vacation days for the period from November 19, 1998 to November 18, 1999.

The Commissioner affirmed the decision of the ALJ for the reasons stated therein.

February 26, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 10050-99

AGENCY DKT. NO. 289-9/99

FLORENCE FRABIZIO,

Petitioner,

v.

BOARD OF EDUCATION OF FARMINGDALE, MONMOUTH COUNTY,

Respondent.

M. Scott Tashjy, Esq., for petitioner (Hobbie, Corrigan, Bertucio & Tashjy, attorneys)

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

Record Closed: November 27, 2000 Decided: January 9, 2001

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter commenced on September 27, 1999, when Florence Frabizio (hereinafter petitioner) filed a petition of appeal with the Commissioner of Education seeking a determination that the Board of Education of Farmingdale (hereinafter respondent) had violated her rights pursuant to *N.J.S.A.* 18A:30-2.1(a) and (b) by declining to restore sick time and vacation time. An answer on behalf of respondent was filed on October 8, 1999 and on November 16, 1999, 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 February 10, 2000, at which time the following were identified as the issues for determination at hearing:

1. Was the petition timely filed pursuant to *N.J.A.C.* 6:24-1.2(c)?

2. What leave time, if any, should be restored/credited to petitioner's accumulated totals?

The hearing was scheduled for May 26, 2000, at the Trenton office of the Office of Administrative Law. That date was adjourned, however, at the request of both counsel who indicated that they would be submitting cross-motions for summary decision. Respondent's motion and supporting papers, including a certification of Stephanie K. Kuhns, School Business Administrator, were received on August 1, 2000. Petitioner's cross-motion and opposition to respondent's motion were received on August 29, 2000, and a letter memorandum in reply was received from respondent on October 6, 2000. Oral argument was conducted by telephone conference call on November 27, 2000, whereupon the record closed.

FINDINGS OF FACT

The facts relevant to a determination of this matter are not in dispute and I therefore **FIND** the following as uncontested facts.

Petitioner is employed by respondent as a tenured, twelve-month administrative secretary. Pursuant to her contract of employment, she is entitled to 15 sick days per year and all unused sick days are accumulative. In addition, she receives annually 36 vacation days including 13 holidays. Pursuant to Board policy with respect to all employees, only five unused vacation days may be carried from one year to the next.

After July 1, 1998 and before November 19, 1998, petitioner utilized 8 sick days. Petitioner filed a notice of accidental injury or occupational illness with respondent's workers' compensation carrier on November 19, 1998. On July 1, 1999, Stephanie K. Kuhns, School Business Administrator, sent the following memorandum to petitioner concerning her vacation and sick days:

> For the 1998-99 school year you were allotted 152.5 sick days (137.5 – carry over + 15-98-99 days = 152.5 total) and 40 vacation days (4 – carry over + 36 – 98-99 = 40 total). As of June 30th, all of your sick days have been depleted and 21.5 of your vacation days have been used. At the discretion of the superintendent, you will not be permitted to carry over any accumulated vacation days from the 1998-99 school year to the 1999-2000 school year. Therefore, as of July 1st, your sick days and vacation days will be limited to the 15 sick days and 36 vacation days granted in your 1999-2000 contract.

On August 27, 1999, the Honorable Andrew M. Smith, Jr., Judge of Workers' Compensation, entered an order for medical and temporary disability benefits to be paid to petitioner as follows:

> Disability benefits from 11/19/98 through present and continuing until petitioner shall be able to return to full employment. (Medical bills, authorized, shall be paid by respondent).

By memorandum dated September 8, 1999, Stephanie K. Kuhns advised petitioner as follows:

> As referenced in the memo sent on July 1, 1999 you were granted 15 sick days and 36 vacation days as of July 1, 1999. On Thursday, September 8, 1999 all 51 days will have expired. Therefore, you will be paid up to and including September 8, 1999 and not beyond. We are in the process of researching whether or not your health insurance and pension contribution should also be terminated.

On September 27, 1999, petitioner filed the petition of appeal commencing the within matter seeking an order from the Commissioner restoring all sick and vacation time deducted by respondent as indicated in the July 1, 1999 and September 8, 1999 memoranda.

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 whether 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, the parties agree that there is no material fact in issue and accordingly, this matter is ripe for summary decision.

With respect to the first issue articulated in the prehearing order and quoted hereinabove, *N.J.A.C.* 6:24-1.2(c) requires a petitioner claiming benefits under *N.J.S.A.* 18A:30-2.1 to file a petition with the Commissioner of Education within 90 days of the district board's action which has the effect of denying such benefits to petitioner. There is no dispute that respondent first notified petitioner by memorandum dated July 1, 1999, that her accumulated sick and vacation leave were being depleted. The petition herein was filed on September 27, 1999, and therefore was timely filed pursuant to *N.J.A.C.* 6:24-1.2(c).

N.J.S.A. 18A:30-2.1, the statutory provision relevant to a substantive determination of this matter provides:

> a. Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in *N.J.S.A.*18A:30-2 and 18A:30-3. Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under chapter 15 of Title 34, Labor and Workmen's Compensation, of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any workmen's compensation award made for temporary disability.
>
> b. Leave taken by an employee pursuant to subsection a. of this section shall constitute satisfactory service as provided pursuant to *N.J.S.A.* 18A:29-14 and any other provision, statutory or contractual, relating to employment, adjustment or other increments and shall not constitute inefficiency or other good cause for the withholding of an employment or adjustment increment.

Respondent argues that petitioner's motion for summary decision is premature, citing the following language from *Verneret v. Board of Ed. of the City of Elizabeth*, 95 *N.J.A.R.* 2d (EDU) 134, 135, where the State Board noted:

> We reiterate that it is the Commissioner who must determine whether or not the particular facts underlying a claim filed with him for benefits pursuant to *N.J.S.A.* 18A:30-2.1 are such that he should refrain from considering the matter until a determination has been made by the Division of Workers' Compensation. [Citation omitted.] [Emphasis Added.]
>
> . . .
>
> . . . the State Board sustained the Commissioner's decision to dismiss the Petitions in both cases [see *Amos & Tompkins*] without prejudice, concluding that, under the particular circumstances therein, a determination by the Division of Workers' Compensation was needed before this Agency could properly consider them. We now conclude that the proper course for the Commissioner to follow when he confronts a case such as *Amos* and *Tompkins* is to hold the matter in abeyance, rather than to dismiss the Petition, while waiting the determination of the Division of Workers' Compensation. [Emphasis Added.]

It is respondent's position that since there has been no final judgment by the Division of Workers' Compensation, but rather only an order for temporary disability benefits and payment of medical costs, the Commissioner should wait for a final determination by the Division of Workers' Compensation before addressing the issues in the within matter. It is clear, however, from a careful reading of the statutory provisions quoted hereinabove, that the payments provided for in 18A:30-2.1 are intended to supplement an award of temporary disability benefits for a period up to one year. Since Judge Smith signed an order awarding petitioner temporary disability benefits, implicit in that act is his determination that the injury or occupational illness sustained by petitioner on November 19, 1998 was compensable under the New Jersey Workers' Compensation Act. Judge Smith could not have signed an order awarding temporary disability benefits to petitioner without having reached such a conclusion. Whether petitioner ultimately obtains any permanent disability award from the Compensation Court is irrelevant to the Commissioner of Education's determination concerning benefits due and payable under *N.J.S.A.*

18A:30-2.1. That statute is designed to ensure that a school board employee receives full salary for a period of one year while temporarily disabled by a service connected disability.

With respect to the number of sick days and vacation days which need to be restored to petitioner's accumulated totals, respondent may not treat petitioner differently from any other employee who was in a full-pay status during the year. Therefore, for the time period November 19, 1998 to November 18, 1999, respondent may not charge petitioner with the use of sick days or vacation time because of her absence from work. Pursuant to the July 1, 1999 memorandum (and the affidavit of Stephanie K. Kuhns, submitted with respondent's motion papers) at the beginning of the 1998-99 fiscal year petitioner was credited with 152.5 sick days. After July 1 and prior to November 19, 1998, petitioner had utilized 8 sick days; accordingly, at the commencement of the 1999-00 fiscal year, her records should reflect a carry-over of 144.5 sick days. In accordance with Board practice for all employees, the maximum number of vacation days which may be carried from one year to the next is 5 days. Accordingly, at the commencement of 1999-00 fiscal year, petitioner's total vacation days should reflect a five-day carry-over in addition to vacation days and holidays credited for the 1999-2000 fiscal year. Pursuant to the provisions of *N.J.S.A.* 18A:30-2.1, respondent is required to continue to pay petitioner's full salary (subject to reduction by the amount of the workers' compensation award for temporary disability) without deducting sick or vacation leave time until November 18, 1999. Thereafter, petitioner is entitled only to those benefits awarded by the Workers' Compensation Court or some other court of competent jurisdiction or those provided in her contractual agreement with respondent.

For all of the foregoing reasons, petitioner's motion for summary decision is hereby **GRANTED.** Respondent's motion for summary decision is hereby **DENIED** and the within proceedings are 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.

Jan 9, 2001
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

1-11-01
DATE

Deborah A. Gilmartin /cn
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 12 2001
DATE

Jeff S. Mizanin
ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

OAL DKT. NO. EDU 10050-99
AGENCY DKT. NO. 289-9/99

FLORENCE FRABIZIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF FARMINGDALE, MONMOUTH 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 and adopts as his own the findings and legal conclusions reached by the Administrative Law Judge that the petition of appeal in this matter was timely filed pursuant to *N.J.A.C.* 6:24-1.2(c) and that, from November 19, 1998 to November 18, 1999, respondent may not charge petitioner with the use of sick days or vacation time because of her absence from work. *N.J.S.A.* 18A:30-2.1.

Accordingly, for the reasons set forth in the Initial Decision, petitioner's motion for summary judgment is granted.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/26/01

Date of Mailing: 2/26/01

* 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.

67-01

IN THE MATTER OF THE TENURE HEARING :
OF CHRISTOPHER WANNEMACHER,
PASSAIC COUNTY MANCHESTER
REGIONAL SCHOOL DISTRICT. :

CHRISTOPHER WANNEMACHER, COMMISSIONER OF EDUCATION

:

PETITIONER, DECISION ON REMAND

V. :

BOARD OF EDUCATION OF THE :
PASSAIC COUNTY MANCHESTER
REGIONAL SCHOOL DISTRICT, :

RESPONDENT. :

SYNOPSIS

Petitioning Board certified 14 charges of unbecoming conduct against Wannemacher and sought his removal from his tenured teaching position, alleging *inter alia*, that Wannemacher sexually harassed female students, made sexually explicit and sexually suggestive remarks to female students, engaged in inappropriate physical touching and contact with female students, displayed a lack of regard and concern for the educational progress and welfare of students, threatened or intimidated students and discriminated against students. Wannemacher denied the charges and filed a separate petition seeking restoration of his employment and adjustment increments withheld from him for the 1999-2000 school year. The cases were consolidated at the OAL and, in 1999, the parties reached a proposed settlement that was rejected by the Commissioner.

Although the 14 charges included extensive factual allegations, the ALJ determined that only 15 of the factual allegations were proven by a preponderance of the credible evidence. The ALJ recommended that Wannemacher be reinstated to his teaching position and that the 120 days of salary withheld from him be tendered to him. The ALJ also upheld the Board's decision to withhold Wannemacher's increments for the 1999-2000 school year.

The Commissioner affirmed the decision of the ALJ with modification. Specifically, the Commissioner determined that two of the findings did not constitute conduct unbecoming a teaching staff member. The Commissioner concluded that the improper comments made by Wannemacher, considering his unblemished record and recent decisions addressing inappropriate comments by teaching staff members, did not warrant his dismissal and affirmed the ALJ's penalty recommendation. Finally, the Commissioner affirmed the dismissal of Wannemacher's petition seeking reinstatement of his increments for the 1999-2000 school year.

February 26, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

BOARD OF EDUCATION OF
THE MANCHESTER REGIONAL
SCHOOL DISTRICT,
Petitioner,
v.
CHRISTOPHER WANNEMACHER,
Respondent,
And
CHRISTOPHER WANNEMACHER,
Petitioner,
v.
BOARD OF EDUCATION OF
THE MANCHESTER REGIONAL
SCHOOL DISTRICT,
Respondent.

CONSOLIDATED
INITIAL DECISION
OAL DKT. NO. EDU 1340-00
AGENCY DKT. NO. 134-6/99

ON REMAND FROM
OAL DKT. NO. EDU 7096-99
AGENCY DKT. NO. 134-6/99
INITIAL DECISION
OAL DKT. NO. EDU 9126-99
AGENCY DKT. NO. 200-7/99

Rodney T. Hara, Esq., for petitioner-respondent Board of Education, (Fogarty and Hara, attorneys)

Sheldon H. Pincus, Esq., for respondent, (Bucceri & Pincus, attorneys)

Record Closed: August 1, 2000 Decided: November 30, 2000

BEFORE **DANIEL B. MC KEOWN,** ALJ (t/a)

PROCEDURAL HISTORY

On May 27, 1999, the Manchester Regional High School District Board of Education (Board) certified 14 charges of unbecoming conduct against Christopher Wannemacher (respondent), a teacher with a tenure status in its employ, to the Commissioner of Education for determination under *N.J.S.A.* 18A:6-10, *et seq.* The Board seeks respondent's removal from its employ. Respondent was simultaneously suspended from his employment without pay pending disposition of the charge. Respondent denies the factual allegations against him and demands reinstatement with full restoration of all benefits withheld from him during his suspension. Respondent also seeks, by way of a separate Verified Petition of Appeal, the restoration of employment and adjustment increments it withheld from him for the 1999-2000 school year for the reasons set forth in the charges.

After the matters were transferred June 18, 1999 to the Office of Administrative Law as contested cases under the provisions of *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to-13, a prehearing conference was conducted before Administrative Law Judge Richard McGill during which plenary hearing dates were agreed upon. On August 18, 1999, ALJ McGill entered an Order of Consolidation of both cases for purposes of hearing. Thereafter, the parties reached a proposed settlement that was recommended for approval to the Commissioner of Education. The Commissioner rejected the proposed settlement because of an absence of evidence the agreement was consistent with the standards in *In re Cardonick*, 1982 *S.L.D.* 842, aff'd. State Board of Education, 1983 *S.L.D.* 846 for the settlement of tenure matters.

On or about April 25, 2000, and pursuant to *N.J.A.C.* 1:1-14.13 (b), the undersigned was appointed as administrative law judge, temporarily assigned, to conduct a plenary hearing and render an initial decision. The hearing was conducted at the Office of Administrative Law, Newark, on May 1. 2. 3. 4, 8, 9, 23, 24, and June 9, 2000 [1] after which the parties filed written briefs on August 1, 2000. The record closed August 2, 2000. Extensions of time within which to issue this initial decision have been granted.

---

[1] Transcript citations used in this initial decision shall be referenced by the date of hearing, followed by the page number or numbers. Line citations are not used here. The transcript citations are as follows:

May 1, 2000	1T	May 8, 2000	5T	June 9, 2000	9T
May 2, 2000	2T	May 9, 2000	6T		
May 3, 2000	3T	May 23, 2000	7T		
May 4, 2000	4T	May 24, 2000	8T		

After a brief presentation of the events leading to the charges and the charges, proofs offered by the parties on the specifications to each charge shall be considered.

EVENTS ANTECEDENT TO THE CHARGES

Hank Sinatra is the principal of the Manchester Regional High School and has been for the past three years. He had served as the assistant principal for one year to the then principal who is now the superintendent of schools, John J. Petrelli. The high school serves the constituent districts of Prospect Park, Haledon, and North Haledon. The school population is economically and socially diversified, and students are heterogeneously grouped.

The principal explained that during the 1998 fall Back-to-School night which was held early in the school year, several parents whose children were in respondent's Chemistry I class, voiced concern that he had said students whose mathematics skills were not strong might not pass the course, but could retake it the following year. The following day, a teacher of algebra whom the principal believes was a Ms. Pacio though he is not certain, complained to him that her students were upset because their parents were unhappy with them because they were reported to have poor mathematics skills. The algebra teacher also complained she felt the high school mathematics department was maligned by respondent's comments the previous night. Later, the principal reported the parent's and algebra teachers' complaints to the superintendent. The superintendent advised the principal to discuss the matter with respondent.

The principal met with respondent the following day. Respondent admitted the comments regarding poor mathematics skills and the probability that such students might not pass Chemistry I. The principal reminded respondent the high school classes are heterogeneously grouped and that he is responsible to address the needs of all his assigned students. The principal also told respondent those who enroll in Chemistry I probably have college in mind. The principal encouraged respondent to observe other teachers who have the same students to see how they handle varying levels of ability, and also recommended he attend workshops. The principal suggested respondent consider having other students who understand the subject matter in his class to assist those who have a difficult time grasping the concepts. It is not disputed that respondent did as directed; that is,

he observed those teachers recommended by the principal, he attended workshops, and he encouraged students to assist other students in a cooperative learning atmosphere.

Respondent has been employed by the Board as a teacher since 1989 and has taught physics, electronics, chemistry, and mathematics. Prior to his present employment he had spent two years in the Peace Corps as a teacher and administrator stationed in Kenya. From the date of his first hire in 1989 until the present, respondent has been observed and evaluated in his teaching performance at least 25 times (R-46-49, R-51-52, R-54-58, R-60-62, R-64-66R-67-71, and R-72-75) The observation - evaluation instrument used by school administrators was unchanged from 1989 until the 1998-1999 school year.

Until the observation-evaluation done after the parental complaints in the fall of 1998, respondent's performance was rated, generally, as more than satisfactory, with no areas in need of improvement noted. Nevertheless, respondent was encouraged in 1990 (R-76), 1991 (R-72), 1992 (R-67), 1994 (R-59), 1995 (R-53), and 1996 (R-53A) to be more flexible in handling students, to work with teachers of mathematics to remediate math skills necessary for science, to experiment with ways to include all members in class activities and seek alternatives to motivate disaffected students, to use frequent illustrations to help make science understandable to students, and to develop higher levels of thinking in students. Still, more comments of superior performance were noted in the year-end evaluations than were recommendations for improvement.

The voluminous record as a whole shows respondent's teaching performance was held in high regard by school authorities until the present charges emerged. As an example of the regard in which respondent's performance was viewed, the 1997-98 summary evaluation (R-47) signed by the principal and by respondent during May 1998, four months before the events leading to these charges began, is reproduced here in full:

General Comments:

> [Respondent] is an experienced teacher who enjoys teaching. [Respondent] works well with his students and has a very good rapport with his class. [Respondent] wrote and implemented a Pilot Electronics program this year.

Commendations:

[Respondent] is to be commended for his efforts with the physics team and the Pilot Electronics program. [Respondent's] efforts have brought the pilot program to full time status for next year. [Respondent] is a positive influence on the students of the school.

1997-98 Professional Improvement Plan:

[Respondent] has completed the Professional Improvement Plan for the 1997-98 school year.

1998-99 Professional Improvement Plan:

Explore theory of construction of and application of capacitors and inductors.

In addition and prior to this summary evaluation, respondent's talent as a teacher was recognized when he was selected as the Governor's Teacher Recognition Program recipient from Manchester Regional School District for 1995-1996. (R-26).

There was no further communication from the principal to respondent regarding the complained of Back-to-School night comments until the principal observed and evaluated his teaching performance on October 29, 1998. For the first time since respondent was employed in the district, he was rated as needing improvement in two areas; one, he was rated as needing improvement in motivational techniques and, two, he was rated as needing improvement in final summary of lesson. While the principal testified on rebuttal that he had had a very brief conference with respondent following the evaluation, which respondent denies having occurred, it is more likely that an evaluation conference did not occur. This is so because the principal also testified that in the meeting held after the parental complaints were made following the Back-to-School night he had told respondent everything that had to be said. There is no evidence in this record that any meaningful communication between the principal and respondent occurred following their meeting when the Back-to-School night parent complaints were discussed to the present time.

The principal testified that sometime before February 25, 1999 he had a meeting with student D.C. and her mother for readmission to the cheerleading squad following D.C.'s disciplinary suspension for misconduct. D.C. was then enrolled in respondent's chemistry I class and, by her own admission, was not doing very well. At the end of the meeting, mother told the principal that in response to D.C.'s request to respondent for paper which was located in a cabinet next to respondent's desk, respondent was to have said "Down there, bend at your knees! You're good at that!" The principal testified he advised the mother he would get to the bottom of the matter. D.C. also said that other students have complaints they would make against respondent if someone would listen to them. The principal told D.C. to tell students who had complaints against respondent to come to his office and he would listen to them. D.C. telephoned at least three of her "good" friends that evening and told them what Sinatra had said if they were having problems with respondent. All three classmates D.C. telephoned, R.S., D.S. and D.E., testified against respondent in this proceeding. Indeed, R. S. testified she was with D.S. when D.C. asked her to file a complaint with the principal against respondent. D. S. testified that D.C. had complained to her earlier of respondent and the manner in which he teaches.

On February 25, 1999 seven students, D.C., R.S., D.S., D.E. K.M., J.C., and E.C., in two separate groups, five and two each, voiced complaints to the principal against respondent in the presence of the other students in their group. The principal took handwritten notes (R-80) of their complaints and subsequently reduced the notes to typed, legible form. (P-1) The principal testified he became angry and upset to learn "this", a teacher's conduct as was being alleged, was going on in the high school. He prepared a memorandum (P-2) to respondent on the same day, February 25, 1999, summarizing the complaints of the students, and in which he asserts the complaints were "corroborated." The memorandum concludes:

> You [respondent] have utilized intimidation tactics on your students. They all express a sense of hopelessness, fear and disgust. You have fallen very short of what a teacher is supposed to be.

While the evidence does not show the number of students respondent has assigned him each day, it is clear that not all his students complained of his conduct.

The principal did not send the memorandum to respondent. Instead, he elected to send the memorandum to the superintendent who instructed him on or about the same day, February 25, not to supply respondent with the memorandum because he wanted to contact the Board attorney.

The evidence shows respondent, still not aware of the principal's meeting with the students, requested the guidance office to transfer four pupils, J.W., J.C., F.M., and R.J., from his period three chemistry class because of their refusal to do any work (P-3) J.C. is one of the original complaining students who met with the principal on February 25. Respondent advised the guidance counselor their continuing presence in chemistry, in light of their refusal to do the work, creates an unnecessary hazard. When the principal learned of this request, he met with two of the remaining three students and solicited comments from them regarding respondent. The principal sent the superintendent a memorandum (P-4) summarizing the comments of the three students, in light of respondent's request to guidance to transfer them from his class.

Sometime between February 25 when he met with and listened to the complaints of the two groups of students against respondent and March 8, 1999, the principal determined to have the students reduce their complaints to writing in his office. The principal also advised the parents of the students that they may be present if they so desired. The written statements of the students form specifications to the tenure charges against respondent. However, when the principal requested the students to prepare statements of complaint against respondent, he did not advise them to confine their statements to events of which they may have personal knowledge. Consequently, the record contains hearsay testimony of the students who complained of incidents of which they have no personal knowledge, but were included in their statements because they "heard" about the incident happening, or they were told by another person who learned of the incident from another person. From time-to-time and where appropriate, such hearsay testimony shall be presented.

On March 8, 1999 the following students prepared written statements, each of which shall be discussed in some detail later: D.C. (P-5); K.M., and supplemented by her on March 29, 1999 (P-6); D.S. (P-7); R.S, (P-8); E.C. (P-9); D.E., and supplemented by her on March 29, 1999 (P-10); R.J. (P-11); J.C. (P-12); and, F.M. (P-13). D.S. recalls that all students who testified in this proceeding received copies of all student written complaints against respondent. F.M. described the group of students, R.S., D.C, K.M., and R.S., as a "clique." (3T: 101, 115).

Another statement of complaint (P-14) was taken March 23, 1999 from M.F., not one of the students who complained on February 25 nor one of the students respondent had requested to be transferred from his third period chemistry class. M.F. testified that while in class on March 23, 1999 he was requested by someone in the main office to report to the principal's office where he was given a piece of paper and told to write what he believed respondent was doing wrong in the classroom. (3T:159) He had known that a group of students had earlier complained of respondent because some of the students had discussed in his presence the complaints they made. (3T:168, 169).

When the principal received the foregoing statements from each student, he subsequently submitted them to the superintendent. The superintendent advised respondent in writing (P-18) on March 12, 1999 that because of "a substantial [10] number of students alleging sexual harassment, inappropriate teaching performance and unprofessional conduct" against him, he was being suspended with pay effective March 15, 1999 pending an investigation. The superintendent filed the tenure charges against respondent with the board secretary on April 1, 1999 (P-19) and on April 16, 1999 respondent entered what constitutes a general denial of the charges. (P-20). The Board certified the charges to the Commissioner for determination on May 27, 1999. By notice dated June 29, 1999 respondent was advised that his employment and adjustment increments were being withheld by the Board for substantially the same reasons as are stated in the charges. (P-21) Respondent filed a Verified Petition of Appeal with the Commissioner challenging his increment withholdings.

CHARGES

The charges certified by the Board against respondent are these:

(1) That during the 1996-1997 school year, Christopher Wannemacher, a tenured teaching staff member in the employ of the Manchester Regional High School District, exhibited unprofessional and unbecoming conduct by sexually harassing female students enrolled in his classes, in the presence of other pupils, and as a result of said unprofessional and unbecoming conduct, he should be dismissed from his position.

(2) That during the 1998-1999 school year, Christopher Wannemacher, a tenured teaching staff member in the employ of the Manchester Regional High School District, exhibited unprofessional and unbecoming conduct by sexually harassing female students enrolled in his classes, in the presence of other pupils, and as a result of said unprofessional and unbecoming conduct, he should be dismissed from his position.

(3) That during the 1996-1997 and 1998-1999 school years, Christopher Wannemacher, a tenured teaching staff member in the employ of the Manchester Regional High School District, exhibited a pattern of unprofessional and unbecoming conduct by sexually harassing female students enrolled in his classes, in the presence of other pupils, and as result of said pattern of unprofessional and unbecoming conduct, he should be dismissed from his position.

(4) That during the 1996-1997 school year, Christopher Wannemacher, a tenured teaching staff member in the employ of the Manchester Regional High School District, exhibited unprofessional and unbecoming conduct by making sexually explicit and sexually suggestive remarks to female students enrolled in his classes, in the presence of other pupils, and as a result of said unprofessional and unbecoming conduct, he should be dismissed from his position.

(5) That during the 1998-1999 school year, Christopher Wannemacher, a tenured teaching staff member in the employ of the Manchester Regional High School District, exhibited unprofessional and unbecoming conduct by making sexually explicit and sexually suggestive remarks to female students enrolled in his classes, in the presence of other pupils, and as a result of said unprofessional and unbecoming conduct, he should be dismissed from his position.

(6) That during the 1996-1997 and 1998-1999 school years, Christopher Wannemacher, a tenured teaching staff member in the employ of the

Manchester Regional High School District, exhibited unprofessional and unbecoming conduct by making sexually explicit and sexually suggestive remarks to female students enrolled in his classes, in the presence of other pupils, and as a result of said pattern of unprofessional and unbecoming conduct, he should be dismissed from his position.

(7) That during the 1998-1999 school year, Christopher Wannemacher, a tenured teaching staff member in the employ of the Manchester Regional High School District, exhibited unprofessional and unbecoming conduct by engaging in inappropriate physical touching and contact with female students enrolled in his classes, in the presence of other pupils, and as a result of said unprofessional and unbecoming conduct, he should be dismissed from his position.

(8) That during the 1996-1997 school year, Christopher Wannemacher, a tenured teaching staff member in the employ of the Manchester Regional High School District, exhibited unprofessional and unbecoming conduct by displaying a total lack of regard and concern for the educational progress and welfare of students enrolled in his classes, and as a result of said unprofessional and unbecoming conduct, he should be dismissed from his position.

(9) That during the 1998-1999 school year, Christopher Wannemacher, a tenured teaching staff member in the employ of the Manchester Regional High School District, exhibited unprofessional and unbecoming conduct by displaying a total lack of regard and concern for the educational progress and welfare of students enrolled in his classes, and as a result of said unprofessional and unbecoming conduct, he should be dismissed from his position.

(10) That during the 1996-1997 and 1998-1999 school years, Christopher Wannemacher, a tenured teaching staff member in the employ of the Manchester Regional High School District, exhibited unprofessional and

unbecoming conduct by displaying a total lack of regard and concern for the educational progress and welfare of students enrolled in his classes, and as a result of said pattern of unprofessional and unbecoming conduct, he should be dismissed from his position.

(11) That during the 1998-1999 school year, Christopher Wannemacher, a tenured teaching staff member in the employ of the Manchester Regional High School District, exhibited unprofessional and unbecoming conduct by threatening and/or intimidating students enrolled in his classes, and as a result of said unprofessional and unbecoming conduct, he should be dismissed from his position.

(12) That during the 1998-1999 school year, Christopher Wannemacher, a tenured teaching staff member in the employ of the Manchester Regional High School District, exhibited unprofessional and unbecoming conduct by making inappropriate, disrespectful and disparaging remarks to students enrolled in his classes, and as a result of said unprofessional and unbecoming conduct, he should be dismissed from his position.

(13) That during the 1998-1999 school year, Christopher Wannemacher, a tenured teaching staff member in the employ of the Manchester Regional High School District, exhibited unprofessional and unbecoming conduct by discriminating against, and/or disparately treating, students enrolled in his classes, and as a result of said unprofessional and unbecoming conduct, he should be dismissed from his position.

(14) That during the 1998-1999 school year, Christopher Wannemacher, a tenured teaching staff member in the employ of the Manchester Regional High School District, exhibited unprofessional and unbecoming conduct by undermining students' respect for, and integrity of, authority and the educational process.

Sixty typewritten pages of specifications, which allege certain, and specific conduct accompany the 14 charges of unbecoming conduct. The specifications [2] provide notice to respondent of the specifics of the charges certified against him. All the complained of conduct was to have occurred in two separate academic years; 1996-97 and 1998-99. The charges as set out above are, in some measure, repetitive in that substantially the same complained of conduct forms the basis, with noted exception, for charges one through seven, while substantially the same conduct forms the basis for charges eight through twelve.

[2] Testimony of certain witnesses address matters which may, by themselves, constitute specific charges against respondent but are not contained within the specifications. If witnesses assert respondent was to have engaged in certain conduct which are not contained within the specifications, that testimony must be ignored for failure of the Board to have provided notice to respondent of the complained of conduct.

PROOFS OF THE PARTIES

To insure only those charges of which respondent had notice will be considered, the specifications which contain the factual allegations shall be presented for each charge. The proofs offered by the parties with respect to each specification shall be considered and findings, which must be based on a residuum of legally competent evidence, will be entered. After findings are reached on all fact allegations, the arguments of the parties shall be addressed with respect to whether respondent's proven conduct constitutes conduct unbecoming a teacher and, if so, the discipline to be imposed.

The students who filed statements of complaint against respondent testified on behalf of the Board. During the course of the proceeding, all witnesses were sequestered upon respondent's motion with the exception of the superintendent and respondent. At the conclusion of the testimony of witnesses, each was cautioned not to discuss their testimony with anyone pending a resolution of the entire matter. That directive was violated by at least one student in the case. K.M. was cautioned at the conclusion of her testimony on May 4, 2000 not to discuss with anyone the testimony she had provided until the case is finished. K.M. responded with the declaration "I promise [I will not];" that is, discuss her testimony with anyone. (4T:93) Four days later, on May 8, 2000, D.C. testified K.M. did discuss with her the testimony she provided which is contrary to the directive issued her and the 'promise' she made. (5T: 49)

Another matter of concern is that the students who filed statements of complaint against respondent and who testified in the matter originally were together when the principal asked them to state the complaints they had. Not only did the students hear the complaints of classmates before they wrote out their individual statements, they had the opportunity between February 22 and March 6, when they wrote out their complaints, to discuss among themselves their individual complaints. Furthermore, all student witnesses against respondent received copies of each other's complaints prior to giving their testimony at hearing. Great caution must, therefore, be used in assessing the credibility of the student witnesses to insure their testimony is based on personal knowledge, and not what they heard other students complaining about.

CHARGE ONE

That during the 1996-1997 school year, Christopher Wannemacher, a tenured teaching staff member in the employ of the Manchester Regional High School District, exhibited unprofessional and unbecoming conduct by sexually harassing female students enrolled in his classes, in the presence of other pupils, and as a result of said unprofessional and unbecoming conduct, he should be dismissed from his position.

The specifications to this charge allege six separate incidents in which respondent was to have engaged in during the 1996-97 school year. Respondent is alleged to have:

1. made the following remarks to D.C.:
    a. 'What do you and your boyfriend do when you are alone', and
    b. 'If your mother is pretty you will not have a problem;
2. told K.M. that she would move her seat to the front of the room as she requested if she kissed the boy next to her;
3. asked K.M. in what direction she "pees" because he was curious to know;
4. "repeatedly" stated to females in his physical science classes that they are attractive;
5. "repeatedly" made comments to female students about their "physiques" and he made comments to others on the physiques of certain female students.

The Board also alleges the foregoing remarks made K.M. and D.C. and unnamed others, feel embarrassed, humiliated, and uncomfortable being in respondent's classes, and that D.C., along with other unnamed students, were uneasy about going to him for extra help because they did not want to be alone with him. The Board relies upon the testimony and written complaints of D.C. (P-5) and K.M .(P-6).

The Board's proofs for specification 1 includes the statement (P-5) and testimony of D.C. D.C. is presently 17 years of age. Her statement (P-5) begins with the assertion she is "uneasy about going for extra help because of the following comments made [by respondent]:" D. C. then proceeds to list comments respondent was to have made when he was her teacher in the 1996-97 year for physical science. D.C. testified she made the introductory statement about feeling uneasy going for

extra help because she and other students had been discussing the fact the principal wanted to know what was going on in the classroom and how they felt.

The first assertion made by D. C. is that in the 1996-97 year respondent stated 'What do you and you're (sic) boyfriend do when you're alone?'' D.C. testified the statement was made to her by respondent. She testified she considers the subject matter personal of what she and her boyfriend do when alone and she felt uncomfortable when respondent made the statement to her. Respondent testified he recalls a general discussion had occurred in the classroom among students that some do study when they are with their boyfriends/girlfriends. Respondent further recalls that D.C. exclaimed, "You study with your boyfriend?" thereby causing a commotion among the students in class. Respondent acknowledges on direct examination having stated "what do you and your boyfriend do when you're alone." while on cross-examination he claims he responded with "What do you and your boyfriend study when you're alone?" In either case, respondent testified the comment was intended to be rhetorical in an effort to get D.C. back on task.

Based on the testimony of D.C. and respondent, **I FIND** that respondent made the comment to D.C. as is alleged. However, there is no evidence to show the context in which the comment was made other than respondent's explanation of a general discussion having occurred among students that some do study with their boyfriends or girlfriends.

Next, D. C. writes in her statement (P-5) that in 1996-97 respondent made the general statement to the entire class "If your mother's pretty you won't have a problem." D.C. testified she is of the view such a comment is inappropriate and should not have been said in a classroom. Respondent denies having made this statement to any student. (7T:168) In determining whether respondent made the statement as alleged, testimony of the mother of K.M., which is relevant to, this issue is to be considered. Mrs. M. had a meeting during the 1996-97 year with respondent to discuss some concerns her daughter had with him and which shall be soon discussed. During the meeting, Mrs. M. testified respondent said to her that her daughter was very bright and outgoing, that she was very pretty, and that he can see where her daughter gets her good looks from. Respondent denies making the statement to Mrs. M.

Based on the believable testimony of D.C., respondent, and the testimony of Mrs. M, **I FIND** that more likely than not respondent did make the general statement that 'if your mother's pretty you won't have a problem.'

The next factual allegation to Charge One addresses allegations made by K.M., who was a student in respondent's physical science class during 1996-97 and in his chemistry class during 1998-99. She is presently 18 years of age. With respect to 1996-97, K.M., who did well in respondent's class that year, writes in her statement (P-6):

> . . . [Respondent] was teaching a lesson, and during the lesson he asked me what direction I 'pee' in. I didn't understand why he needed this information so I questioned it, and he replied that he was just curious. I then replied that I didn't think he needed to know. On a later date, I was placed in the back of the room & when I asked to be moved to the front he told me he would only move my seat if I kissed the boy next to me. When I asked why, he said that he wanted me to. I kept my seat the same.

K.M. testified that the question regarding "pee" occurred during a physical science lesson on friction. Respondent, I infer, was demonstrating the principle that for every action there is an equal and opposite reaction. K.M. explained the class was discussing standing on a patch of ice and how to get off the ice. She said respondent had stated one could make a movement in one direction in order to go in the opposite direction, such as breathing, coughing, sneezing, "and then he said peeing." (4T:12) K.M. testified no one understood the principle and presumably students had questions, although she understood the concept. At that point, respondent was to have turned to her and asked in which direction she 'pees' in. Despite insisting she would not have put the word 'pee' in quotes in her statement unless she heard respondent use that term, K.M. subsequently testified on cross-examination respondent may well have used the term "urinate" as opposed to 'pee.' (4T:40-41) In either case, K.M. testified she did not understand why respondent would put the question to her because she fully understood the concept he was trying to explain to the class.

In support of this charge, the Board also relies upon the testimony of E.C., who is presently 17 years of age and had respondent as a teacher in 1996-97 for physical science and again in 1998-99 for chemistry, prepared a statement (P-9) of complaint against respondent at the request of the principal. While E.C.'s written complaints are limited to the 1998-99 year, he did testify he recalls the incident of the friction lesson. However, his recollection is unclear whether the term 'urinate' or

'pee' was used and he does not recall any question being put to K.M. regarding the direction of either term. (3T:92)

Respondent acknowledges the lesson being taught in the manner described by K.M. including his use of the term 'urination', but not 'pee.' He denies, however, directing any question to K.M. regarding urination or the direction thereof. Respondent says his use of the term "urination" was part and parcel of his explanation to the entire class, along with breathing, coughing, sneezing, of how one can use friction to cause motion.

K.M. testified with respect to respondent's alleged statement he would change her seat to the front of the room if she kissed the boy next to her that she has a reputation among her classmates as a: jokester, as one who is talkative, not bashful, and that her seat had been changed by respondent in the first place because she would talk to those around her despite being told by respondent to stop talking during class. (4T:43-44) She had been originally sitting next to her friends. After respondent had changed her seat, she continually asked him to change it back. because she was then sitting next to R. B., with whom she did not get along. K.M. testified she remained in the seat from which she repeatedly asked to have changed because she would not kiss the boy, R.B., who sat next to her. K.M. also testified she has vision problems and her vision correcting contacts "get bad" in inclement weather. K.M. testified that occasionally she could not see the chalkboard. When respondent would not change her seat unless she kissed the boy next to her she testified she was embarrassed and offended because everyone laughed at her thinking it was funny. K.M. did not think the matter was funny.

Curiously, K.M. testified respondent was one of her favorite teachers because he conducted a "laid back" class, except in her view he went too far with his comments. (4T:89) Indeed, K.M. testified she did go to respondent for extra help before school started in the morning and though she would be alone with him during that time he never made her feel uncomfortable. (4T:86)

K.M.'s mother, Mrs. M., testified K.M. told her of the 'pee' incident and that respondent would change her seat only if she kissed the boy next to her, in addition to other statements respondent was to have uttered that made her feel uncomfortable in class with him. The other matters are not part of this specification and shall not be considered here.

Upon learning of the 'pee' incident as was described to her by K.M., Mrs. M. demanded a meeting with respondent which was conducted in the presence of K.M.'s guidance counselor. This meeting occurred four years ago. (4T:111) Mrs. M., in the presence of the guidance counselor, told respondent his comments regarding the 'pee' issue, and the changing of the seat, made her daughter feel uncomfortable in his class and she, Mrs. M., felt his comments were inappropriate for a teacher to make in a classroom. Furthermore, Mrs. M. told respondent K.M. uses contact lenses and has a difficult time seeing distances. According to the testimony of Mrs. M., the guidance counselor told her he would take the concerns she expressed during the meeting to the principal. It is noted that the guidance counselor who attended this meeting four years ago left the Board's employ at the end of that year, 1996-97. Mrs. M. testified that after the meeting, her daughter would tell her that in class when respondent would make some comment he would add "Oh, I can't say that or K's mother will come in and yell at me again, or K's mother will come back and we'll have to have another conference." (4T:102)

Respondent testified that at the beginning of each year, he allows his students to select where in the classroom they choose to sit. So long as the student behaves and does his/her work, their choice of seats remain for the semester. Respondent testified he did change K.M.'s seat because of continued talking after repeated warnings from him to stop. Consequently, respondent did change K.M.'s seat to the middle of the room. K.M. did not complain to him she could not see from her changed seat, although she persisted in asking for her seat to be changed. He does acknowledge that there came a time when he told her he would change her seat if she kissed the boy next to her. Respondent seems to say that one of the reasons he changed her seat was because she had been bickering with another student. He testified that when "she wanted to move back . . . I suspected it was to start the thing up again. And that's why I said only if she kissed that particular boy." (7T:170) Respondent says he did not expect K.M. to kiss the boy, which she did not, but he made the statement to get her attention back to the task at hand.

Having considered the proofs of the parties regarding this portion of Charge One, **I FIND** that respondent did state as a general proposition in the context of a physical science lesson on friction that the direction in which one urinates may have an effect on the direction of movement. There is no persuasive evidence the comment was specifically addressed to K.M. **I also FIND** as fact respondent told K.M. he would change her seat if she kissed the boy next to her, but in the context of her having been bickering with that student. **I further FIND** that K.M.'s guidance

counselor had knowledge in 1996-97 of both incidents, and **I FIND** Mrs. M. had no further contact with respondent over the manner in which he spoke to her daughter after having the conference with him in 1996-97.

Specifications four and five shall be considered together. They allege respondent repeatedly stated to certain female students enrolled in his physical science classes during 1996-97 and in the presence of others that they were "attractive" or made comments regarding their "physiques." The Board offered limited direct evidence of respondent having engaged in such alleged conduct during the precise year of 1996-97. K.M. wrote in her statement (P-6) that during 1996-97 "I have seen [respondent] tell my fellow classmates that they were attractive and comment on their bodies." At hearing, K.M. testified respondent talked of students being cute in class or that certain students got a particular grade because they were cute. K.M. also testified respondent never made comments regarding a female's breasts, nor any other part of the female anatomy. (4T:89) On cross-examination, she testified that respondent also told boys and girls they looked nice or attractive when they came to school "dressed up."

Respondent denies telling any student in 1996-97 they were attractive in any inappropriate manner, and he denies making any comments on their physiques or their bodies. (7T:175) Respondent testified he does comment on how well a student, male or female, looks if they appear in school dressed up for college or job interviews, a basketball game, or for some other reason requiring them to be dressed up. Respondent says no student ever complained to him that they were offended by any such comment. (7T:135)

I FIND the Board established the truth of the specification that respondent did tell students they looked nice or attractive when they appeared in school dressed up.

CHARGE TWO

That during the 1998-1999 school year, Christopher Wannemacher, a tenured teaching staff member in the employ of the Manchester Regional High School District, exhibited unprofessional and unbecoming conduct by sexually harassing female students enrolled in his classes, in the

presence of other pupils, and as a result of said unprofessional and unbecoming conduct, he should be dismissed from his position.

The Board's specifications to Charge Two state that during 1998-99 respondent:

1. inappropriately touched female students, held their hands, and stood too close in proximity to them;

2. grabbed and held the hands of J.G.;

3. made the following comments to D.C. :
   (a) 'take off your sweater if you are hot, you can wear whatever you want in my room;'
   (b) replied to D.C.'s request for paper. 'Down there, bend at your knees, you are good at that;'
   (c) 'there are a lot of pretty girls in this room, and we all know about the pretty girls;'

4. made the following comments to R.S., one of his students in chemistry:
   (a) that she could sit in the class with her tank top' in response to her complaint that the classroom was hot;
   (b) that he overheard male students in another class comment that 'his class had very good looking girls and that she[R.S.] was one of them;'

5. told K.M. that she was wearing a colored bra under her white t-shirt and remarked 'Nice Bra;'

6. asked E.A., another one of his chemistry students, after having returned from a school-related trip whether she had 'hickeys.'

7. Stated to certain female students in his chemistry class that their 'shirts are too tight,' that they 'should not wear colored bras under white shirts,' and that he 'likes girls in tight black pants;'

8 told certain females students in his chemistry classes, in the presence of others, that they were 'attractive;'

9. repeatedly made comments directly to female students in his chemistry classes about their physiques and made comments to others about the physiques of certain female students;

10. told K.M. she was 'cute' and that her classmate was not and therefore K.M. was allowed to use the bathroom while the other student was not; and

11. told K.M. and he laboratory partner that they received higher marks than another set of students since they 'look nicer.'

The Board asserts the foregoing remarks made K.M., D.C., R.S., J.G., and E.A. and unnamed others, feel embarrassed and humiliated and uncomfortable being in respondent's classes, and that D.C., along with other unnamed students, were uneasy about going to him for extra help because they did not want to be alone with him. In support of this charge, the Board relies upon the testimony and written complaints of D.C. (P-5), K.M.(P-6), D.S. (P-7), R.S. (P-8), E.C. (P-9), and D.E. (P-11).

Specification 1 alleges inappropriate touching of females, holding hands with females, and standing too close in proximity to them. The Board's proofs with respect to the inappropriate touching of females consists of the statement (P-6) and testimony of K.M. In her statement, K.M. writes, "[Respondent] often put his arms around students & would lean over and touch your arm. He made me feel uncomfortable when he touched me because of the comments he had made." K.M. testified that when she would ask him for help during class, he would come to her desk and put his arm around her. K.M. says that when he put his arm around her or "stand really close to me", she wondered if that "was like the next step." In response to the question of the next step for what, K.M. testified she did not know. (4T:20-21) On cross-examination K.M. testified that only on one occasion did respondent touch her arm and the touching occurred between her elbow and her shoulder. K.M. also testified on cross-examination respondent "never put his arm around me" K.M. also testified she only saw one female, E.A., with their arms around respondent and that was because E.A. and respondent were good friends. (4T:73-76)

This same specification alleges respondent improperly held females hands. This part of the allegation is repetitive to specification 2 which shall be addressed shortly.

R.S., who filed a statement of complaint (P-8) with the principal against respondent, is presently 17 years of age. She had respondent for chemistry in 1998-99. R.S. testified she had no concerns about respondent "invading [her] personal space." (2T: 96) D.C. also testified respondent never "invaded her personal space." (5T:20) The only evidence this trier of fact can locate regarding

the Board's proofs that respondent stood too close in proximity to females is that portion of K.M.'s testimony when she declared respondent would stand really close to her in the context of touching her arm. But, if K.M.'s testimony is accurate that respondent only touched her arm one time then he stood too close to her only one time.

Respondent denies ever placing his arm around K.M. Respondent says the only time he may touch a student is on a shoulder when he is walking behind them during lab to let them know he is there, or when he is teaching a particular technique with laboratory equipment and hands must be wrapped around an instrument, or when students are working on problems at their seats and he would touch them in an incidental manner on the arm if their work is correct. (7T:125) However, no student ever complained to him that he/she felt he touched them in an inappropriate manner.

Findings of fact on specification 1 will be entered after having considered the related allegation in the next specification which addresses the grabbing and holding of J.G.'s hands.

Specification 2 is specific to the student identified as J.G., who did not file a written statement against respondent nor did she testify on behalf of the Board against him. Rather, this charge emerges as the result of a supplemental statement (P-10) prepared by one student, D.E. D.E. wrote in her statement that one day she observed another student, J.G., walking past respondent in the corridor. She observed the student poke respondent in the stomach. Respondent held out his hand, D.E. writes, and they held each other's hand while they talked. D.C. concludes the writing by asserting respondent had said if "we" complain to the principal, the principal will make it hard for them. At hearing and in response to the question of why she, D.E., would include such an incident in a statement of complaint against respondent, she replied "I don't think teachers should be doing that with students, like holding hands with them." (5T-72) D.E. was not asked about the circumstances in which respondent was to have stated that complaining to the principal would only make it hard on them.

Though not established in this record by independent evidence, it is reasonable to infer D.E. told R.S. and K.M. of what she describes above because both R.S. and K.M. include this incident in their respective statements of complaint against respondent.

It is noted that R.S. testified she, did not feel comfortable going to respondent for extra help because of ". . . things that I would hear of like what he had said to me." Asked to explain, R.S. testified, "I don't know who said it, but one girls (sic) said that he was holding a girl's hand." (2T:91) K.M. also testified she too was uncomfortable because she "heard" respondent had held J.G.'s hand, and she complained of the incident only because ". . . a lot of people had been talking about it and they had said that there was a time when he had gone up to a student and they were holding hands and they had their arms around each other." (4T:21-22) K. M. acknowledges she did not witness such an event; rather, she 'heard' about it from 'other people.' (4T:77) But, K.M. did include this allegation in her statement of complaint to the principal, who with the superintendent used the statement as the basis for tenure charges against respondent.

Respondent's testimony regarding the factual account of what occurred is essentially the same as that of D.E. Respondent explained he recalls walking down the hallway and coming upon J.G. He testified he held up his hand for a "high-five" and she poked him in the stomach and grabbed his hand and held it for perhaps 10 or 20 seconds while they talked. J.G. never complained about the handholding or that it made her feel uncomfortable. Respondent testified he had no knowledge anyone had observed the incident, nor did anyone complain to him about having observed the incident.

To the extent the Board alleges in specification 2 that respondent 'grabbed and held the hands of J.G.', **I FIND** the Board's competent credible proofs show only that respondent and J.G. did hold hands in a mutually voluntary manner while passing each other in the corridor. To the extent the Board relies upon hearsay to prove the truth of the charges, the effort is in vain. To the extent the Board's allegation that respondent 'grabbed' J.G.'s hand is intended to show J.G. was not a voluntary party to the entire transaction and that the incident was somehow an assault on her by respondent, that allegation is not supported by the evidence. Finally, **I FIND** the Board failed to establish that respondent warned anyone against complaining to the principal regarding this incident.

In regard to specification 1 which relies on the findings in specification 2, **I specifically FIND** the Board failed in its proofs to show respondent inappropriately touched female students; **I FIND** the Board failed to establish respondent inappropriately held hands with females; and, **I FIND** the Board failed to establish respondent inappropriately stood too close in proximity to females.

The Board's proofs regarding Charge Two, specification 3 (a) will be considered in conjunction with specification 4 (a) because they allege, in fact, the same conduct but seen from the perspective of two different students - D.C. and R.S. D.C. writes in her statement (P-5) that respondent stated 'Take off your sweater if you're hot [and] you can wear whatever you want in my room.' D.C. testified the statement was not made to her; it was made to R.S. (5T:9, 30) D.C. testified she does not recall the circumstances in which the statement was made, nor the time of the 1998-99 year in which it was made, although she does recall R.S. was wearing a button down sweater with a "spaghetti strap tank top" under it. D.C. explained she included the statement in her complaint against respondent because, in her view, the comment is inappropriate and a teacher should not have made such a comment. (5T:12, 31) I FIND the Board failed to prove the truth of specification 3 (a) on the testimony of its own witness, D.C., who made it very clear respondent did not make such a statement to her.

With respect to specification 4 (a), R.S. and D.C. are friends. (5T:22, 23) R.S. admits not liking science because she does not do well in the subject. (2T:91) R.S. filed her own statement (P-8) of complaint against respondent with the principal in which she writes respondent "told me I could sit in class with my tank top, when I mentioned the room was hot." R.S.'s testimony regarding the circumstances in which the comment was to have been made is as follows:

Q Okay. In reading the first sentence in P-8, can you tell me the circumstances in which the facts in that statement took place?

A We were in class. I wanted to ta -- I said the class was -- it was hot in there. So I -- had like a sweater with a tank top underneath.

Q Uh-huh. And what happened with regard to you wearing the sweater and the tank top. What did [respondent] say to you in conjunction with what you were wearing?

A Well, I just mentioned that the classroom was hot and he said that I could take off my sweater if I wanted to.

THE COURT: He said what, I'm sorry?

THE WITNESS: That I could take off my sweater.

THE COURT: Okay

BY MR. HARA:

Q Now, what were you wearing under your sweater?

A A tank top

Q Now –

A It's a sleeveless –

Q Okay. What was your understanding as to your ability to wear a tank top in class?

A Well, we're not supposed to really wear tank tops in school.

Q What was your interpretation of the statement [respondent] made to you at the time?

A It felt a little uncomfortable, because we're not supposed to wear them in school. He was allowing me to wear one.

Q Now, why did you feel uncomfortable with [respondent] telling you that you could wear the tank top?

THE COURT: I'm sorry.

THE WITNESS: I'm sorry.

THE COURT: I can't hear you.

THE WITNESS: Oh. You don't really expect it from a teacher.

BY MR. HARA:

Q I don't understand what you mean by that. Can you explain it, please?

A Because you're not allowed to wear it in school, so you would expect him to tell you that you can't wear it.

(2T:88-89)

R.S. testified the classrooms are either "cold or hot" ((2T:119) and that this incident occurred in October. She knew that the wearing of tank tops by students was prohibited by the student dress code, which is contained within the student handbook. The incident occurred at the beginning of class while respondent was in the front of the classroom. This is the only time such an incident occurred.

K.M., though not mentioned by the Board in the specific charges addressing 'tank tops', testified on cross-examination regarding the warmth of the classroom that respondent would from time-to-time directly tell a female student who was warm that she could remain in the classroom with just a tank top on. K.M. testified that was not ever said to her, and the Board produced no students who testified that that was ever said directly to them. (4T:49)

D.S., a student in third period chemistry when she was a junior in 1998-99, filed a statement of complaint (P-7) against respondent with the principal in which she alleges, among other things, that respondent tells students that they may remove their shirts if they are hot. While D.S. says respondent never directed such a comment to her, she did hear him make that comment to R.S. (2T:154) In the whole of R.S.'s testimony (2T:81-142) not once is the word "shirt" mentioned in the context of respondent telling her she may remove her 'shirt' if she is hot.

Nevertheless, the Board relies on the testimony of D.S. to form the basis for a separate charge of misconduct against respondent in specification 14 of Charge Three which will be addressed soon.

Respondent testified that classrooms in the building have varying temperatures; some are very warm, while others are very cold. Teachers do not have access to individual room temperature control. Respondent testified some students report to school either overdressed for the temperature of a given room or underdressed, depending upon the room temperature on a given day. On this particular occasion, his class was just about ready to begin when R.S. made the comment she was hot. In response, respondent explains he told her she may take off her sweater. Respondent testified he had not noticed whether she took her sweater off, and he does not know whether she had a tank top on underneath the sweater. Respondent, nevertheless, testified he would not tell R.S. to take off her sweater without regard to whether she had another garment on underneath; he made the assumption she did have another garment underneath. (8T: 115-116)

I FIND the evidence shows that respondent did tell R.S. she may remove her sweater but in the context that she voiced the complaint she was hot. The evidence does not support a finding that respondent's statement to R.S. that she may remove her sweater, included that she could sit in class with a tank top notwithstanding the testimony of K.M.. But, the Board alleged in this specification that respondent told R.S. she could sit in the class with her tank top, not that he told her she may

remove her sweater. **I specifically FIND** the proofs do not support the allegation that respondent told R.S. she could sit in his class with her 'tank top.'

If the Board intended to show that respondent was encouraging R.S. to specifically violate its student dress code, the evidence does not support such a finding. Respondent did not know what garment R.S. had on underneath the sweater, but because she knew the contents of the dress code with which she was obligated to comply, it was reasonable for him to infer she had an appropriate garment on underneath her sweater.

Having reached this finding independently based on the evidence presented by the parties, it is noted that the Board quotes R.S. as having testified that respondent directed her to 'take off her sweater if you are hot. You can wear whatever you want in my classroom.' and cites 2T:88, lines 1-3. (Board's brief, p.14) I can find no testimony of R.S. either on direct or cross-examination that supports the Board's assertion respondent ever said to R.S. she can wear whatever she wants in his classroom.

The Board's proofs with respect to specification 3 (b) rests on the testimony of D.C. In her written statement (P-5) D.C. writes "I asked him for paper and his response was 'Down there, bend at your knees, you're good at that. Make sure you don't hurt yourself.'" D.C. testified on direct examination that when the comment was made to her she felt uncomfortable because it was inappropriate, she was awkward and was shocked that a teacher would say that to her. (5T:12-13) On cross-examination, D.C. testified respondent kept paper for classroom use in a drawer at the bottom of, or adjacent to, a lab-lecture table which, it seems, respondent uses as a desk as well. (See, R-11(iv)) To retrieve paper from the drawer, one had to bend down to pull the drawer out to access the paper. While D.C. recalls the comment respondent was to have made, she has no recall of when the incident occurred or the reason why she had asked for the paper in the first place. (5T:35-36)

Respondent testified he had been sitting behind the lecture table and the students were beginning their work. D.C. approached and asked if she could get some paper. Respondent testified his response was:

> I said sure. And I said it's down in the bottom drawer. Bend at the knees, use your back 'cause it's a heavy drawer and that's what I say to everybody so they don't hurt themselves and that's what I say to everybody so they don't hurt themselves and

> that's what she did. I assume I didn't watch her the whole way down. I guess she got the paper and went back to her seat.
> (7T:128)

Respondent testified that D.C. did not object at the time to anything he had said nor did she through her demeanor register discomfort by the exchange as he describes.

This is the sum and substance of the proofs offered by the parties in support of this specification. D.C. says respondent included the phrase 'you're good at that' meaning bending at her knees, while respondent acknowledges having said essentially everything alleged but that phrase. With the exception of D.C.'s testimony that she felt uncomfortable, was shocked and felt awkward because in her view a teacher should not make such an inappropriate comment, there is no persuasive evidence to show even if the phrase were said what was intended by it.

It is recognized that the principal and superintendent had already determined based on the written statements of the complaining students that respondent did engage in all of the complained of conduct. With respect to this specification, the principal testified the alleged comment, which he obviously believes is true without even having discussed the matter with respondent, constitutes a "smack" to D.C.'s reputation because of the "connotation" of the words. (1T:79) The principal says the phrase has sexual overtones. The superintendent, who is also of the view respondent engaged in the conduct alleged by the students in their written statements, testified the use of the phrase was uncalled for in the situation because D.C. was asking for paper, she knew where the paper was, and she knew she had to bend to get it. (5T:106) But neither the principal's nor superintendent's testimony is competent evidence on the issue of whether respondent used the phrase as is alleged.

Having considered the proofs of the parties regarding specification 3(b), **I FIND** the evidence offered does not support the allegation that respondent stated 'You are good at that' as part of his response to D.C.'s request for paper.

The Board's proofs with respect to specification 3 (c) consists of the testimony of D.C. In her statement (P-5), D.C. writes that respondent commented during the 1998-99 year 'There are a lot of pretty girls in this room, and we all know about the pretty girls.' D.C. testified that the comment was made to the class as a whole and while she did not understand what he meant, it made her feel

uncomfortable. D.C. cannot recall when the statement was made other than sometime in 1998-99. (5T:13, 37)

Respondent denies making the comment as is alleged by D.C. (7T:129)

I FIND the Board failed to prove by a preponderance of credible evidence the truth of the allegations contained within specification 3 (c).

Specification 4(a) has already been addressed. The proofs offered in support of specification 4(b) consists of the written statement and testimony of R.S. R.S. wrote in her statement (P-8):

While I was asking for work I had to make up, he [respondent] asked me if I was the type of person who like to know things even if I couldn't know who said them. I answered yes, so then he told me that he overheard kids [commenting] that his class had very good-looking girls and that I was one of them.

R.S. testified that she was a little shocked at what respondent said and she felt uncomfortable because she does not expect a teacher to say something like that. R.S. also testified that as a result of this comment, and other comments she heard about such as respondent holding a girl's hand, as already recited above in specification 2 of this Charge; she was reluctant to go to respondent for extra help.

Respondent testified that on this particular occasion, he did tell R.S. that someone thinks she is very attractive. R.S. wanted to know who said that, but respondent would not tell her because of a prior agreement between the two that if he told her what was said, she would not persist in knowing the identity of the speaker. At hearing, respondent identified the speaker as a colleague, Ms. Eva Yazidian, who teaches biology at the high school. (7T:131) Respondent testified that at the time he told R.S. what was said, R.S. did not complain to him of feeling uncomfortable, nor did her demeanor change in any way to show discomfort. (7T:132)

I FIND based on a preponderance of credible evidence that respondent made the comment as alleged by R.S.

Specification 5 alleges respondent remarked 'Nice Bra' to K.M. regarding the bra she was wearing under a white t-shirt. The Board in its filed Brief describes the outer garment K.M. was wearing as a "translucent white shirt." (Board's Brief, p.16) In the statement K.M. filed March 8, 1999 she made no mention of this specific allegation against respondent. She did include this complaint in her supplement on March 29, 1999 to the original statement and after it became known among students of the complaints being filed with the principal against respondent. K.M. testified she had just returned from gym where her shirt became soiled. She changed to a white shirt and acknowledged wearing a colored bra. K.M. testified the colored bra was visible through the white shirt she had on. Respondent said to her "nice bra' and asked if that was a fashionable thing to wear a colored bra under a white shirt. K.M. testified she felt uncomfortable with respondent's comments because she was embarrassed and felt "really weird about it." (4T:19-20)

Respondent denies having made any statement to K.M. regarding 'nice bra' or words to that effect, or making any comments about wearing a colored bra under a white shirt. (7T:133) However, on cross -examination respondent testified in the following manner:

Q [Respondent], did you ever comment to any student about their bras?

A No.

Q And why would you not comment about a student's bra?

A Because I -- I wouldn't.

Q Why?

A I don't' think there would be a need to.

Q It's not appropriate to talk about a student's bra, isn't that correct?

A Probably not.

Q You say probably not. Is it or is it not appropriate to talk about a student's bra?

A Well, I have seen in the course of my teaching girls adjusting their bras in class. I wouldn't -- I wouldn't bring it up, but they might say excuse me, or do something like that. And I don't bring it up, but it's -- and I don't talk about it. But --

Q So, my question to you is, do you feel it would be inappropriate for you –

> [Here follows a direction to go back over the line of questioning, which is followed by the witness testifying thusly:]
>
> A -- people might giggle or she might say I just have to make an -- she did say I have to make an adjustment. And I -- the topic was brought up by a student, but I didn't view that incident as inappropriate, yet it was talked about a bra. I said nothing about it.
> (8T:124-125)

The preceding exchange was to the clear question whether it is appropriate for a teacher to talk about a student's bra. Having reviewed respondent's reply on cross-examination, I am struck by respondent's apparent reluctance to answer the question in as clear a manner as it was posed. Respondent's answer on cross-examination belies his denial on direct examination that he did not comment to K.M. 'nice bra' and / or it that fashionable to wear a colored bra under a white shirt.

I FIND the Board established the truth of the allegation contained within specification 5 in that respondent made the remark to K.M 'Nice Bra' and made the comment regarding whether it was fashionable to wear a colored bra under a white shirt.

The Board with respect to specification 6 alleges respondent asked E.A. whether she had 'hickeys.' The Board relies on the testimony of K.M. who wrote in her supplemental statement (P-6) on March 29, 1998, and I infer after having discussed with other students the complaints they made against respondent, that he had asked a student, E.A., if she returned from a school related trip with 'hickeys.' K.M. also wrote that E.A. immediately told respondent she was 'insulted' by the question.

At hearing K.M. testified E.A. had just returned from a trip to Washington, D.C. where K.M. says she attended a conference. K.M. testified she heard respondent ask her if she had met any "guys." K.M. continues her testimony in this manner:

> . . . And she was like -- she replied that yes, there had been a lot of males there, and he had asked her if she had hickeys that we couldn't see under her clothing. And she said to him that she was offended. She said I'm offended by that. And he said, well -- well, come on. We all know what happens when a group of teenagers get together, you must have some hickeys, and nobody really said anything because nobody knew what to say.
> (4T:23-24)

At this point, it is recalled K.M. had earlier testified regarding Charge One, specification 3, that she would not use quotes around a word unless she actually heard the word spoken. The credibility of that testimony, however, was diminished when she subsequently testified that the word she then had in quotes, 'pee', may not have been the actual word used by respondent. So, too, here. K.M. placed the word 'insulted' in quotation marks in her written statement intending to convey she heard that word used. But, K.M. testified E.A. told respondent she was 'offended' by reference to 'hickeys.' (4T:78) K.M. is also the student whom D.C. testified discussed the testimony she had provided after having been directed, and after having stating 'I promise', not to discuss testimony provided until the conclusion of the case which also tends to lessen the credibility of K.M.

Moreover, E.A., who is the subject student of this specification but not one of the complaining students against respondent, testified that while some comment, which she cannot precisely recall, about 'hickeys' was made to her by respondent upon her return from a trip to Syracuse, she did not feel offended in any manner and that as far as she was concerned it was a joke that was laughed off and class continued. E.A. specifically testified she did not say nor did she tell K.M. she was 'insulted' by the comment. (7T:24)

Respondent testified that E.A. had been on several trips and upon her return they would discuss what occurred. Respondent explained that E.A. had on one or more occasions made mention of the fact that some students who were on the trip were not serious about the purpose of the trip. On this particular occasion, respondent testified E.A. made reference to the trip during a general class conversation and he asked her whether she was serious about the trip's purpose. When E.A. responded in the affirmative that she was serious, he then said to her "[S]o, you didn't give your boyfriend any hickeys." According to respondent, E.A. laughed, said "No', and the class went on. (7T:133-134)

I FIND the Board failed to establish by a preponderance of credible evidence that respondent asked E.A. whether she had 'hickeys'; the proofs do establish that respondent asked E.A. whether she had given her boyfriend 'hickeys' in the context as described by E.A. and by respondent.

The Board offered no evidence in support of the allegations contained within specification 7 regarding the comments attributed to respondent directed at female students including 'shirts are too tight', 'should not wear colored bras under white shirts,' and ' likes girls in tight black pants.'

Accordingly, **I FIND** the Board failed to prove the truth of the allegations contained within specification 7 of Charge Two.

Specifications 8, 9, 10, and 11 shall be considered together because the factual allegations contained in each are similar. The allegations include that during 1998-99, respondent was to have told certain females in his chemistry classes in the presence of others that they were 'attractive,' that he repeatedly made comments directly to female students in his chemistry classes about their physiques and comments to others about the physiques of certain female students, that he was to have told K.M. she was 'cute,' and that he was to have told K.M. she and her lab partner received higher grades than others because they 'look nice.'

The Board relies upon the written statement (P-8) of R.S., and her testimony, to establish respondent told certain females in his chemistry classes during 1998-99 they were attractive. The statement and the testimony of R.S. has already been recited for Charge Two, specification 4 (b) above.

The Board also relies upon the supplemented written statement (P-6), and testimony of K.M to support the allegations in this specification. K.M. writes in her statement that:

> I have seen [respondent] tell my fellow classmates that they were attractive and comment on their bodies. He also chooses people because of their looks & discriminates on those whom he doesn't consider 'cute.' He once told me that because I was 'cute' and a classmate was not that I could use the bathroom, and my classmate couldn't. Another time my lab partner & I received (sic) better grades on the exact same lab as another set of students. [Respondent] told us that even though the labs were the same we received (sic) a higher mark because we 'looked' nicer. (P-6)

Recall that it was earlier reported in discussing specifications 4 and 5 to Charge One that K.M. testified respondent never made comments regarding a female's breasts, nor any other part of their anatomy. For whatever reason, the Board relies on the same evidence for proof of this alleged conduct. K.M. testified regarding respondent's alleged comments on students being 'attractive' and making comments on their bodies as follows:

> . . . I had continually seen him talk about people being cute in class. We -- we would have discussions where he would say, well, I gave this person this grade because they're cute, or look at him, he's cute, or look at her, she's cute. (4T:14)

K.M. testified that respondent would tend to use the word 'cute' when male and female students came to school dressed up for visits to other schools and on other occasions. (4T:50-51)

Regarding the use of the bathroom, K.M. testified that on one occasion respondent denied the request of a male student, identified as M.T. but not a complaining student nor was he called to testify, to use the bathroom even though, K.M. says, it was an emergency. Minutes later, K.M.'s request to use the bathroom was granted by respondent because, K.M. testified, respondent said she was cute. K.M. testified she was a little bit offended by the incident because she felt badly for the other male student and no other teacher ever said anything to her like that. (4T:15-16) K.M. acknowledges the school policy to be students are not allowed the use of bathroom facilities during the first or last 10 minutes of class. K.M. also acknowledges the male student requested to use the bathroom within the first 10 minutes of class. She also adds that she made her request in the first 10 minutes of class as well. (4T:52) K.M. also testified the male student repeatedly asked respondent how come she, K.M., could go to the bathroom but he could not before respondent uttered the 'cute' comment. (4T:55)

K.M. testified that respondent gave her and her lab partner a higher grade than that received by another lab pairing of students who did the same lab and were in K.M.'s group because they "were so cute." (4T:17) K.M.'s statement recited above reads that respondent said she and her partner got a better grade because they 'looked nicer.' In either case, K.M. testified she was embarrassed by respondent's comment. K.M. testified on cross-examination that there were four students in her group, divided into two teams. But, when the group began preparing their individual reports for submission the four sat together and hand wrote their individual reports. In K.M.'s view, neatness did not count towards their grade. (See, generally, 4T:59-64)

The Board also relies upon the statement (P-7) and testimony of D.S., who was in respondent's third period chemistry class during 1998-99 when she was 17 years of age. D.S. wrote to the principal in her statement of complaint bout respondent that, "He says that other students are prettier than others." (P-7) D.S. also writes of respondent, though not included as a separate

specification by the Board, that, "Sometimes he will just throw in perverted comment[s] but it's like you have to catch them as he says them." (Id.)

R.S. testified that she felt it important to include respondent's alleged comment that some students are prettier than others because it is not fair whether one is prettier than the others, and if the comment were directed at her in the sense someone else was prettier than she, it would hurt her feelings. Although she testified she knows respondent engaged in the conduct of which she complains, she cannot recall precisely what it is he said, or when it was said, nor to whom it was o have been said. (2T:156-157; 182) R.S. did not identify the 'perverted' comments respondent was to have said, nor did she include an explanation of the comments in her statement because she did not think she had to. (2T:166)

It is noted that to the extent the Board relies upon the testimony and statement (P-5) of D.C. to show respondent made comments on female students being 'cute' as is alleged here, or being 'pretty' as is alleged in part in Charge Two, specification 3(c) above, the finding was already entered that neither her statement nor testimony, individually or combined, was persuasive to establish the truth of specification 3(c) of Charge Two. The same statement and testimony of D.C. upon which a finding has already been entered will not be reconsidered here.

It is also noted the Board produced no evidence in support of its allegation that respondent made comments regarding the physiques of female pupils. This finding has already been entered on Charge One, specification 5, for 1996-97 and the same holds true for the allegations against respondent which were to have occurred in 1998-99.

Respondent testified he does comment on how well a student, male or female, looks if they appear in school dressed up for college or job interviews, a basketball game, or for some other reason requiring them to be dressed up. Respondent says no student ever complained to him that they were offended by any such comment. (7T:135) He acknowledges having said that K.M. she was cute in the context of allowing her to go to the bathroom when he did not allow the male, M.T., to go to the bathroom. (7T:136) Respondent testified that M.T. had been pestering from the time the bell rang for class to start to go to the bathroom, despite knowing the school rules prohibiting bathroom use during the first 10 minutes of class. The more M.T. pestered, the more he would say no. Eventually, K.M. asked to use the bathroom and he granted her permission. When M.T. inquired why she was

allowed to go to the bathroom and he was not, respondent testified he said, "she's cute and you aren't." (Id.)

Respondent denies ever having assigned K.M. and her partner a higher grade on a lab report than two other members of her group for identical work and he denies K.M. ever asking him about her grade in this context. Respondent states that if the reports were identical, more likely than not he would have assigned zeros because identical reports would indicate copying to him. The reports are to be the individual efforts of the students. If K.M. and her partner received a higher grade than the other two lab partners, it could be because their report was done neatly or that they, the reports, looked 'nicer'; not that K.M. and her lab partner looked 'nicer.'

Having considered the proofs of the parties regarding specifications 8, 9, 10, and 11, **I FIND** the Board carried that part of its burden on specifications 8 and 10 to show respondent did tell female and male students in his chemistry classes they were 'attractive' when they appeared in school dressed up. The proofs are sufficient, **I FIND**, to show respondent did tell M.T. that he allowed K.M. to use the bathroom because she is 'cute' and that he was not. The Board's proofs regarding the remaining allegations are insufficient to show that respondent engaged in the complained of conduct. The Board presented no proofs regarding comments allegedly made by respondent concerning the physiques of females and it did not produce the testimony of the students who were to have received a lesser grade than K.M. and her partner on a lab report because they 'look nicer.' Consequently, **I FIND** as fact that respondent did tell students of both genders they look nice or attractive when they appeared in school dressed up and that he told M.T. he allowed K.M. to use the bathroom because she is 'cute' and he was not. I further **FIND** the Board's proofs are otherwise insufficient to establish the truth of the allegations in specifications 9 and 11.

CHARGE THREE

That during the 1996-1997 and 1998-1999 school years, Christopher Wannemacher, a tenured teaching staff member in the employ of the Manchester Regional High School District, exhibited a pattern of unprofessional and unbecoming conduct by sexually harassing female students enrolled in his classes, in the presence of other pupils, and as result of said pattern of unprofessional and unbecoming conduct, he should be dismissed from his position.

In certifying Charge Three as a separate charge, the Board merely combined Charges One and Two, along with the respective specifications, in order to arrive at the separate Charge Three that the alleged conduct occurred in the 1996-97 AND 1998-99 years. The proofs offered by the Board are identical as were offered in Charges One and Two, and the findings and discussion on the proofs would be identical. There is no need to repeat the same proofs in order to arrive at the same findings of fact already entered.

It is noted that the first three Charges allege the complained of conduct constitutes harassment and sexual harassment. At hearing, respondent's motion to dismiss that portion of the first three Charges alleging harassment and sexual harassment was granted. However, it was pointed out to the parties that whatever conduct was proven to be true could still constitute conduct unbecoming. Whether the conduct proven true is conduct unbecoming a teacher shall be addressed later.

CHARGE FOUR

That during the 1996-1997 school year, Christopher Wannemacher, a tenured teaching staff member in the employ of the Manchester Regional High School District, exhibited unprofessional and unbecoming conduct by making sexually explicit and sexually suggestive remarks to female students enrolled in his classes, in the presence of other pupils, and as a result of said unprofessional and unbecoming conduct, he should be dismissed from his position.

The specifications to this Charge repeat all the specifications to Charge One. The proofs offered by the Board to Charge Four duplicate the proofs already entered and considered on Charge One. There is no need to duplicate that which has already been considered and for which findings of fact have already been entered. The difference between this Charge Four and Charge One is that Charge Four alleges the 1996-97 complained of conduct is sexually suggestive and, therefore, unbecoming conduct. In Charge One the Board alleged the complained of conduct constitutes sexual harassment.

CHARGE FIVE

That during the 1998-1999 school year, Christopher Wannemacher, a tenured teaching staff member in the employ of the Manchester Regional High School District, exhibited unprofessional and unbecoming conduct by making sexually explicit and sexually suggestive remarks to female students enrolled in his classes, in the presence of other pupils, and as a result of said unprofessional and unbecoming conduct, he should be dismissed from his position.

The specifications to this Charge repeat all the specifications to Charge Two. The proofs offered by the Board to Charge Five duplicate the proofs already entered and considered on Charge Two. There is no need to duplicate that which has already been considered and for which findings of fact have already been entered. The difference between this Charge Five and Charge Two is that Charge Five alleges the 1998-99 complained of conduct is sexually suggestive and, therefore, unbecoming conduct. In Charge Two the Board alleged the same 1998-99 complained of conduct constitutes sexual harassment.

There is one new specification to this charge which is not specifically stated in Charge Two. That new specification is that during 1998-99 respondent allegedly informed female students in his chemistry classes, besides R.S., that 'if it is too hot in the classroom they may remove their shirts.'

The Board's proof with respect to this new specification is limited to the statement (P-7) and testimony of D.S., which has already been reported in specification 4 (a) of Charge Two. However, no findings were entered on the testimony at that time. Only because this specification is new to Charge Five will the evidence produced through D.S. be repeated here.

D.S. was a student in third period chemistry when she was a junior in 1998-99. D.S. filed a statement of complaint (P-7) against respondent with the principal in which she alleges, among other things, that respondent tells students that they may remove their shirts if they are hot. While D.S. says respondent never directed such a comment to her, she did hear him make that comment to R.S. (2T:154) In the whole of R.S.'s testimony (2T:81-142) not once is the word "shirt" mentioned in the context of respondent telling her she may remove her 'shirt' if she is hot.

Respondent's defense to this charge is identical to the charge regarding tank tops; he never said students may remove their shirts.

I FIND that the Board failed to prove the truth of the allegation that respondent informed females during 1998-99 they may remove their shirts if they are hot in the classroom.

CHARGE SIX

That during the 1996-1997 and 1998-1999 school years, Christopher Wannemacher, a tenured teaching staff member in the employ of the Manchester Regional High School District, exhibited unprofessional and unbecoming conduct by making sexually explicit and sexually suggestive remarks to female students enrolled in his classes, in the presence of other pupils, and as a result of said pattern of unprofessional and unbecoming conduct, he should be dismissed from his position.

In certifying Charge Six as a separate charge, the Board merely combined Charges Four and Five, along with the respective specifications, in order to arrive at the separate Charge Six that the alleged conduct occurred in the 1996-97 AND 1998-99 years. The proofs offered by the Board are identical as were offered in Charges Four and Five, and the findings and discussion on the proofs would be identical. There is no need to repeat the same proofs in order to arrive at the same findings of fact already entered.

CHARGE SEVEN

That during the 1998-1999 school year, Christopher Wannemacher, a tenured teaching staff member in the employ of the Manchester Regional High School District, exhibited unprofessional and unbecoming conduct by engaging in inappropriate physical touching and contact with female students enrolled in his classes, in the presence of other pupils, and as a result of said unprofessional and unbecoming conduct, he should be dismissed from his position.

Here again, the Board repeats specifications and the respective proofs that have already been considered. Specifically, the Board alleges respondent engaged in conduct such as the inappropriate touching and the holding the hands of females as was already discussed in specification 1 of Charge Two, and holding J.G.'s hand as was already discussed in specification 2 of the same Charge Two. No new allegations of specific misconduct are alleged in the specifications filed by the Board with respect to Charge Seven. The same findings of fact on the evidence already discussed would be

entered here, so there is no need to repeat that which has already been said. The only substantive difference between this Charge and prior Charges is that here the Board merely alleges the inappropriate conduct respondent was to have engaged in constitutes unbecoming conduct without reference to alleging sexual harassment or sexually suggestive comments.

CHARGE EIGHT

That during the 1996-1997 school year, Christopher Wannemacher, a tenured teaching staff member in the employ of the Manchester Regional High School District, exhibited unprofessional and unbecoming conduct by displaying a total lack of regard and concern for the educational progress and welfare of students enrolled in his classes, and as a result of said unprofessional and unbecoming conduct, he should be dismissed from his position.

The fact specifications accompanying this charge are that respondent

1. administered tests to students in the 1996-97 year consisting of only one or two questions and that students either received a 100 or 0 since only two questions were asked;

2. read the grades of students aloud, which caused those who did not do well humiliation and embarrassment.

With respect to specification 1, there is no evidence in the record that either the Board or school administrators ever adopted a policy with respect to the nature of tests which teachers are to administer to their pupils. There is no evidence that respondent's supervisors, including the principal or superintendent, ever told him not to administer tests to his students with only one or two questions. It is basic that before a teacher may be disciplined for a teaching method used in the classroom, either the method must be so controversial that a reasonable teacher would know not to use it or the teacher must first be given fair notice that that method is prohibited.

But beyond the absence of prior notice of a prohibition of administering one or two question tests, it is noted that D.C. complained in her statement (P-5) of being administered tests with only one or two questions. D.C. testified respondent frequently, not all the time, gave one or two question

tests. (5T:15) Indeed, D.C. acknowledges respondent administered tests with more than one or two questions. (5T:37) She also acknowledges that the one or two question tests required students to demonstrate on the test paper their methodology of arriving at the answer and they did get partial credit for demonstrating their methodology even if the answer was wrong. (5T:38).

In its filed Brief, the Board also points to the testimony of A.C., a student witness called by respondent, to support its allegation of respondent administering one or two question tests. A.C., who was in respondent's eighth period chemistry class during 1998-99, testified D.C. is one of her best friends. (6T:55) A.C. testified she tried to help D.C. with chemistry before the tests and quizzes which were given. However, A.C. testified that D.C. hated chemistry because she did not understand it, and that she never did chemistry homework, and that she did not like respondent. In this regard, A.C. testified D.C. " . . . was failing his class. She was always saying she didn't like him. She hated him. She hated being there. She hated the class." (6T:53, 54, 56) A.C. does confirm respondent would administer one or two question pop quizzes for which students who show their work could receive partial credit.

While not relied upon by the Board regarding its allegation of improper conduct with respect to the one or two question examinations, it is noted that K.M. testified partial credit was granted on these examinations to those who showed their work. (4T:84)

Respondent acknowledges having administered one or two question examinations but only when the questions cover a lot of work he and the students did in class. Partial credit was granted students for showing how they reached their conclusion. Respondent testified that D.C. and others did get O on the one or two question examinations because they would hand in a blank paper. (7T:152-153)

Having considered the proofs of the parties regarding specification 1 to Charge Eight, **I FIND** the Board failed to prove that the administration of one or two question examinations, while being established they were given by respondent, is improper or conduct that in any manner constitutes unbecoming conduct.

With respect to specification 2 of Charge Eight, the Board relies upon the statement (P-5) and testimony of D.C., the testimony of J.C., R.B., A.C., and respondent to show that respondent did

read student grades aloud. D.C. wrote in her statement that respondent "reads students' grades out loud which embarrasses them." (P-5) D.C. testified she was not doing well in chemistry and when respondent read her grade out loud she was embarrassed. D.C. clarified that test grades were not read aloud; only marking period grades were read aloud, and that it only occurred in the 1998-99 year - not in 1996-97 as is alleged in this charge. (5T: 16, 39-40) D.C. also testified that at the beginning of the 1998-99 year, respondent inviting students to his desk to learn their marking period grades privately if they so chose, but over time that practice changed to respondent reading all marking period grades out loud. (5T:40)

J.C., who filed a statement (P-12) with the principal against respondent, testified that occasionally respondent would read grades out loud, or he would call individual students to his desk and tell them their grade privately. (3T:29) R.B. was a student in respondent's chemistry class during 1998-99. He did not file a statement of complaint against respondent. In fact, R.B. testified on behalf of respondent in this proceeding. R.B. testified respondent asked individual students if they wanted to know their grade and, if so, he would then read the grade out loud. If the student declined but still wanted to know their grade, they would go privately to respondent to learn their grade. (6T:19) A.C., another student in respondent's chemistry class during the 1998-99 year who did not file a statement of complaint against him, testified that respondent did not read grades aloud without first receiving the student's permission to do so. A.C. explained that if the student did not want their grade read aloud, respondent would allow them to come to his desk and he would then show them the grade they earned. (6T:63)

Respondent testified he read mid-term grades aloud only if the individual student gave permission to do so. He explained that because the same mid-term examinations were used from class to class, he could not release the actual examination paper with the grade because other sections of chemistry had not yet taken the examination. When the examinations were scored, those who wanted to know their grade would ask him to read it aloud; those who did not want to know their grade would not ask to have it read aloud. Respondent saw no reason for students who did not want their grade read aloud to be embarrassed or humiliated. (7T:155) (8T:6-9)

Having considered the proofs of the parties regarding Charge Eight, **I FIND** that respondent did administer tests with one or two questions, but **I also FIND** there is no prior prohibition against

teachers using tests with only one or two questions. **I also FIND** that respondent did from time-to-time read grades aloud to those students who gave permission for their grades to be read aloud.

CHARGE NINE

That during the 1998-1999 school year, Christopher Wannemacher, a tenured teaching staff member in the employ of the Manchester Regional High School District, exhibited unprofessional and unbecoming conduct by displaying a total lack of regard and concern for the educational progress and welfare of students enrolled in his classes, and as a result of said unprofessional and unbecoming conduct, he should be dismissed from his position.

There are 25 specifications accompanying this charge. 19 of the 25 specifications allege conduct for which, if true, respondent may be held accountable. The remaining six specifications are conclusions drawn by the Board which are based on its assumption that the 19 fact specifications are true. Of the 19 fact allegations, the Board repeats specifications 1 and 2 of Charge Eight regarding one or two question tests, and reading grades aloud. These two specifications need not be reconsidered here for they have already been decided based on the proofs submitted by the Board. Consequently, there are 16 fact allegations that will be considered for Charge Nine. They are that respondent:

1. Routinely encouraged students to withdraw from chemistry and made comments to individual students including 'why don't you just drop my class, you are going to fail anyway', 'why don't you drop my class, there is no need for you to be here' and 'why don't you drop my class if you do not want to be here;'

2. Provided instruction in a segregated section of the classroom only to a select group of students including those who understand or are doing well and those whom he favors, while ignoring the remaining students;

3. Favors two females, C.L. and D.H., and directs his teaching attention on them while ignoring the remainder of the class;

4. Placed in the back of the room and completely ignored J.C. and E.C. instead of providing them extra attention and assistance;

5. Refused to repeat classroom instruction to those who did not understand; instructed those who did not understand to see him for extra help either

before school starts or after school ends; would be unavailable for such assistance or fail to keep scheduled appointments;

6. Routinely fails to acknowledge students who have their hands raised;

7. Not always returned tests and papers, thereby depriving students of the opportunity to review constructive criticism and to learn from their mistakes;

8. Has not always taught the entire chemistry curriculum when he makes the judgment either that the subject matter is too easy or the material should have been learned in an earlier grade;

9. Students who miss a laboratory are not given the same laboratory as the one taught on the day they were absent, but are still responsible for the material they missed; told K.M. to go to the Elizabeth library to obtain articles instead of making up a missed laboratory;

10. Tells students who are absent that they chose to be absent and he will not teach again that which they missed;

11. Refused to allow J.C., a chemistry student assigned him, to participate in laboratory since January 1999;

12. Does not collect or check assigned homework, nor does assigned homework or class participation count towards grades he assigns students;

13. Gives students different grades for identical work;

14. Fails to focus or re-focus the attention of students who do not pay attention by either doing homework during chemistry, or falling asleep, or talking, or otherwise not paying attention;

15. Told parents at back to school night that 'these students have poor algebra skills so they will not be able to pass', and that 'they can take chemistry again next year;'

16. On March 2, 1999 requested the guidance office to transfer four students from his period three chemistry class, instead of asking guidance to speak with the students to determine whether a problem exists which could be corrected.

Regarding specification 1, D.C quotes respondent in her statement (P-5) as having said 'Why don't you just drop my class, you're going to fail anyway.' D.C. testified the comment was made directly to her at the beginning of the 1998-99 year when she was not doing well in his class. (5T:17) While she recalls respondent telling J.C. something along the lines of 'if you don't want to be here,

maybe you should consider dropping the class', she denies he made the same remark to her. D.C. insists he told her to drop the class because she was going to fail anyway. (5T:44)

R.S. wrote in her statement (P-7) that respondent "tells students to drop his class if they didn't want to be there." R.S. testified that respondent made that statement to her but that she "wasn't going to give up, [she] was going to try." (2T:151)

In its filed Brief, the Board cites the testimony of R.S. at 6T:22 for support of this allegation. In fact, 6T:22 memorializes the testimony of R.B., a student witness called by respondent, who testified at that cite respondent said something to the effect to why don't you drop the class if you don't want to learn, if you want to disrupt the class, if you have no intention of learning in here, or if you have no intention of getting anything out of this class. (6T:22)

R.S. did not specify in her statement (P-8) that respondent ever told her to drop the class because she was going to fail anyway and she testified she has no knowledge whether respondent ever told any student to drop the class because they are going to fail anyway.

J.C. wrote in his statement (P-12) that respondent told him 'why don't you drop my class, there is no need for you to be here.' J.C. testified that it bothered him to be told by a teacher to drop a class because he was trying to succeed in chemistry. (3T:13) J.C. also testified that in keeping with respondent's policy at the beginning of each year of allowing students to select where they will sit, he chose to sit towards the rear of the room. J.C. remained in his chosen seat until at least the Thanksgiving holiday break and perhaps until the Christmas break. J.C. testified he engaged in talking with a group of students nearby, and respondent would tell them to stop talking while he was trying to teach. He says he never tried to be disruptive in class, though he did bring a game-boy to class one day. He acknowledges having turned in quizzes and tests without anything written on them and, occasionally, he would turn in a test paper without his name on it. J.C. specifically testified that respondent said to him "It seems like you're struggling [in chemistry]. You should drop the class." (3T:23-41)

R.J., who filed a statement of complaint (P-11) with the principal, does not mention having heard respondent make the asserted remark in this specification. He is one of the four students whom respondent recommended guidance transfer out of his class on March 2, 1999. (See, P-3)

However, R.J. was not told by either guidance or by the principal of that recommendation R.J. wrote that respondent pays much attention to the students who are passing his class, rather than the one's that are failing. In his written view, R.J. feels respondent does not teach, as he should. At hearing, R.J. testified that while he wanted to drop chemistry he did not because he did not want another study hall, which he considers a waste of time. (3T:131-132) He also testified never said to him to drop the course because you are going to fail anyway. He did hear respondent tell J.C., in effect, 'if you are not going to do anything, why don't you consider dropping the course and turning your attention to other courses.' (3T:146)

M.F., who did extremely well in respondent's chemistry class during 1998-99, filed a statement (P-14) with the principal in which he alleges respondent usually told J.C. to go to the back of the room, and that he heard respondent ask J.C. numerous times why he does not drop the class. (3T:157)

Respondent denies directly telling any student to drop the class. Rather, he explained that if a student insisted upon not working or putting forth an effort, he "thought" their time might be better spent on mathematics or subjects they were having difficulty with and offered them that option. (8T:55) However, he denies ever telling a student they should drop the course because they were going to fail it anyway.

Having considered the proofs of the parties regarding the statement, in effect, why don't you drop the course, you're going to fail it anyway, I FIND the proofs establish that more likely than not, respondent did make such statements to D.C. and J.C. and in the context of not putting forth an effort to succeed in chemistry. There is no evidence as to the intention of the Board alleging that the comment was made 'routinely.' Thus, no finding is entered on that term.

Specifications 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, and 14, shall be considered together because the alleged conduct relates to the essence of the teaching function. A review of the testimony and statements of students who testified in support of these specifications all show that respondent, from their point of view, engaged in the conduct complained of in these specifications. D.C. testified respondent ignored those who did not understand and concentrated on D.H. and C.L. (5T:15); D.E. testified respondent only taught two persons in class (5T:65); D.S. testified respondent only taught C.L. and D.H. (2T:151), as did E.C., R.J., and F.M. J.C. and E.C. testified they were placed in the

back of the room and despite the attempt of J.C. to get closer to the front, he was directed by respondent to return to the back. D.C., R.S., and R.J. testified they believed respondent moved quickly through his lectures and would not repeat any portion of instruction, while D.C., D.S., K.M., E.C., F.M., R.J., and M.F. all testified that it was very difficult to attend respondent's before class extra-help sessions because it was too early in the morning, or because they could not get to school that early, or because they take the bus to school. Indeed, E.C. testified that he did not go for extra-help in the morning even though he knew respondent was available because seeking help that early was a "[L]arge inconvenience to my time." (3T:55) E.C. also testified on cross-examination that extra help was available to students if they had the ambition to seek it. E.C. also recalls being challenged by other students in respondent's classes that he had no basis to refer to respondent as a bad teacher because he, E.C., never went to him for extra help even though it was available. (3T:76, 89)

D.E. testified that on one occasion she had her hand raised and respondent was to have said he would be right over to her. Specifically, she testified, "Well, one time I raised my hand and he said hold on, I'll be right there and he never came." (5T:66) Because D.E. says she failed to address her concerns on this one occasion, the Board includes this as a specification. D.C., J.C., and A.C. testified that respondent failed to return some tests and quizzes to those who did not do well. K.M. testified that upon her return from an absence, respondent would not allow her to make up a lab she missed; Rather, K.M says she had to go to the Elizabeth library to look up articles. I can find no separate evidence for the allegation respondent tells students who are absent that he will not teach that which they missed.

F.M., S.V., and E.A. testified respondent did not check, collect, of grade homework. D.C., J.C., E.C. and R.B. testified respondent did tell students to stop talking while he was teaching a lesson. They all acknowledged that sometimes students would listen and stop talking; other times they would not listen and continue talking. The principal did testify that there is an administrative policy that is to provide teachers are to assign homework "three times a week, on average." (9T:70) However, the principal cannot recall if the policy is in writing.

As noted earlier, respondent's conduct from the point of view of the students occurred. But, that does not mean whatever conduct he did engage in that that conduct is unbecoming a teacher. Respondent testified he uses various teaching techniques in an effort to motivate all his pupils and

that he spends much time in class and after class with lower ability pupils. R.B., who was in the same chemistry class with D.S., D.E., J.C., E.C., and K.M., testified respondent did answer students' questions and would review things not understood. R.B. explained that respondent expected all students to make an effort to understand the difficult subject of chemistry (6T:80), while E.A. testified respondent did not favor any students over others. He treated everyone equally. (7T:30) S.V. testified respondent explained things over if necessary, and he afforded extra help to non-motivated students in class through a one-to-one explanation. (6T:65)

Respondent testified he did assign J.C. a seat in the back of the room but only after J.C. became a disruptive influence on the class as a whole by talking, sleeping, reading magazines and otherwise doing nothing with respect to putting in an effort towards chemistry. (7T:116-120) Respondent also placed E.C. in the back of the room, but only after he had sent a letter home regarding E.C.'s lack of attention in class and his failure to do work. Respondent explained that he had a telephone conversation with E.C.'s mother after the letter had been sent home during which he received assurances from her that E.C. would begin paying attention and doing his work. E.C. neither began paying attention in class nor did he begin to hand in work.

Respondent testified he did make himself available for extra help to all students from about 6 a.m. until the beginning of school. He explained that while he did occasionally help students after school, it was difficult to arrange for extra help then because of faculty meetings The testimony of K.M., N.P., E.A., and S.V., shows respondent did make himself available for extra help generally before school started and sometimes after school.

Respondent denies deliberately failing to acknowledge any student with their hand raised. (7T:150) There is no credible evidence that respondent consistently refused to acknowledge students who wanted his attention and raised their hands.

Respondent testified that if a student handed in a blank test paper or a paper without a name as was the case with J.C. occasionally, there would be no need to hand back a blank test paper. There is no evidence that respondent consistently administered tests and refused to hand them back to all students, or even to some students.

Respondent testified he would not use class time on subject material that was basic, such as the addition of fractions. However, he invited those who wanted him to spend more time on such basic material to come to him before or after school for extra help. (7T:157) And, despite the testimony from some students that respondent was not available the evidence establishes respondent did make himself available for extra help in the morning before class began and, occasionally, in the afternoon after class ended. There is no evidence that respondent violated some rule or regulation of the Board or of the administration regarding making himself available for extra help to students.

Respondent testified that it was recommended to him by a prior "administration" to have alternate assignments available for those who missed labs, or those whose vision was such they could not do labs. One of the alternate assignments was to research articles relating to chemistry or to physical science, copy the article, and submit it to him with a brief synopsis. In addition to K.M. being assigned to look up an article as an alternate assignment to the lab she missed, two other students who missed the same day were also given similar alternate assignments. He knows the other two were working on their alternate research assignment, but he is not certain whether K.M. ever completed her assignment because he was suspended from his teaching duties. (7T:159-160) The knowledge necessary to have done the labs had already been covered in class during an earlier class so K.M. did not miss any instruction. The evidence fails to show that this teaching technique is improper.

Respondent testified that his grading policy includes credit for test and quiz scores, lab work, and homework and participation in class. He acknowledges he does not collect nor grade homework because his experience as a teacher tells him that if homework is graded, students tend to copy from each other instead of trying to complete the assignment themselves. While respondent acknowledges he did not collect homework, he insists he reviewed assigned homework the following day in class because that is a more helpful process for the students than for him to collect and grade it. (7T:107) It is noted there is no evidence in the record to show Board or administrative policy on teacher treatment of student homework, or if such a policy exists. The principal did testify that there is an administrative policy that is to provide teachers are to assign homework "three times a week, on average." (9T:70) However, the principal cannot recall if the policy is in writing. Nor is there any evidence in this record to show respondent's philosophy on the purpose of homework and how he used homework in class, is professionally improper.

Respondent's testimony regarding the allegation he gave different grades for identical reports is the same here as it was for Charge Two, specification 11, that he would assign a zero to identical papers submitted as individual work because it would show one copied from the other. The inference is drawn that with respect to D.C.'s complaint, respondent is of the view the papers complained of were not identical. Grading of papers is a task left to the sound discretion of a teacher. The record lacks persuasive evidence that respondent abused his discretion in the grading of papers.

Respondent already testified he told those who were talking to stop, those who were disrupting the class to stop, and he even changed the seat locations of two disruptive students. A teacher must have the discretion to manage his or her classroom which produces an environment to encourage learning. While the evidence shows respondent did place two students in the back of the room as a disciplinary measure, absent evidence to the contrary it is inferred that an environment conducive to learning for those who wanted to work resulted from that action.

In light of respondent's testimony on each and every allegation in these specifications, I cannot find as fact that the testimony of the students is persuasive that such conduct rises to the level of conduct unbecoming a teacher. Because students perceive conduct of their teacher as negative, that does not make the conduct, even if true, inherently conduct unbecoming a teacher. The conduct as established as having occurred may be inefficient which deserves an entirely different process than that which occurred in this case. But, it cannot be said on this record that conduct complained of in Charge Nine is conduct unbecoming a teacher. **I FIND** the Board failed to prove the conduct complained of in specifications two through ten and 12 and 13 constitutes conduct unbecoming a teacher.

In the Statement of Fact part of its filed brief, the Board asserts J.C. was not permitted in labs. This allegation is similar though different from specification 11, which alleges respondent refused to allow J.C. to participate in labs since January 1999. The Board cites as support a specific transcript page and line number of J.C.'s testimony. The cited transcript, page and line numbers, 3T:14, 9-14, shows the following testimony:

> Q Did there [come] a certain point [in] time where that your ability to succeed in the [respondent's] class was affected by what was going on?

A Yeah because once you're not able to participate in labs, it's almost near impossible to pass because labs are a huge part of your grade.

The evidence shows J.C. was either removed from respondent's lab class for disciplinary reasons in late January or early February 1999 (7T:117), or alternatively, he withdrew from respondent's class (3T:8). But, respondent's testimony regarding J.C. is illuminating:

Q Tell me as best you can recall -- that would be better. Let's deal with first, with J.C. Tell me what your experience was in so far as him coming to class prepared to learn.

A. I recall J.C. never coming to class to work. . . He sat in the back right. Fine with me. But he talked generally the entire time he was in my class. When he was near enough --

Q To whom?

A Well, E.C., M.F., -- M.F., anyone who was around him or even near him. R.J.

Q When he did that, what did you do?

A Well, initially, like anyone, I would tell them to pay attention, maybe say that that could be distracting other people as well. I would do that repeatedly and eventually I would move his seat.

Q And did you move his seat?

A. I did.

Q Where did you move it?

A One seat away from where he was sitting so there would be a row between J.C. and the people he usually spoke with.

Q Have any success?

A No, the talking continued.

Q What did you do?

A. I moved him to the lab table, the first lab table behind the chairs.

Q Any success?

A No, I recall letting him go back to his seat, promising he would behave or not talk and do all the work and things like this.

Q If I'm clear, his original seat, was it further to the front further to the back, laterally or

A He started in the back and I moved him over from the back basically one seat because it was the first lab table and he wanted to go back. I let him go back.

Q He initially worked with -- I guess the whole time he was there, he worked with E.C. as a lab partner at the near-most lab stall. He would sit with his safety glasses on. I can't recall ever seeing him doing anything in the lab. He did hand in a few labs first marking period but after that, I don't believe he ever handed in any labs.

Q What did you do to try and get him to change his behavior?

A Every time we were doing labs I walk around. There's -- in that class there were probably twelve labs going on because you started with 24 students working I pairs basically. And so I get around and I -- I try to make sure everyone's being safe. I try to make sure they're sort of staying focused because I like them to make their own mistakes but I also like time to finish the labs so U try not to let them get too bogged down. I like them to interact with each other so I try to stay hands off as much as I can but I also walk around. There are always one or two groups that aren't getting anywhere. J.C. and E.C. were often that way and I would prod them along. I can't do the work for them. I can't get the data for them. That's part of the lab. They have to get that themselves. And I rarely say them do anything that I would consider part of the Chemistry lab. They did hand in -- J.C. handed in, again I think, one or two labs first marking period.

Q Did their behavior in any manner cause you to have concerns regarding safety in the lab?

A One of the first rules of lab safety and this is -- this is anywhere from college and industry -- If you aren't doing a lab, then you don't belong in the lab. Safety glasses, don't eat and drink, and if you aren't doing a lab, you shouldn't be in the lab. That was my primary concern.

Q And did there come a time as a result of -- of -- of what he was or was not doing that you removed him from the lab area, you know, for --

A Yes.

Q --for some or all of the labs?

A Yes.

Q When did that occur and tell me what your basis of doing that was.

A. It was -- it was probably late January, maybe early February, the very end. It was probably the beginning of third marking period. He had ceased doing any work in class long ago. He had ceased doing lab work and handing in labs for at least the full marking period and I just decided that if he wasn't going to do any work and insisted on it then I had to take him out of the lab because he wasn't taking part in the labs.

Q Now had you -- talked -- had you sent letters to him (sic) parents?

A And I spoke to counselors many times.

Q And --

A I spoke to J.C. many times as well.

Q That's J.C.?

A J.C., yes.

Q Okay, and tell me what the -- you know, the results of these efforts you know, where is so far as getting him to -- to work or perform.

A Completely unsuccessful. We all were. J.C. never lifted a finger and confined (sic) [continued?] to be disruptive.
(7T:116-120)

To the extent the Board alleges respondent removed J.C. from chemistry lab class without justification, such allegation is not proven by the evidence in this record. If the Board alleges J.C. withdrew from chemistry labs as the result of improper conduct perpetrated upon him by respondent, such allegation is not proven true in this record. The allegation contained within specification 11 of Charge Nine is **DISMISSED**.

Specification 15 shall be considered next because it alleges respondent asked the guidance office to transfer four students, one of whom was J.C. who was just discussed, rather than encourage guidance to see if a problem existed which could be corrected. The fact that respondent did request (P-3) the guidance office on March 2, 1999 to reassign J.W., J.C., F.M., and R.J., was addressed at the beginning of this initial decision in the antecedent event section. However, the Board does not make clear respondent's obligation to specifically ask the guidance office personnel to determine the nature of the problem a student may be having for whom reassignment is requested. It appears that appropriate personnel in the guidance office as part of their professional responsibilities may make inquiries of students of the nature of problems for whom reassignment has been requested. In any

case, there is no basis to conclude that the conduct **I FIND** proven true constitutes unbecoming conduct.

Specification 14, the last specification to Charge Nine, is that respondent told parents at back to school night 'these students have poor algebra skills so they will not be able to pass' and 'they can take chemistry again next year.' In its case in chief, the Board relies upon the hearsay testimony of the principal to support this charge which would not, standing by itself, rise to the level of a residuum of legally competent evidence to prove its truth. And, as pointed out by respondent in his filed brief, the principal testified parents complained to him that respondent was to have said that students with poor math skills would have a difficult time with chemistry and 'they may not pass it, and they can take it again next year.' (1T:26) Nevertheless, respondent did testify as to his communication to the parents at the back to school night.

Respondent testified algebra is a prerequisite for chemistry and because those who are weak in math would probably do better in chemistry if they waited until their senior year to take it and take another math course in their junior year. Respondent testified he discussed this point with the guidance office. (7T:86) Respondent acknowledges telling parents that if their child's math skills are weak, they would have a difficult time with chemistry. He explained that in response to a parent's question of what happens if her child does not pass chemistry, he responded she could take chemistry the following year. (7T:86)

I FIND the Board failed to establish that respondent stated in a definite cause-effect relationship that because 'these' students have poor algebra skills and, consequently, they will not be able to pass chemistry. **I do FIND** that respondent told parents at back to school night that chemistry requires math skills, that if a student does not have good math skills, he/she will have a difficult time with chemistry and may not be able to pass; and, that if a child does not pass chemistry this year, they may take it over again next year. That which the evidence shows respondent said is different from that with which he is charged; therefore, this specification must be and is **DISMISSED.**

CHARGE TEN

That during the 1996-1997 and 1998-1999 school years, Christopher Wannemacher, a tenured teaching staff member in the employ of the Manchester Regional High School District,

exhibited unprofessional and unbecoming conduct by displaying a total lack of regard and concern for the educational progress and welfare of students enrolled in his classes, and as a result of said pattern of unprofessional and unbecoming conduct, he should be dismissed from his position.

The Board essentially repeats specifications and substantially the same proofs that have already been considered in Charge Nine. The Board, as examples, alleges respondent engaged in conduct such as administering one or two question tests, reading grades out loud, telling students to withdraw, and directs his teaching to two students. No new allegations of specific misconduct are alleged in the specifications with respect to Charge Ten filed by the Board with these two exceptions. The Board alleges respondent used one or two question tests in physical science in 1996-97 as well as in chemistry during 1998-99. It also alleges that he read grades out loud in physical science during 1996-97, as well as in chemistry during 1998-99. The same findings of fact on the evidence already discussed is entered here. There is no need to repeat that which has already been said.

CHARGE ELEVEN

That during the 1998-1999 school year, Christopher Wannemacher, a tenured teaching staff member in the employ of the Manchester Regional High School District, exhibited unprofessional and unbecoming conduct by threatening and/or intimidating students enrolled in his classes, and as a result of said unprofessional and unbecoming conduct, he should be dismissed from his position.

Specifications to this charge, not otherwise discussed in other charges, are that during 1998-99 respondent told D.E. and "other students" that 'if they complain, he will make it very hard for them in class', and, that respondent gave D.E. "dirty looks" in response to a question posed to him during class. D.E., it will be recalled, is the student who complained respondent did not respond on one occasion to her raised hand and she is also the student who saw J.G. "poke" respondent in the stomach as they passed each other in the hallway.

D.E. did write in the statement (P-10) she filed with the principal that responded said if "we" complain to the principal that "[the principal] will make it hard for us." (Id.) I reviewed the entire direct and cross-examination of D.E. (5T:63-82). D.E. did not testify in support of this allegation and, consequently, there is no explanation as to the substantive difference between the details of the

charge for which the Board gives respondent notice, and what is contained in the only evidence it offers in support of the charge - that is, the written statement. The written statement does not support the charge as stated in the specification. Accordingly, this specification is **DISMISSED**.

D.E. did testify regarding the 'dirty look' specification that "A few other times, like I asked him a question and he just, gave -- gave me this, like dirty look and looked a way. He didn't answer anything, didn't say anything." (5T:70-71) D.E. testified that the 'dirty look' meant respondent would roll "his eyes or something." (Id., p.71)

The evidence does not support Charge Eleven certified by the Board against respondent. Therefore, Charge Eleven is **DISMISSED** in its entirety.

CHARGE TWELVE

That during the 1998-1999 school year, Christopher Wannemacher, a tenured teaching staff member in the employ of the Manchester Regional High School District, exhibited unprofessional and unbecoming conduct by making inappropriate, disrespectful and disparaging remarks to students enrolled in his classes, and as a result of said unprofessional and unbecoming conduct, he should be dismissed from his position.

The Board offers five specifications, not already discussed in other charges, in support of this charge regarding respondent's 1998-99 conduct. The specifications are:

1. that during 1998-99 respondent told students in his chemistry classes to 'shut up;'

2. that before an observation of his teaching performance is to be conducted respondent instructs his students to pretend his class is their favorite class and to behave as if they are enjoying themselves;

3. that that he said about one student 'he wishes he could put this student farther back in the room than he already is;'

4. That respondent told a friend of J.C.'s who was walking through the hallway with J.C. that he 'should pick better kids to hang out with;' and

5. that respondent sent form letters to the homes of D.E., E.C., and "other student's parents,' which contain false and disparaging information about the student's performance and conduct during class and/or laboratory.

The evidence offered by the Board regarding respondent uttering 'shut up' is the written statement and testimony of D.S., which the superintendent and principal accept as fact. In her statement (P-7) filed at the request of the principal, D.S. writes respondent "[T]ells students to shut up." D.S. acknowledges respondent did not direct the command 'shut up' to her. She explains she intended to convey that 'more or less he wouldn't say so nicely as to can you please be quiet and just pay attention. It would be more discrete (sic) as to shut up." (2T:149) Others students who were in respondent's chemistry classes and who tested on his behalf say respondent has told students 'please be quiet,' or to 'be quiet.' ((6T:17)(7T:10)

Despite the fact of which official notice may be taken that many individuals at one time or another during their lifetime may utter "shut up" to someone, the evidence offered by the Board in support of this precise allegation is not persuasive that respondent made a habit of using that expression to his students, or indeed or even used the expression on one occasion. D.S. was not asked when or under what circumstances the expression was to have been used. Indeed, if respondent was to have made the expression part of his regular vocabulary in or out of the classroom, surely the Board would have produced more evidence than just the testimony of one student who, it will be recalled, may be considered one of the major complainers against respondent.

I FIND the Board failed to prove the truth of this specification.

The Board alleges respondent forewarns students of pending observations of his teaching performance with admonitions that they should pretend to enjoy his class, and to behave as if they were enjoying his class. In support of this specification, the Board relies upon the testimony and written statement (P-6). filed by K.M. As part of her supplemental statement filed on March 29, 1999 after having the opportunity of learning of the complaints of other students from the initial meeting with the principal on February 22, 1999, K.M. wrote:

> Oh, [respondent] told us that when [the principal] comes in to observe the class, we should pretend that it's our favorite class & behave as if we were enjoying ourselves. I was under the impression that the students shouldn't be warned about observation procedures.

(P-6. P.3)

K.M.'s testimony parallels the written supplemental statement she provided. (4T:18-19) On cross-examination, K.M. testified she does not have a specific recollection of respondent being observed by the principal, though she does recall being warned that the principal was due to make an observation. K.M. also testified she is not certain whether the principal observed respondent in her chemistry class or another class in which she was not a member. (4T:67) She believes, though she is not certain, whether teachers knew the day and hour the principal was scheduled to make an observation.

I FIND the evidence in support of this specification insufficient to establish that respondent in any manner improperly forewarned students in his chemistry classes of pending observations by the principal.

The Board points to no specific evidence in its filed brief in support in support of its specification respondent was to have said about a student he wished he could put him farther back in the room than he already had. Respondent claims in his brief the Board offered no evidence to support this allegation. While I can independently find no evidence to support the specification, it is inferred the allegation is with respect to J.C. because he is the student who was placed in the back of the room for disciplinary reasons. Nevertheless, having found no evidence to support this specific allegation, this specification is **DISMISSED**.

In regard to the next specification that respondent stated to M.F., who was walking in the hallway with J.C., that M.F. should 'pick better kids to hang out with', J.C. wrote in his statement (P-12) that respondent did tell his friend, M.F., that he should pick better kids to hang out with. J.C. testified respondent does not have the right and has no basis in fact to make such a statement. (3T:17) M.F., in his filed statement (P-14) wrote that respondent did say to him that to "pick better friends meaning [J.C.]". M.F., who identifies himself as a good friend of J.C.'s testified while his father may have had a conference with respondent regarding his performance in chemistry class, he is not certain when the conference may have occurred. (3T:160-161)

While respondent admits having changed M.F.'s seat in the classroom away from J.C. which he says was done at the request of M.F.'s father, he denies making the statement about J.C. to J.C.

(7T:112-114) Nevertheless, he acknowledges having said to M.F. at or about the time he changed his seat that it is important to wisely choose where he sits to avoid distraction and talking with neighbors and to stay on task.

Having considered the proofs of the parties, **I FIND** respondent more likely than not did make the comment to M.F. as alleged. Respondent's explanation of what he was to have said at or about the time he changed his seat, in the context of whether he made the remark as is alleged, does not have the ring of truth. Respondent and J.C. were at odds over J.C.'s conduct in class, and J.C.'s perception that respondent did not care for him. If an explanation was given M.F. at the time of the seat change which was requested by the father, more likely than not respondent also made the comment to M.F. that he should pick better friends than J.C.

Regarding the referenced false and disparaging information in the form letters respondent was to have sent to the homes of D.E. and E.C. is that the named student was not paying attention and/or was failing to wear safety goggles in lab work. D.E. and E.C. claim they were paying attention and they were wearing safety goggles. Respondent says he was justified in sending the form letters home because they were not paying attention and they were not wearing safety goggles as required.

The proofs offered by the parties in this isolated specification do show that form letters were sent home to the students named. There is no proof whatsoever that the contents of the form letters contain false or disparaging comments. **I SO FIND**. Parenthetically, this is the kind of complaint that is best handled between and among the student, the parent, the teacher, and the principal if need be. It is not the kind of issue which should play a significant role in a tenure charge case.

CHARGE THIRTEEN

That during the 1998-1999 school year, Christopher Wannemacher, a tenured teaching staff member in the employ of the Manchester Regional High School District, exhibited unprofessional and unbecoming conduct by discriminating against, and/or disparately treating, students enrolled in his classes, and as a result of said unprofessional and unbecoming conduct, he should be dismissed from his position.

The specifications to this charge repeat specifications in Charge Nine regarding respondent teaches to a select few, that he favors C.L. and D.H., that he placed J.C. and E.C. in the back of the room, that he fails to acknowledge students with raised hands, that he places those students he favors in the first three rows of the classroom, that he told K.M. she was cute, and that he gave different grades for identical work. The only difference between Charge Nine and Charge Thirteen is that Thirteen alleges the complained of conduct constitutes disparate treatment while Nine alleges the complained of conduct constitutes a total lack of concern by respondent for the welfare of his students.

There is no need to repeat hear the same proofs offered by the Board in support of specifications underlying Charge Nine because the proofs are identical. Thus, there is no need to repeat here findings made on the proofs in Charge Nine because the findings are identical.

CHARGE FOURTEEN

That during the 1998-1999 school year, Christopher Wannemacher, a tenured teaching staff member in the employ of the Manchester Regional High School District, exhibited unprofessional and unbecoming conduct by undermining students' respect for, and integrity of, authority and the educational process.

The fact specifications that accompany this charge repeat specifications already considered in Charge Nine regarding dropping the class in the face of certain failure, and Charge Twelve regarding the forewarning of students of pending observations. The proofs here are the same as in Charges Nine and Twelve and need not be repeated. The findings of fact are the same on these two specifications and need not be repeated.

The Board does include two somewhat new, though familiar, specifications. They are:

1. Respondent repeatedly stated to students in his chemistry classes 'if you have a problem with my class, see [the principal or the superintendent] to complain, they will not have time anyway' or you will 'not be able to get an appointment today.'

2. On one occasion when the school was not opened until 7 a.m., respondent told students who came for extra help that morning 'if the school does not

> want to pay people to open it up early than (sic)[you] have lost out on education.'

The Board's proofs in regard to respondent referring students to the principal or superintendent if they have a problem with his class is referenced in its filed brief as the statement (P-5) of D.C. There, D.C. asserts respondent states 'If you have a problem with my class, go to see [the principal] he won't have time anyway.' D.C. testified respondent made the statement to the class in 1996-97. (5T:19) and that it was said in the context of encouraging students to speak with an administrator if they were having problems. (5T:59) The Board once again argues in its Statement of Fact portion of its brief that the superintendent and principal testified they believe the statements were clearly directed at making students afraid of reprisal. (Board's brief, p.31) Not only is the Board's proof limited to one statement being made by respondent and that in 1996-97, but there is not a scintilla of evidence that the statement, if made, had anything to do with reprisal.

Respondent denies ever making the statement to his students they should go see the superintendent or the principal if they have a problem with his class because they would not have time for them anyway. (7T:166)

I FIND the Board failed to prove the truth of the statement by respondent that students should go see the superintendent or principal if they have a problem with his class because they would not have time for them.

I have searched the Statement of Fact portion of the Board's brief and find no reference to the comment respondent was to have made when the school began opening at 7 a.m. and as contained in specification 2 of Charge Fourteen. Respondent did explain on cross-examination that a change in the opening of the school by janitors was changed from 6:15 a.m. to 7 a.m. and he was bothered by the change. He also acknowledges he shared that upset with his students who were coming in for extra help during the morning. Respondent says he did state that if there was no time available in the morning for extra help then they would not be able to get the help from him. (8T:86)

I FIND the Board failed to prove the truth of the charge contained within specification 2 of Charge Fourteen.

A summary of affirmative findings of fact as contained within this initial decision shows that the Board carried its burden of persuasion and established by a preponderance of credible evidence that respondent engaged in the following conduct:

1. During 1996-97, respondent asked D.C. what she and her boyfriend do when they are alone in the context of a general discussion that some do study with their boy/girl friends;

2. During 1996-97, respondent more likely than not and based on the testimony of Mrs. M stated to students that if your mother is pretty you won't have a problem;

3. During 1996-97, respondent did state as a general proposition the direction in which one urinates may have an effect on the direction of movement and that the guidance counselor had knowledge of the statement;

4. During 1996-97, respondent told K.M. he would change her seat if she kissed the boy next to her with whom she had been bickering and that the guidance counselor had knowledge of the statement;

5. During 1998-99, respondent told students who appeared dressed up that they looked nice, or looked attractive;

6. During 1998-99, respondent and J.G. voluntarily held hands for a brief time after having met each other in the hallway;

7. During 1998-99, respondent told R.S. she may remove her sweater if she were hot in the classroom;

8. During 1998-99, respondent made the comment 'nice bra' to K.M. who was wearing a 'translucent white shirt' in class;

9. During 1998-99, respondent told M.T. that K.M. was allowed to use the bathroom and he was not because she is cute and he is not;

10. While the Board established respondent administered one or two question examinations, there is no companion finding that such examinations were prohibited;

11. During 1998-99, respondent did read certain grades aloud to those students who gave permission;

12. During 1998-99, respondent posed the question to two students of why not drop the class because you are failing anyway;

13. During 1998-99, respondent did request guidance to effect the reassignment of four students from his chemistry class without first asking guidance to talk with them to ascertain the nature of the problem;

14. During 1998-99, respondent did tell parents at a back-to-school night chemistry requires good math skills and if students do not have such skills, the study of chemistry would be difficult and may fail; and

15. During 1998-99, respondent more likely than not stated to M.F. in the presence of J.C. that he should 'pick better kids to hang out with', meaning J.C.

In addition to the findings of fact on the disputed issues, there are also other relevant facts that must be considered in the ultimate determination of the matter. Such facts emerged after the February 25, 1999 meeting between the students and the principal and include:

A. Neither the principal nor the superintendent talked with respondent regarding any of the concerns expressed by the students;

B. No one in a supervisory capacity visited respondent's classroom to determine whether J.C. was sitting in the back of the room and, if so, why;

C. No one in a supervisory capacity visited respondent's classroom to get a sense of the flow of instruction, particularly in third period chemistry where many of the complaining students were assigned;

D. No one in a supervisory capacity visited respondent's classroom to determine the effectiveness of respondent's methodology of instruction;

E. No one challenged respondent why he requested the reassignment of four students; and

F. No one offered any assistance to respondent on how to more effectively work with the complaining students other than the principal telling him four months earlier to observe other teachers and to go to workshops.

Taking the entire record as a whole, it appears that the superintendent and principal were content to ignore respondent's position on the complaints of the students and do nothing to investigate or to assist him other than anticipate the arrival of the tenure hearing. No investigation of the complaints was undertaken by the superintendent which involved speaking with respondent, and no significant teaching assistance was offered him. Charge Nine is particularly telling of the absence of teacher visitation, observation, or evaluation by a qualified supervisor of instruction. Of the 25 specifications in Charge Nine, 12 specifications are of the character of inefficiency which obligates

the Board to provide him assistance to overcome the inefficiencies. Other examples of administration and teacher consultation could be noted in which respondent should have been consulted before charges of misconduct were ever certified for determination. The point is made that out of respect for fundamental fairness, respondent should have been advised of what was occurring and his response to the allegation should have been solicited as eagerly as student complaints against him were solicited.

ANALYSIS

The Board seeks the termination of respondent's employment in its district as a teacher on the strength of the charges it brought against him. As noted throughout this initial decision, because students perceive a teacher's conduct in a certain way does not result in that conduct rising to the level of unbecoming conduct of a teacher. Because the superintendent and the principal appear to believe every student allegation made against respondent, that belief does not translate the allegations into fact. Indeed, only 15 instances of alleged conduct were proven to be true in fact by a preponderance of credible evidence. Of the 15 instances of alleged conduct proven to be true, only 8 instances of conduct would arguably rise to the level of conduct unbecoming a teacher. They are:

1. In 1996-97 telling students that if their mother is pretty they won't have a problem;

2. In 1996-97 using urination as the basis for an explanation of motion;

3. In 1996-97 telling K.M. he would change her seat if she kissed the boy next to her;

5. In 1998-99 telling K.M. 'nice bra';

6. In 1998-99 telling M.T. he was not cute but K.M. was as the basis for permission to use the bathroom;

7. In 1998-99 reading certain grades out loud; and

8. In 1998-99 telling M.F. he could choose better friends than J.C.

These eight instances of proven conduct could rise to the level of conduct unbecoming a teacher. The other conduct found to have been engaged in by respondent either does not rise to the

level of unbecoming conduct or is so trivial that it cannot form the basis for any discipline to be imposed upon respondent.

The issue is thus reduced to whether the eight instances of conduct referenced above, individually or collectively, rise to the level of conduct unbecoming a teacher for which some discipline is warranted. The Board notes in its filed brief that tenure protects the teacher against arbitrary dismissal for unfounded, flimsy political reasons. In determining whether expressive conduct constitutes conduct unbecoming a teacher, the words used and the context in which the words were used must be considered.

In this case, the words used by respondent in facts one through six above are inappropriate for use in a public high school setting and the context in which the words were used is equally inappropriate in each instance. There is no educational need for a teacher to tell a parent who requests a conference with their child's teacher that he can see from where the child gets her good looks; there is no educational need for a science teacher to use the basic bodily function of urination as an example of how to create motion; there is no educational need for a teacher to suggest much less direct a student to kiss a boy as the key to getting their seat changed; there is no educational need for a teacher to comment 'nice bra' to a junior high school female despite the fact the student is wearing a translucent white shirt which itself is more likely than not a violation of the student dress code if the student's midriff is exposed (See, R-22, p.21); and, there is surely no educational need for a teacher to tell a male student the reason he did not receive permission to attend the bathroom was because he was not cute.

A teacher with respondent's experience and ability as a professional must know not to read student grades aloud for the embarrassment such a practice may cause students who do well as well as those who do not do so well. For those who do well, the student may not want his/her peers to know they did well for any number of social reasons; for those who do not do well, those students may not want to suffer the embarrassment which follows having their poor grades read aloud. That some students request their grades to be read aloud does not justify the practice because those who do not so request their grades aloud still suffer the embarrassment of not having made the request.

Finally, there is no educational need, absent compelling reasons, for a teacher to tell one student in the presence of another student to choose better friends. J.C. and M.F. are friends.

Respondent's statement to J.C. to choose better friends than J.C., in J.C.'s presence, is unnecessarily cruel particularly when one considers the animosity apparently existing between respondent and J.C.

It must be kept in mind that respondent is a teacher of 11 years experience. He has been recognized as a leader in the field of science and, until these charges were brought, seemed to have the respect of his colleagues. As the result of the charges being brought against him, respondent has suffered the ignominy of being publicly charged with misconduct; he has suffered a loss of salary for at least 120 days of his suspension without pay, and he is presently facing an uncertain future. In short, respondent has already suffered as the result of the charges being brought against him and without first having been found to have engaged in any misconduct.

A finding of misconduct must be entered here against respondent as the result of the eight specific findings above. The issue then becomes what discipline must be imposed for the conduct in which he engaged. Termination of employment is the ultimate sanction the Commissioner of Education may impose, together with the possibility of the State Board of Examiners revoking respondent's teaching certificate. Such a discipline would effectively end respondent's teaching career. This ultimate discipline is rejected as being much too harsh under the totality of the circumstances. Despite the conduct in which he engaged through the use of his expression, there is no evidence that any student has suffered long-term damage emotionally, socially, psychologically, or educationally. It is clear that some of the students who testified will not soon forget the experience, nor will they think kindly of respondent. But, that is not proof of long-term damage. Still, damage was done by respondent, regardless of how fleeting, because teachers who engage in this kind of conduct place the profession of teaching at risk of losing the confidence of the students for whom they are responsible.

A discipline short of dismissal is in order. A fair discipline in light of the circumstances would be for respondent to lose the salary and adjustment increments the Board has already withheld from him and which he challenges by way of a separate Verified Petition of Appeal. [3] Based on the findings reached in this initial decision, the Board's action to withhold respondent's salary and adjustment increments for 1999-2000 are not arbitrary, capricious, or unreasonable. The withholding action has a rational basis in fact and it is not induced by improper motives. See, Kopera *v. West Orange Bd. of Ed/.* 60 *N.J. Super.* 2888 (*App. Div.* 1960).

[3] OAL DKT. NO EDU 9126-99; Agency DKT. No. 200-7/99

CONCLUSION

Having found respondent did engage in eight instances of conduct unbecoming a teacher, it is hereby **ORDERED** that the salary and adjustment increment for 1999-2000 be withheld from him. It is further **ORDERED** that the determination of whether the salary and adjustment increment withheld from him should be restored at some future time is within the sound discretion of the then existing board of education. It is also **ORDERED** that respondent be reinstated to his position of employment with the Board and that the salary withheld from him for the first 120 days of his suspension without pay be immediately tendered him. Finally, it is **ORDERED** that the Verified Petition of Appeal filed by respondent regarding a challenge to the withholding action already taken by the Board 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.

November 30, 2000
DATE

Daniel B. McKeown
DANIEL B. MCKEOWN, ALJ t/a

Receipt Acknowledged:

1-10-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 11 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

DOCUMENTS IN EVIDENCE

For the Petitioner:

P-1 Typed Notes of Principal
P-2 Memorandum, February 25, 1999
P-3 Request to Guidance, March 2, 1999
P-4 Memorandum, March 4, 1999
P-5 D.C. Statement
P-6 K.M. Statement, as amended
P-7 D.S. Statement
P-8 R.S. Statement
P-9 E.C. Statement
P-10 D.E. Statement, as amended
P-11 R.S. Statement
P-12 J.C. Statement
P-13 F.M. Statement
P-14 M.F. Statement
P-15 Affidavit, Principal
P-16 Observation Report, October 30, 1999
P-17 Board Policy
P-18 Letter, March 12, 1999
P-19 Letter, April 1, 1999
P-20 Letter, April 16, 1999
P-21 Letter, June 29, 1999
P-22 Handwritten Note

For the Respondent:

R-1 Letter, October 31, 1999
R-2 Letter, November 15, 1999
R-3 Letter, November 29, 1999
R-4 Letter, December 20, 1999
R-5 Letter, December 20, 1999
R-6 MRHS Counseling Referral Form
R-7 Student Comments
R-8 Student Safety Rules
R-9 Chemistry Examinations
R-10 Mid Term Examination
R-11 Photographs
R-12 Letter, May 18, 1994
R-13 Letter, May 20, 1994
R-14 Letter, April 17, 1997
R-15 Resume
R-16 Identification Only
R-17 Plan Book
R-18 Plan Book
R-19 Sign In-Out Record, 1996-97
R-20 Sign In-Out Record, 1998-99
R-21 Student Handbook, 1996-97
R-22 Student Handbook, 1998-99
R-23 Middle States Report
R-24 Middle States Progress Report
R-25 Chemistry I Curriculum
R-26 Letter, April 2, 1996
R-27 Authorization for Staff Attendance
R-28 Reimbursement Vouchers
R-29 Board Regulation R-6147.1
R-30 Board Policy 6147.1
R-31 Board Policy 5124
R-32 Board Policy 6146.2
R-33 Board Policy 6146
R-34 Board Policy 4117.50
R-35 Board Policy 4117.51
R-36 Board Policy 4117.52
R-37 Identification Only
R-38 Board Policy 5125
R-39 Board Policy 4115/4116
R-40 Board Policy 5131
R-41 Board Policy 6172
R-42 Letter, July 20, 1998
R-43 Letter, March 12, 1999
R-44 Letter, April 20, 1999
R-45 Letter, June 29, 1999
R-46 Observation Report

R-47 Summary Evaluation
R-48 Observation Report
R-49 Observation
R-50 Summary Evaluation
R-51 Identification Only
R-52 Observation
R-53 Summary Evaluation
R-54 Observation
R-55 Observation
R-56 Summary Evaluation
R-57 Observation
R-58 Observation
R-59 Summary Evaluation
R-60 Observation
R-61 Observation
R-62 Observation
R-63 Summary Evaluation
R-64 Observation
R-65 Observation
R-66 Observation
R-67 Summary Evaluation
R-68 Observation
R-69 Observation
R-70 Observation
R-71 Observation
R-72 Summary Evaluation
R-73 Observation
R-74 Observation
R-75 Observation
R-76 Summary Evaluation
R-77 Observation
R-78 Observation
R-79 Observation
R-80 Notes
R-81 Policy

OAL DKT. NOS. EDU 9126-99, EDU 7096-99 and EDU 1340-00 (ON REMAND)
AGENCY DKT. NOS. 200-7/99 and 134-6/99

IN THE MATTER OF THE TENURE HEARING OF CHRISTOPHER WANNEMACHER, PASSAIC COUNTY MANCHESTER REGIONAL SCHOOL DISTRICT.

CHRISTOPHER WANNEMACHER,

PETITIONER,

V.

BOARD OF EDUCATION OF THE PASSAIC COUNTY MANCHESTER REGIONAL SCHOOL DISTRICT,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON REMAND

The record of this consolidated matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exception and reply arguments were submitted on behalf of the parties (hereinafter, "the Board" and "Wannemacher") in accordance with *N.J.A.C.* 1:1-18.4.

WANNEMACHER'S EXCEPTIONS AND THE BOARD'S REPLIES

Wannemacher takes exception to the findings of the Administrative Law Judge (ALJ). Specifically, Wannemacher contends that the ALJ improperly determined that: 1) he made the statement, "If your mother's pretty you won't have a problem" (Wannemacher's Exceptions at 2); he said to K.M., "Nice bra." (*id.* at 4); 3) he made the statement, "Why don't you just drop my class, you're going to fail anyway," to D.C. and J.C. (*id.* at 5); 4) he made the statement "You should pick better kids to hang out with," to M.F. (*id.* at 6); 5) his use of the

process of urination as an example in his class to explain motion constitutes unbecoming conduct (*id.* at 7); and 6) his practice of reading certain grades aloud was conduct unbecoming a teaching staff member (*id.* at 8).

With respect to the ALJ's recommended penalty, Wannemacher argues that, in the Board's eagerness to file the within charges without any investigation and without soliciting his response to the students' allegations, his reputation has been damaged and he has suffered a reduced income for the past two years, since he has been paid at the salary rate he was receiving for the 1998-99 school year. (*Id.* at 10) Wannemacher underscores the positive evaluations he has received in the course of his employment with the Board, and urges the Commissioner, in carefully considering this matter, to conclude that his "actions do not constitute an adequate basis to sustain the charges of unbecoming conduct***." (*Id.* at 12) In this connection, he asserts that the ALJ's recommended forfeiture of his salary and adjustment increment for the 1999-2000 school year is too harsh a penalty. Wannemacher contends he is entitled to return to his position, with back pay and benefits withheld during his suspension, and that his increments for the 1999-2000 school year be restored.

In reply to Wannemacher's exceptions, the Board argues that each of the ALJ's factual findings and concomitant credibility determinations to which Wannemacher objects is grounded in the record and, therefore, entirely proper. The Board further contends that Wannemacher's use of the process of urination in his class, which offends the "sound judgment and sensibility" that a teacher must demonstrate (Board's Reply at 12), as well as his practice of reading aloud students' grades, thereby failing to take into consideration their "potential sensitivities," constitutes unbecoming conduct of a teaching staff member. (*Ibid.*)

As to its decision to withhold Wannemacher's increment for the 1999-2000 school year, the Board contends that Wannemacher's exceptions do *not* argue that its action was arbitrary or capricious, but only "that he has already suffered because of the tenure charges brought against him." (*Id.* at 16) However, in light of the ALJ's findings of unbecoming conduct, the Board maintains that its decision to withhold his 1999-2000 increment should be upheld. (*Id.* at 7) The Board further reasons:

> Since there can be no doubt that the decision to withhold Wannemacher's increments was not arbitrary, unreasonable, or capricious, the ALJ effectively did not impose a penalty for his findings of misconduct. The Board respectfully requests that the Commissioner, at the absolute minimum, increase the sanctions against Wannemacher to include the 120 day suspension (which was effectively 60 days since Wannemacher's suspension coincided with the summer months when he would not receive any pay). *** (*Id.* at 18, 19)
>
> It is respectfully submitted that it is incumbent upon the Commissioner to reject Wannemacher's arguments for a lesser penalty and order the forfeiture of 120 days salary, increase the length of the suspension, and require dismissal of Wannemacher ***." (*Id.* at 20, 21)

BOARD'S EXCEPTIONS AND WANNEMACHER'S REPLY

The Board excepts to the ALJ's dismissal of Charges One, Two and Three, basically contending that it met its burden to prove the essential specifications of these charges.[1]

[1] In this connection, and with respect to Charge One, the Board argues that Wannemacher's comments constituted sexual harassment. It contends, "Courts have further held that sexual harassment of students by teachers is unacceptable and cannot be tolerated in the school setting. In *In the Matter of the Tenure Hearing of Gregory J. Brewer*, Agency Dkt. No. 205-6/98 (September 13, 2000), a tenured teacher was dismissed from his position when he engaged in the sexual harassment of a female student by complimenting the student on her attire ***. The court reasoned that sexual harassment cannot be tolerated in the school setting where students deserve a great deal of protection." (citations omitted) (Board's Exceptions at 6) To this, Wannemacher responds that the case is completely inapposite, since the conduct attributed to Brewer far exceeds the actions herein alleged. (Wannemacher's Reply at 3) In any event, the Commissioner finds that the Board's use of *Brewer* to advance its position is both misleading and misplaced, since, notwithstanding that the ALJ recommended Brewer's dismissal, the case was remanded to the OAL for further proceedings subsequent to Brewer's Motion to Reopen the record, and upon the Commissioner's specific finding that the ALJ's credibility determinations issued therein were based largely on facts not supported by evidence in the record. *Brewer*, Commissioner Decision December 11, 2000, slip op. at 34.

(Board's Exceptions at 4-9) Additionally, the Board asserts: 1) that the ALJ erroneously found that Wannemacher did not state, in response to a request from D.C. for paper, "Down there, bend at your knees, you're good at that." (*id.* at 11); 2) that the ALJ wrongly discounted the testimony of Cynthia Miller, A.D. and B.B., who testified as part of the Board's case on rebuttal in order to dispute Wannemacher's assertions that he did not make inappropriate comments to students; 3) that the ALJ incorrectly prevented the Board from offering the testimony of Barbara Ann Kopicki, the teacher who was hired to replace Wannemacher after his suspension, in order to prove its charges; 4) that the ALJ improperly found that the Board failed to prove the conduct alleged in specifications 2 through 10, 12 and 13 of Charge Nine, since the "overwhelming evidence offered to the court proved that Wannemacher willfully neglected, consciously abandoned and blatantly refused to teach many of the students enrolled in his Chemistry I class," (*id.* at 28); 5) that the ALJ erroneously dismissed specification 14 of Charge Nine, stating that Wannemacher refused to allow J.C. to participate in a laboratory since January 1999[2]; 6) that the ALJ wrongly found that only eight of the findings of proven conduct actually constitute unbecoming conduct a teaching staff member; and 7) that the ALJ improperly concluded, particularly in light of prior case law, that the eight instances of unbecoming conduct did not warrant Wannemacher's 120-day suspension and dismissal.

In reply to each of the Board's exceptions, Wannemacher argues that the ALJ carefully examined each and every charge, as well as his responses to the charges, and properly determined which charges should be dismissed. Wannemacher also distinguishes the case law relied upon by the Board in furtherance of its position, and urges the Commissioner, where certain statements are admitted or found to be factual by the ALJ, to consider the circumstances

[2] Wannemacher notes in his replies that although the Board refers to specification 14 of Charge Nine, he believes that the exception in fact refers to specification 11 of Charge Nine. (Wannemacher's Reply at 17)

"and not merely rule for the petitioner because they have attempted to frame their charges in a way that allows for no explanation of respondent's motivations for his actions." (Wannemacher's Reply at 17) Notwithstanding the Board's repeated references to sexually explicit comments, Wannemacher underscores that "none of the comments that the ALJ found that respondent made are [sic] sexually explicit," although some may be inappropriate and one or two may be suggestive. (*Id.* at 22-23)

COMMISSIONER'S DETERMINATION

Upon careful and independent review of the record in this matter, which included the transcripts from nine days of hearings at the OAL, the Commissioner determines to affirm the Initial Decision of the ALJ, with modification.[3] Initially, the Commissioner notes that the ALJ accurately summarized the testimony from numerous witnesses in this matter, meticulously linked such testimony, along with the documentary evidence, to the specifications alleged in each of the Board's charges, and prepared a careful set of findings which the Commissioner can find no cause to disturb. Not insignificant in this examination of evidence is the ALJ's admonition with respect to the students' statements which, to a large degree, not only formed the genesis of these charges, but also the crux of the Board's case herein:

> [T]he students who filed statements of complaint against respondent and who testified in the matter originally were together when the principal asked them to state the complaints they had. Not only did the students hear the complaints of classmates before they wrote out their individual statements, they had the opportunity between February 22 and March 6, when they wrote out their complaints, to discuss among themselves their individual complaints. Furthermore, all student witnesses against respondent received copies of each other's complaints prior to giving their testimony at hearing. Great caution must, therefore, be used in assessing the credibility of the student witnesses to insure their

[3] To the extent Wannemacher submitted documents in his exception arguments which were not presented at the hearing, these documents were not considered by the Commissioner in reaching his decision. *N.J.A.C.* 1:1-18.4(c).

> testimony is based on personal knowledge, and not what they heard other students complaining about. (Initial Decision at 13)

As such, notwithstanding the parties' objections to findings which were predominantly based upon credibility determinations, the ALJ's credibility determinations herein are entitled to the Commissioner's deference, since the Commissioner finds the ALJ *did* use great caution as he measured conflicts, inconsistencies and potential biases in deciding which testimony to credit in reaching his findings of fact and which facts are supported by evidence in the record. The ALJ, as the finder of fact, had the greatest opportunity to observe the demeanor of the witnesses -- most of them students -- and consequently, is better qualified to judge their credibility. *See In the Matter of the Tenure Hearing of Frank Roberts*, 96 *N.J.A.R* 2d (EDU) 549, 550, *citing In the Matter of the Tenure Hearing of Tyler*, 236 *N.J. Super.* 478, 485 (App. Div. 1989), *certif. denied* 121 *N.J.* 615 (1989). *See also Whasun Lee v. Board of Education of the Township of Holmdel*, Docket No. A-5978-98T2 (App. Div. 2000), slip. op. at 14.

Furthermore, with respect to the Board's contention that the ALJ improperly failed to consider the testimony of its witnesses on rebuttal which the Board offered, "not as a basis for unspecified tenure charges, but rather to dispute Wannemacher's assertions that he did not make inappropriate comments and, more importantly, did not make comments regarding students' boyfriends or girlfriends as asserted in charges 1 through 6" (Board's Exceptions at 17), the Commissioner finds that, even considering, as he did, the testimony of these rebuttal witnesses for the purposes advanced by the Board, the factual findings listed, *infra,* would not be altered by the Commissioner. Similarly, although the Board objected to the ALJ's exclusion of the testimony of Barbara Ann Kopicki, the Commissioner herein affirms the ALJ's ruling in this regard. (Tr. 4 (5/4/00) at 119-122) Finally, based upon his review of this record and, in particular, the ALJ's specific factual findings, the Commissioner declines to set aside the ALJ's

dismissal, issued at the close of the Board's case, of that portion of the charges alleging "sexual harassment." (Initial Decision at 37; Tr. 5 (5/8/00) at 150-152)

Thus, the Commissioner affirms the following findings of fact and, in so doing, recognizes that the ALJ was deliberate in his choice of words, no doubt in order to exclude phrases and allegations which were unsupported by the record herein:[4]

1. During 1996-97, respondent asked D.C. what she and her boyfriend do when they are alone in the context of a general discussion that some do study with their boy/girl friends;

2. *During 1996-97, respondent more likely than not, and based on the testimony of Mrs. M., stated to students that if your mother is pretty you won't have a problem;*

3. *During 1996-97, respondent did state, as a general proposition, the direction which one urinates may have an effect on the direction of movement and that the guidance counselor had knowledge of the statement;*

4. *During 1996-97, respondent told K.M. he would change her seat if she kissed the boy next to her with whom she had been bickering and that the guidance counselor had knowledge of the statement;*

5. During 1998-99, respondent told students who appeared dressed up that they looked nice, or looked attractive;

6. During 1998-99, respondent and J.G. voluntarily held hands for a brief time after having met each other in the hallway;

7. During 1998-99, respondent told R.S. she may remove her sweater if she were hot in the classroom;

8. *During 1998-99, respondent made the comment, "nice bra," to K.M., who was wearing a "translucent white shirt" in class;*

9. *During 1998-99, respondent told M.T. that K.M. was allowed to use the bathroom and he was not because she is cute and he is not;*

10. While the Board established respondent administered one or two question quizzes and examinations, there is no companion finding that such examinations were prohibited;

11. *During 1998-99, respondent did read certain grades aloud to those students who gave permission;*

---

[4] It is noted that the recitation of factual findings may contain some grammatical or semantic changes which do not alter the substance of the findings. Additionally, as in the Initial Decision, "R" refers to Wannemacher.

12. During 1998-99, respondent posed the question to two students of why not drop the class because you are failing anyway;[5]

13. During 1998-99, respondent did request guidance to effect the reassignment of four students from his chemistry class without first asking guidance to talk with them to ascertain the nature of the problem;

14. During 1998-99, respondent did tell parents at a back-to-school night chemistry requires good math skills and if students do not have such skills, the study of chemistry would be difficult and [they] may fail; and

15. *During 1998-99, respondent more likely than not stated to M.F. in the presence of J.C. that he should "pick better kids to hang out with", meaning J.C.* (emphasis supplied) (Initial Decision at 62-63)

From these 15 findings of fact, the ALJ concluded that seven findings, *i.e.*, *those italicized above*, could actually constitute conduct unbecoming a teaching staff member.[6] However, the Commissioner disagrees, in part, with the ALJ's conclusion. Specifically, the Commissioner cannot find, based on the record herein, that Wannemacher's practice of reading students' grades aloud, *with their permission*, was conduct unbecoming a teaching staff member, *particularly* where Superintendent Petrelli testified that it would not be inappropriate to do so, provided students were given the option. (Tr. 5 (5/8/00) at 112) Moreover, the Commissioner cannot conclude on the record before him that Wannemacher's use of urination in his physical science class constituted conduct unbecoming a teaching staff member, where the reference occurred within the context of identifying bodily functions which may be impacted by the laws of motion (*e.g.*, breathing, coughing), (*see* Initial Decision at 17 and Tr. 7 (5/23/00) at 171, 172), and where the ALJ makes no specific finding that any statement related thereto was directed to a

[5] The ALJ also found these comments were made "in the context of not putting forth an effort to succeed in chemistry. There is no evidence as to the intention of the Board alleging that comment was made 'routinely.'" (Initial Decision at 46)

[6] Although the Initial Decision states that there are *eight* findings which constitute unbecoming conduct, only seven are listed on page 64, as a result of misnumbering.

particular student, notwithstanding that Wannemacher may not have carefully considered the use of this term vis-a-vis his young audience.

Therefore, the Commissioner finds that the following conduct, as proven by the Board, may fairly be considered unbecoming a teaching staff member:

1. During 1996-97, Wannemacher more likely than not, and based on the testimony of Mrs. M., stated to students that if your mother is pretty you won't have a problem;
2. During 1996-97, Wannemacher told K.M. he would change her seat if she kissed the boy next to her with whom she had been bickering and that the guidance counselor had knowledge of the statement;
3. During 1998-99, Wannemacher made the comment, "nice bra," to K.M., who was wearing a "translucent white shirt" in class;
4. During 1998-99, Wannemacher told M.T. that K.M. was allowed to use the bathroom and he was not because she is cute and he is not; and
5. During 1998-99, Wannemacher more likely than not stated to M.F. in the presence of J.C. that he should "pick better kids to hang out with," meaning J.C.

Further, in spite of the Board's urging to the contrary, the Commissioner concurs with the ALJ that the improper comments made by Wannemacher, although certainly imprudent and unprofessional, do not warrant his dismissal in the context of his prior unblemished record and when measured against the conduct of respondent teaching staff members in recent cases who were dismissed largely due to their inappropriate comments to students. *See In the Matter of the Tenure Hearing of Henry Komorowski, State-Operated School District of the City of Jersey City, Hudson County*, Commissioner Decision July 27, 2000, *aff'd* State Board December 6, 2000, where respondent was found to have engaged in graphic discussions with fifth grade students regarding torturing and killing one of the students in his class; *In the Matter of the Tenure Hearing of Roberts,* 94 *N.J.A.R.* 2d (EDU) 284, *aff'd* State Board 95 *N.J.A.R.* 2d (EDU) 349, *aff'd* App. Div. 96 *N.J.A.R.* 2d (EDU) 549, where respondent was found to have spoken openly about sex, at times crudely, to have discussed his personal experiences and probed the conduct of his students, to have initiated monologues about sex, and to have commented on

the sex lives and physical features of his students; *In the Matter of the Tenure Hearing of Sheridan*, 92 *N.J.A.R.* 2d (EDU) 257, *aff'd* State Board 92 *N.J.A.R.* 2d (EDU) 393, where respondent was found to have used profanity in the presence of students, to have made derogatory remarks about women, to have made improper sexual references to students' bodies, and to have inferred that he was in a relationship with a student; *In the Matter of the Tenure Hearing of Campbell*, 93 *N.J.A.R.* 2d (EDU) 196, *aff'd* State Board 93 *N.J.A.R.* 2d (EDU) 604, *aff'd* App. Div. 95 *N.J.A.R.* 2d (EDU) 211, where respondent was found, *inter alia*, to have made racist remarks to students in class, to have commented that "girls can be stupid" to a student (*id.* at 207), to have told students that he's been known "to hit kids," (*id.* at 208) and to have engaged in a pattern of unprofessional conduct with parents, students and administrators generating numerous complaints, in spite of many prior warnings from administration; and *In the Matter of Van Gilson*, 93 *N.J.A.R.* 2d (EDU) 378, *aff'd* State Board 93 *N.J.A.R.* 2d (EDU) 630, where respondent was found to have verbally abused and ridiculed a classified pupil in class, to have made derogatory and belittling comments to students, to have commented about a seventh grader's "hooters" and said "If I were 30 years younger, I'd go after her," (*id.* at 382, 385) to have used profanity when talking to a student, and to have discussed personal matters regarding his wife and their divorce with his students. Thus, the Commissioner concurs with the ALJ that the extreme penalty of loss of tenured employment is not warranted under the circumstances of the within matter.

In concert with his penalty determination regarding the Board's tenure charges, the Commissioner considers Wannemacher's allegations that his 1999-2000 employment and adjustment increments were withheld arbitrarily and capriciously. (Petition of Appeal at 2) Here, the Board provided as reasoning for its withholding the following:

(a) sexual harassment of female students enrolled in your classes;
(b) use of sexually explicit and sexually suggestive remarks toward female students enrolled in your classes;
(c) inappropriate physical touching and contact with female students enrolled in your classes;
(d) a total lack of regard and concern for the educational progress and welfare of students enrolled in your classes;
(e) use of threatening and/or intimidating remarks and/or tactics toward students enrolled in your classes;
(f) use of inappropriate, disrespectful and disparaging remarks to students enrolled in your classes;
(g) discrimination against, and/or disparate treatment of, students enrolled in your classes; and
(h) use of language and/or tactics that undermine students' respect for, and integrity of, authority and the educational process. (Petition of Appeal at 2) (Exhibit R-44)

Recognizing that it is Wannemacher's burden to prove, by a preponderance of credible evidence, that the Board's decision to withhold his increment for the 1999-2000 school year was unreasonable, based on the facts, *Kopera v. West Orange,* 60 *N.J. Super.* 288 (App. Div. 1960), and relying upon the above 15 factual findings made by the ALJ and affirmed herein as part of this consolidated matter, the Commissioner finds that Wannemacher has not demonstrated that the Board's action was arbitrary, capricious and unreasonable. In so finding, the Commissioner notes that since *one of the eight reasons* provided by the Board for withholding Wannemacher's increment is supported, at least in part, by these factual findings, *i.e.,* that Wannemacher used inappropriate, disrespectful and disparaging remarks to students enrolled in his classes, the Board's action cannot be said to be without any rational basis. Thus, the Commissioner finds that Wannemacher's Petition of Appeal was properly dismissed.

Accordingly, the Initial Decision is affirmed for the reasons set forth by the ALJ, as modified herein. Like the ALJ, the Commissioner concludes that much of the conduct alleged by the Board did not occur as described and that the nature of the conduct proven to have been exhibited by Wannemacher, *supra,* does not warrant dismissal or forfeiture of his 120-day salary, already withheld pursuant to *N.J.S.A.* 18A:6-10. As such, Wannemacher's salary withheld from him for the first 120 days of his suspension must be immediately restored. Rather, like the ALJ, the Commissioner finds that the loss of salary increments for the 1999-2000 school year is the appropriate sanction to impress upon Wannemacher that his conduct fell short of the "self-restraint and controlled behavior" required of a teaching staff member, *In the Matter of the Tenure Hearing of Jacque L. Sammons,* 1972 *S.L.D.* 302, 321, and that, therefore, he must act with greater prudence in his comments to, and interactions with, students in his charge.

IT IS SO ORDERED.[7]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/26/01

Date of Mailing: 2/26/01

[7] 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.

68-01

DR. H. BENJAMIN WILLIAMS, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, AND THERESA BEBEE THOMAS, PRESIDENT OF THE ATLANTIC CITY BOARD OF EDUCATION, ATLANTIC COUNTY, INDIVIDUALLY AND JOINTLY, : DECISION

RESPONDENTS. :

:

SYNOPSIS

Petitioner, former Superintendent of Schools, sought payment of his salary for the period between the effective date of his resignation pursuant to a settlement agreement with the Board and the date of the Commissioner's approval of the settlement approximately three weeks later. The Board opposed payment of salary for the period after the effective date of petitioner's resignation.

The ALJ determined that the settlement agreement between the parties is a binding contract and that, although petitioner would have been entitled to collect his salary until the Commissioner issued a determination in his tenure case, the settlement agreement set a different date through which petitioner would be paid a salary by the Board. Because the Commissioner approved the terms of the settlement agreement, the ALJ concluded that petitioner is bound by the terms of the agreement, including the date through which he is entitled to a salary.

The Commissioner initially agreed with petitioner that the terms of the settlement agreement should not have been effectuated by the Board before the Commissioner approved the terms of the settlement. However, the Commissioner also agreed with the ALJ that while petitioner may be technically correct that he was entitled to receive the payment of his full salary until the Commissioner made a determination on the tenure charges, it is clear that after the Commissioner's approval of the settlement, the Board would have been entitled to a credit for an overpayment of salary to petitioner under the terms of the settlement agreement. Consequently, the Commissioner adopted the determination of the ALJ that petitioner was only entitled to payment of his salary through December 31, 1999, per the terms of the settlement agreement between the parties.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4032-00

AGENCY DKT. NO. 123-4/00

DR. H. BENJAMIN WILLIAMS,

Petitioner

v.

BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, AND THERESA BEBEE THOMAS, PRESIDENT OF THE ATLANTIC CITY OF BOARD OF EDUCATION, INDIVIDUALLY AND JOINTLY,

Respondents.

Gregory G. Johnson, Esq., for petitioner

George G. Frino, Esq., for respondent

Record Closed: November 27, 2000 Decided: January 10, 2001

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner seeks a salary payment of approximately $7,437.30 from January 3, 2000 to January 21, 2000, the period between the effective date of his resignation, pursuant to a

settlement agreement, and the date of the Commissioner's approval of the settlement agreement. Petitioner filed a petition seeking this payment and the matter was transmitted to the Office of Administrative Law (OAL) on May 15, 2000, for hearing as a contested case. A prehearing conference was held and at that time the parties agreed that the matter could be decided by motion. As a result, attorney for respondent submitted a motion for summary decision and attorney for petitioner responded thereto. The record was closed by the administrative law judge (ALJ) on November 27, 2000.

FACTUAL DISCUSSION

Undisputed Facts:

The facts in this matter are not disputed and are set forth as follows:

1. The respondents filed and certified tenure charges against the petitioner on September 19, 1998.

2. The petitioner's salary was suspended on September 19, 1998 until January 1999, when he was restored to the payroll.

3. The parties executed a settlement agreement, which they submitted to the OAL on December 21, 1999; Judge Martone issued an initial decision dated December 30, 1999, recommending the approval of the settlement to the Commissioner of Education.

4. The respondent removed petitioner from the payroll and discontinued his salary while the initial decision was under review by the Commissioner. On January 12, 2000, petitioner's counsel requested that salary payments continue during the Commissioner's review of the ALJ's decision.

5. The Commissioner approved the settlement agreement by decision dated January 24, 2000. The settlement agreement was not implemented until the Commissioner's decision was issued and received by all parties.

6. The settlement agreement provides in relevant part:

WHEREAS, Dr. Williams is willing to resign from his position of Superintendent of Schools and in lieu of current salary, back pay, front pay, potential damages and attorneys fees is willing to settle all outstanding and pending litigated matters for the lump sum of Two Hundred Sixty Thousand Dollars ($260,000), provided however, that Dr. Williams will continue to receive his salary until December 31, 1999 at which time his salary and benefits shall cease (except for medical) and Dr. Williams shall receive the lump sum on or before January 15, 2000.

* * *

2. Dr. Williams, simultaneously with the withdrawal of the contractual-tenure charges and conditioned upon the payment described herein, submit a binding letter of resignation to the Board effective December 31, 1999 which the Board acknowledges and accepts;

* * *

6. Dr. Williams shall continue on the Board's medical plan until February 1, 2000, and thereafter have the right to extend group medical, hospitalization, prescription and/or dental insurance coverage, at his expense, under the COBRA law.

As a result of this Agreement, except as specifically set forth herein the Parties shall have no further obligations to each other.

* * *

The Superintendent hereby agrees to release and forever discharge the Board, its present and former individual members, successors, assigns, and agents from any and all past, present and future claims, suits, actions and law or in equity of any kind, in any forum that he may have against it or them, and agrees that execution of this Agreement shall serve as full and final satisfaction of same, except for any claims arising from a breach of this Agreement or any provision thereof.

Paragraph 5 of the petition in this matter alleges that when the settlement agreement was submitted to the OAL and to the Commissioner for approval, the respondent illegally stopped paying petitioner's salary from January 3, 2000 to January 21, 2000. Petitioner asserts that he was entitled to receive approximately $7,437.30 in salary payments from January 3, 2000 to January 21, 2000.

LEGAL DISCUSSION AND ANALYSIS

The petitioner argues that it is well settled that the Commissioner of Education has the authority to resolve and determine tenure matters, not boards of education, citing *N.J.S.A.* 18A:6-10. The petitioner asserts that *N.J.S.A.* 18A:6-14, which governs salary payments during tenure proceedings, is binding herein. This states in relevant part:

> Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then *the full salary* (except for said 120 days) *of such person shall be paid beginning on the one hundred twenty-first day until such determination is made...* (Emphasis supplied by petitioner).

The petitioner relies on the language of the statute that , ". . . the full salary. . . of such person shall be paid beginning on the one hundred twenty-first day until such determination is made . . ." and argues that the statute clearly provides that after an employee is suspended, and after serving a 120-day suspension, the board is obligated to restore the employee to the payroll until the Commissioner renders a determination on the charges.

The petitioner contends that the argument of the respondent board is erroneous when it takes the position that it had a right to implement the settlement terms by removing petitioner from the payroll and implementing his resignation made pursuant to the settlement on December 31, 1999, before the Commissioner's approval on January 24, 2000. Petitioner notes that the respondent did not pay petitioner the $260,000 lump sum payment as called for in paragraph three of the settlement agreement until February 2000. Other key terms of the settlement

agreement which required action by January 15, 2000 were not performed until after the agreement was approved by the Commissioner.

Petitioner asserts that by arguing that it had the right to stop petitioner's salary payments, the respondent directly contravenes the authority of the Commissioner. Petitioner relies on the language in *Union County Regional High School District No. 1 v. Minitelli,* 1986 S.L.D. _____, CD 12-86 (Jan. 27, 1986), that, "[A] decision or settlement agreement rendered by the Office of Administrative Law is merely an initial decision recommended to [the Commissioner] by that body and that decision is not final until [the Commissioner] renders his own determination or he chooses not to act on the initial decision."

The petitioner argues that respondent has provided no legal support for unilaterally removing petitioner from the payroll. The petitioner seeks only the compensation which he asserts he was rightly due.

Respondents take the position that if the relief being requested by petitioner is granted, the respondents will have to consider an action either to re-open the settlement and/or to file an action in Superior Court on account of the breach of the settlement agreement. In any event, the respondents argue that no relief can be granted to petitioner herein, that the petition is frivolous, and that the settlement agreement and order should be enforced as written. They assert that any delay in processing the administration of this matter is not the fault of the respondents and is irrelevant to its form and effect.

Respondents argue that the law is that a settlement agreement between parties to a law suit is a contract which, like all contracts, may be freely entered into between the parties and should be enforced as other contracts in the absence of fraud or other compelling circumstances. Respondents argue that in the absence of a rejection of the settlement agreement in this matter by the Commissioner, the settlement agreement is valid and enforceable in accordance with its terms. The respondents point out that the settlement agreement provides for a payment of salary to petitioner up until December 31, 1999, following which he resigns effective that date and is no longer entitled to any salary. Accordingly, they take the position that under the terms of the

settlement agreement petitioner is not entitled to the payment of salary after the effective date of his resignation, and that his petition should be denied.

Court-enunciated principles encouraging settlements also apply to settlement agreements made before administrative agencies. In *Zuccarelli v. State*, 326 *N.J. Super.* 372, 380-381 (App. Div. 1999), the Court noted the strong public policy favoring the settlement of litigation, citing *Nolan v. Lee Ho*, 120 *N.J.* 465, 472 (1990) (quoting *Jannarone v. W.T. Co.*, 65 *N.J. Super.* 472, 476 (App. Div. 1961), *certif. denied,* 35 *N.J.* 61 (1961)). Thus, when an agreement to settle a lawsuit is voluntarily entered into it is binding on the parties. *Pascarella v. Bruck*, 190 *N.J. Super.* 118 (App. Div. 1983), *certif. denied,* 94 N.J. 600 (1983). A settlement agreement between parties to a lawsuit is a contract. *Nolan, supra,* 120 *N.J.* at 472 (citing *Pascarella, supra,* 190 *N.J. Super.* at 124). In *Pascarella* it was noted that "an agreement to settle a lawsuit is a contract which, like all contracts, may be freely entered into and which a court, absent a demonstration of fraud or other compelling circumstances, should honor and enforce as it does other contracts." *Pascarella, supra,* 190 *N.J. Super.* at 124-25; *Hannigan v. Township of Old Bridge*, 288 *N.J. Super.* 313, 319 (App. Div. 1996), *certif.. denied,* 144 N.J. 588 (1996); *Montville Bd. of Ed. v. Pinto,* 94 *N.J.A.R.* 2d (EDU) 507, 511. Settlement agreements are contracts governed by "general principles of contract law," and even a subsequent change in the law is not sufficient reason to rescind a settlement agreement. *New Jersey Mfrs. v. O'Connell*, 300 *N.J. Super.* 1, 7 (App. Div. 1997), *certif.. denied*, 151 *N.J.* 75 (1997); *Montville Bd. of Ed. v. Pinto, supra* at 511-512 .

As pointed out by respondents, in *Montville Bd. of Ed. v. Pinto, supra,* 94 *N.J.A.R.* 2d (EDU) 507, the Commissioner enforced a settlement agreement as written with a resignation date effective *prior to* the requisite Commissioner's approval. In that matter, the ALJ stated (at 511-512):

> A settlement agreement between parties to a lawsuit is a contract which, like all contracts, may be freely entered into. *Pascarella v. Bruck,* 190 *N.J. Super.* 118 (App. Div. 1983), *certif. den.* 94 *N.J.* 600 (1983). Basic contract law controls, whether the Commissioner or a court is reviewing this question.
>
> * * *

> When a lawyer has authority from a client, the lawyer may bind that client to a settlement. *New Jersey Highway Authority v. Renner*, 32 *N.J. Super.* 197 (App. Div. 1954). I have already found that Oxfeld had authority from Pinto to settle this case on November 19, 1990. There is no dispute over Rand's settlement authority especially since the entire Board ratified his actions on November 20, 1990.
>
> Oxfeld on November 19, 1990, stated that *Pinto* would resign in return to paid leave and other benefits. When Rand accepted on behalf of the BOE, a binding contract occurred. *Eg., First Presbyterian Church, Newark v. Howard Co. Jewelers,* 12 *N.J.* 410, 413-414 (1953). An agreement to settle a lawsuit, voluntarily entered into, is binding upon the parties, whether or not made in the presence of a court and even in the absence of a writing. *Accord, Good v. Pennsylvania R.R.*, 384 F.2d 989, 999 (3rd Cir. 1967).
>
> * * *
>
> Finally, the Office of Administrative Law in this matter has a policy interest which is distinct from the transmitting agency. The OAL believes in encouraging fair settlements that are consistent with the applicable law in order to divert unnecessary litigation from its dockets. *See E.g., N.J.A.C.* 1:1-4.2, 1:1-8.1, 1:1-10.1(a), 1:1-19.1 and 1:1-20.1. This OAL policy is akin to the courts "strong public policy in this state in favor of settlements." *Department of Public Advocate v. N.J. Board of Public Utilities*, 206 *N.J. Super.* 523, 528 (App. Div. 1985).

The settlement agreement in this matter is a contract between the parties and should be enforced as other contracts in the absence of fraud or other compelling circumstances. *Hagrish v. Olson*, 254 *N.J. Super.* 133, 137 (App. Div. 1992). If there were no settlement agreement, petitioner would have been entitled to receive the payment of his full salary until the Commissioner made a determination on the tenure charges pursuant to *N.J.S.A.* 18A:6-14. However, after the parties entered into the settlement agreement, their respective rights, duties and relationship are controlled by the terms of the settlement agreement, absent a determination by the Commissioner to set aside the settlement as violative of the public interest pursuant to *In re Cardonick,* 1990 *S.L.D.* 842, *aff'd,* State Board, 1990 *S.L.D.* 846. In the absence of a rejection

of the settlement by the Commissioner, the settlement agreement is valid and enforceable in accordance with its terms.

The settlement agreement in this matter provides for the payment of salary to petitioner until December 31, 1999, which is the effective date of his resignation. As of that date petitioner is no longer entitled to any salary. I note that the settlement agreement herein does not provide in any way that its efficacy is contingent on its approval by the Commissioner.

Petitioner may be technically correct that he was entitled to receive the payment of his full salary until the Commissioner made a determination on the tenure charges. However, it is also clear that after the Commissioner's approval of the settlement, the respondent would have been entitled to a credit for an overpayment of salary to petitioner under the terms of the settlement agreement since his resignation was to be effective as of December 31, 2000. Any delay which occurred in processing the settlement was not the fault of either party and is irrelevant to the form and effect of the settlement agreement.

Based upon the foregoing, I **FIND** that in the absence of a showing of fraud, bad faith or violation of the law, and in the absence of a disapproval of the settlement agreement by the Commissioner of Education pursuant to *In re Cardonick*, the settlement agreement between the parties is valid and enforceable in accordance with its terms. Therefore, I **CONCLUDE** that respondents herein are under no obligation to provide any additional salary payments to petitioner and that petitioner is not entitled to receive approximately $7,437.30 in salary payments for the period from January 3, 2000, to January 21, 2000.

DECISION AND ORDER

For the reasons stated above, it is hereby **ORDERED** that petitioner's petition seeking additional salary payments to petitioner of approximately $7,437.30 from January 3, 2000, to January 21, 2000, is hereby **DENIED** and **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.

n thirteen (13) days from the date on which this recommended decision was mailed ny party may file written exceptions with the **COMMISSIONER OF THE NT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, 8625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be e and to the other parties.

2001

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed to Parties:

N 16 2001

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 04032-00
AGENCY DKT. NO. 123-4/00

DR. H. BENJAMIN WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, AND THERESA BEBEE THOMAS, PRESIDENT OF THE ATLANTIC CITY BOARD OF EDUCATION, ATLANTIC COUNTY, INDIVIDUALLY AND JOINTLY,	:	DECISION
RESPONDENTS.	:	

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 in this matter, the Commissioner initially notes his agreement with petitioner's position that the settlement terms in the tenure matter against him should not have been effectuated before the Commissioner issued a final decision. In that decision, the parties were cautioned against the effectuation of settlement terms prior to the approval of a settlement by the Commissioner. At page 8 of the final decision, the Commissioner specifically stated that

> the terms of the settlement appear to have been effectuated prior to the Commissioner's approval. 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 pursuant to *N.J.A.C.* 1:1-19.1. (In the Matter of the Tenure Hearing of Dr. H. Benjamin Williams, decided by the Commissioner of Education January 24, 2000, slip opinion at 8)

Furthermore, the Commissioner finds meritless any suggestion by the Board that it was justified in carrying out terms of the settlement prior to final disposition of the tenure matter because "any delay in processing the administration of [the tenure] matter is not the fault of the respondents and is irrelevant to its form and effect." (Initial Decision at 5) The papers which are incorporated as part of the controverted settlement agreement indicate that the signature process documenting the parties' acceptance of the settlement agreement was not completed until the signatures for the Board were submitted to the OAL on December 21, 1999. The Administrative Law Judge (ALJ) issued the Initial Decision on December 30, 1999. The case file was transferred to the Commissioner by the OAL on January 6, 2000 and the final decision was issued on January 24, 2000. By law, the ALJ and the Commissioner *each* had 45 days within which to issue a decision. Even with the Board's anticipation that review of the tenure matter would be expedited, the Board *should not have effectuated any of the settlement terms* until the Commissioner's decision was issued, and in so doing, it acted at its own peril, as indicated by the litigation of the instant matter.

Nonetheless, upon careful and independent review of the record, the Commissioner agrees with and adopts the ALJ's recommendation that the instant matter be dismissed because he fully concurs with the ALJ's conclusion that:

> Petitioner may be technically correct that he was entitled to receive the payment of his full salary until the Commissioner made a determination on the tenure charges. However, it is also clear that after the Commissioner's approval of the settlement, *the [Board] would have been entitled to a credit for an overpayment of salary to petitioner* under the terms of the settlement agreement since his resignation was to be effective as of December 31, [1999].*** (emphasis supplied) (Initial Decision at 8)

Accordingly, for the reasons stated in the Initial Decision, as amplified herein, the petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/26/01

Date of Mailing: 2/27/01

* 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.

69-01

PAMELA M. PFISTER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ROXBURY, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

February 26, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9978-97

PAMELA M. PFISTER,

Appellant,

v.

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

Respondent.

Gail Oxfeld Kanef, Esq., for appellant, Pamerla M. Pfister
(Oxfelf Cohen, attorneys)

Vito A. Gagliardi, Esq., Jr. for respondent
(Porzio, Bromberg & Newman, attorneys)

Record Closed: November 27, 2000 Decided: January 5, 2001

BEFORE **ARNOLD SAMUELS**, ALJ

On September 19, 1997, the petitioner, Pamela M. Pfister, filed a Verified Petitioner with the Commissioner of Education alleging that the respondent, Board of Education of the Township of Roxbury, violated her seniority rights in reducing her

hours and hiring another individual in a part-time computer teacher position. The petitioner is tenured and holds an Elementary School Teacher Certification.

The respondent filed a Motion for Summary Decision, which was initially opposed by the petitioner. However, both parties subsequently agreed that the matter was appropriate for Summary Decision on both procedural and substantive issues. After several conferences, oral argument was held on April 17, 2000, accompanied by briefs filed by both parties. Settlement discussions were subsequently entered into by the parties, which ultimately resulted in an agreement, signed by the petitioner and by the Secretary of the respondent Board of Education. A copy of the settlement agreement, together with an extract of the Board Resolution adopting the settlement was filed in the Office of Administrative Law on November 27, 2000.

The parties have agreed to settle this matter in accordance with the attached agreement.

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 on the attached agreement.

It is **CONCLUDED** 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 5, 2001
DATE

Arnold Samuels L/a
ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

1/12/01
DATE

D. M. Artamautis/se
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 18 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sej

OXFELD COHEN, LLC
50 Commerce Street
Newark, New Jersey 07102
(973) 642-0161
Attorneys for Plaintiffs

PAMELA M. PFISTER, Appellant, VS. ROXBURY TOWNSHIP BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY Docket No.: EDUOR 009978-97 Agency Ref. No.: 350-9/97 SETTLEMENT AGREEMENT

This matter having come before the Court upon application of Appellant, Pamela Pfister by her counsel Oxfeld Cohen, LLC, and Respondent, Roxbury Board of Education having denied the allegations of the Petition of Appeal and the parties having amicably resolved the dispute between them,

IT IS HEREBY agreed as follows:

1. Respondent, Roxbury Board of Education shall pay to Appellant, Pamela Pfister the total sum of $15,000 in full satisfaction of all issues asserted by Appellant in the within litigation.

2. Respondent, Roxbury Board of Education shall make all appropriate deductions from the $15,000 which is deemed to be back-pay payable to Appellant. These deductions shall include appropriate pension contributions.

3. In exchange for the above consideration, Appellant, Pamela Pfister hereby agrees to withdraw with prejudice the within Petition of Appeal.

4. Both Appellant and Respondent agree that this Agreement resolves all issues between the parties.

5. This Agreement shall become final upon its approval by the Commissioner of Education. Once counsel for the parties receive the approval from the Commissioner of Education, Respondent shall pay the aforementioned monies to Appellant within twenty (20) days of the Commissioner's approval.

PAMELA M. PFISTER

MARSHALL SIGALL, Board Secretary

LOUIS M. RIPATRAZONE, Ed.D., SUPERINTENDENT

ROXBURY TOWNSHIP BOARD OF EDUCATION
25 Meeker Street
Succasunna, New Jersey 07876

EXTRACT OF MINUTES

The following is an extract from the minutes of the Roxbury Township Board of Education, County of Morris, State of New Jersey, as recorded in the official minute book for the date stated.

The Board of Education of the Township of Roxbury in the County of Morris, State of New Jersey, convened in Workshop Session on Monday, September 11, 2000 at 6:30 p.m. at Eisenhower Middle School, Succasunna, NJ 07876.

The following members of the Board of Education were present for this vote:

Mrs. D. McCleerey	Mr. J. Perfetti	Mrs. J. Crimmel
Mrs. L. Kubala	Mr. N. Maddaloni	Mr. E. Paradiso
Mr. R. Bednarcik	Mrs. P. Miller	Mr. E. Hill

The following member(s) of the Board of Education were absent for this vote:

Mr. R. Badini

The following motion was moved by Mr. Edward Hill and seconded by Mr. Joseph Perfetti and adopted by the Board of Education by the following vote:

YES: 6 NO: 0 ABSENT: 1 ABSTAIN: 2

Resolution No. 532-00
Litigation

It was moved by Mr. Edward Hill and seconded by Mr. Joseph Perfetti that the Board authorizes counsel to settle the matter encaptioned P.P. v. Roxbury Township Board of Education, OAL Docket No. EDUOR 009978-97 for $15,000, payable upon the approval of the settlement by the Commissioner of Education.

Motion carried by roll call vote, 6-0-2. Mr. Maddaloni and Mr. Bednarcik abstained.

I, Marshall Sigall, Secretary of the Board of Education of the Township of Roxbury, County of Morris, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on Monday, September 11, 2000, is a true complete copy of the original minutes as recorded in the minute book of said Roxbury Township Board of Education so far as the same relate to the subject matter referred to in said extract.

In witness, I have hereto set my hand and affixed the corporate seal of the said Board of Education on this 3rd day of November, 2000.

Witness

Marshall Sigall
Board Secretary

ROXBURY TOWNSHIP BOARD OF EDUCATION
25 Meeker Street
Succasunna, New Jersey 07876

EXTRACT OF MINUTES

The following is an extract from the minutes of the Roxbury Township Board of Education, County of Morris, State of New Jersey, as recorded in the official minute book for the date stated.

The Board of Education of the Township of Roxbury in the County of Morris, State of New Jersey, convened in Workshop Session on Monday, September 11, 2000 at 6:30 p.m. at Eisenhower Middle School, Succasunna, NJ 07876.

The following members of the Board of Education were present for this vote:

Mrs. D. McCleerey	Mr. J. Perfetti	Mrs. J. Crimmel
Mrs. L. Kubala	Mr. N. Maddaloni	Mr. E. Paradiso
Mr. R. Bednarcik	Mrs. P. Miller	Mr. E. Hili

The following member(s) of the Board of Education were absent for this vote:

Mr. R. Badini

The following motion was moved by Mr. Edward Hill and seconded by Mr. Joseph Perfetti and adopted by the Board of Education by the following vote:

YES: 6 NO: 0 ABSENT: 1 ABSTAIN: 2

Resolution No. 532-00
Litigation

It was moved by Mr. Edward Hill and seconded by Mr. Joseph Perfetti that the Board authorizes counsel to settle the matter encaptioned P.P. v. Roxbury Township Board of Education, OAL Docket No. EDUOR 009978-97 for $15,000, payable upon the approval of the settlement by the Commissioner of Education.

Motion carried by roll call vote, 6-0-2. Mr. Maddaloni and Mr. Bednarcik abstained.

I, Marshall Sigall, Secretary of the Board of Education of the Township of Roxbury, County of Morris, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on Monday, September 11, 2000, is a true complete copy of the original minutes as recorded in the minute book of said Roxbury Township Board of Education so far as the same relate to the subject matter referred to in said extract.

In witness, I have hereto set my hand and affixed the corporate seal of the said Board of Education on this 3rd day of November, 2000.

Witness

Marshall Sigall
Board Secretary

OXFELD COHEN, LLC
50 Commerce Street
Newark, New Jersey 07102
(973) 642-0161
Attorneys for Plaintiffs

PAMELA M. PFISTER, Appellant, VS. ROXBURY TOWNSHIP BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY Docket No.: EDUOR 009978-97 Agency Ref. No.: 350-9/97 SETTLEMENT AGREEMENT

This matter having come before the Court upon application of Appellant, Pamela Pfister by her counsel Oxfeld Cohen, LLC, and Respondent, Roxbury Board of Education having denied the allegations of the Petition of Appeal and the parties having amicably resolved the dispute between them,

IT IS HEREBY agreed as follows:

1. Respondent, Roxbury Board of Education shall pay to Appellant, Pamela Pfister the total sum of $15,000 in full satisfaction of all issues asserted by Appellant in the within litigation.

2. Respondent, Roxbury Board of Education shall make all appropriate deductions from the $15,000 which is deemed to be back-pay payable to Appellant. These deductions shall include appropriate pension contributions.

3. In exchange for the above consideration, Appellant, Pamela Pfister hereby agrees to withdraw with prejudice the within Petition of Appeal.

4. Both Appellant and Respondent agree that this Agreement resolves all issues between the parties.

5. This Agreement shall become final upon its approval by the Commissioner of Education. Once counsel for the parties receive the approval from the Commissioner of Education, Respondent shall pay the aforementioned monies to Appellant within twenty (20) days of the Commissioner's approval.

PAMELA M. PFISTER

MARSHALL SIGALL, Board Secretary

LOUIS M. RIPATRAZONE, Ed.D., SUPERINTENDENT

OAL DKT. NO. EDU 9978-97
AGENCY DKT. NO. 350-9/97

PAMELA M. PFISTER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ROXBURY, MORRIS 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 Assistant Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34, 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.

Maria Ruggiero

ACTING ASSISTANT COMMISSIONER

Date of Decision: 2/26/01

Date of Mailing: 2/28/01

70-01

CHRISTINE SAN GEORGE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

March 1, 2001

OAL DKT. NO. EDU 7769-99
AGENCY DKT. NO. 137-6/99

CHRISTINE SAN GEORGE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL-TECHNICAL 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: 3/1/01

Date of Mailing: 3/2/01

71-01

BARBARA WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 1, 20001

OAL DKT. NO. EDU 11815-99
AGENCY DKT. NO. 235-8/99

BARBARA WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, 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: MAR - 1 2001

Date of Mailing: MAR - 2 2001

72-01

M.D.G., on behalf of minor child, M.E.G., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF UNION CITY, HUDSON COUNTY, : DECISION

:

RESPONDENT.

:

March 2, 2001

OAL DKT. NO. EDU 3977-00
AGENCY DKT NO. 100-3/00

M.D.G., on behalf of minor child, M.E.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF UNION 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: 3/1/01

Date of Mailing: 3/2/01

75-01

75-01

IN THE MATTER OF THE TENURE	:	
HEARING OF DALE BROOKS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF UNION CITY, HUDSON COUNTY.	:	
	:	

MAR 2 2001

AGENCY DKT. NO. 26-2/01

IN THE MATTER OF THE TENURE	:	
HEARING OF DALE BROOKS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF UNION CITY, HUDSON COUNTY.	:	
	:	

For the Board, Mitzy Galis-Menendez, Esq. (Chasan, Leyner, Bariso & Lamparello)

For Respondent, Sanford R. Oxfeld, Esq. (Oxfeld Cohen, LLC)[1]

This matter having been opened before the Commissioner of Education on February 1, 2001 through certification of tenure charges of incapacity due to chronic and excessive absenteeism, and conduct unbecoming a teaching staff member against a tenured teacher of Special Education by the Board of Education of Union City; and

The Commissioner having directed respondent, via both certified and regular mail on February 1, 2001, to file an Answer to the tenure charges against him[2]; 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

[1] Although the charges certified to the Commissioner included a letter from Mr. Oxfeld informing the Board's counsel and a representative from the New Jersey Education Association that Mr. Oxfeld would not be representing Mr. Brooks in this matter, an Answer was nevertheless filed by Mr. Oxfeld on behalf of respondent.

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

Notwithstanding such notice, an Answer was filed on behalf of respondent on February 22, 2001, six days after the Answer was due,[3] although no extension had been requested by or on behalf of respondent, and no explanation for such late filing was provided; and

The Commissioner's review of the tenure charges certified against respondent by the Board and the statement of evidence in support of those charges indicating that, during the 2000-2001 school year, respondent has been absent a total of 20 full days and 7 half days, as of November 17, 2000 (Board's Statement of Charges at 2); during the 1999-2000 school year, respondent was absent a total of 67 days and was late 3 ½ days, thereby causing the Board to take disciplinary action and deduct 57 days from respondent's salary (*ibid.*); during the 1998-99 school year, respondent was absent 28 full days, 12 half days and was late on 8 occasions, thereby causing the Board to take disciplinary action on several occasions, to vote to withhold respondent's salary and adjustment increment for 1999-2000 school year, and to charge respondent with chronic absenteeism (*ibid.*);[4] during the 1997-98 school year, respondent was absent 42 days (including half days and days late), thereby prompting the Board to take disciplinary action in the form of salary deductions (*id.* at 2-3); during the 1996-97 school year, respondent was absent 13 full days, and 5 half days, thereby causing the Board to make a deduction in his salary and to conduct a disciplinary hearing to address respondent's absences

---

[2] The notice sent to respondent via certified mail (Z-451-488-534) was returned "unclaimed."
[3] The Answer was dated February 20, 2001 and received February 22, 2001.

(*id.* at 3); during the 1995-96 school year, respondent was absent 10 full days, 5 half days, and was late on 7 occasions, thereby causing the Board to take disciplinary action (*ibid.*); and

The Commissioner's review of the tenure charges certified against respondent by the Board and the statement of evidence in support of those charges further indicating that, due to his chronic and excessive absences, as set forth above, respondent is not available to the students who place their trust in him as a Special Education Teacher (*ibid.*); that respondent has failed to submit a plan book and resource schedule for the current school year, which materials are critical because respondent's students require a consistent and organized environment in their educational program (*id.* at 4); that respondent took a pair of glasses belonging to a student, allegedly to have them fixed, but failed to report to work the next day, thereby leaving the child unable to effectively perform his school work (*ibid.*); and

These charges being deemed admitted by respondent by virtue of his failure to submit a timely response; and

The Commissioner finding that respondent's actions constitute incapacity to perform his job function due to his chronic and excessive absenteeism and lateness over a period of five years and conduct unbecoming a teaching staff member sufficient to warrant his dismissal from his tenured position; now therefore

IT IS ORDERED this 2nd day of March 2001 that summary decision shall be granted to the Board, and Dale Brooks shall be dismissed from his tenured position as a teacher in the Board's employ as of the date of this order. This matter shall be referred to the

[4] The Board avers that "Brooks was previously charged with unbecoming conduct for corporal punishment and chronic absenteeism on July 27, 1999. Although those charges were settled, part of the settlement required Brooks to improve his attendance." (Board's Statement of Charges at 1)

State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.6 for action against respondent's certificate as it deems appropriate.[5]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: MAR 2 2001

Date of Mailing: MAR 6 2001

[5] 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.

76-01

A.D., on behalf of minor child, N.A.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH PLAINFIELD, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the Board's determination that her child was not domiciled in the District and its demand for tuition from petitioner.

The ALJ determined that petitioner's child had been entitled to a free public education until December 31, 1999 because of a family hardship but was not entitled to a free education in the District after that time. The ALJ ordered payment of tuition to the Board.

The Assistant Commissioner affirmed the decision of the ALJ and ordered petitioner to pay the District tuition in the amount of $4,740.

MAR 2 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6739-00
AGENCY DKT. NO. 253-7/00

A.D., ON BEHALF OF MINOR CHILD, N.A.D.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF NORTH PLAINFIELD, SOMERSET COUNTY,

Respondent.

A.D., petitioner, *pro se*

Theodore Gast, Esq., for respondent (Vogel and Gast, attorneys)

Record Closed: December 1, 2000 Decided: January 17, 2001

BEFORE **KATHRYN A. CLARK**, ALJ:

PROCEDURAL HISTORY

Petitioner challenged the Board of Education's determination of residency. The petitioner appealed to the Department of Education and on September 15, 2000, the Department of Education transmitted this matter to the Office of Administrative Law (OAL) for hearing and 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 case was heard on November 20, 2000 and on December 1, 2000.

STATEMENT OF FACTS

In June, 1999, petitioner who lives in Belleville, gave temporary custody of her daughter, N.A.D., to her sister, C.D., who lives in North Plainfield. Petitioner took this action because of the disruption caused by a foster child in the home. N.A.D. entered a North Plainfield school. Petitioner gave up her foster child in December 31, 1999, but as N.A.D. was doing well, N.A.D. did not return home. The Board of Education of North Plainfield decided to that N.A.D. was entitled to a free, public education in North Plainfield until December 31, 1999 based on family hardship, but that after that date, there was no longer a reason for N.A.D. to be out of the home, and that, therefore, she was no longer entitled to a free, public education at North Plainfield.

FINDINGS OF FACT

Having had the opportunity to observe and to judge the demeanor and credibility of all witnesses in their testimony, and upon review of all the evidence and exhibits submitted, and drawing reasonable inferences there from, I **FIND** the following as **FACT** by a preponderance of the credible evidence:

1. Because of a family hardship, N.A.D. attended a North Plainfield School in school year 1999-2000.

2. The foster child, who was the cause of the family hardship, was removed from A.D.'s home in December, 1999.

3. N.A.D. did not demonstrate any behavioral or academic problems while in North Plainfield schools.

4. The Board appropriately decided that, for reasons of family hardship, N.A.D. was entitled to a free, public education in North Plainfield School District until December 31, 1999.

5. The Board also appropriately decided that the reason for the family hardship (the foster child) was removed from the home and that the family hardship reason no longer existed after December 31, 1999.

6. N.A.D. returned to school in Belleville for School Year 2000-2001.

7. Throughout this time; A.D. listed N.A.D. as a dependent on from her income tax.

8. N.A.D. was not being supported by C.D. during school year 1999-2000, as if she were C.D.'s own child.

9. The tuition cost for January, 2000 through the end of the school year 2000 is $4,740.

DISCUSSION

The relevant statute, *N.J.S.A.* 18A:38-1, states that public schools shall be free to all domiciliaries of the school district, and also to any child who is kept in the home of another person domiciled within the school district and who is supported by such other person gratis as if she were such other person's own child. Further, a showing is required that the domiciliary intends to keep and support the child without cost to the parent for a longer time than merely throughout the school term.

The Board made an allowance for the hardship created by the foster child in A.D.'s home, but the foster child left A.D.'s home in December, 1999. The hardship ended at that time. N.A.D. continued for the rest of the school year at North Plainfield for her own and her mother's personal preference and convenience, and not because of any hardship. No showing was made that C.D. intended to keep and support the child without cost to the parent for a longer time than merely throughout the school term. Rather, A.D. said that N.A.D. wanted to stay in the North Plainfield school for a dance recital, and A.D. wanted her to stay at her sister's until the damage to the walls and furniture caused by the foster child was repaired, and the stress caused by the presence of the foster child was lessened.

ORDER

It is therefore **ORDERED** that petitioner owes North Plainfield School District the tuition cost for January, 2000 through the end of the school year 2000, or $4,740.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 17, 2000
DATE

Kathryn A Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

1-19-01
DATE

Deborah M. Cittadino /cr
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 22 2001
DATE

Jeff S. Masin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

es

WITNESSES

For Petitioner:

A,D., petitioner

For Respondent:

Joan Graham, school counselor

DOCUMENTS IN EVIDENCE

P-1 Affidavit of A.D.

For Respondent:

R-1 Affidavit of A.D.

R-2 Letter, Theresa DiGiacomo to Marilyn Birbaum, June 15, 2000.

R-3 Record of Parent-Teacher Conference, November 17, 1999.

R-4 Report Card

R-5 Iowa Test of Basic Skills

R-6 Letter, Sills to Parents of N.A.D.

OAL DKT. NO. EDU 6739-00
AGENCY DKT. NO. 253-7/00

A.D., on behalf of minor child, N.A.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH PLAINFIELD, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed by the Assistant Commissioner, to whom this matter has been delegated pursuant to N.J.S.A. 18A:4-34. The parties did not file exceptions.

Upon careful and independent review of the record in this matter, the Assistant Commissioner concurs with the Administrative Law Judge's finding that N.A.D. was entitled to a free public education in respondent's district until December 31, 1999, based on family hardship. The Assistant Commissioner further concurs that, after December 31, 1999, family hardship no longer existed and, therefore, petitioner is responsible for N.A.D.'s tuition in the amount of $4,740 for the period of N.A.D.'s ineligible attendance from January 2000 through the end of the school year.

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

IT IS SO ORDERED.*

ASSISTANT COMMISSIONER

Date of Decision: MAR 2 2001

Date of Mailing: MAR 6 2001

* 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 the date of mailing to the parties.

76-01

EDU # 6739-00
C # 76-01
SB # 13-01

A.D., on behalf of minor child, N.A.D., :

PETITIONER-APPELLANT, :

V. :

BOARD OF EDUCATION OF THE BOROUGH OF NORTH PLAINFIELD, SOMERSET COUNTY, :

RESPONDENT-RESPONDENT. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Assistant Commissioner of Education, March 2, 2001

For the Petitioner-Appellant, DeMeo & LaVista (Alfonse A. DeMeo, Esq., of Counsel)

For the Respondent-Respondent, Vogel & Gast (Theodore E. Gast, Esq., of Counsel)

A.D. (hereinafter "appellant") filed a petition of appeal with the Commissioner of Education challenging a determination by the North Plainfield Board of Education that her daughter was not entitled to a free public education in the district after December 31, 1999. On March 2, 2001, an Assistant Commissioner of Education, acting on behalf of the Commissioner pursuant to authority granted by N.J.S.A. 18A:4-34, upheld the North Plainfield Board's determination.

On April 6, 2001, the appellant filed the instant appeal to the State Board of Education.

Pursuant to N.J.A.C. 6A:4-1.11(a), the appellant's brief in support of her appeal was due on April 26, 2001, 20 days after she filed her notice of appeal. Counsel for the appellant requested and was granted an extension for filing an appeal brief until May 11. He subsequently requested and was granted a second extension until May 18. The appellant, however, failed to file a brief by that date. By letter dated May 25, 2001, the Director of the State Board Appeals Office notified counsel for the appellant of his failure to file a brief in support of the appeal and informed him that this matter was being referred to the Legal Committee of the State Board for consideration of the appellant's failure to perfect the appeal.

The appellant has still failed to file a brief in support of her appeal, more than seven weeks after the extended deadline for such filing and more than six weeks after her counsel was advised of such failure. Nor has the appellant offered any explanation for her failure to file or requested an additional extension of time. 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 of Education, April 1, 1992, aff'd, Docket #A-4812-91-3 (App. Div. 1993).

July 10, 2001

Date of mailing JUL 12 2001

77-01

IN THE MATTER OF THE TENURE	:	
HEARING OF RYAN ING, SCHOOL	:	
DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
ELIZABETH, UNION COUNTY.	:	DECISION
	:	

SYNOPSIS

Board filed tenure charges of conduct unbecoming a teaching staff member against respondent based on his attempt to forge an inappropriate relationship with a 13-year-old female student, and his sending of notes to students in contemplation of his suicide. Respondent admitted the charges dealing with his relationship with a 13-year-old student but denied the fourth charge pertaining to the suicide note, and raised as an affirmative defense that he was diagnosed with bi-polar disorder and, after having received psychotherapy and medication, asserts he is able to continue his teaching career.

The ALJ granted summary decision to the Board on the first three charges and, after conducting a hearing, concluded that the fourth charge was substantiated by the Board. The ALJ considered and discounted respondent's affirmative defense, and recommended respondent's removal from his position.

The Commissioner affirmed the decision of the ALJ for the reasons set forth therein and determined that the appropriate penalty was dismissal of respondent from his teaching position. The Commissioner also referred the case to the State Board of Examiners for action, as the Board deems appropriate, against respondent's certificate.

MAR 2 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3122-00
AGENCY DKT. NO. 75-2/00

IN THE MATTER OF THE TENURE HEARING OF RYAN ING, SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY.

David F. Corrigan, Esq., and **Mary E. Hennessy,** Esq., for the School District of the City of Elizabeth
(Murray, Murray & Corrigan, attorneys)

Sanford R. Oxfeld, Esq., for Ryan Ing
(Oxfeld Cohen, LLC)

Record Closed: December 15, 2000 Decided: January 12, 2001

BEFORE **RICHARD McGILL**, ALJ:

The School District of the City of Elizabeth ("District" or "petitioner") filed charges against Ryan Ing ("respondent"), whom it employees as a tenured teacher. The charges include four allegations of conduct unbecoming a teacher.

Three of the charges are based on an attempt by respondent to forge a romantic relationship with a thirteen-year-old female student. The first charge is that respondent engaged in sexually explicit conversations and correspondence with the student in an attempt to create the relationship. The second charge is that respondent kissed the student. The third charge is that respondent transported the student in his vehicle without the knowledge or permission of her parents. The fourth charge against respondent is that he drafted suicide notes to his students.

In his answer, respondent admitted the factual allegations related to the first, second and third charges and denied the fourth charge. As an affirmative defense, respondent asserted that he suffered from an undiagnosed psychiatric condition known as bi-polar disorder and that having received psychotherapy, counseling and medication, he is now able to continue his career as a teacher.

PROCEDURAL HISTORY

The District filed the charges of conduct unbecoming a teacher with the Commissioner of Education on February 28, 2000. Respondent filed an answer on March 7, 2000, and the matter was transmitted to the Office of Administrative Law on March 22, 2000, for determination as a contested case.

On April 25, 2000, petitioner filed a motion for summary decision, which was opposed by respondent. By Order dated June 6, 2000, petitioner's motion was granted in part and denied in part. Partial summary decision was granted sustaining charges one, two and three and denying summary decision with respect to the fourth charge and the question of removal.

The hearing commenced on June 7, 2000, and continued for a total of three days. Hearing dates were adjourned several times for reasons related to illnesses of respondent's expert witness. The record closed on December 15, 2000, upon receipt of briefs.

ISSUES

The issues to be addressed at the hearing were whether the fourth charge should be sustained and whether removal is warranted under the circumstances of this case. In his post-hearing brief, respondent stated that he is not challenging removal from the District but that he should not lose his certification due to his medical condition and the opinion of his expert that he can continue to teach.

FACTS

The facts related to the first three charges were set forth in the Order granting partial summary decision as follows:

a. Respondent is a tenured teacher employed by petitioner since October 21, 1996.

b. During the 1999-2000 school year, respondent was assigned to teach social studies at the Westminster Academy, which is also known as School No. 26, where he taught seventh and eighth grades.

c. B.C.[1] is a thirteen-year-old girl, who was a student in respondent's social studies and leadership classes during the 1999-2000 school year.

d. During the period from approximately December 22, 1999, to January 8, 2000, respondent attempted to forge a romantic relationship with B.C.

e. In furtherance of this effort, respondent wrote several letters to B.C. expressing his admiration and love for her. The letters contain an outpouring of emotion.

f. On several occasions, respondent contacted B.C. at home by telephone to engage in social conversations.

g. Respondent met with B.C. socially on two occasions and took her for a ride in his motor vehicle without the knowledge or permission of her parents.

h. On one occasion, respondent kissed B.C.

[1] Fictitious initials are used herein.

SUMMARY OF EVIDENCE

Respondent's first witness was Lydia E. Furnari, who is the principal of School No. 26. Through this witness, petitioner presented thirteen notes which respondent sent to students at about the same time that he sent a letter to Ms. Furnari acknowledging his conduct and stating that he would not be returning to school. The letter to the principal was dated January 7, 2000, which was a Friday, and was received on Monday, January 10, 2000. The students also received the notes on January 10, 2000. In the letter to the principal, respondent stated that he intended to end his life. Two notes contain oblique references to suicide. In one note, respondent writes: "Having lost your respect kills me." (Emphasis in original.) In another, respondent states: "I'll be wishing you luck in basketball from above." In all of the notes, respondent in substance apologizes for his conduct and for being a poor role model.

In Ms. Furnari's view, respondent violated the trust between teacher and student and between teacher and parents and other staff. In Ms. Furnari's opinion, respondent should not be returned to school as a teaching staff member in the District or anywhere else in New Jersey.

Martha Weber is employed by respondent as its Director of Human Resources. After respondent acknowledged his conduct, he was suspended from his employment, and he has not returned to school. Ms. Weber described how upset the student's parents and siblings were when they were apprised of the situation. In addition, one of the other students was very upset by the notes from respondent. In Ms. Weber's view, respondent failed to teach trust and responsibility. Respondent should not be returned to the District or any other school.

Respondent acknowledged his relationship with the thirteen-year-old female student, and he admitted that he sent the notes in question to the other students. By Friday, January 7, 2000, respondent was aware that the other students knew about his relationship with B.C. Respondent removed his personal belongings from the school and contemplated suicide. Respondent then wrote the notes to the students and the letter to the principal. On both Saturday and Sunday, respondent met B.C. and took her for a ride in his car.

Respondent then proceeded with his plan to commit suicide. Before doing so, respondent called his girlfriend, who contacted the police. Respondent ultimately changed his mind, and when he arrived at his apartment, the police were waiting for him.

As a result of this situation, respondent was involuntarily committed, and he remained at the Carrier Clinic for eighteen days. The diagnosis was bi-polar disorder. Prior to this time, he was not aware that he had a mental disorder. The treatment included group therapy in a very structured environment and medication. After his discharge, respondent continued to see a psychiatrist and to take medication. Respondent recognizes that his relationship with the thirteen-year-old girl was inappropriate. At the time, respondent did not realize that the relationship could be harmful to the student. Respondent has not made an attempt to commit suicide since leaving the Carrier Clinic.

Seymour F. Kuvin, M.D., is a psychiatrist who was accepted as an expert and testified on behalf of respondent. Dr. Kuvin examined respondent on July 6, 2000. Dr. Kuvin's diagnoses are major depression of a recurrent nature and bi-polar disorder. During the examination, respondent demonstrated an appreciation of the nature and gravity of his actions, although that was not the case at the time of his misconduct. Dr. Kuvin expressed the opinion that with appropriate treatment including counseling and medication, respondent would be able to continue teaching.

Alvin Krass was accepted as an expert in psychology and testified for petitioner. Dr. Krass conducted a psychological evaluation of respondent on May 26, 2000. During an interview, respondent was concerned about his own psychological well-being, and he did not demonstrate an appreciation of the inappropriateness of a relationship with a thirteen-year-old female or the potential harm to the student. Respondent did not take responsibility for the situation. Dr. Krass expressed the opinion that respondent is not an appropriate candidate for return to the classroom and that he should find another career.

LAW AND ANALYSIS

A tenured teacher holds his position under tenure during good behavior and efficiency and may not be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct or other just cause. *N.J.S.A.* 18A:6-10. The first, second and third charges of conduct unbecoming a teacher were sustained in the Order granting partial summary decision.

The fourth charge is that respondent engaged in conduct unbecoming a teacher by sending suicide notes to his students. The facts in regard to this charge are essentially undisputed, and I **FIND** as follows. After becoming aware that the other students knew about his relationship with B.C., respondent contemplated suicide and developed a plan to end his own life on a Sunday evening. Before carrying out his plan, respondent wrote thirteen notes to his students. Two of the notes contained oblique references to respondent's contemplated suicide. However, respondent intended that all of the notes would be received after he committed suicide.

It seems evident that the notes could have a detrimental impact on the students, particularly if respondent had actually committed suicide. Therefore, I **CONCLUDE** that the fourth charge of conduct unbecoming a teacher must be sustained.

The next question is whether the circumstances of this case warrant dismissal. Factors to consider in making this determination include the nature and gravity of the offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation, and 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).

In regard to the nature and gravity of the offenses, respondent took advantage of his position as a teacher to forge a romantic relationship with a thirteen-year-old female student in his class. In doing so, he did not display any appreciation of or regard for the emotional impact on the student. Respondent's conduct betrayed the trust which was placed in him as a teacher of children. In addition, respondent disregarded the potential emotional impact on his students by sending them notes which were to be received after his contemplated suicide. Two of the notes

contained oblique references to his contemplated suicide. Thus, respondent's misconduct is very serious in that it created a risk of emotional harm to the thirteen-year-old girl and his other students.

Respondent's primary contention is that his conduct was the result of an undiagnosed mental condition and that this is a mitigating circumstance. Respondent maintains that with proper treatment including counseling and medication he can return to the classroom. In support of his contention, respondent cites several cases in which charges were sustained but the penalty was less than removal due to mitigating circumstances. In *In the Matter of the Tenure Hearing of Dorothy Howard,* 93 *N.J.A.R.*2d (EDU) 788, charges of incapacity and excessive absenteeism were sustained against a teacher who was an alcoholic. However, the State Board of Education reversed the removal of the teacher because alcoholism is a handicap under the Law Against Discrimination, *N.J.S.A.* 10:5-1 to -49, requiring accommodation. In addition, since returning to school after an absence, the teacher improved her attendance. Similarly, in *In the Matter of the Tenure Hearing of H. Evelyn Cohn,* 1983 *S.L.D.* 633, Cohn threatened to kill a secretary with a knife, which she showed to another teacher. Cohn was disarmed before she did any actual harm to the secretary. The school district filed charges of conduct unbecoming a teacher and sought Cohn's removal. Cohn asserted mitigating circumstances in that she was suffering from various physical and mental medical conditions and presented testimony of a psychiatrist to the effect that she could return to work. The charge of conduct unbecoming a teacher was sustained, but the penalty was loss of one month's pay, as opposed to removal, because Cohn's actions were the result of personal difficulties which had been resolved.

Respondent relies on *Parsippany-Troy Hills School District v. Hess,* 97 *N.J.A.R.* 2d (EDU) 34. In this case, Hess engaged in conduct unbecoming a teacher by making inappropriate comments to female students. Despite presenting testimony of a psychiatric expert, Hess was removed from his position as a teacher.

It must be recognized that teachers are entrusted with the care and custody of school children. This public trust places a heavy duty on a teacher to exercise self-restraint and controlled behavior. Teachers who violate the public trust by disregarding the well-being of the student and indulging their own self-interest must expect dismissal or other serious

consequences. Here, respondent's misconduct is similar in nature but worse than in *Hess* and surely warrants dismissal absent mitigating circumstances. While the testimony of respondent's expert was convincing that respondent's contemplation of suicide was the result of depression, I am not persuaded that respondent's involvement with the thirteen-year-old female student was caused by his undiagnosed condition. Additionally, the testimony of petitioner's expert to the effect that respondent should not be returned to the District was more persuasive. Continued employment of respondent would pose an unacceptable risk to students. Therefore, I **CONCLUDE** that removal is warranted under the circumstances of this case.

It has become evident that respondent is more concerned with the possible impact of this situation on his teaching certificate than with the loss of his position with the District. This concern is not properly the subject of this proceeding, but it is evident that this matter should be referred to the Board of Examiners for consideration.

Accordingly, it is **ORDERED** that:

1. The four charges of conduct unbecoming a teacher are sustained.

2. The penalty is removal from respondent's 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.

Jan 12, 2001
DATE

RICHARD McGILL, ALJ

Receipt Acknowledged:

1-19-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN [illegible] 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cml

APPENDIX

WITNESS LIST

For petitioner:

Lydia E. Furnari
Martha Weber
Alvin Krass

For respondent:

Ryan Ing
Seymour F. Kuvin, M.D.

EXHIBIT LIST

P-1	Letter dated January 7, 2000, from Ryan J. Ing to Lydia (Furnari) with attached letter to students	Evidence
P-2A	Note from Ryan Ing to a student	Evidence
P-2B	Note from Ryan Ing to three students	Evidence
P-2C	Note from Ryan Ing to a student	Evidence
P-2D	Note from Ryan Ing to a student	Evidence
P-2E	Note from Ryan Ing to a student	Evidence
P-2F	Note from Ryan Ing to a student	Evidence

P-2G	Note from Ryan Ing to a student	Evidence
P-2H	Note from Ryan Ing to a student	Evidence
P-2I	Note from Ryan Ing to a student	Evidence
P-2J	Note from Ryan Ing to a student	Evidence
P-2K	Note from Ryan Ing to a student	Evidence
P-2L	Note from Ryan Ing to two students	Evidence
P-2M	Note from Ryan Ing to a student	Evidence
P-3	Letter dated December 22 and 23 from Ryan Ing to female student	Evidence
P-4	Letter dated December 23 and 24 from Ryan Ing to female student	Evidence
P-5	Letter dated December 25 from Ryan Ing to female student	Evidence
P-6	Letter dated December 26 from Ryan Ing to female student	Evidence
P-7	Letter dated December 27, 28 and 29 from Ryan Ing to female student	Evidence
P-8	Letter dated January 1 and 2, 2000, from Ryan Ing to female student	Evidence

P-9	Letter dated January 3, 2000, from Ryan Ing to female student	Evidence
P-10	Letter dated January 4, 2000, from Ryan Ing to female student	Evidence
P-11	Letter dated January 6, 2000, from Ryan Ing to female student	Evidence
P-12	Letter dated January 8, 2000, from Ryan Ing to female student	Evidence
P-13	Letter dated April 27, 2000, from Mary Carroll-Williamson to Thomas G. Dunn, Jr. with attachments	Evidence
P-14	Curriculum Vitae of Alvin Krass, Ph.D.	Evidence
P-15	Report of Alvin Krass, Ph.D., dated June 14, 2000	Evidence
P-16	Consent Order dated December 18, 1988	Identification
R-1	Letter dated February 10, 2000, to Sanford Oxfeld, Esq. (retained)	Identification
R-2	Curriculum Vitae of Seymour F. Kuvin, M.D.	Evidence
R-3	Psychiatric examination report by Seymour F. Kuvin, M.D., dated July 6, 2000	Evidence

OAL DKT. NO. EDU 3122-00
AGENCY DKT. NO. 75-2/00

IN THE MATTER OF THE TENURE	:	
HEARING OF RYAN ING, SCHOOL	:	
DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
ELIZABETH, UNION COUNTY.	:	DECISION
	:	

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 an independent and careful review of the record,[1] the Commissioner agrees with the findings and conclusions of the Administrative Law Judge (ALJ) that each of the Board's four charges of unbecoming conduct against respondent have been sustained, and the appropriate penalty is respondent's dismissal from his tenured teaching position.

Initially, the Commissioner affirms the ALJ's June 6, 2000 Order granting partial summary decision to the Board on Charge Nos. 1, 2 and 3 of its four tenure charges against respondent based on the uncontested facts enumerated by the ALJ on page 3 of his Initial Decision and the evidentiary record in this matter.[2] The Commissioner further adopts the ALJ's

[1] It is noted that the record did not contain transcripts of the hearing conducted below.

[2] Specifically, such charges read: "Charge No. 1 – Mr. Ryan Ing is guilty of conduct unbecoming a teacher by engaging in sexually explicit conversations and correspondence with a female student at various times during the years 1999 to 2000. Mr. Ing did contact by telephone, on several occasions, a thirteen year old student in his class in an attempt to forge a romantic and/or sexual relationship with the student. (Exhibits A-F).*** Charge No. 2 – Mr. Ryan Ing is guilty of conduct unbecoming a teacher by kissing and/or inappropriately touching a thirteen year old student during the years 1999 to 2000. (Exhibit C).*** Charge No. 3 – Mr. Ryan Ing is guilty of conduct unbecoming a teacher by contacting a thirteen year old female student and transporting the student in his vehicle to engage in a physical relationship without the knowledge or permission of the student's parents. (Exhibit C).***" *See* Statement of Charges, January 27, 2000.

conclusion here that the Board's Charge No. 4 of unbecoming conduct has similarly been sustained, since he concurs that the notes respondent sent to his students in contemplation of his suicide (*see* Exhibits P-2A, P-2B, P-2C, P-2D, P-2E, P-2F, P-2G, P-2H, P-2I, P-2J, P-2K, P-2L, and P-2M), could have had a significant detrimental impact on these students, particularly if respondent had ultimately committed suicide. In reaching his determination, the Commissioner notes that it is well-established that teachers are in a unique position of public trust and, as such, are required to adhere to an enhanced standard of behavior and to serve as positive role models to students and to the community. *See In re Sammons*, 1972 *S.L.D.* 302; *In re Tordo*, 1974 *S.L.D.* 97. Moreover, as the Commissioner has previously observed:

> ***The peculiar relationship between the teacher and his pupils is such that it is highly important that the character of the teacher be above reproach.*** [***][P]arents and pupils regard the teacher as an exemplar whose conduct might be followed by his pupils, and the law by necessary intendment demands that he should not engage in conduct which would invite criticism and suspicions of immorality. *In re Quinn,* 1975 *S.L.D.* 397, 411, quoting *Tracy v. School District No.* 22, 70 *Wyo.* 1, 243 *P.2d* 932, 937 (1952).

Here, there is no question that respondent violated the teacher-pupil relationship by engaging in improper interaction with a 13-year-old eighth grade student, whose interest he was obligated to safeguard. A review of the letters written by respondent to this young girl, wherein he expresses his thoughts, fantasies and romantic feelings toward her, leave no doubt as to their inappropriateness. The Commissioner also finds disquieting that the record evidences that respondent was cognizant of the unbefitting nature of his conduct and instructed the young student not to let her parents find his letters and to keep their relationship quiet. (*See* P-3, P-4, P-5, P-7, P-8, P-12.)

With regard to the determination of the appropriate penalty to be imposed in this matter, the Commissioner is mindful that he is required to consider: the nature and gravity of respondent's offenses under all the circumstances involved; his prior record in the District, any evidence as to provocation, extenuation or aggravation; and any harm or injurious effect which his 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, 421-22 (App. Div. 1967). In so considering, the Commissioner is in full agreement with the ALJ that:

> [R]espondent took advantage of his position as a teacher to forge a romantic relationship with a thirteen-year-old female student in his class. In doing so, he did not display any appreciation of or regard for the emotional impact on the student. Respondent's conduct betrayed the trust which was placed in him as a teacher of children. In addition, respondent disregarded the potential emotional impact on his students by sending them notes which were to be received after his contemplated suicide. Two of the notes contained oblique references to his contemplated suicide. Thus, respondent's misconduct is very serious in that it created a risk of emotional harm to the thirteen-year-old girl and his other students. (Initial Decision at 6-7)

As such, the Commissioner finds and concludes that the behavior established here transcends the boundaries of conduct which can be tolerated from a teaching staff member in a position of authority who has a responsibility for the custody and care of children, necessitating respondent's dismissal from his position. Furthermore, the Commissioner determines that, based on the record before him, this result is in no way altered by respondent's subsequent diagnosis of, and treatment for, a bi-polar disorder, as he, like the ALJ, is "not persuaded that respondent's involvement with the thirteen-year-old female student was caused by his undiagnosed condition." (Initial Decision at 8)

Accordingly, for the reasons expressed therein, the Commissioner affirms the Initial Decision of the OAL and hereby orders that Ryan Ing be dismissed from his tenured

teaching position with the School District of the City of Elizabeth as of the date of this decision. This matter shall be transmitted to the State Board of Examiners, pursuant to the requirements of *N.J.A.C.* 6:11-3.6, for action, as that body deems appropriate, against respondent's certificate.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: MAR 2 2001

Date of Mailing: MAR 6 2001

[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.

78-01

78-01 E

E.G., on behalf of minor child, E.G., Jr.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, AND LARRY PENNY, VICE PRINCIPAL, BURLINGTON COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

MAR 2 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING APPLICATION
FOR TEMPORARY EMERGENT RELIEF
OAL DKT. NO. EDU 201-01
AGENCY DKT. NO. 3-1/01

E.G. O/B/O MINOR CHILD, E.G., JR.,
Petitioner,
v.
BOARD OF EDUCATION OF BURLINGTON TOWNSHIP AND LARRY PENNY, VICE-PRINCIPAL, BURLINGTON COUNTY,
Respondents.

Melissa S. Franchio, Esq., for petitioner
David M. Serlin, Esq., for respondent

Record Closed: February 20, 2001 Decided: February 21, 2001

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter was opened before the undersigned on an application for temporary emergent relief filed by E.G., parent of minor child, E.G., Jr., *pro se.* The petition of appeal filed on January 4, 2001, alleged that student E.G., Jr. had been wrongfully suspended from school on

two occasions on charges of engaging in physical altercations or rude and discourteous conduct. The petition further alleged failure of teaching staff members to take appropriate prophylactic measures to defuse problems between students or to take proper corrective measures to rectify problems and sought:

> an emergent order to have the staff members of Thomas Hopkins Middle School stop denying my son help when he raises a complaint against another student, and to take corrective measures to rectify or defuse minor problems before they get out of hand. Corrective measures defined as changing the students seating arrangement and having a guidance councilor intervene with mediation between the parents and children, before any serious confrontation or violation of rules are allowed to occur between the children. Without this emergent order of relief the petitioner will suffer irreparable harm if not granted.

On January 17, 2001, the Department of Education transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to –13. The transmittal letter advised the parties that the matter was being transmitted to the OAL without an answer for disposition of the emergent relief request. A return date for oral argument on the motion for temporary emergent relief was scheduled for Friday, January 26, 2001, before the undersigned administrative law judge. By letter dated January 25, 2001, petitioner requested an adjournment of the oral argument in order to retain counsel to represent him. By separate letter dated January 27, 2001, petitioner requested a subpoena to obtain his son's school records. The undersigned replied by letter dated January 30, 2001, as follows:

> Pursuant to your January 27, 2001 letter to me, I am enclosing a blank form of subpoena. I believe, however, that you are entitled to see and copy the records you seek without the necessity of a subpoena pursuant to *N.J.A.C.* 6:3-6.1 to 6.8. You are also entitled to discovery materials in the course of this litigation pursuant to *N.J.A.C.* 1:1-10.1 to 10.6. Just so we are all clear as to what is scheduled for February 9, 2001 at 1:30 p.m. – there is no hearing that day, only oral argument on a motion for temporary emergent relief. The standards for determining such a motion require me to find:
>
> 1) The applicant has a reasonable probability of ultimately prevailing on the merits; *i.e.*, the relevant facts are not in dispute and legal rights are relatively well defined;

2) temporary relief pending the outcome on the merits is necessary to prevent irreparable harm, *i.e.*, harm which cannot be retroactively addressed with monetary damages or correcting paperwork, etc., and

3) the relief is narrowly drawn to prevent the specific harm from occurring and to impose as little hardship as possible.

The hearing on the merits herein is scheduled for April 3, 2001. We will discuss any question you may have about the procedures for the plenary hearing when we meet on the record on February 9, 2001.

By letter dated January 31, 2001, Ms. Franchio entered her appearance as counsel for petitioner and requested an adjournment of the oral argument scheduled for February 9, 2001, to permit sufficient time to prepare. Accordingly, the matter was rescheduled for February 20, 2001.

On February 13, 2001, counsel for respondent filed a letter memorandum and a certification of Lawrence Penny in opposition to the application for emergent relief. He also filed an answer to the petition of appeal with the Commissioner's office. Nothing further was received from counsel for petitioner until February 20, 2001, when she hand-delivered the certification of student E.G., Jr. and a proposed form of order requesting the following relief:

a. Petitioner's request that teachers at the Thomas Hopkins Middle School, Burlington Township adhere to the school's policy and respond to the requests for help of E.G., Jr., to listen to his complaints, and take the necessary steps to address the situation at hand;

b. Take affirmative steps to accelerate a Peer Mediation Session that was and is still today being requested by Petitioner's Son, E.G., Jr., to address the situation in order to prevent escalation to a potentially dangerous situation; with list of students to be determined and agreed upon by Petitioners and Administration;

c. Teachers and Administrative Officials follow the School's own policy regarding suspension in the future which requires that a teacher should give the child a detention slip one day in advance of a suspension, sent home to be read by the parent (See Student Handbook 2000-2001;

d. Notify Parent immediately either at home or work that a child has been involved in a situation that may involve discipline and/or suspension; and to give the Petitioner and his son an opportunity to respond;

e. Enjoining Thomas Hopkins Middle School Officials from discouraging and/or banning the Petitioner from communicating or meeting with school personnel with regard to E.G., Jr.;

f. If E.G., Jr., is involved in an alleged incident in the future, school personnel should take the time to talk to E.G., Jr., and afford him the opportunity to write a statement as to his side of the events which occurred.

Extended efforts to resolve the matter amicably between the parties were unsuccessful, and accordingly, oral argument on petitioner's motion took place on February 20, 2001.

FINDINGS OF FACT

Some of the facts relevant to a determination of the motion for temporary emergent relief are not in dispute, and I therefore **FIND** the following as uncontested facts.

Student E.G., Jr., is a seventh grader at Thomas Hopkins Middle School in respondent's district. On October 30, 2000, following an incident between student E.G. and another student, Vice-Principal Lawrence Penny imposed a 2-day out-of-school suspension upon E.G., Jr. A disciplinary referral form completed by Mr. Penny indicates that the reason for the discipline was rude/discourteous behavior, attempted fighting and threatening another student in the cafeteria. E.G., Jr., served the suspension on October 31, and November 1, 2000. Following the October 30 incident, Mr. Penny met with petitioner. Petitioner conducted his own investigation of the incident and as a result of information discovered and brought to Mr. Penny's attention, the other student involved in the October 30, 2000 incident was also suspended. Mr. Penny agreed to honor future requests by E.G., Jr., for seating changes. Following another incident which occurred on December 21, 2000, during E.G., Jr.'s seventh period class which was being taught by a substitute teacher, William G. Freund, an investigation was conducted by the administration and as a result thereof, E.G., Jr., received an out-of-school suspension for four days (12/22/00

through 1/4/01). The disciplinary referral form in connection with that incident indicates that the reason for the discipline was assaulting a student in class. E.G., Jr., served the suspension and returned to class on January 5, 2001. This concludes the recitation of uncontested facts.

Petitioner and his son assert that Vice-Principal Penny was not present and did not observe the incident of October 30, 2000. It is their position that the problem arose initially because the music teacher would not listen to E.G., Jr., when he asked to be moved away from a student who was bothering him during music class. Mr. Penny certifies that he did in fact observe the incident which led to the October 30, 2000 discipline. Exactly what transpired between the two students who were arguing in the cafeteria and after school is in dispute. Petitioner and E.G., Jr., assert that the various incidents which occurred on October 30, 2000, were instigated by other students. E.G., Jr., writes in his certification, "I think that most people automatically assume that it is my fault because I am taller than most kids my age. They think that I am the aggressor. These things that have happened at school are not my fault. When things happen, I do get upset and can't help but show it sometimes."

With respect to the incident of December 21, 2000, the petition of appeal states, *inter alia*, that when E.G., Jr., warned Mr. Freund that another student, R.G., was disrupting him in class, Mr. Freund had replied that if E.G., Jr., did not stop talking he would be sent to detention. The boys had then engaged in a physical confrontation where R.G. had pushed E.G., Jr., in the face and E.G., Jr., "then punched back just once in self-defense." The certification of E.G., Jr., however, states that, "I was not choking him at any time. I was pushing him off of me." Mr. Penny's certification attaches the various statements taken from students and the substitute teacher about the December 21, 2000, incident, all of which indicate that the only pushing or punching involved in the incident was done by E.G., Jr. The certification of E.G., Jr., indicates that Mr. Penny did not give him an opportunity to explain his side of what had occurred on December 21, 2000, and complains that R.G. was not disciplined in connection with the incident. "I thought the rules were that anyone who got involved in a fight got suspended. It seems that I was the only (one) held to the 'rules'," he wrote in his certification. E.G., Jr., believes that Mr. Penny simply does not like him and feels that Mr. Penny treats him differently from the way he treats other students.

APPLICABLE LAW AND DISCUSSION

N.J.S.A. 18A:37-2 (d) identifies "physical assault upon another pupil" as conduct which shall constitute good cause for suspension or expulsion of a pupil from the public schools in New Jersey. A school principal may suspend any pupil from school for good cause. *N.J.S.A.* 18A:37-4. The power to reinstate pupils suspended administratively, to continue a suspension, or to expel a pupil is vested in the Board of Education. *N.J.S.A.* 18A:37-5. For a non-classified student, the length of time which an administratively imposed suspension may continue, as construed in case law and by the Commissioner, is not to exceed 21 days. *R.R. v. Board of Education of Shore Regional High School*, 109 *N.J. Super.* 337 (Ch. Div. 1970); *Graham v. Board of Ed. of the Township of Ocean*, 1978 S.L.D. 810. A suspension beyond the 21-day period may be imposed only after a full-blown due process hearing before the Board of Education. *Tibbs v. Board of Ed. of Franklin Tp.*, 59 *N.J.* 506 (1971). Here no such hearing was required before the Board; both administrative suspensions were brief. 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. *Quinlin v. Board of Ed. of North Bergen*, 73 *N.J. Super.* 40 (App. Div. 1962); *Thomas v. Morris Township Board of Education*, 89 *N.J. Super.* 327 (App. Div. 1965); aff'd 46 *N.J.* 581 (1966); *K.L. v. Matawan/Aberdeen High School Dist.*, 91 N.J.A.R. 2d. (EDU) 74; *M.G. v. Monmouth Regional High School*, 91 N.J.A.R. 2d. (EDU) 38.

In the within matter, the 2-day suspension and the 4-day suspension which gave rise to the filing of the petition of the appeal have been served. Petitioner nevertheless argues that he is entitled to an order from the Commissioner instructing the Board of Education and school administrators concerning how to deal with disputes involving E.G., Jr., during the pendency of this matter. The standards for granting such relief prior to a full hearing are set forth at *N.J.A.C.* 6A:3-1.6(b), as follows:

> Where a motion for a stay or emergent relief is filed, it shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982):

1. The petitioner will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater than the respondent will suffer if the requested relief is not granted.

Although petitioner asserts that irreparable harm will occur if the order he seeks is not issued, in fact, that is purely speculative. There is currently no prospective disciplinary action contemplated. The facts concerning what transpired in regard to the two prior disciplinary actions are in dispute. At this posture in the proceedings, there is absolutely no reason whatsoever to believe, or any basis from which to make a finding, that respondent has violated petitioner's rights in the past or will be likely to violate them in the future in the absence of a directive from the Commissioner. Whether petitioner will prevail on the merits of his underlying claim, *i.e.*, that the suspensions were wrongfully imposed and should be expunged, will have to await a determination following a full hearing on the merits. There is currently no basis for determining that petitioner has any greater likelihood of prevailing than respondent. Petitioner bears the burden of proving by a preponderance of the competent and credible evidence that respondent's actions were arbitrary, capricious and unreasonable. This is a heavy burden and until and unless petitioner satisfies it, the Commissioner may not interfere with respondent's administration of its statutory duties. Absent a finding that the Board has abused its discretion, it is not the Commissioner's function to substitute his judgment for respondent's. Currently no factual or legal basis appears for the entry of any order granting relief to petitioner, and accordingly, petitioner's motion for temporary emergent relief is hereby **DENIED.**

The plenary hearing will take place on April 3, 2001, commencing at 9 a.m. at the Trenton office of the Office of Administrative Law. A separate prehearing order will be issued concerning discovery, etc.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If **COMMISSIONER** 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.

Feb 21, 2001
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

cc

OAL DKT. NO. EDU. 201-01
AGENCY DKT. NO. 3-1/01

E.G., on behalf of minor child, E.G., Jr.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, AND LARRY PENNY, VICE PRINCIPAL, BURLINGTON COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter, including the audio tape of the hearing 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 concurs with the ALJ that petitioner has failed to satisfy the standards required for the granting of emergent relief set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Accordingly, the recommended Order is affirmed for the reasons well expressed therein. As contemplated by the ALJ, this matter shall be returned to the OAL for a plenary hearing on its merits scheduled for April 3, 2001.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: MAR 2 2001
Date of Mailing: MAR 6 2001

* 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.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

80-01

R.L. and U.L., on behalf of minor child, R.L., :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY, : DECISION

:

RESPONDENT.

:

MAR 7 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3386-00
(EDU 1732-00 ON REMAND)
AGENCY DKT. NO. 65-2/00

R.L. AND U.L. ON BEHALF OF MINOR CHILD, R.L.,
Petitioners,
v.
EAST ORANGE BOARD OF EDUCATION, ESSEX COUNTY,
Respondent.

Ellen M. Boylan, Esq., for petitioners (Education Law Center, attorneys)

Marvin L. Comick, Esq., for respondent (Love & Randall, attorneys)

Record Closed: December 20, 2000 Decided: December 26, 2000

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

This matter was initiated upon the filing of a Verified Petition and Motion for Emergent Relief by R.L. and U.L. on behalf of their minor son, R.L., arising out of his suspension by respondent East Orange Board of Education. The Department of

Education transmitted the matter to the Office of Administrative Law (OAL) where, on February 29, 2000, it was filed under Docket No. EDU 1732-00. Following the entry of a Consent Order for Emergency Relief on March 10, 2000 and pursuant to the decision of the Commissioner of Education dated March 23, 2000, the matter was remanded to the OAL where it was filed on March 31, 2000 for further proceedings, as deemed appropriate, to determine the merits of petitioners' claims.

Subsequent to settlement, prehearing and status conferences with counsel on May 23, July 13, and September 15, 2000, the matter was scheduled to be heard on December 7, 2000. On December 6, 2000, the undersigned was advised that the matter had settled and the parties, thereafter, submitted the attached Stipulation of Settlement indicating the terms of agreement which was received on December 20, 2000.

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. 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.

December 26, 2000
DATE

MARGARET M. MONACO ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 9 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

md

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

DEC 20 3 36 PM '00

Ellen M. Boylan, Esq.
EDUCATION LAW CENTER
155 Washington Street, Suite 205
Newark, New Jersey 07102
(973)624-1815; FAX (973) 624-7339
Attorney For Petitioner

R.L., by his parents, R.L. and U.L., and R.L. and U.L.,

Petitioners,

v.

East Orange Board of Education,

Respondent.

BEFORE THE COMMISSIONER OF EDUCATION

Agency Dkt. No. 65-2/00

OAL Dkt. No. EDU 3386-00N

STIPULATION OF SETTLEMENT

This matter having been open to the Commissioner of Education upon the petition of R.L. and U.L., on their own behalf and on behalf of their minor son, R.L., Ellen M. Boylan, Esq. (Education Law Center), for petitioners, and Marvin L. Comick, Esq. (Love & Randall, attorneys), for respondent, and the Commissioner having previously entered a Decision on March 23, 2000 on petitioners' Motion for Emergency Relief on the basis of a Consent Order entered between the parties on or about March 10, 2000, and the parties having reached an agreement, it is hereby stipulated and agreed that the remaining claims in the petition are settled upon the following terms:

1. The East Orange Board of Education shall adopt a written policy requiring that all long-term suspension (suspension for more than 10 consecutive school days) and expulsion hearings be scheduled and decided by the Board within 21 days of the student's removal from school, except hearings to authorize the suspension, expulsion or one-year

removal of a student under N.J.S.A 18A:37-2.1 (assault upon a teacher, administrator, school board member or employee), N.J.S.A 18A:37-2.2 (assault with a weapon upon a teacher, administrator, school board member or employee, or another student) or N.J.S.A. 18A:37-7 (possession of a firearm at school, on a school bus or at a school function), which, according to statute, shall be scheduled within 30 days of the student's removal from school. The written policy shall be incorporated into the Board's discipline policies and the Student Handbook, which shall be disseminated at least annually to all board members, school administrators and parents and students.

2. The East Orange Board of Education shall adopt a written policy requiring that as soon as possible, but not less than five days before a Board hearing on a proposed long-term suspension/expulsion, the Board provide the student and his/her parents with a statement of the charges against the student, a list of the Board's witnesses, a summary of each witness' testimony and a copy of all documentary evidence to be considered by the Board. The written policy shall be incorporated into the Board's discipline policies and the Student Handbook, which shall be disseminated at least annually to all board members, school administrators and parents and students.

3. The East Orange Board of Education shall adopt a written policy requiring the immediate provision of alternative education services to any student who has been suspended long-term (for more than 10 consecutive school days), pending a Board hearing and decision on the suspension/expulsion. The purpose of the alternative education services is to provide the student with the instruction and course work missed during the period of suspension. The written policy shall be incorporated into the Board's discipline policies and the Student Handbook, which shall be disseminated at least annually to all

board members, school administrators and parents and students.

4. All other claims in the petition are dismissed with prejudice. Petitioners preserve their claim for attorney's fees against the Board pursuant to 42 U.S.C. §§ 1983 and 1988.

Ellen M. Boylan, Esq.
Attorney for Petitioners
Date: December 7, 2000

Marvin L. Comick, Esq.
Attorney for Respondent
Date:

OAL DKT. NOS. EDU 3386-00 AND EDU 1732-00
AGENCY DKT. NO. 65-2/00

R.L. and U.L., on behalf of minor child, R.L.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST 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 the parties' compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: MAR 7 2001

Date of Mailing: MAR 8 2001

* The final decision in this matter was, in accordance with *N.J.S.A.* 52:14B-10, due to be issued on February 20, 2001. However, the record did not contain information, as required by *N.J.A.C.* 6A:3-1.13(d), indicating that the East Orange Board of Education had consented to the settlement terms. In order to permit the Board time to review and act on the Stipulation of Settlement, an extension of time for issuance of the final decision was requested by the Commissioner, and granted by the OAL, until April 6, 2001. The settlement terms were approved by the Board at its February 20, 20001 meeting; a certified copy of the resolution approving the settlement was faxed to the Commissioner on February 21, 2001.

81-01

CHARLOTTE WELLINS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY, BERT LOPEZ, PRESIDENT, DANIEL GALLAGHER AND THERESA KELLEY, INDIVIDUALLY AND JOINTLY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner, Organizational Development Specialist, challenged the elimination of her position by respondents and her termination, arguing that the elimination of the position and termination were arbitrary and capricious, contrary to the Law Against Discrimination and retaliatory. The Board argued that it properly eliminated petitioner's position because of a budget deficit, and that its action was a legal reduction in force.

The ALJ determined that the Board acted legally when it eliminated petitioner's position and dismissed the petition. The ALJ concluded that the Board's actions were motivated by a fiscal crisis, and were not arbitrary and capricious. However, the ALJ did conclude that petitioner was entitled to an additional days pay because an incorrect termination date was utilized by the Board.

The Commissioner affirmed the decision of the ALJ with modification, holding that petitioner may be entitled to compensation for unused sick or personal days if so provided for in the policy or agreement applied to her to reimburse her for unused vacation days.

MAR 7 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8903-98

AGENCY REF. NO. 432/98

CHARLOTTE WELLINS,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY ATLANTIC CITY, ATLANTIC COUNTY, BERT LOPEZ, PRESIDENT, DANIEL GALLAGHER AND THERESA KELLY, INDIVIDUALLY AND JOINTLY,

Respondents.

Gregory G. Johnson, Esq., for petitioner

Michael Epps, Esq., General Counsel for respondent

Record Closed: October 4, 2000 Decided: January 17, 2000

BEFORE **LILLARD E. LAW,** ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, a non-tenured staff member in the employ of the Board of Education of the City of Atlantic City (Board) appeals from a decision by the Board to eliminate her State funded position as Organizational Development Specialist. The Board admits it eliminated petitioner's

employment position. However, it contends it did so for purposes of economy, as permitted by *N.J.S.A.* 18A:28-9, and caused a Reduction In Force (RIF).

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 and under the jurisdiction of the Commissioner of Education (Commissioner) found at *N.J.S.A.* 18A:6-9 to –25. The hearing was held on April 7, 9, 12 and May 3, 1999. The parties requested and were granted leave to submit post-hearing memoranda. The hearing record closed on October 4, 2000.

ISSUES

Pursuant to the Prehearing Order issued in this matter, the parties agree that the following are the issues to be determined by this tribunal.

1. Whether the Board's action to eliminate petitioner's employment position was arbitrary and capricious?

2. Whether, subsequent to her termination, the Board properly compensated petitioner for her sick time, vacation time and other time accrued by her?

3. Whether the Board's decision to eliminate petitioner's employment position was discriminatory and in violation of the New Jersey Law Against Discrimination (LAD)?

4. Whether the Board retaliated against petitioner for her association with the Board's former Superintendent of Schools, in violation of petitioner's constitutional right of freedom of association?

STIPULATION OF FACTS

Prior to the opening of the hearing record, the parties entered into a Stipulation of Uncontested Facts which are set forth below and are hereby adopted, by reference, as **FINDINGS OF FACT:**

1. The petitioner, Charlotte L. Wellins, was hired by the respondent, Atlantic City Public Schools, on September 2, 1997, in the position of Organizational Development Specialist.

2. Petitioner Wellins holds valid teaching and administrative certificates. Petitioner Wellins was in charge of Staff Development for the District, including training other staff members.

3. Petitioner Wellins' annual salary was $80,000 for the 1997-98 school year. (See attached contract as Exhibit A).

4. Petitioner Wellins performed her job duties and responsibilities satisfactorily. In April 1998, Superintendent of Schools, Dr. H. Benjamin Williams, recommended the petitioner's reappointment by including her position in the budget.

5. On or about May 21, 1998, the Board approved a final budget that funded the petitioner's salary and benefits. The petitioner's position was fully funded by the State as part of its Demonstrable Effective Program Aid (DEPA). (See attached page 4 of the DEPA Budget, as Exhibit B).

6. DEPA funding is restricted funding and cannot be used for programs or costs that are not approved as eligible for DEPA funding, pursuant to *N.J.S.A.* 18A:7F-18b(1),(2) and (3). DEPA funds, if not used for DEPA expenses, cannot be used to satisfy other expenses within the budget.

7. The respondent's total budget, including the DEPA budget, was approved by the County Superintendent.

8. Petitioner Wellins received an employment contract for the 1998-99 school year. The petitioner signed the attached contract and returned it to the District's Human Resources Office. (See attached contract as Exhibit C).

9. On or about June 3, 1998, the respondent Board placed Superintendent Williams on administrative leave.

10. Also on June 3, 1998, the respondent Board voted to appoint Delois Campbell as Acting Superintendent.

11. On or about June 20, 1998, petitioner Wellins received a letter from the Department of Human Resources, notifying her that the Board intended to discuss her employment in closed session. This is known as a RICE notice. [1]

---

[1] *Rice v. Union City Reg. High School Bd. of Ed.*, 155 *N.J. Super.* 64 (*App. Div.* 1977)

12. At a June 23, 1998 Board meeting, respondent Board member Daniel Gallagher, Chairman of the Goods and Services Committee, recommended that the petitioner's position be cut, including several other positions. Mr. Gallagher stated that the District would end the year in a deficit. As chairman he recommended the reduction of positions, including petitioners, to create a free balance to adequately fund other accounts.

13. At the Board Meeting on June 23, 1998, Acting Superintendent Campbell spoke in public. Ms. Campbell did not recommended that the Board abolish the petitioner's position because her position was (1) funded by the State; (2) it was necessary to carry out the District's plans; and (3) those plans have not been changed. Ms. Campbell stated to the Board that there were two positions she was not recommending be cut, Chief of Security and the Organizational Specialist.

Delois Campbell stated:

> The Chief of Security, that is the position that I'm recommending we keep. This particular person plans, coordinates, monitors and supervise the security operation, she provides training for the security guards. She schedules regular meetings with safety and personnel. She works with community based agencies to deal with safety related issues. She works and coordinates the entire safety security staff that we have here in Atlantic City.

Ms. Campbell stated:

> The Organizational Specialist, her position is being funded through the DEPA. This is the staff development effort for Atlantic City. The staff development initiatives are also funded through the DEPA. She plans and organizes staff development efforts, she maintains staff development committees, she works with schools to develop business partnerships and she has developed a learning academy. That is the position as you know we need staff development with respect to the core curriculum content standard, also to get our teachers prepared for teaching our students with problem solving and other initiatives that she has planned. And those are positions that we do have that I can discuss.

14. The petitioner also spoke at the Board meeting in support of keeping her position. The petitioner stated that her position, salary and benefits, was funded by the DEPA program budget.

15. Respondent Gallagher made a motion, and seconded by Board member Kelly, to adopt a Resolution No. 98 6B 57, to abolish several positions, including petitioner Wellins. The resolution was approved by a 7 to 3 margin. (See attached as Exhibit D).

16. Petitioner Wellins received a letter notifying her of the layoff, as a "reduction in force" (RIF), on or about June 24, 1998, terminating her employment with 30 days notice. (See attached as Exhibit E).

Petitioner's Statement of Facts And Summary of Testimony[2].

General Background

Generally the underlying facts are not in dispute in this case. The petitioner was hired by the respondent Board on September 2, 1997 in the position of Organizational Development Specialist. She was hired upon recommendation of the new Superintendent Dr. H. Benjamin Williams, and she received a one year contract at a salary of $80,000 for 1997-98 school year. (Stipulation of Facts, hereinafter referred to as "Stipulation," Exhibit A). The petitioner had nearly 30 years work experience as a teacher and administrator in public education. Previously, the petitioner was a supervisor of staff development and training for the Paterson Public School, a State takeover district. The petitioner worked for Dr. Williams when he was the State District Deputy Superintendent in Paterson.

Atlantic City has the reputation of a politically charged district struggling to overcome Level Two Monitoring deficiencies identified by the Department of Education. During the 1997-98 school year, the petitioner immediately addressed deficiencies outlined by an educational audit prepared by Thomas Edison State College. (P-1) The petitioner was given charge to implement corrective measures in the area of professional development. She started immediately training teachers and supervisors in the 4Mat-training model. She also held monthly training sessions for new teachers, established a district-wide staff development committee to discuss staff development and curriculum, and developed a comprehensive staff development plan. On

[2] Transcript references for testimony adduced at the hearing and exhibits admitted into evidence.
T1 April 7, 1999 Transcript
T2 April 9, 1999 Transcript
T3 April 12, 1999 Transcript

May 11, 1998, the petitioner's performance was rated as satisfactory for the 1997-98 school year, and the superintendent recommended that she continue in her position for the 1998-99 school year. (P-21) The petitioner later received a contract for employment for the 1998-99 school year, signed it, and forwarded it to the Human Resources Office. (Stipulation ¶8, Exhibit C).

Dr. Williams made staff development a major priority in order to improve teaching effectiveness in the classroom. Dr. Williams obtained approval from the Board and the State to fully fund petitioner's position as a part of a State grant called the Demonstrable Effective Program Aid (DEPA). By funding staff development through DEPA, Dr. Williams sought to achieve budgetary clarity and spending accountability in staff development. (T2:110:1-25; 111:1-9).

The Board was confronted with fiscal crisis during the year. The budget required the Board to privatize custodial services on July 1, 1997. When the Board did not privatize, this created a two million budget deficit. Also, the Board spent unbudgeted funds on renovating the old high school for use as an elementary school. At the time of April 1998 school elections, the school budget was defeated and a new faction of the Board gained majority status. City Council voted to restore the regular budget and the majority of the cap waiver question. Board members were not satisfied with funding amounts in certain budget accounts. On May 13, 1998, the Board voted to direct the Superintendent to come up with $500,000 to transfer in the Buildings and Grounds account. The Superintendent did this without cutting staff.

On June 3, 1998, the new majority Board voted to suspend Superintendent Williams and to file tenure charges. Delois Campbell was named as Acting Superintendent. Board President Bert Lopez informed Ms. Campbell that the Board intended to abolish a number of positions, including petitioner's. Ms. Campbell informed Mr. Lopez that the petitioner's position was funded in the budget by grant monies from DEPA, and not local funds.

At the June 23, 1998, Board meeting, Ms. Campbell informed the full Board that she did not recommend the elimination of the petitioner's position, that the position was needed, and it was funded by DEPA. The Board did not have approval from the County Superintendent to

---

T4 May 3, 1999 Transcript

change the planned activities in the DEPA plan. The Board voted to adopt a resolution to eliminate the petitioner's position. (Stipulation ¶16, Exhibit E). The petitioner's termination letter, dated June 24, 1998, lists the effective date of her removal as July 22, 1998. The letter states that it serves as 30-day notice of termination. The petitioner, however, received her letter via hand delivery on June 29, 1998.

The petitioner continued to work for the District after July 22, 1998 due to preplanned 4Mat training sessions for District teachers. Before June 1998, interested teachers such as Bodhan Christian registered to attend intermediate and advanced 4Mat training sessions scheduled for July and August 1998. If the petitioner cancelled the July training, Mr. Christian could not have attended the advance session. Mr. Christian later became a certified 4Mat trainer.

As a result of the decision to eliminate the petitioner's position, and to take 4Mat training out of the DEPA budget, this created an abundance of grant money to spend. Supervisor Ellen Woolley testified without contradiction that in a September 16, 1998, meeting, she was told she could hire outside consultants or spend money for training. (P-9). This type of scenario fosters fragmented and uncoordinated staff development initiatives.

The petitioner believes her position was eliminated for improper reasons because of her relationship to Superintendent Williams. Board members Banks and Hill testified that the petitioner was a target on a "hit list." Supervisor Woolley testified about the hit list. Assistant Superintendent Campbell corroborated the existence of a "hit list" by testifying she saw Board member Herzog with such a list.

Charlotte Wellins (Petitioner)

Charlotte Wellins is currently employed as a vice-principal at Highland Park High School. (T1:10-20). She assumed that position on July 20, 1998. (T1:10:22) Prior to assuming her current position, the petitioner was employed by the respondent as the Organizational Development Specialist. (T1:11:13-18) The petitioner has a Bachelors of Science Degree and a Masters Degree in educational administration and supervision. Additionally, she holds a

teaching certificate in business and career education, as well as a principal/supervisor's certificate. (T1:12:3-25; 13:10-21).

Mrs. Wellins is a national and international consultant in the area of 4Mat training (T1:22:13-17). 4Mat is a learning model that trains classroom teachers to honor all types of learning styles of students. The District was aware of her expertise in 4Mat training. (T1:22:18-24; 23-7-24).

Mrs. Wellins identified the educational audit report of the Atlantic City Schools prepared by the John S. Watson Institute of Thomas Edison State College. (P-1) (T1:27:9-14) The audit serves as a warning to the District from the monitoring activities of the State Department of Education that if the District fails to address deficiencies highlighted in the report adequately, the State would not hesitate to take further actions. (T1:28:3-6) Paterson school district underwent a Level Two monitoring similar to that as detailed in document P-1 and Mrs. Wellins was specifically hired there to tackle the professional development component of their corrective measures. (T1:28:7-23)

The petitioner focused her attention on the educational audit (P-1) (the curriculum areas, student achievement, organizational culture and climate) and was instrumental to her development of a five-year plan. (T1:29:9-23) The mission that Mrs. Wellins was charged with was ensuring that teacher-training workshops had direct impact on the children's learning in the classroom. (T1:30:24-25) Mrs. Wellins addressed the fragmentation problems that the audit report highlighted. (T1:31:2-6) Mrs. Wellins streamlined district-wide staff development to enhance efficiency and increased productivity. (T1:32:2-8) She provided bi-monthly training activities that addressed problems teachers encounter in classroom control and management. (T1:62:1-21) Mrs. Wellins did not receive any indication from either the Superintendent or Board that her performance was inadequate or unacceptable. (T1:66:14-25).

Mrs. Wellins participated in the development process of the DEPA portion of the 1998-99 school year budget. (T1:47:12-16) That budget was presented to the Superintendent and later approved by the Board. (T1:47:17-25) Mrs. Wellins was familiar with the budgetary problems that confronted the District and in that light sought alternative funding sources for the 4Mat

program. (T1:51:2-10) She succeeded in getting the national office to commit to conducting the advanced 4Mat training in Atlantic City at no cost to the District, such training can ordinarily cost other districts $18,000. (T1:51-11-25; 52:1-16) The petitioner's salary, benefits and travel allowances were funded with DEPA funds. (T1:55:11-25; 56:1-2) The petitioner's role and staff development activities spanned the entire K-12 grades. (T1:60:1-16)

Rumors about a "hit list" began circulating in the District after the April 1998 school board elections, and several people informed Mrs. Wellins that her name was on that list. (T1:69:16-25) The Superintendent was placed on administrative leave. Mrs. Wellins received a RICE letter indicating that her position would be discussed at the June 23rd Board meeting; she attended that meeting and informed the Board that her salary and benefits were part of the DEPA portion of the budget provided by the State. (T1:71:4-8; 73:2-6) The Board did not modify or adjust the DEPA portion of the budget prior to June 23, 1998. (T1:73:16-24)

On June 29, 1998, the petitioner received a letter indicating that her last day of employment was effective July 22, 1998. (T1:77:12-25) On June 29, 1998, Mrs. Wellins wrote Bert Lopez, Delois Campbell and Melvin Clarke (P-2) apprising them of a preplanned summer 1998 advanced 4Mat training and requested an extension to enable her to fulfill that obligation gratis. (T1:78:9-25) Excel, Inc., which owns 4Mat, agreed to use Atlantic City as a host site. (T1:80:19-25) Another training session dealing with student discipline was scheduled for August 1998. (T1:95:18-25) That training was conducted by Dr. Medler. (T1:96:10-14)

Mrs. Wellins' services were vital to the District at the time of her termination because the implementation stage of staff development was the next step. (T1:103:1-25) The 4Mat program was abandoned when the petitioner left the District. (T1:104:14-25).

Dr. H. Benjamin Williams, Superintendent of Schools

Dr. Williams was hired in January 1997 and began his duties as the Superintendent on March 3, 1997. (T2:97:18-24) He served as the State District Assistant Superintendent for the Paterson Public Schools from August 1991 until March 1, 1997. (T2:98:1-13). While employed

with the Paterson Schools, Dr. Williams supervised the petitioner when she was the Supervisor of Staff Development. (T2:99:8-15).

After arriving in Atlantic City and assessing the needs of the District, Dr. Williams recruited petitioner in Atlantic City to assist staff members gaining the knowledge required to move the District forward. (T2:100:7-25).

According to Dr. Williams, the rationale behind including petitioner's salary and benefits in the DEPA funds were twofold; first because staff developments is one of the areas that the State Department of Education emphasize for school improvement, and secondly, for budgetary clarity and spending accountability in staff developments. (T2:110:1-25; 111:1-9) He testified that he had every intention of retaining the services of petitioner. (T2:111:17-22) Prior to June 3, 1998, the date Dr.Williams was placed on administrative leave, no Board member expressed concerns about staff development or the petitioner's performance. (T2:112:14-21; 113:1-4\5) Dr. Williams stated a contract for school year 1998-99 was extended to the petitioner. (P-6) (T2:114:20-23).

Dr. Williams emphatically stated that the Board could not unilaterally alter DEPA without obtaining prior approval from the County Superintendent's office or State Department. (T2:115:1-15) Dr. Williams maintained that any readjustment to the DEPA budget requires prior approval of the County Superintendent. (T2:133:3-18)

The Board Minutes of May 13, 1998, confirm that petitioner's name was on the list Mr. Gallagher had submitted for budget cuts. (T2:117:1-20) But the Board rejected Mr. Gallagher's recommendations. (T2:117:22-25; 118:1-7).

Delois Campbell, Assistant Superintendent

Ms. Campbell testified that the DEPA budget contained a number of goals and objectives (T3:72:5-18), including 4Mat training. Ms. Campbell testified that funding the petitioner's position through DEPA was a good thing. The DEPA budget was approved by the Board and County Superintendent.

On June 3, 1998, the Board voted to suspend Dr. Williams and name Ms. Campbell as Acting Superintendent. Ms. Campbell testified that President Lopez called her by phone after June 3, 1998 and informed her of the Board's intention to eliminate certain positions. Ms. Campbell, who has jurisdictions over DPEA operations, informed Mr. Lopez that the petitioner's position was funded by DEPA. (T3:83:25; 84:1-17)

At the June 23, 1998 Board meeting, Ms. Campbell informed the Board that she wanted to maintain the positions of Organizational Development Specialist and Chief of Security. Ms. Campbell also told the Board that she was doing two or three jobs and she needed administrative help. Further, Ms. Campbell informed the Board that the petitioner's position was funded by DEPA.

Ms. Campbell stated she had problems with the Board's proposal to eliminate positions. (T3:865:20-22) She did not have approval from the State to change the DEPA budget or objectives. Board member Hill asked Ms. Campbell if prior approval was necessary. Mr. Hill asks:

> Hill: I got a question of Ms.Campbell. This is regarding the DEPA. The State Dept. of Education with the action of the board of education tonight, does a resubmission have to take place?
>
> Campbell: The chair was squeaking. I could not hear you. I am sorry.
>
> Hill: I said every time we have changed the DEPA activities we had to submit a different proposal.
>
> Campbell: Yes, we have to submit a different proposal.
>
> Hill: Will that hold up all the funding for DEPA or just a portion.
>
> Campbell: I don't think so. I have to speak to someone at the state. I don't think it will but it might. I don't think so. At least I hope not.
>
> (T3:49:2-25; 50:1-13)

Ms. Campbell was uncertain about the impact of cutting the petitioner's job on the DEPA budget, or if it would be approved by the State.

Ms. Campbell testified about the resolution offered by Mr. Herzog to create the Academic Achievement Academy on June 23, 1998. Ms. Campbell stated that the mandate to create the program interfered with the running of the District. (T3:90:9-23) Ms. Campbell stated that the program was not reviewed by the Curriculum Committee before June 23, 1998. The creation of this program was improper. Eventually, the Board voted to implement the program at a cost of approximately $30,000.

Ms. Campbell testified that she had knowledge of a "hit list" created by Board members. Several employees were on the list such as Melvin Clarke, Assistant Superintendent, and Kemry McFarland, Personnel Director, and others. Ms. Campbell stated that she saw Board member Herzog with a list at a Board meeting at the Richmond Avenue School. Ms. Campbell testified that Ms. McFarland came to her upset one day because her name was on the list and she feared the loss of her job. (T3:103:1-3)

Ellen Woolley, Supervisor of Student Personnel Services

Ms. Ellen Woolley is Supervisor of Student Personnel Services for the District. (T2:7:2-9) Part of her responsibilities is the supervision of the elementary and high school guidance counselors as well as the child study team. (T2:7:13-25; 8:1-3)

As a district-wide supervisor, Ms. Woolley attends different monthly meetings. (T2:14:2-19) She recalls attending a meeting in September 1998 convened for all supervisors for the purpose of discussing professional development as per DEPA budget allocations. (T2:14:18-25; 15:1-20) According to Ms. Woolley, petitioner's name was mentioned at the outset of the meeting. (P-9) (T2:16:6-9) Ms. Woolley testified that Bruce Greenfield, supervisor, opened the meeting by saying we had to spend this DEPA money; that everyone in the room has a responsibility of hiring outside consultants or arranging for some kind of training because there was plenty of money to pay for it and that the DEPA budget has been altered to eliminate 4Mat.

(T2:17:4-18) Ms. Woolley testified that after Mr. Greenfield mentioned that 4Mat is being discontinued in the DEPA budget as advised by Assistant Superintendent Ms. Campbell, Bob Linbald, another supervisor inquired why such a decision was made after the District had committed significant resources to the program. At that point in the discussion, Avon Chapman stated "that petitioner sued the Board!" Arlene Margagiano, Math supervisor added, "oh, and the Board supposedly fired her for financial reasons." (P-9) (T2:18:2-15)

According to Ms. Woolley, the petitioner and two other District employees were pejoratively considered "Ben's people" and were included in what was generally known as a *"hit list"*. (T2:20:6-17; 21:1-12) The *"hit list"* had little to do with budgetary constraints and everything to do with revenge and retaliation for being politically incorrect. (T2:22:1-10) Her knowledge of a *"hit list"* came from newspaper articles and a public meeting at a local church. (T2:22:15-23)

Under cross-examination, Ms. Woolley indicated that she felt it was important to transcribe her record of events at the September 16, 1998 meeting because the open discussion of plans to alter the DEPA allocations and eliminate the 4Mat program bothered her. (T2:26:6-16) She did not take any further steps to determine the veracity of the discussion because the DEPA budget was right there before her and 4Mat program was not in it. (T2:26:17-24).

Ms. Woolley explained that in relation to the *"hit list,"* there probably were many political forces at play, different Board members with different agendas, some genuine and honest and some devious. (T2:35:7-25) Ms. Woolley testified that a supervisor once handed her a list purportedly found on the floor of the Boardroom with staff names and salaries. (T2:52:1-21).

Marven Hill, former Board Member

Marven Hill, was a Board member and served as Board president from 1995 to April 1998. Mr. Hill testified that during the 1997-98 school year, the district experienced significant financial difficulties. It was a priority for the District to seek outside funds to pay for

administrative costs. Mr. Hill stated that staff development was a priority for the Superintendent. (T3:39:15-18)

Mr. Hill firmly believes that the action to eliminate the petitioner's position was motivated by a *"hit list."* (T3:542:4-7) Accordingly, Mr. Hill voted against the resolution to layoff the petitioner on June 23, 1998. Mr. Hill did not believe it was necessary to cut administrative positions. (T3:40:17-23) Mr. Hill testified that the petitioner's position was funded in DEPA and before the Board could change the DEPA budge the administration had to get prior approval. Mr. Hill asked Acting Superintendent Campbell about this and she said she did not know.

Mr. Hill also testified about the resolutions by Board member James Herzog to create an Academic Achievement Academy program on June 23, 1998. (T3:45:3-20) There was no money in 1998-99 budget to fund the new program. Mr. Hill believed that it was not proper for a Board member to propose a program. The wording of the resolution mandated the creation of the program. The Board voted to table the proposal and send it to the Curriculum and Instruction Committee. Eventually, the Board voted to implement the program at a cost of $36,000.

Theresa Perry, Board Member

Theresa Perry is a member of the respondent Board. (T1:135:20-24) She had first hand knowledge of the goals and objectives approved by the Board prior to the hiring of Superintendent Williams. (T1:136:22-25) According to Ms. Perry, Mrs. Wellins was hired to provide in-house staff training so as to meet the requirements of the Level Two Monitoring. (T1:138:7-25; 139:1-3) She stated that the staff development is an important part of the District's activities. (T1:139:15-24)

Ms. Perry knew that petitioner's salary and benefits were provided for in the DEPA portion of the 1998-99 budget. (T1:156:5-21) Ms. Perry stated that there were no funding concerns for the petitioner's position in the 1998-99 budget. (T1:183:17-19)

Ms. Perry also testified that at the June 23, 1998 Board meeting, Ms. Campbell recommended the retention of petitioner's position. (T1:168:2-7) Resolution 98 6B 57 eliminated the petitioner's position and Ms. Perry voted against it because according to her, she was more inclined to support the professional recommendation of the Acting Superintendent Campbell. (T1:169:5-25)

Ms. Perry testified that as part of Board member James Herzog's statement in support of eliminating positions, Mr. Herzog proposed the creation of an academic academy. (T1:175:10-25) This occurred less than 20 days after Dr. Williams was suspended and the Board subsequently approved the proposed academic academy even though it was not provided for in the 1998-99 budget. (T1:176:8-25)

Ms. Perry serves on the Personnel and Goods and Services Committees of the Board. (T1:142:1-3) She testified that as a result of the April 1998 school board elections, there was a change in the presidency of the Board and committee assignments changed as well. (T1:145:8-17) Mrs. Perry was present at the May 13, 1998 Board meeting during the discussions on the defeated budget. (T1:146:4-12) She testified that Mr. Gallagher (fellow Board member) made statements regarding recommended cuts to the budget. (T1:146:13-19) According to Ms. Perry, Mr. Gallagher handed out a list that included petitioner's position for elimination. (T1:146:23-25; 147:1-10) Ms. Perry and the Superintendent were not in support of Mr. Gallagher's recommended list of budget cuts. (T1:149:1-9) Ms. Perry confirmed that her statements on the minutes of that meeting to the effect that "the recommended cuts were identified by the City Council, not Mr. Gallagher, and that this was a head hunt" were absolutely correct. (P-3) (T1:149:15-21) She learned that the Atlantic City Council was interested in reinstating a portion of the money in question but wanted cuts in community functions. (T1:150:15-20) Ms. Perry stated that petitioner's position should not have been in question because her position was in the academic portion of the budget. (T1:151:19-25; 152:1-7) She believes that the City Council was exerting some political influence on the Board's decision with regards to the defeated budget. (T1:152:8-11)

She was also present at the June 3rd Board meeting when the Superintendent stated that the District would not end the year in a deficit. (T1:165:1-13)

Alberto (Bert) Lopez, Board President

Bert Lopez is the President of the Atlantic City Board of Education. (T2:57:12-14) He acknowledged receipt of document marked as P-2 and did nothing about it because he had no recommendation for action from the administration. (T2:58:15-25; 59:24-25; 60:1-6) Mr. Lopez testified that the Board eliminated the petitioner's position because the over abundance of supervisory positions and that petitioner's position was not required insofar as the duties could be shared among other supervisors – that even though her position was funded through DEPA, the Board can use those funds any way it sees fit for other purposes or for the same purpose in a different way. (T2:63:1-7)

Mr. Lopez admitted that on June 23, 1998, Ms. Campbell informed the Board that petitioner's position was necessary due to the nature of the various responsibilities and duties for that position. (T2:64:1-12) He also admitted that the Board chose to disregard the Acting Superintendent's recommendation. (T2:64:13-15) The Board did not seek nor receive prior approval from the County office before their decision to eliminate petitioner's position on June 23, 1998, and alter the DEPA allocations. (T2:64:16-23)

Under cross-examination, Mr. Lopez stated it was the understanding of the Board that staff development would somehow continue in the District. (T2:91:6-23) According to Mr. Lopez, the Board was not informed that it needed prior approval from the County Superintendent in order to alter the DEPA budget. (T2:92:11-17)

Mr. Lopez testified that as a result of the elimination of the petitioner's position at the June 23, 1998 meeting, the school district had no staff member certified to conduct 4Mat training. (T2:95:7-11) Also, the District had no one qualified to continue the Star Urban Teacher training program. (T2:95:12-16)

THE BOARD'S STATEMENT OF FACTS AND SUMMARY OF TESTIMONY

During the plenary hearing a Stipulation of Facts was agreed upon by counsel and made part of the record. Those facts shall be incorporated herein as if set forth at length. In addition to the Stipulated Fact there was testimony which adds to those facts.

During the 1997-98 school year the Atlantic City Board of Education experienced financial crisis. (T1:164:20-21) By February of 1998 there was an announced deficit and the Atlantic City Board of Education went to the voters for a Supplemental Tax Levy. (T3:53:6-8) The voters of Atlantic City rejected the Supplemental Tax Levy. (T3:53:9-16)

Ultimately, the Board petitioned the Commissioner for permission to use unexpended funds from a Capital Account raised as a result of a bond referendum, to fund the deficit. The Commissioner granted his approval. Thereafter the Board began the process of preparing the budget for the 1998-99 school year. During the budget preparation process the petitioner's salary and benefits were included in the DEPA budget. DEPA is a program for which school districts write a plan and a budget and the monies are funded through a State grant. In or about March of 1998 the Atlantic City Board of Education's budget was to be submitted to the County Superintendent. The budget submitted to the County Superintendent was submitted on the last day allowable by law. The budget was approved and was submitted to the voters of Atlantic City. The budget was defeated, as was a supplemental spending question. The matters were submitted to City Council, by operation of law. City Council restored the budget in total and restored a majority of the supplemental spending question. After having the budget and most of the supplemental spending question restored, the Board remained concerned about the soundness of the budget. There were several line items in the approved budget, which were under-funded. The Board engaged in a lengthy budget review process and determined that some cuts were necessary to fund other line items and to establish a fund balance in case of emergencies.

Thereafter on June 23, 1998 the Board took several actions in an effort to address budget concerns. Several positions were eliminated either because they were not filled or because they

were deemed not essential to the educational program. The focus of the Board was not to take anything out of the classrooms. They tried to focus on positions, which would not effect the bottom line classroom operations. (T4:37:25-38:10) Specifically, the Board voted to eliminate the position of head custodian and return all head custodians to the positions of custodian. The Board voted to eliminate the position of Director of Facility/Custodial Services. The Board voted to consolidate the functions of the Director of Transportation and the Planning and Compliance Officer. The Board voted to establish the positions of Educational Facility Specialist, Squad Leader, Technical Support Specialist, Chief of Security and one psychologist.

Ultimately, the Board also voted to eliminate the petitioner's position. The petitioner's position was funded in the DEPA budget. However, the District writes the DEPA program and had the authority to revise and resubmit the program with any changes. Members of the Board felt that items in the general budget could be moved into the DEPA budget, thereby freeing up money in the general fund to address other deficiencies.

Thereafter on June 24, 1998, the petitioner was forwarded correspondence indicating that the Board had voted to eliminate her position by way of a reduction in force for reasons of economy and that her last day of employment would be July 22, 1998.

Daniel Gallagher

Daniel Gallagher is currently a member of the Atlantic City Board of Education and has been since being elected in April of 1998. (T4:17:15) During the 1998-99 school year Mr. Gallagher served as the chair of the Goods and Services Committee. (T4:17:18-20) After the budget and cap waiver question were returned to the District by City Council the Board, and particularly Mr. Gallagher, felt that there were concerns regarding this budget. There was a concern that several line items were woefully under-funded. (T4:20:23-21:10) In particular, Mr. Gallagher noted that the Board had gone out for bid for health benefits, and when the bids came in the budget was approximately $500,000 short. (T4:21:11-15) He also noted that there had been an effort to privatize the custodial staff and the budget was deficient by approximately $700,000 in order to effectuate that privatization. (T4:21:15-18) Mr. Gallagher also expressed that the budget was short in the line item reserved for judgments against the District. (T4:22:8-

14) He also expressed that the line item for Buildings and Grounds was inadequate. (T4:22:15-23:5) Mr. Gallagher acknowledged that there came a time when there was some discussion among Board members about recommending some staff cuts. He testified that at the time there were several budget line items, which were short, and some Board members came to the realization that there would have to be some reduction somewhere in the budget to come up with money to take care of the custodial situation, to take care of deficient line items. (T4:30:21-31:10) Mr. Gallagher testified that on June 23, 1998 there was a resolution put forth to reduce the custodial staff, for economy purposes and to eliminate the position of head custodian. (T4:35:16-22) He noted that the effect of the reduction was done because the Board could not afford to hire the entire custodial staff as a result of the effort to privatize. He testified that the reduction was to get to a staffing level, which would comport with the budget. (T4:36:3-10) He testified that there was a resolution to abolish the position of Director of Facility Custodial Services. He testified that that position was eliminated to create more money to fund other, necessary line items. (T4:36:11-17). He also noted that the position of Educational Facility Specialist was abolished to free up funds to address other deficient line items. (T4:36:18-25). Mr. Gallagher testified that in determining which positions could be eliminated, the Board focused on not taking anything out of the classroom while making an effort to address the funding concerns in other areas. He stated that the focus was to avoid any adverse impact on the bottom line classroom operation. (T4:37-25.38:10). Mr. Gallagher testified that he supported the resolution to abolish the petitioner's position knowing that her position was funded in the DEPA program. He testified that he felt that the reduction would not affect the service to children and that some things which were funded in the general fund could be moved into the DEPA program and funded with the money realized as a result of abolishing the petitioner's position from the program. (T4:39:10-17). Mr. Gallagher testified that at the time of this hearing he was confident that the Board would finish the 1998-1999 year successfully as a result of the adjustments made by the Board, including the elimination of certain positions. (T4:42:13-16). However, he noted that there was no surplus in the budget for contingencies or emergencies. He testified that those funds were exhausted as a result of problems, which occurred in the 1998-1999 school year. He also noted that the Board was forced to invade a capitol project fund to infuse money into the general fund in order to complete the 1998-1999 school year without going into a deficit. (T4:42:16-25). Mr. Gallagher testified that it was his belief that the money saved by eliminating

the petitioner's position within the DEPA budget, something else in the general fund could be moved into the DEPA plan, thus freeing up funds in the general fund. (T4:69:15-18).

When questioned about his support of the Academic Achievement Academy and the potential source of the funding, he testified that he believed that current teachers could be reallocated and not affect the general fund or any other funds. (T4:81-11-14).

Mr. Gallagher also testified that it did not matter when, in the budget year, the funds were made available as a result of the elimination of the petitioner's position, as long as they were made available. (T4:102:16).

Theresa Kelly

Theresa Kelly is a Ventnor resident and is the Ventnor Board of Education's representative on the Atlantic City Board. (T4:106:12-13). Mrs. Kelly testified that the Atlantic City Board experienced difficulty in preparing the budget for the 1998-1999 school year. She stated that the Board was operating in a budget for 1997-1998, which was in bad shape, and the budget being prepared had line items that were not as secure as the Board members would have hoped. (T4:108:20-109:3). She stated that when the budget for the 1998-1999 school year was submitted to the voters, when the Board approved the budget to be submitted to the voters, she was not satisfied that the budget was sufficient to address areas of concern for Board members. (T4:109:4-8). She stated that she supported submitting the budget because the Board was at the eleventh hour and the budget had to be submitted to the County Superintendent as required by law. (T4:109:11-14). Mrs. Kelly testified that when the budget and the Cap Waiver question were returned to the district she, as a Board member, was not satisfied that the budget was secure to successfully maneuver through the 1998-1999 school year. (T4:110:12-16). She stated that her dissatisfaction stemmed from the fact that there were insufficient funds in the custodial line item, she did not feel that there was sufficient security budgeted, and she felt that the Buildings and Grounds account was insufficient to address emergencies. (T4:110:19-111:8). Mrs. Kelly testified that there came a time when the Goods and Services Committee made recommendations to address budget concerns. She stated that the only way the Board could get real money into the budget, specifically the deficient line items, was to address some personnel reductions.

(T4:111:22-112:4). She testified that in the deliberative process to determine which positions to address she wanted to make sure that any positions would not adversely impact youngsters. (T4:112:8-15). She testified that she considered the petitioner's position a duplication of the services currently performed by district supervisors. (T4:112:21-25). Mrs. Kelly testified that the action on June 23, 1998, to eliminate the position of Head Custodian was taken to save the Board a great deal of money. (T4:114:13). She testified that the abolition of the position of Director of Facilities, Custodial Services was also an effort to save the District money. (T4:114:14-19).

Mrs. Kelly testified that she did not know that the petitioner's position was budgeted in the DEPA plan, however, if she had known she would have still supported abolishing the position. She said she would have done so because she believed that the money realized by eliminating the position, could be used to fund other programs currently funded in the general fund by moving them into the DEPA plan. (T4:115:11-23). Mrs. Kelly testified that after the several actions of June 23, 1998 meeting she felt that the Board had done what they had to do, and then crossed their fingers and hoped that the Board was able to get through to June 30, 1999.

Mrs. Kelly testified that the decision made with respect to the petitioner did not concern the petitioner's performance, but instead was made because the Board needed money because there were several line items which were under-funded. (T4:116:15-24).

Adalberto Lopez

Mr. Lopez is a member of the Atlantic City Board of Education and was President of the Board for the 1998-1999 school year. (T2:57:12-13). Mr. Lopez testified that the petitioner's position was eliminated while it was known that the position was funded in the DEPA plan because there was a consensus on the Board that there was an over abundance of supervisory positions. They felt that this was one position that was not needed because the work could be performed by other supervisors and staff, and therefore, the DEPA funds could be used to fund other projects. (T2:63:1-7). He further testified that he did not feel it was the intention of the Board to eliminate staff development. (T2:91:11-13).

Theresa Perry

Mrs. Perry testified that as a member of the Goods and Service Committee there came a time when the committee discussed eliminating the petitioner's position. She said the recommendation was made to reduce the position because the budget was in crisis. (T1:164:10-21). Mrs. Perry testified that the reduction in force would enable the Board to hire teachers more critical to the classroom and to the direct contact with the students, and to reduce class size. (T1:166:2-14).

Mrs. Perry testified that subsequent to the June 23, 1998 meeting, the Board revisited the budget to make certain that the funded line items were sufficient and found that it was not. (T1:182:1-10).

LEGAL ARGUMENT OF THE PARTIES

Petitioner's Positions

Point I

The Board's Action to Eliminate the Petitioner's Position Was Arbitrary and Motivated by Bad Faith

N.J.S.A. 18A:28-9 grants boards of education the authority to abolish positions of employment for reasons of economy. In exercising its discretion to abolish positions for economic good cause, a board is not legally bound to follow a superintendent's recommendation, provided the Board is acting reasonably in good faith. *Stahnten v. Board of Education of Township of Hillside,* 1987 *S.L.D.* 1096, 1099 (Comm'r. Decision of 1987) aff'd 1987 *S.L.D.* 1104 (State Board of 1987). It is well established that actions of a Board are entitled to a presumption of correctness, as well as a presumption that such actions will be upheld by the Commissioner, absent a showing of bad faith, illegal motive or a lack of rational basis. *Kopera v. West Orange Board of Education,* 60 *N.J.* 288 (1960). The petitioner acknowledges that she has the burden of proof, based upon a preponderance of the evidence standard, on all her claims.

The respondents contend that the Board action on June 23, 1998 to abolish the petitioner's position, as well as others, was done to create a free balance to fund other budget accounts. The petitioner asserts that the respondent's actions, under the circumstances of this case, were arbitrary and should be set aside.

A. The Unilateral Change in the DEPA Grant Budget and Targeting the Petitioner for Removal Shows Bad Faith

Was there a rational basis for the Board to abolish petitioner's position? Absolutely not. The petitioner produced substantial evidence that the Board's action was improper. There are several compelling reasons for this conclusion. First, the petitioner was evaluated satisfactory by Superintendent Williams and recommended to continue in her position for 1998-1999. (P-6) She signed her contract and returned it to the personnel office. By statute, *N.J.S.A.* 18A:27-10, school districts may non-renew non-tenured employees by written notice before May 15th of the year. In this case, the respondent Board renewed petitioner's contract.

Further, "[a]t the Board Meeting on June 23, 1998, Acting Superintendent Campbell did not recommend that the Board abolish the petitioner's position because her position was (1) funded by the State; (2) it was necessary to carry out the District's plans; and (3) those plans have not been changed." (Stipulation ¶13) The parties have stipulated that the petitioner's position was fully funded by DEPA, in dedicated budget line items for the 1998-1999 school year. Accordingly, abolishing the petitioner's position would not add monies to the free balance or affect any economic benefits to the general budget.

Second, there is no dispute that the Board did not have approval from the County Superintendent to change the goals, objectives or activities in the previously approved DEPA budget (P-5). The first goal listed in the DEPA budget, page 4 of 10 (Exhibit B, Stipulation) is "To provide on-going high quality training programs . . .." On the same page, the objective is "To provide a program director to facilitate and oversee aforementioned programs." There is no doubt about the petitioner's qualifications as an expert in 4Mat training. The petitioner helped develop the DEPA budget and was to play a key role as the program director. The petitioner trained 60 teachers and supervisors in the 4Mat model during the 1997-98 year, more training

sessions were scheduled for the summer of 1998 and during the 1998-99 school year. Specifically, the district planned to train 200 teachers in the coming year. In fact, as of August 1998, three District teachers, including Bodhan Christian, became certified trainers. In other words, the planning was completed and full implementation of 4Mat was going forward. The resources of staff time and money were already invested in 4Mat training.

Dr. Williams testified without contradiction that the Board could not unilaterally alter the DEPA without obtaining prior approval from the County Superintendent's office or State Department. (T2:116:1-15) Any readjustments to the DEPA budget required prior approval of the County Superintendent. (T2:133:3-18) Also, Board member Hill similarly testified that the petitioner's position was funded in DEPA and before the Board could change the DEPA budget, prior approval was necessary. Even Acting Superintendent Campbell was uncertain about the consequences of the Board's action. Asked if this change would hold up funding for DEPA, Ms. Campbell stated, "I hope not." (T3:49:1-13).

The resultant consequence of the changes was that the line item for petitioner's salary and benefits, approximately $92,000 remained dormant in the accounts for several months. In fact, the Board voted to revise its DEPA budget on December 15, 1998, six months after its ill-feted decision. When the Board unilaterally changed its DEPA priorities by removing the petitioner on June 23, 1998, it gutted the heart of its staff development plan. There was no one in the District capable of replacing the petitioner. For a Level Two monitoring district to act in such a manner is truly irrational. See the educational audit (P-1) which found that "[m]any programs and changes are initiated to address problems, but they typically are not fully thought out prior to implementation, and often are not provided the necessary staff and support required to make them work and achieve the intended solutions . . ." (P-1) (T1:30-10-25)

A unilateral change to state approved program may be sufficient to render the Board's decision arbitrary and capricious. In a recent case, the Commissioner found that a board improperly abolished a learning disability teacher-consultant (LDTC) position of a tenured teacher for reasons of economy, and violated her tenure rights. *Sally Primka v. Jamesburg Borough of Board of Education,* 93 *N.J.A.R.* 2*d.* (EDU) 91, (Comm'r Decision December 2, 1992), aff'd *State Board*, aff'd by *Appellate Division* (January 18, 1994) No. A-2427-92. In that

case, ALJ Daniel McKeown ruled that the Board's abolishment of the full-time LDTC position was a unilateral change of it's approved special education plan, which the Board did not get prior approval. The unilateral change made the Board out of compliance with special education regulation *N.J.A.C.* 6:28-1.2 because it altered the level of services provided by District's Child Study Teams. The Commissioner gave the Board the option of restoring the position or apply to the County Superintendent to amend its plan. Similarly, as in the *Primka* case, the respondent Board here did not obtain the necessary approval to change "the District's plans" before abolishing petitioner's position.

Third, the Board failed to engage in any cost analysis as to the absence of the petitioner and impact in the DEPA plan of activities. *See, Glab v. Borough of Belmar,* 92 *N.J.A.R.* 2*d.* (CSV) (Civil Service ruling that one of the ways in which an employee may establish bad faith on part of the public employer is to show its failure to perform any cost analysis before having undertaken the layoff in question). The respondent realized no savings by terminating the petitioner in order to fund a free balance. It is plainly false for the respondent Gallagher to say that "general funds would be freed up" by cutting the petitioner's position. (T4:69:12-18) The reason the administration had 4Mat training placed in the DEPA budget was to utilize dedicated state funding aid so that the taxpayers would not have to pay for these costs. (T1:51:3-10) The parties have stipulated that "DEPA funding is restricted funding and cannot be used for programs or costs that are not approved as eligible for DEPA funding, pursuant to *N.J.S.A.* 18A:7F-18b(1)(2) and (3). DEPA funds, if not used for DEPA expenses, can not be used to satisfy other expenses within the budget." (Stipulation ¶6) Without prior approval, DEPA funds must be used only for intended purposes, and if not used, must be returned to the State.

In addition, the actions of the Board on June 23, 1998, to direct Ms. Campbell to create the Academic Achievement Academy further supports our position that there was no need to "create a free balance." The Academy was not budgeted for the 1998-99, nor planned. The program was not reviewed by the Curriculum Committee of the Board before June 23, 1998. The Board voted to implement the program for the 1998-99 school year at a cost of approximately $36,000. Speaking for the Board, Mr. Gallagher testified that the Academy was necessary and that "Whether there were funds to fund that particular Academy, we believe there were." (T4:81:2-6).

Fourth, Resolution No. 98 6B 57 which purported to abolish the petitioner's position was seriously flawed by its sponsor Board member Theresa Kelly. Ms. Kelly testified that her mind was made up before the June 23, 1998 Board meeting to eliminate the petitioner's position because she deemed it a duplication. (T4:130:1-5) Ms. Kelly testified that she had no knowledge of the petitioner's duties, or that the DEPA budget continued 4Mat training of staff. (T4:133) Ms. Kelly testified that she had no knowledge that the petitioner's position was funded in the DEPA budget at the time she made the motion. (T4:115:5-8) Interestingly, Ms. Kelly stated that she never saw a copy of the DEPA budget previously approved by the Board and State. (P-5) (T4:124).

Ms. Kelly also testified that she never spoke to Superintendent Williams about eliminating the petitioner's position. After June 3, 1998, Ms. Kelly did not talk to or consult with Acting Superintendent Ms. Campbell about the petitioner's position. Ms. Kelly's admissions here clearly show she has stepped outside the role of a Board member as a policy maker. The petitioner believes Ms. Kelly actions, voting on important personnel matters without basic facts, shows an intent to just "go after" the petitioner. Without question, the actions of Kelly were not based upon facts or the recommendation of Acting Superintendent Campbell. They show bad faith.

The petitioner believes that the Board had a duty to ensure that its decision to abolish petitioner's position was based upon facts. To the contrary, Ms. Kelly's motion was not based upon facts, but her opinion. Compare, *McElroy v. Hardyston Twp. Bd. of Ed.,* 1985 *S.L.D.* 175 (Comm'r Decision February 14, 1985) (Increment denial reversed because it was not based upon teachers' performance in current year, but rather, upon Board President's recollection of prior performance.)

Finally, the Board action to remove the petitioner was motivated by a political agenda or bad faith. It cannot be overlooked that Superintendent Williams was suspended on June 3, 1998 and is embroiled in a nasty tenure case and litigation with the Board. The tension was ever present and there was an unsettling environment in the central office. Moreover, substantial testimony by several witnesses clearly show that the petitioner was on a "hit list" and targeted for

removal. Board members Hill and Banks testified about the hit list and the petitioner's ties to Superintendent Williams. Board Member Banks testified that he believed that the new Board majority were using position cuts to "go after" individuals. (T3:15:7-23). Mr. Hill testified that the petitioner's removal was motivated by a "hit list." (T3:52:4-7).

Further, Assistant Superintendent Campbell, Supervisor Woolley, and Board Member Perry all testified about a hit list or political agenda. Ms. Perry confirmed her May 13, 1998 statements in the minutes of that meeting to the effect that "the recommended cuts were identified by the City Council, not Mr. Gallagher, and that this was a head hunt" were absolutely correct. (T1:149:15-21) Ms. Perry stated that petitioner's position should not have been in question because her position was in the academic portion of the budget. (T1:151:19-25; 152:1-7) She believes that the City Council was exerting some political influence on the Board decisions with regards to the defeated budget. (T1:152:8-11).

Ms. Campbell testified that she had knowledge of a *"hit list"* created by Board members. Several employees were on the list such as Melvin Clarke, Assistant Superintendent, and Kemry McFarland, Personnel Director, and others. Ms. Campbell stated that she saw Board Member Herzog with a list at a Board meeting at the Richmond Avenue School. Ms. Campbell testified that Ms. McFarland came to her upset one day because her name was on the list and she feared the loss of her job. (T3:103:1-3). And Ms. Woolley stated that the petitioner and two other District employees were pejoratively considered 'Ben's people' and were included in what was generally known as a *"hit list.'* (T2:20:6-17; 21:1-12). According to Ms. Woolley, the *'hit list'* had little to do with budgetary constraints and everything to do with revenge and retaliation for being politically incorrect. (T2:22:1-10) Her knowledge of a *'hit list'* came from newspaper articles and a public meeting at a local church. (T2:22:15-23) Ms. Woolley testified that a supervisor once handed her a list purportedly found on the floor of the Boardroom with staff names and salaries. (T2:52:1-21).

The facts of our case are case are similar to the case of *Harry Dearden v. Board of Education of the City of Trenton,* 1990 *S.L.D.* _____, (Comm'r Decision October 1, 1990). In that case, Dearden challenged the Board's action to abolish his position of Assistant Purchasing

Agent as arbitrary and capricious. Dearden further claimed that he was a victim of an arbitrary and politically inspired hatchet job initiated by the late Mayor of Trenton, Arthur Holland.

The Commissioner held that the abolition of Dearden's position was in bad faith based upon political considerations. The Commissioner found that the Mayor's remark that Dearden was a "political hack" during a School Board of Estimate meeting influenced the Superintendent to cut Dearden's position from the budget. Before the Mayor's remark, Dearden's position was not at issue or in jeopardy. Although the Superintendent believed Dearden's position was necessary and there was funding in the budget for it, the Superintendent felt pressured to cut the position to gain Board approval for the budget. *Id.* at 6-7. Several teaching positions were cut from the budget.

The Trenton School District was a political hot bed which required constant oversight by the Department of Education by imposing a monitor general and a corrective action plan. *Id.* at 19. The respondent's Level Two monitoring is a mirror image of the Trenton District.

As in Atlantic City, Board members were "interfering with the administration" of the District. *Id.* at 19. Similar to *Dearden*, Board members, Gallagher, Kelly and Herzog have been interfering with the administration of the District by the Superintendent. For instance, the Resolution by Herzog to mandate the creation of the unbudgeted program, Academic Achievement Academy was a blatant power grab. Ms. Campbell testified that the mandate to create the program interfered with the running of the District. (T3:90:9-23).

B. The Testimony of Board Members Gallagher, Lopez and Kelly was Inconsistent, Implausible and Should Be Deemed Not Credible

The Board denies that the decision to eliminate the petitioner's decision was arbitrary or improper. The trier-of-fact is free to reject testimony as inherently incredible or inconsistent with other testimony and/or common experience. *See, Congoleton v. Pura-Tex Stone Corp.* 53 *N.J. Super.* 282, 287 (*App. Div.* 1958). In order to be credible testimony must proceed not only from the mouth of a credible witness, but also must be credible in itself and be such as the

common experience and observation of man can approve as likely or probable in the circumstances. *See, Spagnulolo v. Bonnet,* 16 *N.J. Super.* 546, 554, 555 (1954).

The petitioner asks that this tribunal credit the testimony of her witnesses. The petitioner gave sincere and reliable testimony regarding her experiences in the Atlantic City schools. She felt like an outsider and was continually reminded that she was unwelcomed. Despite doing a tremendous job to address the significant Level Two monitoring deficiencies of the District in staff development, the respondents gutted an otherwise sound and worthy development plan. In comparison, the testimony offered by respondents Lopez, Gallagher and Kelly at times lacked common sense and was suspect. For instance, on direct testimony Mr. Gallagher was asked why he seconded the motion to terminate the petitioner. Mr. Gallagher responded "I don't recall . . ." (T4:34:1-7) Ms. Kelly testified that her mind was made up before the June 23, 1998 Board meeting to eliminate the petitioner's position because she deemed it a duplication. (T4:130:1-5) This admission is surprising since Ms. Kelly did not know critical information: that the petitioner's position was fully funded by DEPA, petitioner's duties or had seen petitioner's job description (P-19), or reviewed petitioner's May 15, 1998 evaluation (P-21). Ms. Kelly did not even consult with Superintendent Williams or Acting Superintendent. Mr. Lopez testified that there was a "consensus of the Board" to eliminate supervisory positions (T2:63:1-7) but apparently the alleged "consensus" was arrived at coincidentally after the June 3, 1998 suspension of Superintendent Williams, and without the support of fellow Board members Hill, Banks and Perry.

Based upon the testimony of the witnesses and documentary evidence, the petitioner believes she has proven by credible evidence that the Board acted arbitrarily, capriciously, and in bad faith by terminating her.

C. The District Failed to Give the Petitioner 30 Days Notice of Termination Pursuant to Her Contract

Count Two of the Petition alleges that the petitioner received less than 30 days notice of termination contrary to her contract. Assuming for the sake of argument that the petitioner failed

to prove any other claim in the Petition, she maintains that the respondent owes her pay for the full 30-day period. Basic contract law applies to this matter.

The petitioner's contract requires 30 days notice in writing of a party's election to terminate the contract. (Exhibit A, Stipulation) The petitioner's termination letter, dated June 24, 1998, states that it "serves as the required thirty-day notice . . ." (Exhibit E, Stipulation) The petitioner testified without contradiction that she received her letter via hand delivery on June 29, 1998. This would entitle the petitioner to be compensated up to July 29, 1998 for a complete 30 days. Therefore, the petitioner contends she is owed compensation for at least five more workdays July 23, 24, 25, 28 and 29.)

The petitioner will stipulate that the respondent paid her salary up to July 22, 1998. The period from July 23 to 29 contains five workdays. The petitioner believes she is owed for five days @ $333.33 per day or $1,666.65 in gross salary. Please note that the respondent Board has finalized a collective bargaining agreement with the administrators' union. Therefore, the petitioner is entitled to a salary adjustment from $80,000 to $82,400.00 from July 1 to July 29, 1998.

D. Petitioner's Removal was a Violation of Her Constitutional Right of Association and Discriminatory

Count Three of the Petition alleges two claims, that is a violation of petitioner's Free Speech rights for her association with Superintendent Williams, and her termination violated the New Jersey Law Against Discrimination under *N.J.S.A.* 10:5-1 *et seq.* Assuming that the court finds that the petitioner's removal was in bad faith, then the next step would be an analysis of the applicable claims here.

On June 23, 1998, the petitioner was confronted with a *fait accompli.* Mr. Gallagher and Ms. Kelly had already decided, at least Ms. Kelly's mind was made up, to vote to terminate. The petitioner's termination was predicated upon her exercise of constitutional protected freedom of association. A school district cannot terminate an employee for exercising his/her First Amendment free speech rights. *Parente v. Metchen Board of Education,* 94 *N.J.A.R.* 2*d.* (EDU) 352 (Comm'r March 17, 1994) In order to maintain a claim for termination based upon constitutional rights, the petitioner must prove that her discharge was predicated at least in part on her exercise of First Amendment rights. *Endress v. Brookdale Community College,* 144 *N.J. Super.* 126 (*App. Div.* 1976).

Pickering v. Board of Education, 391 *U.S.* 563 (1968) held that statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors, citing *Garrison v. Louisiana,* 379 *U.S.* 64 (1964). In *Wood v. Georgia, supra.,* the Supreme Court further said:

> The burden is upon the governing body to show that there is compelling public interest which warrants the restriction of First Amendment rights. In the absence of such a showing, these rights are not subject to impairment or destruction. *Thomas v. Collins,* 323 *U.S.* 516, 65 *S. Ct.* 315 80 *L. Ed.* 430 (1945); *Bates v. City of Little Rock,* 361, *U.S.* 516 (1960); *NAACP v. Button,* 371 *U.S.* 415 83 *S. Ct.* 328, 9 *L. Ed. 2d.*405 (1963); *Gibson v. Florida Legislative Investigation Committee,* 372 *U.S.* 539 83 *S. Ct.* 880, 9 *L. Ed.* 2*d.* 929 1963); *DeStafano v. Wilson, supra.* at p. 599. . . . .

In addition to the protection of rights contained in the United States Constitution, the New Jersey Constitution provides the protection of civil and personal rights.

Article 1, paragraph 18, of the New Jersey Constitution provides:

> The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives to petition for redress of grievances.

The plaintiffs' employment positions were a protectable property right under the New Jersey Constitution. Article 1, paragraph 5, of the New Jersey Constitution provides:

> No persons shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right . . .

Article 1, paragraph 6, of the New Jersey Constitution provides in part:

> Every person may freely speak, write and publish his sentiments on all subject, being responsible for the abuse of that right.

In *Slohoda v. United Parcel,* 193 *N.J. Super.* 586 (*App. Div.* 1985), the Court held that if the employee's discharge is based in significant part from the discriminatory reasons, the discharge must be invalidated. *See also, Arverd v. Bushburg Brothers,* 137 *N.J. Super.* 537 (*App. Div.* 1975). In the second *Slohoda* case, 207 *N.J. Super.* 145 (*App. Div.* 1986), the Appellate Division said:

> It is sufficient, if taken with other possible meritorious reasons, the discriminatory purpose was a determinative factor.

The petitioner's employment status as a non-tenured employee does not defeat her claim of a constitutional violation. *Mt. Healthy City Board of Ed. v. Doyle,* 429 *U.S.* 274 (1977). As previously stated, the petitioner was targeted on a "hit list." There is a strong causal connection between the suspension of Superintendent Williams, June 3rd, and the petitioner's removal on June 23rd, or less than 21 days apart. There is no issue about the need for the petitioner's position. She performed her job well and was exceptionally qualified. Further, the petitioner

was removed in the middle of the ongoing 4Mat training sessions which were planned and funded in the 1998-99 budget.

For the foregoing reasons, the petitioner Charlotte Wellins asks that this tribunal find that the termination action of the respondent Board was precipitous, arbitrary and in bad faith. Also, we ask that the Court to find the actions of respondent a violation of her constitutional rights and discriminatory. We request the award of back pay and benefits.

The Board's Position

Point I

The Board Did Not Act Arbitrarily When It Moved to Eliminate the Petitioner's Position By Way of a Reduction in Force

It is well established that in certain situations a board of education has broad authority to effectuate a reduction in force. *N.J.S.A.* 18A:28-9 provides:

> Nothing in this title or any other law relating to tenure of services shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.

In the instant action the petitioner's position was abolished by the Board for reasons of economy given the financial crisis of the District. The foregoing statute gives the Board broad latitude because it does not require that the Board's action come at the recommendation of the superintendent of schools. Reduction in force decisions made pursuant to *N.J.S.A.* 18A:28-9 are entirely within the authority of the local Board. *In re Maywood Bd. of Ed.* 168 *N.J. Super.* 45, 55 (*App. Div.*), cert. denied 81 *N.J.* 292 (1979). Moreover, where the RIF is done for reasons of

economy, such a determination is entirely within the authority of the Board. *Klinger v. Cranbury Tp. Bd. of Ed.,* 190 *N.J. Super.* 354, 357 (*App. Div.* 1982); cert. den. 93 *N.J.* 277 (1983).

The majority of the Board deemed it necessary to abolish certain positions in order to restore the budget to a secure level given the events of the preceding school year and the fact that although the budget had been restored there were several line items which were inadequately funded. These line items included the Buildings and Grounds account. This account funds repairs of buildings. It is well known that the Atlantic City School District has some of the oldest facilities in the State.

A. The Change in the DEPA Grant was Done in Good Faith in Effort to Address Deficiencies in the General Fund

There was a rational basis for the elimination of the petitioner's position. The Board deemed the petitioner's position to be one of several positions within the table of organization, which could be eliminated, to free up funds, without critically impacting the classroom. The action against the petitioner had nothing to do with her job performance or the programs, which she was running within the District. Therefore, all of the testimony with respect to the merits and value of the program and the expertise of the petitioner are irrelevant because that was not a consideration for the action taken against her. It has been the position of the Board from the initiation of this action that the action taken against the petitioner was strictly for budgetary reasons.

The petitioner makes reference to the statutes governing non-renewal of non-tenured teaching staff members. That statute is of no moment in this matter because this was not an action of non-renewal but a reduction in force. Reduction in force may occur at any time.

The respondent asserts that it had the authority to revise its DEPA plan. There was no testimony from anyone from the Department of Education, which established that prior approval was required before changes were made to a DEPA plan in June of 1998. Moreover, Dr. Williams testified that it was his understanding that if the Board were to readjust the DEPA plan that readjustment would have to go to the County Superintendent for his review and he would

approve or disapprove, and if he approved the revised budget, the money could be spent accordingly. (T2:133:13-19). So, therefore, even Dr. Williams was under the assumption that the DEPA plan could be revised and the money spent according to the revisions. This was the intention of the Board. Then Board President Mr. Lopez testified that it was the will of the Board to revise the DEPA plan to take some programs funded in the general budget and move them into the DEPA plan to free up funds in the general fund.

By eliminating the petitioner's position and her staff development plan the District did not abandon staff development. There was a staff development component of the DEPA plan, which remained after the changes.

Moreover, this matter turns on the action of the Board in effectuating the reduction in force. Actions of the Board thereafter are not relevant to this matter. The petitioner argues that the DEPA budget was not revised until December. This is not relevant to the Board's June action.

The petitioner cites *Primka v. Jamesburg Borough Board of Education, N.J.A.R.* 2*d.* (EDU) 91, (Comm'r Decision December 2, 1992), aff'd *State Board,* aff'd by Appellate Division (January 18, 1994) No. A-2427-92, for the proposition that "a unilateral change to a state approved program may be sufficient to render a board's decision arbitrary and capricious." *In Primka,* the state-approved program was a special education program, which is specifically controlled by *N.J.A.C.* 6:28-1.2. *N.J.A.C.* 6:28, repealed and recodified, specifically addressed special education. *N.J.A.C.* 6:28-1.2 (c) specifically states "If there are any changes to parts one or three of the plan they shall be prepared in accordance with the requirements of this section." The rule requires each district board of education to develop a written plan for special education, which shall conform, to the State plan for the educationally handicapped. There was a specific regulation, which required the Board in that matter to get prior approval before changing their special education plan. The petitioner in the instant action has not established any statutory provision or administrative regulation, which requires prior approval of the Commissioner of Education or the County Superintendent before a DEPA plan could be amended.

Petitioner's cost analysis argument also must fail. The petitioner asserts a bad faith on the part of the respondent. There is a presumption in favor of the respondent's action. *See, Schnipper v. North Bergen Twp.,* 13 *N.J. Super.* 11, 14-15 (*App. Div.* 1951). The petitioner cites *Glab v. Borough of Belmar,* 92 *N.J.A.R.* 2*d.* (CSV) page omitted for the proposition that the respondents were required to perform a cost analysis in order to show good faith for the reduction in force. *Glab* is a Civil Service case and is governed by the Civil Service Act. It has been held, in Civil Service cases that where the presumption of good faith "is not overcome by sufficient proofs showing bad faith, it is inconsequential that there is proof showing that considerations other than economy underlay or played some part in the layoff." In the instant action the petitioner has not submitted sufficient evidence to overcome the presumption of good faith. The petitioner has presented only speculative testimony that the action taken against the petitioner was motivated by anything other than reasons of economy. On June 23, 1998 the Board passed several resolutions effectuating a reduction in force for reasons of economy. Moreover, Courts have held that even if the motive for removal is tainted by improper considerations, the actions will be upheld if the position is unnecessary and can be abolished without impairing departmental efficiency, *Santucci Paterson,* 113 *N.J.L.* 192 (Sup. Ct. 1934). The question is not whether a plan conceived and adopted for the purpose of saving money actually in operation attained its purpose, but whether the design in adopting the plan was to accomplish economy or on the contrary was to effect the removal of a public employee without following the . . . Civil Service Act. *See, Dowling v. State Operated School Dist. of City of New Jersey City,* 1995 WL 605245, 95 *N.J.A.R.* 2*d.* (CSV) 603 (*N.J. Adm.* Jun 27, 1995) (No. CSV 8520-93).

B. The District Gave the Petitioner 30 Days Notice Pursuant to Her Employment Contract

The Board took an action to abolish the petitioner's position on June 23, 1998. On June 24, 1998 correspondence was addressed to the petitioner notifying her of the Board's action and giving her notice that her termination would take effect on July 22, 1999. The petitioner presents no basis for the position that the date of termination is to be determined from the date of receipt of the notice of termination. The respondent asserts that the employee is informed of the Board's action and the notice gives the employee 30 days from the date of the Board action.

C. The District's Action Against the Petitioner Was Not Discriminatory

The action against the petitioner was done solely for reasons of economy. The record is replete with testimony as to the financial difficulty of the District during the 1997-98 school year. It is not disputed that the state of the budget for the 1998-99 school year was uncertain, as several budget line items were under-funded. Moreover, it is clear that the action against the petitioner was not based on her performance. The petitioner was in a newly created position within the school district. Prior to the 1997-98 school year supervisors and other district administrators had carried out the function. Given the financial constraints, it was the feeling of a majority of the board members that the petitioner's position was not essential and that the functions could be performed by other staff.

There is no factual basis in the record for the conclusion that the Board took an action to abolish the petitioner because she was associated with the former Superintendent.

For the foregoing reasons the respondent Atlantic City Board of Education, *et als,* respectfully requests that the Court find that the Board action abolishing the petitioner's position was a reduction in force for reasons of economy and was not arbitrary or in bad faith. Moreover, the respondents ask that the Court dismiss all counts of the petitioner's appeal.

CONCLUSIONS

Issue No. 1. Whether the Board's action to eliminate petitioner's employment position was arbitrary and capricious?

I

The record clearly demonstrates, and petitioner admits, that the Board was in a severe financial crisis when petitioner was employed as its Organizational Development Specialist. In her Statement of Facts, petitioner observes that the Board faced a two million-dollar budget deficit. In addition, petitioner observes that the former Board spent unbudgeted funds on renovating the old high school for use as an elementary and/or middle school, referred to as the

Albany Avenue School. Thereafter, petitioner observes, the Board's proposed budget for the 1998-99 school year was defeated at the polls by the electorate.

Notwithstanding that the Atlantic City Council restored the funds the electorate rejected at the Board's annual school election, the incoming Board was confronted with the specter of Level II monitoring by the Department of Education, together with an unstable financial future. The Board determined to eliminate employment positions which would not directly affect the classrooms or classroom teaching. It chose to effectuate a reduction in force to petitioner's position, among others, pursuant to the provisions at *N.J.S.A.* 18A:29-9. The facts further show that petitioner had not achieved a tenure status in the Board's employ.

As the Commissioner observed in the matter of *Sally Klig v. Board of Education of the Borough of Palisades Park, Bergen County,* 1975 *S.L.D.* 168;

> The employment of teachers who have not achieved a tenure status in the district is a matter of lying wholly within the discretionary authority of the board. *Id.* at 172.

The Commissioner continued in *Klig, supra.*, to cite the Board's authority under the provisions of *N.J.S.A.* 18A:11-1 which states, in part, that the Board shall:

> . . . .
>
> **c.** Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title II, Civil Service, of the Revised Statutes; and
>
> **d.** Perform all acts and do all things, consistent with the law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.

The Commissioner continued to observe in *Klig* that a board of education's discretionary authority is not unlimited and may not act in an arbitrary, unreasonable, capricious or improper

way. The Commissioner then cites his comments in *George A. Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, Atlantic County,* 1968 *S.L.D.* 7, 10: dismissed *State Board of Education,* May 1, 1968, affirmed Superior Court (*App. Div.*), 1969 *S.L.D.* 202, as follows:

> The Commissioner agrees that boards of education may not act in an unlawful, unreasonable, frivolous, or arbitrary manner in the exercise of their powers with respect to the employment of personnel. Thus a board of education may not resort to statutorily proscribed discriminatory practices, *i.e.,* race, religion, color, etc., in hiring or dismissing staff. Nor may its employment practices be based on frivolous, capricious, or arbitrary considerations which have no relationship to the purpose to be served. Such a *modus operandi* is clearly unacceptable and when it exists it should be brought to light and subjected to scrutiny. *Id.* at 172.

The Commissioner found that the Board in *Klig* advised petitioner that its reasons for her termination were economic, as provided by *N.J.S.A.* 18A:28-9. The Commissioner found as do I, that the Board's action bore not taint and was not arbitrary, capricious, unreasonable or improper. I **CONCLUDE,** therefore, that the Board's action to abolish petitioner's employment position and, thus, terminate her employment was proper and in accordance with *N.J.S.A.* 18A:11-1 and *N.J.S.A.* 18A:28-9.

II

Petitioner claims that the Board failed to properly compensate her for her sick time, vacation time and other time she accrued. The herein record shows that the Board and petitioner entered into an employment contract which provided, in part, as follows:

> It is hereby agreed that either of the said parties to this contract may, at any time, terminate said contract and the employment aforesaid, by giving the other party thirty days notice in writing of its election to so terminate the same (Stipulation of Facts, Exhibit C) (P-6).

The facts demonstrate that the Board took action on June 23, 1998 to abolish petitioner's employment position, effective 30 days following its resolution. Thirty days from June 23, 1998 fell on July 23, 1998. The Board asserts that the termination of petitioner's position fell on July 22, 1998, rather than July 23, 1998.

Petitioner presented no evidence that she was entitled to vacation time or that the Board had enacted a policy which compensates employees for unused sick time. Assuming, arguendo, that petitioner had accrued any vacation time, it would have been prudent for petitioner to use such time she had coming to her immediately upon receipt of the termination notice. Having not done so, the Board is in no fashion obligated to reimburse petitioner for her failure to use the time to which she may have been entitled while petitioner was still under contract with the Board.

Having carefully considered all of the evidence before me, I **CONCLUDE** that the Board owes petitioner one day of pay for July 23, 1998, prorated, pursuant to the contract between the parties at the time of the termination of petitioner's employment.

III AND IV

Petitioner argues that the Board's decision to abolish her employment position was discriminatory and in violation of the New Jersey Law Against Discrimination (LAD). Petitioner also argues that the Board retaliated against her for her association with the Board's former Superintendent of Schools, in violation of her constitutional right of freedom of association. Petitioner asserts that Board members had a "hit list" of Board employees who were to be terminated and were either employed by the former Superintendent or loyal to him. There was considerable testimony about the so-called "hit list" by petitioner and former Board members. None of these witnesses who testified about the 'hit list" could produce a copy of the document nor could they testify with certainty that they had even seen the so-called "hit list."

The LAD, found at *N.J.S.A.* 10:5-12 state, in part at subsection a. that:

> It shall be unlawful employment practice, or, as the case may be, an unlawful discrimination:

> a. For an employer, because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, sex or atypical hereditary cellular blood trait of any individual, . . . to refuse to hire or employ or to bar or to discharge or require to retire . . . from employment such individual or in terms, conditions or privileges of employment . . .

Petitioner fails to state which of the enumerated factors set forth in *N.J.S.A.* 10:5-12a. the Board violated and discriminated against her. If it may be assumed petitioner is grounding her LAD claim against the Board on the basis of her sex, our Appellate Branch of Superior Court has held that in order to establish a successful claim for gender discrimination in violation of LAD, the employees must show that he/she suffered intentional discrimination because of her sex, that the discrimination was pervasive and regular and that such discrimination detrimentally affected the employees. The LAD claim must also show that the discrimination would detrimentally affect a reasonable person of the same sex in that position in addition to the existence of *respondent superior* liability. *Muench v. Township of Haddon* 255 *N.J. Super.* 288 (*App. Div.).*

Petitioner has failed to demonstrate that any of the *Muench* elements were present and caused the Board to abolish her employment position. Similarly, petitioner has failed to establish, by any credible evidence, that the abolition of her employment position was due to her constitutional right of freedom of association with the former Superintendent of Schools.

The herein record is quite clear that the Board's decision to abolish and eliminate employment positions was for the purpose of economy. There was uncertainty as to the budgetary future of the school district and, therefore, the Board eliminated those employment positions which did not directly affect the classroom teaching programs.

I **CONCLUDE,** therefore, that the action by the Board to abolish and, thus, terminate petitioner's non-tenured employment position was proper and in accordance with the law. I **CONCLUDE** that the Board's action should be sustained and the herein Petition of Appeal dismissed.

ORDER

For the reasons set forth hereinbefore, it is **ORDERED** that the Petition of Appeal of Charlotte Wellins be **DISMISSED,** with the exception that the Atlantic City Board of Education is **ORDERED** to be reimburse petitioner for one day of pay.

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

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

17 January 2001
DATE

LILLARD E. LAW, ALJ

Receipt Acknowledged:

1-22-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 23 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

For Petitioner:

Charlotte Wellins
H. Benjamin Williams
Delois Campbell
Ellen Woolley
Marvin Hill
Theresa Perry
Alberto Lopez
Wilbur Banks
Theresa Christian
Elisha Tompkins
Bohdan Christian
Merle Hurst-Kyle

For Respondent:

Daniel Gallagher
Theresa Kelly

DOCUMENTS IN EVIDENCE

For Petitioner:

P-1 Educational Audit, 1996 by Thomas Edison State College
P-2 6/29/98 memo to respondent Lopez (4Mat Summer Training)
P-3 Board Minutes of 5/13/98 and 6/23/98; added page 20
P-4 Omit
P-5 DEPA Budget revised 5/1/98
P-6 Petitioner's Employment Contract for 1998-99
P-7 Five year plan developed by petitioner (curriculum)
P-8 6/2/98 letter to principals
P-9 Notes of 9/16/98 supervisors' meeting
P-10 Star Urban Teacher documents
P-11 Petitioner's letter to Board undated
P-12 Omit
P-13 4Mat Training documents, including 3/13/98 letter by Excel, Inc.
P-13A 4Mat Training documents, 10/21, 28 and 11/18/98, w/attachments
P-14 Omit
P-15 Omit
P-16 District Staff Development Committee memos and documents
P-17 Omit

P-18 9/3/98 letter of appointment by District
P-19 Petitioner's Job Description
P-20 Petitioner's 8/12/97 cover letter and resume
P-21 Petitioner's evaluations dated 5/15/98 (3 pages)
P-22 See Stipulations Exhibit A (Petitioner's Employment Contract for 1997-98)
P-23 Reduction in Force letter dated 6/24/98
P-24 Committee notes of Goods/Services dated 6/11/98
P-25 Petitioner's pay stub for 8/5/98
P-26 Omit
P-27 Letter of recommendation by Bruce Greenfield, dated 6/29/98
P-28 Board Members Code of Ethics
P-29 Letter to Frank Siracusa & Son, 9/18/98
P-30 Transcript of a portion of the Board Meeting held on 6/23/98. Exchange between Board Member Hill and Acting Superintendent Campbell

For Respondent:

R-1 Memo 5/11/98 w/attachments (2 pages) [disregard handwriting]

OAL DKT. NO. EDU 8903-98
AGENCY DKT NO. 432-9/98

CHARLOTTE WELLINS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY, BERT LOPEZ, PRESIDENT, DANIEL GALLAGHER AND THERESA KELLEY, INDIVIDUALLY AND JOINTLY,	:	DECISION
RESPONDENTS.	:	

The record in this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4, and were duly considered by the Commissioner in reaching his determination herein.

In her exceptions, petitioner objects to the conclusions of the Administrative Law Judge (ALJ), stating that: 1) the ALJ failed to credit the testimony of the former superintendent regarding the Board's authority to alter the Demonstrable Effective Program Aid (DEPA) budget without the County Superintendent's prior approval; 2) it is unacceptable for a board to determine professional development programs without direction from the superintendent; and 3) the ALJ erroneously concluded that the Board's decision to eliminate petitioner's position was proper and in accordance with *N.J.S.A.* 18A:11-1 and *N.J.S.A.* 18A:28-9. (Petitioner's Exceptions at 2) Noting that the District was in Level II Monitoring, with staff development identified as an area needing drastic improvement, petitioner avers that the Board was unaware

when it voted to eliminate both her position and the 4Mat training model for staff development from the budget that the District had already invested thousands of dollars in the 4Mat staff training model and had committed resources to future planned activities. (*Id.* at 2-3) Petitioner further asserts that the Board's action terminating her employment for reasons of economy was unreasonable and arbitrary because the District's budget crisis was resolved with the closing of the Albany Avenue School, saving the District a projected one million dollars. (*Id.* at 4) Therefore, the Board's assertion of fiscal instability is inaccurate, petitioner posits, because the crisis had ended, as demonstrated by the subsequent funding of an unbudgeted program, the Academic Achievement Academy, at a cost of $36,000. (*Ibid.*)

In its reply, the Board asserts that the ALJ weighed all the evidence and gave weight to that which he found most credible. Agreeing that staff development was one of the issues under review as a result of the Level II Monitoring by the State, the Board contends that the 4Mat training model cannot be presumed to be any more appropriate for the District than any other training model. (Board's Reply Exceptions at 1) Moreover, the Board maintains that the District was in a financial crisis at the time it acted to terminate petitioner and the Board was, therefore, forced to eliminate the staff development program with which petitioner was involved, and find ways to address staff development internally in order to preserve funds for classroom instruction. (*Id.* at 2) The Board points out that the changes to the DEPA budget were ultimately approved by the County Superintendent, and that there was never an issue with the County or the State concerning the changes. (*Ibid.*)

Upon a thorough review, the Commissioner determines to affirm the decision of the ALJ, as modified below. Initially, the Commissioner concurs that the record supports the Board's contention that the District was in a financial crisis and that its actions to pursue a

reduction in force and a change in the method of delivery of staff development were for reasons of economy. The Commissioner, therefore, determines, for the reasons expressed by the ALJ, that petitioner has failed to show by a preponderance of credible evidence that the Board's action to abolish her position was arbitrary or capricious. The Commissioner also agrees that there is no evidence that the Board engaged in discriminatory activity when it voted to abolish petitioner's position, and that petitioner has failed to establish a *prima facie* case to support her claim of a violation of the New Jersey Law Against Discrimination. Moreover, since the Board took action to abolish petitioner's position on June 23, 1998, notifying her by letter of June 24, 1998 of such action, the Commissioner agrees that the Board was obligated to reimburse petitioner for services rendered through July 23, 1998, pursuant to the employment contract, which specifies that petitioner will be afforded "*thirty days notice, in writing*," upon the Board's election to terminate the employment contract. (P-6 in Evidence, ¶3)

With respect to petitioner's compensation claim for unused vacation and sick time, the Commissioner observes that petitioner's contract is silent as to employment benefits she is to receive in addition to her annual salary. Although the ALJ states that "[p]etitioner presented no evidence that she was entitled to vacation time or that the Board had enacted a policy which compensates employees for unused sick time" (Initial Decision at 40), the Commissioner observes that petitioner testified that she received a check, dated August 5, 1998, for $1,666.65 (Exhibit P-25) compensating her for five unused vacation days. (Tr. 4/7/99 at 86)

Accordingly, it appears that the Board provided benefits to petitioner which were not specified in her contractual agreement. Although the record does not contain a copy of the policy or collective agreement, if any, which the Board may have applied in awarding petitioner vacation days, the Board is obligated to adhere to the terms and conditions of the same policy or

collective agreement applied in awarding the vacation days and other employee benefits with respect to compensation to petitioner for any unused vacation days. In the event that petitioner was also awarded sick or personal days, petitioner is also entitled to compensation for any unused sick or personal days, if so provided for in the policy or agreement applied to her.

Accordingly, the Initial Decision of the OAL is affirmed for the reasons expressed therein, as modified above.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: MAR 7 2001

Date of Mailing: MAR 8 2001

* 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.

87-01

MARTIN BROWN,

PETITIONER,

V.
STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF JERSEY CITY,
HUDSON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

March 9, 2001

OAL DKT. NO. EDU 3796-99
AGENCY DKT. NO. 399-9/98

MARTIN BROWN,

PETITIONER,

V.
STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF JERSEY CITY,
HUDSON 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 before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: MAR - 9 2001

Date of Mailing: MAR - 9 2001

86-01

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

March 9, 2001

OAL DKT. NO. EDU 9810-98
AGENCY DKT. NO. 388-8/98

LAURIE RALPH,	:	
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 Rinaldi
ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: MAR - 9 2001

Date of Mailing: MAR - 9 2001

90-01

TINA LAINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 12, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO.EDU 8084-99

AGENCY DKT. NO. 253-8/99

TINA LAINO,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,

Respondent.

Gail Oxfeld Kanef, Esq., for petitioner (Oxfeld Cohen, attorneys)

Malachi J. Kenney, Esq., for respondent (Kenney, Gross & Kovats, attorneys)

Record Closed: January 23, 2001 Decided: January 23, 2001

BEFORE **JOSEPH F. MARTONE,** ALJ:

This matter was transmitted to the Office of Administrative Law on September 13, 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. A prehearing conference occurred on November 23, 1999, and the matter was scheduled for hearing on April 24, 2000. The hearing was adjourned at petitioner's request and was rescheduled for October 11, 2000.

On the rescheduled hearing date the parties agreed to a settlement and have prepared a Consent Order indicating the terms thereof, which is incorporated herein by reference.

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.

January 23, 2001
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

1-26-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 29 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

mph

KENNEY, GROSS, KOVATS & CAMPBELL
The Courts of Red Bank, Building 8
130 Maple Avenue, Post Office Box 8610
Red Bank, New Jersey 07701
(732) 530-7500
Counsel for Respondent Middletown
Township Board of Education

TINA LAINO, Petitioner, vs. BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION / OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO. 253-8/99 OAL DOCKET NO. EDUOA 08084-99S **CONSENT ORDER**

THIS MATTER, having come before the undersigned Administrative Law Judges upon joint application by the parties, the Board of Education of Middletown Township (hereinafter "BOARD"), the Middletown Township Education Association (hereinafter "MTEA"), and Petitioner Tina Laino (hereinafter "LAINO"), and the parties wishing to withdraw this matter in consideration of terms of the agreement recited herein pursuant to N.J.A.C. 1:1-19.1;

IT IS on this 12th day of January, 2001, ***ORDERED*** as follows:

1. Effective retroactively to September 1, 1999, the BOARD shall place LAINO at Step 7 of the Level 6- ten-month salary guide for the 1998-1999 school year, at a salary of $21,958. LAINO's guide placement shall be "red-circled" at the level of $21,958 until such a time as she would be entitled to receive an equal or greater amount based upon the Level 2- ten-month salary placement;

2. LAINO waives any objection that she may have to her assignment to the Clerk-Level 2 position;

3. In consideration for the above, the MTEA and LAINO agree to the dismissal of their Petition of Appeal with prejudice;

4. This Agreement does not constitute an admission of liability by either party, nor does it constitute an admission of violation of any statute, regulation, rule, policy or legal duty. This Agreement shall not be cited as precedent, not shall it be used in any future legal proceeding (except for the enforcement of its own terms), by either party or their representatives;

5. LAINO, the MTEA, and the BOARD each hereby acknowledge that they have had ample opportunity to review this Agreement and the terms embodied herein, and to consult with competent legal counsel, prior to executing this Agreement;

6. This Agreement shall constitute the parties' entire understanding and agreement on the subjects encompassed herein;

7. This Agreement shall be governed by, and shall be subject to, the laws of the State of New Jersey.

The parties consent to the form of this Order:

TINA LAINO

DR. JOHN D. DETALVO,
SUPERINTENDENT OF SCHOOLS

DIANE K. SWAIM, PRESIDENT
MIDDLETOWN TOWNSHIP
EDUCATION ASSOCIATION

IT IS SO ORDERED

1/23/2001

~~STEVEN REBACK, ALJ~~
JOSEPH F. MARTONE, A.L.J.

OAL DKT. NO. EDU 8084-99
AGENCY DKT. NO. 253-8/99

TINA LAINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
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. 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: MAR 12 2001

Date of Mailing: MAR 13 2001

89-01

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

March 12, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 1746-97

AGENCY DKT. NO. 549-11/96

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK, ESSEX COUNTY,
Petitioner,
v.
IN THE MATTER OF THE TENURE
HEARING OF JOHNNIE BENNETT,
Respondent.

Philip E. Stern, Esq., appearing for Petitioner
(Sills, Cummis, Radin, Tischman, Epstein & Gross, attorneys)

Paul L. Kleinbaum, Esq., appearing for Respondent
(Zazzali, Fagella & Nowak, attorneys)

Record Closed: January 4, 2001 Decided: January 24, 2001

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

The Board charged a tenure teacher of conduct unbecoming for her participation in conduct intended to defraud the State Health Benefits Program (SHBP). The matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on February 10, 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.

FINDINGS OF FACT

The District filed tenure charges against Respondent tenure teacher, alleging conduct unbecoming a teacher. The District sought termination of the teacher's employment. The charges were based on Respondent teacher's participation in a scheme to defraud the SHBP. Prior to a hearing at the OAL, Respondent entered a plea of guilty on July 10, 2000, to charges of conspiracy in the third degree one count and theft in the third degree two counts.

In addition to monetary penalties and restitution, Respondent teacher agreed that she would not apply for pretrial intervention and that she would no longer be employed by the City of Newark Board of Education. Accordingly, I **FIND** that the charges raised by this petition have been rendered moot.

I **CONCLUDE**, therefore, that this petition should be dismissed as moot.

ORDER

I hereby **ORDER** that this petition 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.

January 24, 2001
DATE

MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

1-26-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 29 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

OAL DKT. NO. EDU 1746-97
AGENCY DKT. NO. 549-11/96

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

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

Upon his independent review, the Commissioner affirms the conclusion of the Administrative Law Judge. As a consequence of respondent's guilty plea to one charge of conspiracy in the third degree and two counts of theft in the third degree, respondent agreed that she would not apply for pretrial intervention and that she would no longer be employed by the Newark School District. Therefore, the tenure charges instituted against her by the State-operated School District of the City of Newark have been rendered moot.

Accordingly, the within tenure charges are hereby dismissed. This matter shall be transmitted to the State Board of Examiners, pursuant to *N.J.A.C.* 6:11-3.6(a)2, for action against respondent's certificate as that body deems appropriate.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: MAR 12 2001

Date of Mailing: MAR 13 2001

* 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.

82-01

HELEN MININSON,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning teacher challenged the withholding of her increment for the 1999-2000 school year.

The ALJ determined that petitioner had not established that the Board's withholding of her increment was the result of disparate treatment or improper motives but, rather, the ALJ found that such withholding was a result of validly perceived deficiencies in her performance. As such, the Board's action in this regard could not be overturned.

The Commissioner affirmed the decision of the ALJ.

MAR 7 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11350-99
AGENCY DKT. NO. 216-8/99

HELEN MININSON,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE,
Respondent.

Timothy R. Smith, Esq., for petitioner (Oxfeld Cohen, attorneys)

Marvin L. Comick, Esq., for respondent (Love and Randall, attorneys)

Record Closed: December 12, 2000 Decided: January 19, 2001

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

Statement of the Case

This is an appeal by a teacher from the decision of the Board of Education of the City of East Orange ("District") to withhold her salary increment for the 1999-2000 school academic year pursuant to *N.J.S.A.* 18A:29-14.

Procedural History

Initially, this matter was filed with the Commissioner of Education on August 3, 1999, by three petitioners, Helen Mininson, Jackie Orr and Amy Hanks Scott. The petitioners alleged the wrongful withholding of their increments for the 1999-2000 school year. On September 22, 1999, the District filed its answer. On October 15, 1999, the Commissioner forwarded this matter to the Office of Administrative Law ("OAL") for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was assigned to the undersigned judge on November 24, 1999, and a telephone prehearing conference was scheduled for January 25, 2000. The prehearing conference was adjourned and held on April 3, 2000. During that conference, the issues were isolated and the undersigned was advised that petitioner Jackie Orr had withdrawn her petition. The hearing was held on October 30 and 31, 2000. At the onset of the hearing, the undersigned was advised that petitioner Amy Hanks Scott had withdrawn her petition. Thus, the hearing commenced in regard to petitioner Helen Mininson. Witnesses and exhibits are listed in the attached appendix.

Findings of Fact

Following the conclusion of the hearing, I directed counsel to provide me with proposed findings of fact and conclusions of law. Counsel for the Board of Education of the City of East Orange submitted proposed findings of fact, which I have adopted with certain modifications:

1. On September 8, 1998, Debra Harvest, principal of Johnnie L. Cocoran, Jr., Academy in the District, met with petitioner Helen Mininson regarding her professional expectations for the 1998-1999 school year. Ms. Mininson was given a statement of the evaluation process and a list of specific concerns regarding her teaching performance that she needed to address during the school year (R-1).

2. On November 9, 1998, Ms. Harvest conducted a formal observation of Ms. Mininson. Ms. Harvest determined that Ms. Mininson's teaching performance was in need of improvement. She discussed her observations in regard to each section of the evaluation with Ms. Mininson and provided Ms. Mininson with a formal observation report that outlined the specific deficiencies in her teaching performance. She offered improvement suggestions. Included in the report were detailed suggestions to address the observed deficiencies and a sixteen-point professional improvement plan. R-2.

3. Of import, the observation conducted on November 9, 1998, indicated that Ms. Mininson must continue to (a) employ various techniques to focus pupil attention on tasks; (b) devote more time to organizing materials and subject matter; (c) incorporate the use of the overhead in her lessons and learn how to pace herself so all areas are covered; (d) improve her organizational skills; (e) lower her voice; (f) reach out to the parents of her students in regard to the disciplinary process.

4. On November 30, 1998, petitioner was given a teacher evaluation that relied on observations, conferences and meetings on various dates, as well as a number of written communications given to Ms. Mininson. This evaluation outlined various deficiencies in Ms. Mininson's teaching performance. It incorporated detailed strategies to improve performance with a seventeen-point professional improvement plan (R-3). The overall rating indicated that Ms. Mininson's performance was deficient in a number of areas. In addition, the evaluation indicated that a failure to improve her performance in the stated areas would result in a recommendation that her salary increment should be withheld.

5. On December 10, 1998, Debra Harvest conducted an informal evaluation of petitioner. It was Ms. Harvest's policy to advise the teachers by memo

of any incorrect performance she observed during an informal observation. Harvest's note to petitioner in regard to her observation of December 10, 1998, indicated that petitioner was not teaching the subject matter on her schedule and that five students were engaged in inappropriate activities (R-4).

6. Ms. Harvest conducted a formal observation of petitioner on February 3, 1999. Ms. Harvest found Mininson's performance unsatisfactory in the areas of teaching strategies or techniques, knowledge of content, planning and preparation and classroom management. She provided petitioner with detailed strategies for improvement, as well as a specific professional improvement plan. R-5.

7. On March 26, 1999, petitioner was given a teacher evaluation that reflected petitioner's performance for the entire school year, incorporating the results of numerous observations and written communications. Her performance was rated as unsatisfactory, and it was stated that as a result of the numerous areas in which petitioner was deficient, Ms. Harvest would be recommending the withholding of her increment/increase for the 1999-2000 school year. The particular reasons were set forth in the evaluation. Moreover, detailed strategies for improvement and a twenty-five-point professional improvement plan were provided. R-6.

8. More particularly, the March 26, 1999, evaluation indicated that petitioner's teaching strategies needed improvement. She was not following the Success For All (SFA) program and there was no logical sequence to what she presented to the students. She was advised to use the acting listening signal to help the students focus. In regard to knowledge of content, she was informed that she did not have the requisite knowledge of the content and the curriculum for social studies and SFA. In regard to planning and performance, she was advised that

her lessons required organization and planning. As to classroom management, she was told to involve students in classroom routines by sharing with them what was expected and to follow given time frames. She was also advised to take a more active role in devising a plan to assist with the development and improvement of student attitude. Her students were not focused on her or the teaching and too much instructional time was lost while she tried to redirect behavior. Petitioner yelled at the students, which was inappropriate, and her classroom management indicated that she had no control of her students. In reference to her professional and personal qualities, she was told that the suggested strategies and techniques to enhance performance were met with excuses. In regard to school and community relations, she was advised that her communication with parents was minimal and that effective communication with parents was needed to assist with the development of student attitude. She was told to work on presenting herself in a more positive manner; Ms. Harvest considered her to be hostile and angry towards her. In regard to attendance and punctuality, she was advised to improve her attendance in order to provide continuity of instruction. R-6.

9. By memo dated April 7, 1999, Debra Harvest advised petitioner that she was recommending the withholding of her salary increment for the 1999-2000 school year based on documented poor teaching performance (R-7).

10. Harvest informed petitioner by memo dated May 24, 1999, that she was extremely concerned with Ms. Mininson's established pattern of lateness, which hindered her ability to plan for her students prior to the instructional day. Mininson was late to work on eight occasions in the five-month period beginning January 6, 1999, and ending May 24, 1999. R-8.

11. Doreathea Welsh Jones, a parent, filed a complaint with the administration in regard to petitioner's teaching performance. A meeting

was held on June 9, 1999, with Ms. Mininson, Ms. Jones and Debra Harvest. Certain suggestions were made to resolve the parent's complaint. The parent did not return her child to the school the following year (R-9).

12. The East Orange Board of Education considered the documentation supplied by Debra Harvest, as well as that of Helen Mininson, prior to voting to withhold petitioner's salary increment for the 1999-2000 school year (R-10).

13. Petitioner has shown improvement in her teaching performance during the 2000-2001 school year. Her lesson plans are completed and on time.

14. Debra Montague Harvest is presently serving in her fifth year as principal of Johnnie L. Cocoran, Jr., Academy. Prior to this, she served as a teacher and an assistant principal. She is a member of the Delta Sigma Theta sorority, whose members are African-Americans. Other teachers in the school are members of that sorority or members of Alpha Kappa Alpha, another African-American sorority.

15. Petitioner's increment was withheld for the 1995-1996 school year. At that time, Brenda Veal was the administrator.

Arguments

Respondent asserts that the withholding of petitioner's increment was justified because it was purely performance based. Petitioner contends that the withholding of the increment was arbitrary and capricious in that it was predicated on her non-sorority member status. According to petitioner, the issue is whether the District's purported basis for the withholding is genuine or a pretext for discriminating against employees, including petitioner, who are not members of sororities.

Petitioner argues that many of the observations contained in the evaluation reports could not reasonably be made during the course of one brief visit to petitioner's classroom and that her performance could not fluctuate to the extent depicted in the evaluations over such a short period of time. Petitioner asserts that the noted inconsistencies and fluctuations were due to an improper motive on the part of Ms. Harvest.

Petitioner buttresses that conclusion by pointing to Ms. Harvest's testimony in regard to sorority membership in her school. Petitioner asserts that Ms. Harvest initially testified that "a couple" of teachers in the school were members of sororities, and then later designated at least seven teachers who were sorority members, and to which sorority each belonged. Petitioner alleges that Ms. Harvest's testimony in regard to the basis for assigning so-called "preferred" duties was incredible. Petitioner alleges that all of the preferred duties in the school were assigned to sorority members and that none of the teachers who were denied increments or disciplined during the 1998-1999 school year were sorority members.

Petitioner alleges that the testimony of Jackie Greadington, Victoria Causey, Jannine Howard, Chero Hall and Amy Scott supports her position. Petitioner points out that Ms. Greadington, the union representative, testified to a personal hostility by Ms. Harvest toward Ms. Mininson. The remaining four witnesses, all employees of the school, testified that Ms. Harvest discriminated against non-sorority employees in instituting discipline and assigning preferred duties. Petitioner contends that the argument that these were disgruntled employees who were previously disciplined for poor teaching performance has no basis, except possibly in regard to Ms. Scott.

Testimony

I have considered petitioner's argument and cannot agree with her position. In so concluding, I have considered the testimony of the teachers in the school in regard to the impact of sorority membership.

Jannine M. Howard, a third-grade teacher at Cocoran Academy, indicated that assignments were not given on a fair basis. Some teachers who were sorority members received preferential treatment in workload and evaluations. She noted that it was "just the way they were interacted with" and that they were treated "nicer." She pointed to one teacher who was in a sorority who had a favorable assignment. She opined that Ms. Mininson was treated like the rest of the non-sorority members.

On cross-examination, she admitted that she never had a conversation with Ms. Harvest regarding sorority membership. She agreed that Renee Richardson, who had a preferential assignment, was considered an exemplary teacher and that Richardson, who is still a sorority member, no longer holds the preferential job. She also agreed that Tamara Troast, who held the same job as Richardson, was Caucasian; she did not know if she was a sorority member.

Victoria Causey, a security guard at the school, could not respond as to whether Ms. Harvest made employment decisions or disciplined fairly. She believed that the sorority members were treated better than non-sorority members. Although she could not recall details, she opined that certain teachers, including Mininson, were treated differently. She observed the manner in which Ms. Harvest spoke to Ms. Mininson and, although she could not recall details, alleged that Ms. Harvest said things to Mininson that would make a person feel bad. Ms. Harvest did not share the teachers' evaluations with her.

Chero Hall, a teacher at Cocoran Academy for three and one-half years, believed that sorority members received different treatment. She indicated that the general feeling in the building was that they had it easier. Harvest spoke to them in a different manner; things were forgiven and they were not dealt with as harshly. Mininson, who was not a sorority member, was spoken to differently.

On cross-examination, she indicated that Ms. Boiseman, a sorority member, received preferential treatment in regard to her duties and her evaluations. She recalled showing Boiseman her own evaluation and Boiseman opining that Hall had

been treated more harshly than Boiseman. She believed that certain people received preferential treatment. Although she admitted that Phyllis Spinck and Grace Bayerlein, non-sorority members, were tutors, she testified that they both felt that they had been treated unfairly. Spinck felt that Harvest harassed her and became sick as a result. Hall explained that there are different levels of tutors and that certain tutors have to tutor many more students. Hall admitted she never had her increment denied.

Further testimony was offered by Amy Hanks Scott, who had been a teacher at Cocoran Academy. She also indicated that the sorority members were treated less harshly. Their involvement in an incident was ignored, while others were reprimanded. She was told to handle a disruptive student in her class, but when the student acted up in Boiseman's class, the student was reprimanded. She admitted she received a negative letter regarding her classroom skills. She was not aware of preferential treatment in assignments.

On cross-examination, she admitted that her increment was withheld in 1999-2000 by a supervisor at the Althea Gibbons School. Her increment was also withheld in 1996-1997 and 1998-1999 when she taught at Cocoran Academy. She admitted that it was not improper to be told to contact a parent and that this did not occur because she was not in a sorority. She could not say she was reprimanded because she was not in a sorority.

In response, Ms. Harvest agreed that one of the full-time tutors is a member of her sorority and that being a tutor could be considered a special assignment. She disagreed, however, that receiving a preferential assignment was related to sorority membership. She indicated that Andrea Boiseman and Renee Richardson are both members of her sorority and attend monthly meetings. Other teachers are members of Alpha Kappa Alpha, another sorority. The two sororities have traditionally been adversaries. Yolanda Lockley, Bridget Venable, Dawn Chase, Carol Douglas and Franchette Epps were not members of her sorority and she had no way of knowing which teacher was a member of which sorority.

On rebuttal, Harvest contended that the tutoring assignment is not a preferential assignment and is equivalent to a teaching position. She indicated that she selects teachers for this assignment based on performance record and experience and the vacancy that exists. She explained why she assigned Richardson to a tutor position and claimed that her sorority membership was not a factor in the decision. She was aware that SFA was a new program and she considered that fact in her teacher evaluations. She gave Mininson time to familiarize herself in this area, but observed her in other areas. She contended that her evaluation of Mininson was not based on sorority membership. She disagreed with Ms. Greadington's testimony regarding the November 17 meeting and contended that Mininson yelled at her and that Mininson's behavior bordered on insubordination. She stated that as Mininson raised her voice, she lowered her own tone. Other than Boiseman and Richardson, she had no knowledge of who was in a sorority. A teacher's sorority status did not affect her treatment of the teacher. Since Mininson's teaching performance improved in 2000-2001, she so informed her. She opined that the teachers who had problems with their teaching performance wanted to find a common ground to justify their bad performance.

Helen Mininson stated that she had previously received satisfactory evaluations and did not "go crazy and become unsatisfactory in one year." She reviewed Harvest's evaluations of her and noted her disagreements with the various points referred to by Ms. Harvest. She alleged that the SFA program takes a substantial period of time to master and should not have affected her final evaluation. She presented the material accurately but not always in Harvest's time frame. She alleged that Harvest did not observe her between February 4 and March 26 and did not reevaluate her after she learned the program. She alleged that she works as hard as she can and is positive.

Of import, Mininson contended that Harvest was verbally abusive to her. If there was no witness, she threatened her and was hostile to her. According to petitioner, Harvest told her she wanted her out of the school and would deny her increment every year until she left. Harvest came into her room constantly and showed hostility towards her. She alleged that Harvest's action was because she wanted her out of the school. Harvest exhibited the same behavior to Ms. Orr and Ms. Scott.

Mininson contended that Harvest wanted the school to reflect the community. More particularly, Harvest wanted the staff to consist of college-educated blacks in sororities and wanted the school to be affiliated with her sorority. Mininson contended that the sorority paraphernalia around the school caused feelings of exclusion for those who were not members. Additionally, certain teachers were bombarded with negative feedback, while there was forgiveness for teachers who were sorority members. The witness was questioned as to thirty teachers and indicated that eight were members of a sorority. All sorority members wore insignia and a couple of them received preferential job assignments.

Testifying as to the meeting with Ms. Harvest in 1998 (attended by Greadington), Mininson recalled that Harvest told her she would not tolerate her voice. She responded that she had been hired with the same voice. Mininson told Harvest that teachers in the sorority were treated in a kinder manner. She recalled that Harvest told her that she had the wrong color skin. She recalled a situation where she was improperly accused for something minor.

On cross-examination, Mininson indicated that one cannot learn the SFA program in a few months. Although she is now proficient in the program, she was resentful that in 1998 it was used as a tool to evaluate her. She admitted that some teachers adapted better to it than she did. She admitted that during the four years that she was a teacher and Harvest was the principal she received only one unfavorable evaluation; she was not a sorority member during the years she received favorable evaluations.

In further testimony, she admitted that at the November 17, 1998, meeting she may have raised her voice after Harvest pointed a finger at her. She resented that Harvest told her that she was not a good teacher; it was demeaning and threatening. She alleged that she did not "fit the image" and that Harvest wanted people connected with the black business community in the school. She contended that other white teachers also had a hard time. She agreed that they did not all have their increments

denied even though they were not members of sororities or fraternities, but she alleged that if she had been in a sorority, she would not have lost her increment.

On redirect examination, Mininson indicated that Harvest systematically tried to get rid of a certain number of teachers a year. Five teachers, not members of sororities, would have a hard time and three would lose an increment. She believed that her "number was up." Harvest was out to clean house, not out to get her.

Having reviewed the testimony and evidence, I feel compelled to make several observations. Although there was some evidence presented by petitioner in support of her contention that certain teachers who were sorority members received preferential treatment, the testimony does not indicate that the sorority members referred to were members of the same sorority as Ms. Harvest, or that all sorority members received preferential treatment. In fact, there is no proof that certain teachers who were sorority members and received tutorial assignments, would not have received the assignments had they not been sorority members.

The testimony at best demonstrates that there was a failure to confer benefits on non-sorority members and that non-sorority members were more inclined to receive discipline. While I do not believe that petitioner has demonstrated this by a preponderance of the believable evidence, even if it were true, this would not help petitioner. If in fact a teacher who was a member of a sorority had a benefit conferred, it does not support petitioner's allegation that her own increment was withheld for improper motives. For petitioner to prevail, she would have had to demonstrate that the reason her increment was withheld was because of her non-sorority member status. The testimony of the witnesses other than petitioner does not prove that petitioner's increment was withheld because of her non-sorority member status. None of the other witnesses testified to this or commented on petitioner's teaching performance. In fact, the non-sorority members who testified did not have their increments withheld, nor did any of them testify as to discipline imposed, because of their non-sorority member status.

The only individual who testified that her increment was withheld because of her non-sorority member status was petitioner. Petitioner's testimony in this regard was not believable. She essentially bases this conclusion on her belief that she is a good teacher, tries hard, only had her increment withheld once before, and was improperly treated by Ms. Harvest. She fails to link her non-sorority member status to the evaluations conducted by Ms. Harvest. In fact, her increment was not withheld in the three other years she was evaluated by Ms. Harvest. She testified that a number of teachers whose increments were not withheld were not members of Ms. Harvest's sorority. In fact, the majority of the teachers who were members of a sorority were not even members of Ms. Harvest's sorority. In sum, her testimony simply did not support her contention that her increment was withheld based upon her non-sorority member status.

In contrast, Ms. Harvest's testimony demonstrated her experience, her intelligence and her organization. I found her testimony to be credible and worthy of belief. She conducted numerous evaluations of petitioner, provided her with detailed observation reports and strategies for improvement and professional improvement plans. She worked diligently to give Mininson the opportunity and tools to improve. If she wanted her to fail, she certainly worked hard to achieve a different result.

Conclusions of Law

Based on the foregoing findings of fact and the applicable law, I **CONCLUDE** that the Board's discretionary exercise of its statutory authority to withhold Mininson's salary increment should not be overturned.

N.J.S.A. 18A:29-14 provides that a board of education may withhold a teacher's salary increment "for inefficiency or other good cause." Courts recognize that salary increments are "a reward for meritorious service." *Probst v. Haddonfield Bd. of Educ.*, 127 *N.J.* 518, 527 (1992). *N.J.S.A.* 18A:29-14 is clearly meant to vest local school districts with the ability to withhold increments from teachers who have not performed well during the previous year. *Id.* at 526. Appeals from such action may be taken to

the Commissioner, who may either affirm or direct that an increment be paid. A decision to withhold an increment is a matter of essential managerial prerogative, which has been delegated by the Legislature to the local school board. *North Plainfield Educ. Ass'n v. North Plainfield Bd. of Educ.*, 96 *N.J.* 587 (1984); *Bernards Township Bd. of Educ. v. Bernards Township Educ. Ass'n*, 79 *N.J.* 311 (1979). When reviewing such determinations, the Commissioner is prohibited from substituting his own judgment for that of the local board. His scope of review is limited to assuring that there exists a reasonable basis for the decision.

Exercise of the discretionary powers of the local board may not be upset unless patently arbitrary, without rational basis, or induced by improper motives. *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288 (App. Div. 1960). The burden of proving unreasonableness rests upon the party challenging the board's action. *Id.* at 297. Accordingly, the Commissioner's scope of review is limited to determining: (1) whether the underlying facts were as those who made the evaluation claimed; and (2) whether it was reasonable for them to conclude as they did upon those facts, bearing in mind that they are experts. *Id.* at 296-97.

It was petitioner's burden to show that the criticism of her teaching performance was unreasonable and that her increment was withheld arbitrarily or for improper motives. Petitioner failed to meet this burden of proof. Here, the underlying facts were substantiated by the testimony of Debra Harvest, a qualified education expert. Petitioner, an experienced teacher, received unsatisfactory ratings in teaching strategies or techniques, knowledge of content, planning and preparation, classroom management, development of student attitude, professional/personal qualities, school community relations and attendance and punctuality. In sum, petitioner's performance was less than satisfactory when evaluated in regard to those factors utilized by the District to evaluate performance. Under the circumstances, petitioner has not succeeded in showing that the Board's decision to withhold her salary increment was arbitrary, capricious or unreasonable.

Moreover, I have considered petitioner's arguments and **CONCLUDE** that the evidence simply does not substantiate her contentions. I cannot agree that the motives and credibility of Ms. Harvest were insincere or that she personally disliked Ms. Mininson, casting a serious shadow over her credibility. As discussed above, I found Ms. Harvest's testimony to be credible and worthy of belief. Additionally, in regard to petitioner's argument that the observations were not long enough, I **FIND** that there were a number of evaluations that supported the findings of fact here, based on observations of sufficient duration to make an informed and reasonable decision. In addition, the observations and evaluations extended over a substantial period of the school year. Moreover, I **FIND** that the teaching requirements for Ms. Mininson were made clear to her on a number of occasions. The alleged deficiencies in her teaching skills were not the result of the District's failure to properly train her or inform her of what was required of her. In fact, it is observed that the testimony and evidence supports the fact that Ms. Harvest attempted to advise petitioner of what was expected of her and make suggestions for improvement of her performance. Given petitioner's years of teaching, she should have possessed the requisite expertise to rectify the situation or sought help if she needed additional training in the deficient areas noted in the evaluations.

In addition, petitioner has not proven that the observations and evaluations were the result of disparate treatment based on her non-sorority member status. As discussed above, the evidence simply does not support petitioner's contention that the evaluations were incorrect and due to her non-sorority member status. If petitioner or any other teacher in the District believes that he or she was treated with disrespect, the remedy clearly lies elsewhere. In sum, petitioner's arguments amounted to excuses which were unsupported by the evidence and did not seem reasonable or credible. As such, I **CONCLUDE** that petitioner's arguments are unsubstantiated by the evidence and testimony in the record. Petitioner has not proven that it was unreasonable for the principal who observed and evaluated her teaching performance during the 1998-1999 school year to conclude that her performance was less than satisfactory.

Order

It is hereby **ORDERED** that the relief requested by petitioner is denied and petitioner's appeal is **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (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 19, 2001
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

1-23-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 25 2001
DATE

OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

For Petitioner:

Jacqueline Greadington
Helen Linda Mininson
Jannine M. Howard
Victoria Causey
Chero Hall
Amy Hanks Scott

For Respondent:

Debra Montague Harvest
Kenneth Douglas King

List of Exhibits

For Petitioner:

P-1 First set of interrogatories (questions and answers)
P-2 Memo to Helen Mininson from Debra Harvest, dated October 11, 1999

For Respondent:

R-1 Memo to H. Mininson from D. Harvest, principal, dated September 8, 1998 (two pages)
R-2 Teacher evaluation/observation for Helen Mininson, dated November 9, 1998 (three pages)
R-3 Teacher evaluation/observation for Helen Mininson, dated November 30, 1998 (seven pages)
R-4 Handwritten notes, dated December 10, 1998
R-5 Teacher evaluation/observation for Helen Mininson, dated February 3, 1999 (eight pages)
R-6 Teacher evaluation/observation for Helen Mininson, dated March 26, 1999 (eight pages)
R-7 Memo to Helen Mininson from Debra Harvest, dated April 7, 1999 (two pages)

R-8 Memo to Helen Mininson from Debra Harvest, dated May 24, 1999
R-9 Memo to Helen Mininson from Debra Harvest, dated June 9, 1999 (five pages)
R-10 Petition by Helen Mininson
R-11 Packet of materials regarding petitioner's increment withholding

OAL DKT. NO. EDU 11350-99
AGENCY DKT. NO. 216-8/99

HELEN MININSON,	:	
PETITIONER,	:	
	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner sought and was granted an extension of time within which to file exceptions to the Administrative Law Judge's (ALJ) decision. Such exceptions and the Board's reply thereto were timely filed.

Upon careful and independent review of the record, the Commissioner, finding petitioner's exceptions essentially reiterative of her arguments advanced below, which were fully addressed and considered by the ALJ in her decision,[1] affirms the recommended decision, as the Commissioner agrees that, under the circumstances presented here, the Board's action in withholding petitioner's increment for the 1999-2000 school year was a valid exercise of its discretionary authority. In so determining, the Commissioner is mindful, as recognized by the

[1] To the extent petitioner challenges the facts determined by the ALJ based on the testimony of the witnesses and the credence ascribed to such testimony, the Commissioner notes that the record before him does not include transcripts of the hearing conducted at the OAL. Challenges to factual findings predicated upon credibility determinations made by an administrative law judge require the party to supply the agency head with the relevant and necessary portion of the transcript. *See In re Morrison*, 216 *N.J. Super.* 143, 158-59 (App. Div. 1987). Additionally, it is well-established that due regard should be given to the person who heard the live testimony and assessed the witnesses' behavior at the hearing. *See Close v. Kordulak Bros.*, 44 *N.J.* 589, 599 (1965).

ALJ, that it is well-established that a Board's imposition of an increment withholding may not be upset unless such action is demonstrated to be patently arbitrary, capricious, unlawful or induced by improper motive. *See Kopera v. West Orange Bd. of Ed.*, 60 *N.J. Super.* 288 (App. Div. 1960)). Moreover, the burden of proving unreasonableness lies with the petitioner. (*Id.* at 297)

The Commissioner's review compels him to concur with the ALJ that the Board's action withholding petitioner's increment, after she received several less than satisfactory evaluations during the 1998-99 school year, did not exceed the reasonable use of its broad discretionary authority. Moreover, the Commissioner further agrees that petitioner has not met her burden of establishing otherwise. Consequently, the Commissioner may not substitute his judgment for that of the Board.

Accordingly, the recommended decision of the OAL is affirmed for the reasons therein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: MAR 7 2001

Date of Mailing: MAR 8 2001

[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.

83-01

MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Education Association alleged that the Board improperly employed an uncertified volunteer to instruct students in Spanish during the extended absence of the district's regular Spanish teacher. The Board argued that the teacher was not an employee, that she was supervised by a certified teacher, that petitioner has no standing to raise its claims, and that the matter is moot.

The ALJ determined that petitioner had standing, and that the case was not moot because it presented a situation capable of repetition and involving the public interest. However, the ALJ dismissed the petition based on a determination that it is not contrary to law to permit a volunteer to teach if supervised by a certified teacher.

The Commissioner affirmed dismissal of the petition, but not for the reasons set forth by the ALJ. The Commissioner found the matter to be moot because the arrangement at issue had ceased to exist in the district, and because a newly adopted amendment to the Professional Licensure Standards Code, providing for conditional certification of world language teachers, now sets forth a mechanism to address the situation confronted by the Board.

MAR 7 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

OAL DKT. NO. EDU 2432-00

AGENCY DKT. NO. 22-1/00

MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,

Respondent.

Gail Oxfeld Kanef, Esq., for petitioner (Oxfeld Cohen, attorneys)

Malachi J. Kenney, Esq., for respondent (Kenney, Gross, Kovats and Campbell, attorneys)

Record Closed: December 4, 2000 Decided: January 18, 2001

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On January 18, 2000, Petitioner, Middletown Township Education Association (hereinafter "MTEA"), filed its Petition of Appeal claiming that Respondent, Middletown

Township Board of Education (hereinafter "Board"), had violated New Jersey school laws by employing an uncertified volunteer Spanish teacher. (Petition of Appeal at 2). The MTEA requests the following relief: an order declaring illegal the employment of an uncertified volunteer as a teacher, an order requiring the Board of Education to immediately terminate the employment of the uncertified volunteer, and any other just and equitable relief. (Petition of Appeal at 2).

On March 8, 2000, the Board filed its Answer to Petition of Appeal, whereby it claimed that the MTEA did not have standing to bring this Petition, that the certification requirements for individuals employed as teaching staff members are not relevant to this matter since the Board did not "employ" a teaching staff member who lacked proper certification at any time, that this volunteer teacher was at all times supervised by the regular classroom teacher possessing full certification; that it did this because no appropriately certified person was available to be hired, and that the use of an unpaid volunteer working under the supervision of a certified candidate for employment is fully consistent with the law. (Answer to Petition of Appeal at 1-3).

The matter was transmitted to the Office of Administrative Law (OAL) as a contested case on or about April 4, 2000. Thereafter, and following various telephone conferences, it was agreed that the matter would be heard "on the papers." The final brief entered on behalf of the respondent was submitted to my office on November 28, 2000. Thereafter my secretary contacted counsel for the petitioner by telephone on or about December 4, 2000 inquiring whether she was going to reply to respondent's brief. On or about December 4, 2000 we were advised that petitioner rested. Accordingly the record closed on the latter date.

I

Respondent seeks summary decision on the following grounds: 1. that the Board of Education complied with the guidelines promulgated by the New Jersey Department of Education[1] in using Ms. Abreu's services and 2. that the matter upon which the Petition is based is moot. (Resp. Br. at 4-13).

The parties have stipulated to the following set of facts:

1. Ms. Dorothy Waters was, at all times relevant to the controversy herein, a certified and tenured teacher of Elementary Spanish at Fairview Elementary School, River Plaza Elementary School and Ocean Avenue School, all of which are elementary schools in the Middletown School District.

2. Due to illness, Ms. Waters was unable to perform her duties as described above effective September 22, 1999. Although the period of her absence was initially unknown, her illness ultimately required her absence from work through January 3, 2000.

3. The Administration revised the teaching schedules of the remaining Spanish teachers to cover those classes, which Ms. Waters would ordinarily have taught.

4. Ms. Stephanie LaMarca, a certified Spanish teacher at Navesink Elementary School and Middletown Village School, volunteered to teach Ms. Waters' classes at Ocean Avenue School, in addition to her own regular assignments.

5. Despite the assignments outlined above, some of Ms. Waters' classes remained uncovered.

6. The Administration became aware in October 1999 that the Principal at River Plaza, Mr. Frank Vaccerelli, knew of one Veronica Abreu, who spoke Spanish and had volunteered to assist in teaching Ms. Waters' classes at both River Plaza and Fairview Schools.

7. The Administration accepted Ms. Abreu's Offer to teach on a volunteer basis, with the caveat that regular, duly certified teachers would be required to remain in the classroom while Ms. Abreu was instructing Spanish classes. The regular, certified classroom teacher is required to remain in the classroom when any Spanish teacher is instructing pupils. The employees involved in this arrangement were as follows:

[1] Respondent incorrectly states that the New Jersey Department of Education promulgates guidelines, when it is the New Jersey State Board of Education that does so.

a. Second grade at River Plaza School: Ms. Denise Generelli, Ms. Charlene Steib, and Ms. Rosemary Milevoi;
b. Third Grade at River Plaza School: Ms. Norma Kelly or Ms. Elizabeth Murray;
c. Second grade at Fairview Elementary School: Ms. Karen Armstrong, Mr. James Gent, and Ms. Julie Schloesser;
d. Third grade at Fairview Elementary School: Ms. Elaine Barton, Ms. Barbara Palumbo, and Ms. Patricia Lovato.

8. Ms. Abreu subsequently commenced teaching three-second grade and two third grade Spanish classes at River Plaza, and three-second grade and three third grade classes at Fairview, per week.

9. At no time was Ms. Abreu ever compensated or provided with benefits for her services, nor was any Board resolution adopted regarding her services.

10. On or about October 25, 1999, the MTEA learned that the Board had accepted Ms. Abreu's offer to serve as a volunteer teacher. The MTEA thereafter filed the within Petition of Appeal and simultaneously filed a grievance.

11. Ms. Waters, the certified teacher of Spanish whom Ms. Abreu had in part replaced, returned to work on January 3, 2000. However, the MTEA was unaware of her return on that date.

12. Although the MTEA was unaware that her services had been concluded at the time they filed the within Petition, Ms. Abreu has not been used on a volunteer basis by the Board since December 17, 1999, and as noted above, she was at no time compensated or provided with benefits for her volunteer services to the Board.

[Stipulation of 8/21/00.]

Analysis and Discussion:

I. STANDARD FOR SUMMARY DISPOSITION

Pursuant to N.J.A.C. 1:1-12.5, a motion for summary decision may be awarded "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is **no genuine issue as to any material fact challenged** and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). (emphasis added) After the moving party has made and supported such a motion, "an adverse party in order to prevail must by responding

affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid.

Similarly, the New Jersey Court Rules provide a provision applicable to summary judgment. R. 4:46-2(c). That rule provides that summary judgment will be rendered if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Ibid. Furthermore, the rule states "an issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences there from favoring the non-moving party, would require submission of the issue to the trier of fact." Ibid.

The case of Brill v. Guardian Life Ins. Co., has clarified the legal standard for summary judgment and, hence, summary decision. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995). In Brill, the New Jersey Supreme Court adopted the federal standard for summary judgment and stated that

> 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.
>
> [Id. at 540.]

Therefore, the essential question in this analysis is "'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 533. According to this analysis, summary judgment is appropriate where the opposing party "points only to disputed issues of fact that are 'of an insubstantial nature'." Id. at 529. In addition, the motion judge is not to weigh the evidence and determine the truth of the matter, but is to determine only whether there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

In the instant matter, where both parties have moved for summary decision, the adverse party to the particular motion to be granted must raise factual issues, which are sufficient to lead a rational fact finder to rule in its favor. Otherwise, summary decision in favor of the respective party is inappropriate.

II. LEGAL ARGUMENTS

A. Standing

The MTEA claims that as the duly certified Collective Bargaining Representative for all certified teaching staff members employed by the Board, it has standing to bring this Petition. (Petition of Appeal at 1). However, although the Board acknowledges that the MTEA is the recognized representative for purposes of collective negotiations for all non-supervisory teaching staff members employed by the Board, it argues that this representation is insufficient to confer standing on the MTEA to bring this Petition. (Answer to Petition of Appeal at 1-2).

The New Jersey Constitution provides that "[p]ersons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing." N.J. Const. art. I, ¶ 19. The scope of collective negotiations regarding such proposals were established by the New Jersey Employer-Employee Relations Act, codified at N.J.S.A. 34:13A-1 through 34:13A-21, and subsequent case law.

Particularly relevant to this analysis is Red Bank Reg'l Educ. Ass'n. v. Red Bank Reg'l High School Bd. of Educ., where the issue before the court was whether N.J.S.A. 34:13A-5.3 "mandates the right of the representative organization to initiate and process a grievance on behalf of the individual employee even in the event the employee chooses not to process a grievance on his or her own behalf." Red Bank Reg'l Educ. Ass'n. v. Red Bank Reg'l High School Bd. of Educ., 151 N.J. Super. 435, 437 (App. Div. 1977), aff'd., 78 N.J. 122 (1978). In Red Bank, the Appellate Division reversed the lower court's finding that a grievance is a personal right belonging to an individual. Id. at 438. The Appellate Division framed the issue as a question of "whether the Legislature intended to limit grievance rights to situations where

individuals wanted to, were in a position to, were unafraid to and were disposed to file a grievance." Id. at 439. Since the "purpose of this constitutional right has been said to secure to employees collectively the right to get together to select representatives to present their grievances", the Appellate Division stated that

> [w]e cannot conceive that the Legislature would on the one hand forcefully implement the constitutional guarantee of the benefits of collectivity in negotiation and then totally short-circuit the system by requiring individual activity at the moment of truth when the results of the collective bargaining came into question. Such a construction would challenge the integrity of the collectively bargained contract and insult legislative purpose.
>
> [Ibid.]

Thus, it is possible for an organization to file a grievance on behalf of its members.

In Winston v. Board of Educ., S. Plainfield, an education association and a non- tenured teacher appealed the decision of the school board to not renew the teacher's contract. Winston v. Board of Educ., S. Plainfield, 125 N.J. Super. 131 (App.Div. 1973). The appellants argued it was error to dismiss the education association as a party to the proceedings before the Commissioner of Education. Id. at 140. Respondents argued that since the association was the bargaining agent of the employees under N.J.S.A. 34:13A-1 et seq., the Commissioner did not have jurisdiction to hear the complaint "under the guise of a controversy and dispute under School law." Ibid. It was also argued that the association did not have standing to represent an individual on a 'personal grievance' based on its role as representing the person for collective purposes. Ibid. However, the court reasoned that while disputes involving teachers are generally cognizable as controversies under the school laws, such disputes might also be the proper subject of grievance procedures adopted pursuant to N.J.S.A. 34:13A-5.3. Ibid. The Appellate Division found that the association had the authority to initiate a grievance and process a claim on behalf of an aggrieved teacher through the applicable administrative levels. Id. at 142. As stated by the court

> [i]n this posture it would be anomalous to deny the Association the standing to pursue the matter to conclusion. The final disposition of such claims might have an impact which transcends the personal interest of the individual claimant and have repercussions affecting other employees.
>
> The concern of an exclusive representative of public employees with respect to matters touching their employment is tangible and genuine; it is an interest sufficient to enable an entity to participate as a party in proceedings before the Commissioner and State Board of Education.
>
> [Ibid.]

Therefore, the court held it was error to have dismissed the South Plainfield Education Association as a party to the proceedings. Ibid.

The present matter involves a controversy and dispute arising under the school laws of New Jersey. Therefore, this matter is properly before the Commissioner who has determined that it is a contested case and transmitted it to the Office of Administrative Law (hereinafter "OAL") for a hearing. As conceded by Respondent, the MTEA is the recognized representative for purposes of collective negotiations for all non-supervisory teaching staff members employed by them. The absence of a specifically aggrieved teacher does not prohibit the MTEA from bringing this action, as this is an issue that could affect other teachers. Thus, the MTEA has standing and the Respondent's motion for summary decision on this issue is **DENIED**.

B. Employment

The MTEA claims that using Ms. Abreu as an unpaid volunteer was in direct contravention of New Jersey school laws. (Petition of Appeal at 2). In response, the Board argues that the certification requirements for individuals employed as teaching staff members are not relevant to this matter since they did not 'employ' a teaching staff member who lacked proper certification at any time. (Answer to Petition of Appeal at 2). In addition, the Board states that the uncertified teacher provided instruction under the supervision of and in the presence of the regular certified classroom teacher, therefore its actions were not in violation of any New Jersey statute or regulation. (Answer to Petition of Appeal at 2; Resp. Br. at 7). It adds that the volunteer was used only because no appropriately certified person was available to be hired and when a qualified person did become available shortly thereafter, that person was hired and the

volunteer's services ceased.[2] (Answer to Petition of Appeal at 2). Aside from the fact that the regular certified classroom teacher was required to remain in the classroom while Ms. Abreu taught, the parties have not stipulated to these facts. (Stipulation of 8/21/00 at 2.)

Furthermore, Respondent argues that its actions were not contrary to New Jersey regulations and statutes because due to a shortage of certified professionals in the area of world languages, it looked to a memo by Assistant Commissioner Ellen Schechter of the New Jersey Department of Education for guidance on how to properly proceed in finding a replacement for its teacher. (Resp. Br. at 4-5). In her memo, the Assistant Commissioner alluded to some previous concern regarding the lack of certified personnel, but stated "it has been determined that there is not an immediate need to use the emergency certification option". (Letter from Assistant Commissioner Ellen Schechter to Chief School Administrators of 1/26/99 at 1.) However, she did provide certain staffing options regarding world language instruction, including:

> Option 6: **Employment of paraprofessionals** who possess the necessary skills to assist with the delivery of language instruction **may be considered provided that they are under the supervision of a certified staff member in the classroom**.
>
> Option 7: **Districts may use** resource persons in conjunction with a certified staff member in the classroom to assist in implementing a program similar to the program process outlined in N.J.A.C. 6:29-4.2(g) for family life education. College students, pre-service teachers, parents, or other **interested and qualified members of the community with the necessary language skills may be considered. This person shall be under the supervision of the certificate staff member in the classroom**.
>
> [Ibid. (emphasis added).]

Thus, Options 6 and 7 authorizes the Board to use the services of non-certified persons in language instruction as long as a certified teacher supervises that person.

[2] Because this statement may lead one to assume someone new was hired to fill this teaching position, it must be noted that Respondent did not hire anyone after the volunteer's services ceased. On the contrary, the regular certified Spanish teacher came back and resumed her normal job responsibilities.

The MTEA argues that these Options are only suggestions and that no formal regulations have been promulgated in this regard. (Petit. Br. at 2). Also, as to Respondent's argument that there was a shortage of certified professionals, Petitioner argues that any shortage of certified teachers, if such a shortage exists, is not as serious a situation as Respondent claims, as indicated by the Assistant Commissioner's failure to implement an emergency certificate program. Id. at 3. Lastly, although the Board argues it attempted to fill the position with a certified teacher, the stipulation only indicates that Respondent revised the teaching schedules of the remaining Spanish teachers in an effort to cover Ms. Waters' classes, but certain classes still remained uncovered. Ibid. Neither the stipulation nor the Board's submissions indicate that the Board ever formally advertised the availability of the position.

A teaching certificate is required to teach in a public school. N.J.A.C. 6:11-2.3 provides that "[c]onsistent with N.J.S.A. 18A:6-38, the State Board of Examiners shall issue three educational certificates: the Instructional Certificate, the Administrative Certificate and the Educational Services Certificate. In addition, the State Board of Examiners may issue for each teaching, administrative or service position a special endorsement under the appropriate certificates."[3] The relevant certification for a Spanish teacher is an instructional certificate with an endorsement in the foreign language of Spanish.

Employment as a teaching staff member without proper certification is prohibited. N.J.S.A. 18A:26-2 provides that "[n]o teaching staff member shall be employed in the public schools by any board of education unless he is the holder of a valid certificate to teach, administer, direct or supervise the teaching, instruction, or educational guidance of . . . pupils in such public schools and of such other certificate, if any, as may be required by law." Furthermore, N.J.A.C. 6:11-3.1(a) requires that pursuant to N.J.S.A. 18A:26-2, "the requirement of certification applies to any person who is employed by a district board of education to perform duties that are regulated through certification rules pursuant to this chapter. Such duties shall be performed by the holder of the required certificate or under his or her direct and continuous personal supervision." In certain circumstances, however, it is possible for a person to teach in a public school even if they do not hold a standard certificate or, it appears, any certificate at all.

[3] Endorsements on the instructional certificate are provided in N.J.A.C. 6:11-6.2.

First, N.J.A.C. 6:11-4.5(a) provides that "[p]ersons who do not hold a standard instructional certificate . . . may be granted a county substitute certificate for day-to-day substitute teaching in the county which grants the certificate." However, "[t]he certificate will be issued for a three-year period, but the holder may serve for no more than 20 consecutive days in the same position in one school district during the school year." N.J.A.C. 6:11-4.5(c).

The second provision, applicable to paraprofessionals, N.J.A.C. 6:11-4.6(a), provides that "[s]chool aides and/or classroom aides, assisting in the supervision of pupil activities under the direction of a principal, teacher or other designated certified professional personnel, shall be approved by the county superintendent of schools." This provision also requires that those school districts employing aides develop job descriptions and standards for appointment that are to be submitted by the chief school administrator to the county superintendent for approval. N.J.A.C. 6:11-4.6(b) & (c).

Finally, N.J.A.C. 6:11-3.1(a), supra, which requires certification of persons employed by a district board who "perform duties regulated through certification rules", also provides that those duties "shall be performed by the holder of the required certificate or under his or her direct and continuous personal supervision." A reasonable interpretation of this regulatory section would allow a non-certified person to teach while under the supervision of a certified teacher. However, the language does not include a requirement that the certified supervising teacher must also possess the relevant endorsement in the subject being taught by the non-certified person. Indeed, a plain reading of N.J.A.C. 6:11-3.1(a) would allow a certified teacher to supervise a non-certified teacher in an area where the certified teacher does not hold an endorsement. The Assistant Commissioner's Options 6 and 7, supra, obviously based on this regulatory section, suffer from the same lack of clarity on the endorsement issue.

Resolution of this matter requires determining whether any of these requirements or exceptions applied to Ms. Abreu when she volunteered her services as a Spanish teacher. N.J.S.A. 18A:26-2, supra, indicates that in order to apply these provisions to Ms. Abreu, she would have to be an employee of the Board because the certification requirements apply to teachers who are 'employed'. Whether Ms. Abreu's status was that of an employee as contemplated by the education statutes and regulations will first be considered.

Respondent's assertion that at no time was Ms. Abreu "employed" by the Board is based simply on the fact that Ms. Abreu served as a volunteer who was never compensated with money or benefits in exchange for her services at any time. The definition of an employee in Title 18A fails to clarify this term adequately to determine whether Ms. Abreu was an employee which is defined only as "includes the holder of any position or employment". N.J.S.A. 18A:1-1.

The term employee is commonly defined as "a person hired by another, or by a business firm, etc., to work for wages or salary," Webster's New World College Dictionary, 466 (4th ed. 2000). Black's Law Dictionary defines an employee as "[a] person who works in the service of another person (an employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance." Black's Law Dictionary, 543 (7th ed. 1999). An employee is generally hired to perform a service especially for wages or salary. Merriam-Webster's Dictionary of Law (1996), www.findlaw.com/dictionary.

Webster's Dictionary defines volunteer as a "person who chooses freely to do or offer to do something." Webster's Dictionary, supra, at 1603. More specific, a volunteer is "[a] voluntary actor or agent in a transaction; esp., a person who, without an employer's assent and without any justification from legitimate personal interest, helps an employee in the performance of the employer's business." Black's Law Dict., supra, at 1570.

According to these definitions, the difference between an employee and a volunteer is the nature of the work and the context in which it is performed, as well as the receipt of compensation. A volunteer's services are usually limited, while an employee's services are more permanent, as the parameters of an employee's duties are dictated by contract. These definitions would support a finding that Ms. Abreu served as a volunteer, since she temporarily filled in for Ms. Waters while she was ill and was in no way providing her services under a contract or for any compensation. While the sparse definition of employee provided in N.J.S.A. 18A:1-1, supra, makes no mention of compensation, it is reasonable to conclude that a person is not an employee of a school district, as contemplated by the education laws, unless the person receives monetary compensation. That conclusion is strongly supported by § (e) of N.J.A.C. 6:11-3.1, supra, which provides for a penalty where a school district employs an uncertified or improperly certified teaching staff member. Specifically, the Commissioner:

> may direct any district board of education that, properly notified, fails to terminate the contract of an uncertified or improperly certified teaching staff member to show cause why the amount of the teaching staff member's per diem salary should not be withheld from the district board of education's State financial aid for each day the teaching staff member remains employed. If such district board of education fails within 20 days to respond or to show adequate cause, either by exhibiting an appropriate certificate or by terminating the contract of the uncertified teaching staff member, the Commissioner ..., in order to fulfill his or her responsibility for ensuring the certification of teaching staff members and the thorough and efficient education of students, may reduce State financial aid to such district board of education by the amount of the uncertified teaching staff member's per diem contract salary...
>
> [Ibid.]

This regulatory section plainly ties the status of employee to the receipt of compensation, in accord with the generally accepted definition of the term employee. Thus, a person who provides temporary services as a volunteer, like the short term Spanish instruction provided by Ms. Abreu, is not an employee and, therefore, is not subject to the certification requirements that apply to employees under the education laws and regulations.[4]

---

[4] Petitioner's reliance on Guttenberg Educ. Assoc. v. Guttenberg Bd. of Educ, SB#11-98, is misplaced as that matter is completely distinguishable from the matter herein. In Guttenberg, the Guttenberg Board of Education sought an equivalency "of the requirement that currently exists which permits substitutes (certified) to replace academic classroom teachers." Id. at 2-3. The equivalency granted by the Commissioner of Education allowed for the utilization of staff members from the Berlitz Language Program holding only a county substitute certificate to teach world languages at the elementary level. Id. at 1-2. Appellants' challenged the legality of the Guttenberg Board of Education's proposal to assign individuals possessing only county substitute certificates to provide language instruction and to subcontract with Berlitz for these services. Id. at 3. After the parties submitted a proposed settlement to the State Board, the State Board refused to approve it. Ibid. Instead, the Board stated "we have concluded that the responsibility of the State Board of Education for the general supervision of public education, N.J.S.A. 18A:4-10, and for the enforcement of the education laws of this state, N.J.S.A. 18A:4-15, preclude us from permitting the Commissioner to exercise the authority we have delegated him by the adoption of N.J.A.C. 6:3A-1.1 et seq. to set aside certification requirements that would otherwise apply. In that the equivalency granted by the Commissioner in this case would have such an effect, we conclude that it is invalid. Id. at 4.
The State Board of Education rejected the Commissioner of Education's grant of an equivalency to the Guttenberg Board of Education because it believed the equivalency operated to set aside the certification requirements for service as a foreign language teacher specified by N.J.A.C. 6:11-6.3(a)(9). Id. at 5. The State Board also rejected appellants' argument that Guttenberg's need to develop a world language program justified using the equivalency and waiver process to set aside certification requirements. Id. at 6. Rather, it stated "as reflected by N.J.A.C. 6:11-4.3, the regulatory process provides the proper course to be followed in the event that teacher shortages develop in a particular subject area. In this respect, we emphasize that in contrast to the discretion afforded by N.J.A.C. 6:3A-1.1 et seq., alternative methods provided in the certification rules were carefully designed to assure the integrity of the standards embodied in those rules". Id. at 6-7.
Guttenberg is distinguishable from the situation herein. Aside from the fact that it involved the approval of an equivalency and no equivalency was sought in the present matter, the equivalency sought in Guttenberg would have resulted in an uncertified individual providing unsupervised instruction to students. In addition, the uncertified individual would have been paid in accordance with the district's salary guide. Guttenberg is also distinguishable

The conclusion that a volunteer is not an employee is expressly recognized in N.J.S.A. 18A:6-7.1, which mandates a criminal history check of all school employees. This provision prohibits a person from serving in a position, which involves regular contact with pupils unless the employer has first determined that no criminal history record information exists that could disqualify that person from being employed. Ibid. Volunteer personnel are specifically excluded from this requirement. Ibid.

Obviously, the purpose of a criminal history check is to ensure the safety and well being of all students by protecting them from individuals that could prey on their innocence and youth. Considering the importance of such a concern, it would seem that both volunteers and employees should be subject to a criminal history check. The Legislature, however, determined not to subject volunteers to this requirement. The rationale behind this exception is likely based on the temporary nature of a volunteer's services. In addition, the imposition of such a requirement would probably have the effect of discouraging volunteers from offering their services.

While none of the certification requirements discussed, supra, apply to Ms. Abreu, compliance with N.J.A.C. 6:11-3.1(a), supra, was required of the Respondent school district. In summary, that section requires school district employees to be certified who "perform duties regulated through certification rules", and those duties "shall be performed by the holder of the required certificate **or** under his or her direct and continuous personal supervision." Ibid. (emphasis added). As discussed, this section would allow a non-certified person, such as a volunteer, to teach while under the supervision of a certified teacher. The parties have stipulated that when Ms. Abreu was instructing Spanish classes one of the regular certified teachers remained in the classroom with her during that instruction. Consequently, it appears that Respondent was in compliance with N.J.A.C. 6:11-3.1(a).[5]

---

because there the nature of the proposal to have non-certified personnel teaching the language courses was more permanent, as the equivalency was granted for a three year period and was renewable.

[5] It should also be noted that any concerns regarding the exclusion of volunteers from a criminal history check is greatly alleviated by this requirement in which a volunteer would be under the constant supervision of a certified teacher who has undergone a criminal history check.

No endorsement requirements are included in N.J.A.C. 6:11-3.1(a). Thus, a plain reading of the regulation requires only that a teacher supervising a non-certified person possess the appropriate certification, which in most instances will be an instructional certificate. This interpretation, particularly in the area of languages, is fully supported by the Assistant Commissioner's guidelines, supra, for staffing options in the area of world language instruction where there is a recognized shortage of qualified instructors. Option 7 suggested that the use of "interested and qualified members of the community with the necessary language skills" could be considered to implement language instruction in the classroom, but that such persons "shall be under the supervision of the certificate staff member in the classroom." Letter from Asst. Comm. Schechter, supra.

Ms. Abreu was under the constant supervision of a certified teacher when she provided Spanish instruction. She provided that instruction for approximately 30 school days. Upon the return of Ms. Waters, Ms. Abreu's volunteer services ceased. In light of the circumstances and considering the intent of the relevant education statutes and regulations, it does not appear that the Respondent has violated or attempted to circumvent those statutes or regulations. Therefore, the motion for summary decision on this issue is **GRANTED**.

C. Mootness Doctrine

The Board argues that the allegations and the relief sought in the Petition are currently moot, and were moot at the time the Petition was filed. Therefore, it argues, the Petition must be dismissed. (Resp. Br. at 8-13). In addition, Respondent argues that Petitioner fails to state a claim upon which relief can be granted since Ms. Abreu was neither paid nor compensated with any benefits during the time in which she volunteered her services. Therefore, the Board argues, its actions were not contrary to New Jersey statutes and regulations because she was not 'employed'. (Resp. Br. at 10).[6]

[6] As discussed previously, Ms. Abreu was an employee of the Board. Additionally, having the certified classroom teacher remain in the classroom while Ms. Abreu taught Spanish was not in accordance with New Jersey statutory and regulatory law.

According to the stipulated facts, the MTEA was unaware at the time of filing that Ms. Abreu's services ended on December 17, 1999. (Stipulation of 8/21/00 at 3.) The MTEA filed its Petition on January 18, 2000. A review of these dates indicate that Ms. Abreu ceased volunteering her time approximately 30 days before Petitioner's claim was filed, and therefore Respondent was not in receipt of her services for that time. Respondent argues that since it was not using the services of an unpaid volunteer at the time of filing, the issue is moot and no live controversy subject to adjudication exists. (Resp. Br. at 9). Moreover, it argues, courts and administrative agencies are without the power to render advisory opinions, and decide questions that cannot affect the rights of the litigants in the case before them. (Resp. Br. at 10-11).

An issue is not moot where the potential for a recurrence of the action exists. Galloway Twp. Bd. of Educ. v. Galloway Twp. Educ. Ass'n., 78 N.J. 25, 46-47 (1978). In support of its argument that this issue is not moot, the MTEA again cites Guttenberg. Guttenberg, supra. (Petit. Br. at 5). In Guttenberg, the Commissioner granted an equivalency for a three-year period, at the end of which time the Guttenberg Board of Education could request a continuation of the period. Guttenberg, supra, at 3. There, the issue was not moot because the Commissioner found the equivalency could be continued at a later time.

In Board of Educ. of Twp. of Neptune v. Neptune Twp. Educ. Ass'n., the Neptune Township Board of Education (hereinafter "Board") sought a declaratory judgment concerning the applicability of N.J.S.A. 18A:29-4.1 and N.J.S.A. 18A:1-1 and whether prior adopted salary schedules were binding upon it after the expiration of a collective bargaining agreement. Board of Educ. of Twp. of Neptune v. Neptune Twp. Educ. Ass'n., 93 N.J.A.R.2d (EDU) 178, 178-179; aff'd State Board, 93 N.J.A.R.2d (EDU) 791; aff'd, No. A-5612-94T3 (App. Div. May 15, 1995), aff'd in part, rev'd in part, 144 N.J. Super. 16 (App. Div. 1996). The matter in Neptune arose when the Board filed a Petition for Declaratory Judgment before the Commissioner of Education to determine whether "in the absence of a successor contract, the salary schedules contained in the expired Agreement obligated the Board to pay salary increments to its employees" beyond the term of the expired contract. Id. at 179. After the Commissioner dismissed the Petition with prejudice, the Board filed an appeal of the dismissal with the State Board of Education. Ibid. The State Board of Education remanded the matter to the Commissioner. Ibid. The Commissioner then decided not to consider the matter as a declaratory judgment, but instead

transferred the Board's claims to the OAL in the form of a Petition of Appeal. Id. at 179. The Commissioner also advised the OAL that first to be considered in this matter were the jurisdictional and mootness questions. Ibid. Respondents argued that the matter no longer constituted a controversy or dispute between the parties and the matter was therefore moot. Id. at 180. In response, petitioner argued that the matter was one that would likely present itself again in the future. Ibid. Also, petitioners argued that clarification and guidance on the issue was imperative. Ibid. As to the mootness issue, the Administrative Law Judge (hereinafter "ALJ") found that the matter presented an "adversary proceeding by virtue of its broad public interest" and was therefore not moot. Ibid. The Commissioner affirmed the ALJ's finding that petitioner raised a novel issue of law "implicating matters of substantial public interest." Id. at 182.

While Ms. Abreu is no longer serving as a volunteer for the Board, it is possible that the Board could use a volunteer's services in the future, which would again raise the issue at the core of the matter herein. Therefore, as indicated by Neptune and Guttenberg, supra, this is a case that falls within the exceptions to the mootness doctrine.

Accordingly, Respondent's motion on this issue is **DENIED**.

Conclusion:

As the Collective Bargaining Representative for all non-supervisory teaching staff employed by the Board, the MTEA has standing to bring this petition. Additionally, since this matter falls under an exception to the mootness doctrine, Respondent's motion must be denied.

It is undisputed that the Board utilized the services of Ms. Abreu, who lacked proper certification to teach Spanish, as a non-paid volunteer while Ms. Waters was ill. However, in doing so the Board has not violated the relevant education laws and regulations. Thus, the Respondent's motion for summary decision on the issue of Ms. Abreu's volunteer services, be and is hereby **GRANTED**.

Accordingly, it is **ORDERED** that respondent's motion for summary decision be and is hereby **GRANTED** insofar as Mrs. Abreu's volunteer services are concerned.

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

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

1/18/01
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

1-22-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 23 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

es

OAL DKT. NO. EDU 2432-00
AGENCY DKT. NO. 22-1/00

MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION, PETITIONER, V. BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

The record in this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4, and were duly considered by the Commissioner in reaching his determination.

Upon careful and independent review, the Commissioner determines to affirm the Administrative Law Judge's (ALJ's) dismissal of the petition in this matter. However, he does so not for reasons expressed by the ALJ, but because the matter is moot, as set forth below.

Initially, the Commissioner notes that Ms. Abreu, the volunteer whose services are at issue, ceased her volunteer services approximately 30 days before petitioner's claim was filed. "***[A]n action is considered 'moot' when it no longer presents a justiciable controversy because the issues involved have become academic. A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing

controversy." *Ronald Victoria v. Board of Education of the Township of Woodbridge, Middlesex County,* 1982 *S.L.D.* 1, 5.

Moreover, the potential for recurrence of the Board's use of an uncertified volunteer to teach world language classes appears minimal, and resolution of the instant matter is no longer an issue of substantial public interest. On January 3, 2001, subsequent to the closing of the record in this matter, the State Board of Education adopted *N.J.A.C.* 6:11-4.8, an amendment to the Professional Licensure and Standards code, establishing a mechanism for conditional certification of world language teachers to address circumstances such as occurred in this matter.

Accordingly, for the reasons expressed above, the petition is hereby dismissed as moot.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: MAR 7 2001

Date of Mailing: MAR 8 2001

* 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.

85-01

A.O., on behalf of minor child, E.S.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 9, 2001

OAL DKT. NO. EDU 5574-00
AGENCY DKT. NO. 202-6/00

A.O., on behalf of minor child, E.S.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF 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.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: MAR - 9 2001

Date of Mailing: MAR - 9 2001

91-01

CAROL BOTTIGLIERI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 12, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 675-00

AGENCY DKT. NO. 394-12/99

CAROL BOTTIGLIERI,

Petitioner,

v.

BOARD OF EDUCATION OF EAST BRUNSWICK, MIDDLESEX COUNTY,

Respondent.

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

Martin Pachman, Esq., for the respondent

Record Closed: January 8, 2001 Decided: January 22, 2001

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

This matter concerns the allegation of the petitioner, Carol Bottiglieri, that the respondent, Board of Education of East Brunswick, Middlesex 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 February 14, 2000, for a hearing pursuant to *N.J.S.A.* 52:14F-1 to –15 and *N.J.S.A.* 52:14B-1 to –13.

A telephone prehearing conference was held on April 28, 2000. After the conference, 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.

January 22, 2001
DATE

BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

1-26-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 29 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

MARTIN R. PACHMAN, P.C.
60 East Main Street
Freehold, New Jersey 07728
(732) 780-5590
Attorneys for Respondent

CAROL BOTTIGLIERI, Petitioner:	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
vs.	:	AGENCY REF. NO. 394-12/99 OAL DOCKET NO. EDU 00675-00S
EAST BRUNSWICK BOARD OF EDUCATION, Respondent:	:	**STIPULATION OF SETTLEMENT**

This Stipulation of Settlement is entered into by the Petitioner herein, Carol Bottiglieri ("Ms. Bottiglieri"), and the Respondent herein, the Board of Education of the East Brunswick School District ("Board of Education").

WHEREAS, the Board of Education is legally charged with the effective management and operation of the East Brunswick School District; and

WHEREAS, Ms. Bottiglieri is an employee of the Board of Education; and

WHEREAS, Ms. Bottiglieri suffered an alleged work-related injury on May 17, 1999, and was out of work for numerous days (in whole or in part) during the 1998/99 and 1999/00 school years allegedly due to said injury; and

WHEREAS, on December 27, 1999, Ms. Bottiglieri filed the within action alleging a violation of N.J.S.A. 18A:30-2.1, in that the Board of Education charged twenty-three (23) half-day absences during the 1999/00 school year to her accrued sick leave; and

WHEREAS, on January 19, 2000, the Board of Education filed an Answer in the within action denying any wrongdoing on its part; and

WHEREAS, Ms. Bottiglieri and the Board of Education wish to amicably resolve the instant dispute;

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

1. With the execution of this Stipulation of Settlement, the Petition of Appeal in the within action shall be deemed to have been voluntarily withdrawn with prejudice

2. The Board of Education shall promptly act to restore five and one-half (5½) days to Ms. Bottiglieri's accrued sick leave account.

3. Ms. Bottiglieri hereby releases and gives up any and all claims against the Board of Education, its representatives, agents and employees, and their successors in interest, relating to the subject matter of the within action, including, but not limited to, claims for attorney fees and court costs.

a. This release is binding upon Ms. Bottiglieri and anyone (or entity) who (or which) succeeds to her rights and responsibilities, including, but not limited to, her heirs and the executor (or administrator) of her estate.

b. With the exception of temporary disability benefits accrued to date, this release does not preclude claims asserted in any action filed heretofore in Workers' Compensation Court relating to the aforementioned injury.

4. To the extent permitted by law, the terms of this Stipulation of Settlement shall be kept confidential by the parties and their respective representatives, agents and employees.

5. This Stipulation of Settlement does not constitute an admission of liability or wrongdoing by either party, nor does it constitute an acknowledged violation of any statute, regulation or other source of authority by either party.

6. This Stipulation of Settlement shall not be cited or be relied upon as precedent, nor shall it be used for any purpose in any currently pending or future contractual or legal proceeding (except one brought for the enforcement of its terms) by either party or their respective representatives, agents and employees.

7. Each party enters into this Stipulation of Settlement voluntarily after having been afforded ample time to confer with legal counsel prior to its execution.

8. This Stipulation of Settlement embodies the parties' entire understanding and agreement upon the subject matter addressed herein.

9. Upon execution by both parties, this Stipulation of Settlement shall be submitted for approval to the Honorable Beatrice S. Tylutki, the Administrative Law Judge presiding over the within action, with ultimate approval to be rendered by the Commissioner of Education.

CAROL BOTTIGLIERI

DR. JAMIE P. SAVEDOFF, Sup't.
East Brunswick Bd. of Educ.

Sworn to, and subscribed,
before me on this 10th
day of September, 2000.

Michael T. Barrett, Esq.
Attorney at Law of
New Jersey

Sworn to, and subscribed,
before me on this 2nd
day of January, 2000.

Doreen Konvit

DOREEN KONVIT
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 12/19/2001

OAL DKT. NO. EDU 675-00
AGENCY DKT. NO. 394-12/99

CAROL BOTTIGLIERI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: MAR 12 2001

Date of Mailing: MAR 13 2001

92-01

LAWRENCE P. KEMMET,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

MAR 14 2001

SPRINGSTEAD & MAURICE, ESQS.
39 Hudson Street
Hackensack, New Jersey 07601
201-487-1414
Attorneys for Petitioner

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

FEB 28 3 15 PM '01

LAWRENCE P. KEMMET,

Petitioner,

Vs.

BERGEN COUNTY TECHNICAL SCHOOL DISTRICT,

Respondent.

BEFORE THE COMMISSIONER OF EDUCATION

OAL Docket No. EDUOR 01589-01N
Agency Ref. No. 31/2/01

ORDER

01 MAR -6 AM 11:46

CONTROVERSIES AND DISPUTES

THIS MATTER having been opened by the petitioner (Harold N. Springstead, Esq., appearing) for emergent relief seeking the return to the payroll and the Office of Administrative Law having considered the moving papers and opposing papers submitted by Nowell Amoroso Klein Beirman, P.A. (William Soukas, Esq., appearing) and the argument of counsel,

It is on this 28th day of Feb., 2001,

ORDERED that petitioner be returned to the payroll retroactive to February 1, 2001 and to continue on the payroll ~~until~~ unless respondent Board of Education files tenure charges with the Commissioner of Education. and suspends the pay.

KS

Ken R. Springer
A.L.J.

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.

Feb. 28, 2001
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

OAL DKT. NO. EDU 01589-01
AGENCY DKT. NO. 31-2/01

LAWRENCE P. KEMMET,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter, including the Administrative Law Judge's (ALJ) Order and an audio cassette tape of the hearing conducted at the Office of Administrative Law (OAL) on February 28, 2001, have been reviewed.[1]

The parties do not appear to dispute the following facts. Petitioner is a tenured Commercial Foods Instructor for the Board, where he has been employed for seven years. On March 15, 2000, petitioner, apparently upset and overwrought by the conduct of his students, reportedly stated, "I have to get out of here before I kill somebody." (Board's Written Statement of Evidence of Charges Against Lawrence Kemmett at 1). The Board also alleges that on the same date petitioner began to throw pots and pans around the shop, entered the students' locker room and proceeded to destroy some of the property therein. (*Id.* at 1, 2) The next day, March 16, 2000, petitioner was suspended with pay. (*Id.* at 5) Thereafter, petitioner underwent two examinations by physicians selected by the Board, one on June 9, 2000 and one on November 10, 2000. (*Id.* at 5, 6) In both reports, the physicians stated, *inter alia*, that petitioner

[1] Therein, the ALJ issued a complete oral order which is, in part, summarized below.

could return to work. (Petition of Appeal at 2) On January 31, 2001, the Board took action to suspend petitioner, effective February 1, 2001, without pay. (*Ibid.*)

In this emergent matter, petitioner challenges the Board's action to suspend him without pay, effective February 1, 2001, contending that the Board was without legal authority to do so. Although petitioner initially contended in his application that a consequential lapse in his medical coverage would cause him irreparable harm since he suffers from medical conditions requiring continued treatment, he conceded at the hearing that this is not an issue, since the Board has certified that his medical coverage is ongoing, notwithstanding that they have suspended his pay. (Certification of Robert Aloia at 3) However, petitioner nevertheless maintains that "the loss of pay from the Board will create a severe financial hardship as [he has] substantial debts in addition to child support payments." (Affidavit of Lawrence Kemmet at ¶4) Petitioner further contends that, since the Board has not brought tenure charges against him pursuant to *N.J.S.A.* 18A:6-1 *et seq.*, its decision to suspend him without pay is clearly contrary to existing law and he, therefore, has a likelihood of prevailing on the merits of his claim. Finally, petitioner asserts that the harm he has suffered from "being summarily removed from the payroll in violation of his due process rights is significant." (Petitioner's Brief in Support of Motion for Emergent Relief at 3). Whereas, no harm could be suffered by the Board by returning petitioner to his proper status. (*Ibid.*)

The Board argues that petitioner was suspended without pay as of February 1, 2001 "in anticipation of" its certification of tenure charges to the Commissioner. (Board's Brief at 3) That is, tenure charges were filed with the Board's Business Administrator on February 19, 2001 and the Board is scheduled to determine whether such charges should be certified to the Commissioner at its meeting on March 21, 2001. (*Ibid.*) The Board asserts that

its action to suspend petitioner without pay was "reasonable under the circumstances," (Board's Brief at 2) essentially contending that petitioner's conduct on March 15, 2000 was so egregious that it does not wish to have him return as a teacher. The Board further argues that petitioner has not indicated that he has been receiving treatment,[2] that petitioner did not contest the Board's actions, and that petitioner is working in another job which may be significant for mitigation purposes.

In accordance with *N.J.A.C.* 6A:3-1.6, a grant of emergent relief is considered an extraordinary remedy which may only be issued where petitioner has demonstrated that the relief is necessary to prevent irreparable harm, where the legal right underlying petitioner's claim is settled, where there is a likelihood of success on the merits and where the relative hardship to the moving party favors granting such relief. *Crowe v. DeGioia*, 90 *N.J.* 126, 132-134 (1982).

The Commissioner recognizes that "[h]arm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages." *Crowe, supra* at 132-133. Here, the Board argues that, indeed, petitioner's alleged losses are pecuniary in nature and, therefore, do not warrant interim remedy. However, "severe personal inconvenience" may also constitute irreparable harm, under certain circumstances. *Id.* at 133. Thus, the Commissioner concurs with the ALJ that, under the particular circumstances in this matter, petitioner has made a satisfactory showing that he will suffer irreparable harm, absent a grant of emergent relief. As the ALJ properly noted, there is nothing at this moment to compel the Board to certify tenure charges against petitioner, notwithstanding that it apparently takes the position that petitioner's conduct on March 15, 2000 was sufficiently egregious to warrant his removal. Moreover, to the extent the Board delays in certifying tenure charges with respect to an incident which took place

[2] The Commissioner notes that the ALJ challenged the Board on this statement, in that both physicians' reports refer to petitioner receiving ongoing treatment for existing medical conditions.

one year ago, yet continues to withhold petitioner's pay, petitioner is faced with a situation where the Board may deprive him of his livelihood without providing him a forum to defend himself.[3] Additionally, the Commissioner recognizes petitioner's duty to pay child support and, like the ALJ, he seeks to avoid any potential harm to innocent parties by compromising this obligation under circumstances such as exist herein.

Petitioner's demonstrated legal right to emergent relief and his likelihood of success on the merits of his claim are considered together. Here, petitioner correctly argues that a local board may not suspend a tenured teacher without pay unless tenure charges have been certified to the Commissioner pursuant to *N.J.S.A.* 18A:6-14, or unless, in accordance with *N.J.S.A.* 18A:6-8.3, he has been indicted. Therefore, where no such tenure charges have been certified and no indictment against petitioner exists, petitioner's legal right to pay during the period of his suspension is clear. The Commissioner concurs with the ALJ that the Board's action to suspend petitioner without pay effective February 1, 2001 was *ultra vires,* and petitioner is entitled to prevail on this issue. Indeed, the Board could offer no legal authority for its position.

Finally, the Commissioner concurs with the ALJ that the potential harm to petitioner in suspending his pay, under the circumstances, is greater than the harm to the Board to continue to pay his salary, particularly where it has done so for almost one year. As the ALJ noted, to the extent the Board seeks to suspend petitioner's pay, it has the power to do so, within the confines of the law, by certifying tenure charges to the Commissioner.[4]

---

[3] The Board admits that its allegations as to petitioner's income from another job are not proven at this stage of the proceedings.

[4] As per *N.J.S.A.* 18A:6-14, a suspension without pay after certification of tenure charges to the Commissioner may continue for a period of 120 days "but, if the determination of the charge by the commissioner of education is not made within 120 calendar days after certification of the charges, *** then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made.

Accordingly, the Board is ordered to return petitioner to the payroll effective February 1, 2001 and to continue him on the payroll unless it files tenure charges in accordance with *N.J.S.A.* 18A:6-14.[5] This matter is ordered returned to the Office of Administrative Law for further proceedings as may be deemed necessary by the ALJ.

IT IS SO ORDERED.[6]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: MAR 14 2001

Date of Mailing: MAR 16 2001

[5] The Commissioner concurs with the ALJ that the record before him does not support an interim order of prejudgment interest or an order to return petitioner to his position as a tenured teacher.

[6] 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.

94-01

94-01

REGIS G. IDEC,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MAR 16 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1265-98
AGENCY DKT. NO. 429-11/97

REGIS G. IDEC
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK, UNION COUNTY,
Respondent

Sanford R. Oxfeld, Esq., for petitioner
(Oxfeld Cohen, LLC, attorneys)

Neil M. Cohen, Esq., for respondent
(Gill & Cohen, P.C., attorneys)

Record Closed: January 22, 2001 Decided: January 24, 2001

BEFORE **MICHAEL L. RAVIN,** ALJ:

This matter was transmitted to the Office of Administrative Law on January 22, 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.

A hearing was scheduled for January 22, 2001, but was adjourned because the parties reached a settlement. A signed stipulation of settlement was forwarded to this office on January 24, 2001 and is attached hereto.

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

1. The parties have voluntarily agreed to the settlement as evidence 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.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 24, 2001
DATE

Michael L. Ravin
MICHAEL L. RAVIN, ALJ

Receipt Acknowledged:

1-30-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB - 2 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sej

Oxfeld Cohen, LLC
50 Commerce Street
Newark, New Jersey 07102
(973) 642-0161
Attorneys for Petitioner

REGIS G. IDEC,

Petitioner,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE,

Respondent.

OFFICE OF ADMINISTRATIVE LAW

OAL Docket No.: EDUOA-01265-98N
Agency Ref. No.: 429-11/97

STIPULATION OF SETTLEMENT
&
DISMISSAL

WHEREAS Petitioner Regis G. Idec and the Respondent, Board of Education of the Borough of Roselle, amicably resolved the within matter; the same may be and is hereby dismissed, without costs and with prejudice, on the following basis:

1. Idec is entitled to gross wages in the amount of $4,119.38 for the period of July 28th to September 5th, 1997 (the period covered in his Workers' Compensation Award).

2. The Board shall make all appropriate deductions from said sum so that Idec is expected to receive net pay in the amount of $2,892.46.

3. Recognizing that the matter was filed in 1997, Idec shall receive full pay as set forth above, no later than ten (10) days following the execution of this Settlement.

Dated: 1/22/01

SANFORD R. OXFELD, ESQ.
On Behalf of Regis G. Idec

Dated: 1/22/01

NEIL M. COHEN, ESQ.
On Behalf of Roselle Board of Education

TOTAL P.02

3a

OAL DKT. NO. EDU 1265-98
AGENCY DKT. NO. 429-11/97

REGIS G. IDEC,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Stipulation of Settlement & Dismissal and Initial Decision issued by the Office of Administrative Law on petitioner's claim of entitlement to sick leave, 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. It is noted, however, that pursuant to Term No. 3 of the parties' agreement, the Board was to pay petitioner money pursuant to this settlement no later than ten days following the execution of the agreement on January 22, 2001. The parties are hereby reminded that effectuating settlement terms prior to their approval by the Commissioner is improper and undertaken at the peril of parties. 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: MAR 16 2001

Date of Mailing: MAR 19 2001

95-01

SHIRLEY JOHNSON-TUCKER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

MAR 16 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11345-97
AGENCY DKT. NO. 335-9/97

SHIRLEY JOHNSON-TUCKER,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,
Respondent

Kenneth Gainer, Esq., for petitioner
(William A. Thomas & Associates, Attorneys)

Victor E.D. King, Esq., for respondent
(King, King & Goldsack, attorneys)

Record Closed: January 25, 2001 Decided: January 26, 2001

BEFORE **IRENE JONES**, ALJ:

This matter was transmitted to the Office of Administrative Law on November 26, 1997 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 signed stipulation of settlement was forwarded to this office on January 17, 2001 and is attached hereto.

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

A signed stipulation of settlement was forwarded to this office on January 17, 2001 and is attached hereto.

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

1. The parties have voluntarily agreed to the settlement as evidence 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.

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

1/24/01
DATE

IRENE JONES, ALJ

Receipt Acknowledged:

1-30-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB - 2 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

sej

Law Offices of
KING, KING AND GOLDSACK
948 U. S. Highway #22, East
North Plainfield, NJ 07060-3625
(908) 756-7804 Fax (908) 756-2184
Attorneys for Respondent,
Board of Education

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
DEC 7 4 36 PM '00

SHIRLEY JOHNSON-TUCKER, PETITIONER VS. BOARD OF EDUCATION OF THE CITY PLAINFIELD, UNION COUNTY, RESPONDENT	BEFORE THE COMMISSIONER OF EDUCATION STATE OF NEW JERSEY DOCKET NO. OAL 335-0/97 STIPULATION OF SETTLEMENT

This matter coming on before the Honorable Irene Jones, Administrative Law Judge and Kenneth Gainer, Esq., appearing on behalf of Petitioner and Victor E. D. King appearing on behalf of Respondents. And an agreement having been reached between the parties;

NOW THEREFORE, be it agreed and stipulated by and among the parties herein:

1. The Respondent, Board of Education of City of Plainfield, Union County, will pay to the Petitioner the sum of $1,000 in full settlement of all claims brought against the Respondent in the within matter.

2. The Petitioner agrees to and consents to a dismissal of the within action with prejudice and without costs to either side.

Law Offices of
KING, KING AND GOLDSACK
948 U. S. Highway #22, East
North Plainfield, NJ 07060-3625
(908) 756-7804 Fax (908) 756-2184
Attorneys for Respondent,
Board of Education

SHIRLEY JOHNSON-TUCKER, PETITIONER VS. BOARD OF EDUCATION OF THE CITY PLAINFIELD, UNION COUNTY, RESPONDENT	BEFORE THE COMMISSIONER OF EDUCATION STATE OF NEW JERSEY DOCKET NO. OAL 335-0/97 STIPULATION OF SETTLEMENT

This matter coming on before the Honorable Irene Jones, Administrative Law Judge and Kenneth Gainer, Esq., appearing on behalf of Petitioner and Victor E. D. King appearing on behalf of Respondents. And an agreement having been reached between the parties;

NOW THEREFORE, be it agreed and stipulated by and among the parties herein:

1. The Respondent, Board of Education of City of Plainfield, Union County, will pay to the Petitioner the sum of $1,000 in full settlement of all claims brought against the Respondent in the within matter.

2. The Petitioner agrees to and consents to a dismissal of the within action with prejudice and without costs to either side.

3b

3. The Petitioner may, if she wishes, file and make a part of her permanent personnel file maintained by the Respondent board, an addendum to evaluations with which she disagrees.

VICTOR E. D. KING

KENNETH GAINER

GARRY OTTMANN, BOARD SECRETARY

SHIRLEY JOHNSON-TUCKER

STATE OF NEW JERSEY:
COUNTY OF UNION : SS.:

I CERTIFY that on MAY 22, 2000, SHIRLEY JOHNSON-TUCKER, personally came before me and acknowledged under oath, to my satisfaction, that this person:

(a) is named in and personally signed the attached document; and

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

KENNETH GAINER
ATTORNEY AT LAW OF N.J.

May-23-00 11:02A P.03

OAL DKT. NO. EDU 11345-97
AGENCY DKT. NO. 335-9/97

SHIRLEY JOHNSON-TUCKER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Stipulation of Settlement and Initial Decision issued by the Office of Administrative Law on petitioner's increment withholding claim, 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: MAR 16 2001

Date of Mailing: MAR 19 2001

96-01

R.J. AND C.J., on behalf of minor child, K.J.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

MAR 16 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7325-00
AGENCY DOCKET NO. 174-5/00

R.J. and C.J. o/b/o K.J.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

Respondent.

R.J. and C.J., petitioners, *pro se*

Stephen J. Christiano, Esq., for respondent

Record Closed: January 24, 2001 Decided: January 25, 2001

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

This matter involves an appeal by petitioners, R.J. and C.J. on behalf of K.J., from a residency determination by respondent, Board of Education of the Township of West Orange, Essex County. The Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL) where, on August 9, 2000, it was filed for an expedited hearing. The matter was assigned to the undersigned on September 15, 2000, and a hearing was scheduled for November

20, 2000. The parties appeared on November 20, 2000 and requested that the hearing be adjourned to provide additional time toward an amicable resolution of the matter. Following telephone status conferences with the parties in December 2000, the parties reached a settlement and, thereafter, submitted the attached Stipulation of Settlement indicating the terms of agreement which the undersigned received on January 24, 2001. Having reviewed the record and the terms of 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.

January 25, 2001
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Receipt Acknowledged:

1-30-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB - 2 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

pb

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
JAN 24 12 39 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. EDUOS 07325-00

R.J. AND C.J. ON BEHALF OF MINOR CHILD, K.J.,	
Petitioners,	
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) Petitioners withdraw their petition of appeal.

(2) Respondent withdraws its counterclaim for tuition charges.

(3) Respondent acknowledges K.J.'s eligibility to attend its schools, but reserves its right to make periodic residency checks to ensure continued compliance with school residency requirements.

(4) Petitioners shall pay respondent a sum of $1500 for back tuition charges. Payment shall be made in three monthly installments of $500. The first payment is due on February 1, 2001; the second payment is due on March 1, 2001; and the final payment is due on April 1, 2001. In the event of default, respondent reserves the right to proceed with its original tuition claim (less any payments made).

(5) This settlement is subject to approval by the Commissioner of Education. In the event of disapproval of the settlement by the Commissioner, any tuition payments made by petitioners shall be refunded by respondent.

Dated: January 5, 2001

Robert Jeffers, Petitioner

Dated: Jan 5, 2001

Cynthia Jeffers, Petitioner

ATTEST:

Secretary

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE

By: President

OAL DKT. NO. EDU 7325-00
AGENCY DKT. NO. 174-5/00

R.J. AND C.J., on behalf of minor child, K.J.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner approves the settlement terms and adopts the settlement agreement as the final decision in this matter. In so holding, however, the Commissioner observes that the settlement included with the Initial Decision sets forth terms that were to be effectuated prior to approval of the settlement terms by the Commissioner pursuant to *N.J.A.C.* 1:1-19.1. The ALJ and the parties are cautioned against effectuating terms of a settlement agreement in controverted matters that have been duly transmitted to the OAL 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: MAR 16 2001

Date of Mailing: MAR 19 2001

97-01

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

MAR 16 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9199-00
AGENCY DKT. NO. 272-7/00

K. F., on behalf of minor D.D.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY,
Respondent

Ellen M. Boylan, Esq., for petitioner
(Education Law Center, Attorneys)

Alan J. Schnirman, Esq., for respondent

Record Closed: January 3, 2001 Decided: January 24, 2001

BEFORE **IRENE JONES**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 6, 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 hearing was scheduled for January 16, 2001, but adjourned because the parties reached a settlement. A signed stipulation of settlement was forwarded to this office on January 3, 2001 and is attached hereto.

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

1. The parties have voluntarily agreed to the settlement as evidence 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.

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

1/24/01
DATE

IRENE JONES, ALJ

Receipt Acknowledged:

1-30-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB - 2 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sej

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

JAN 3 2 26 PM '01

EDUCATION LAW CENTER
Ellen M. Boylan, Esq.
155 Washington Street, Suite 205
Newark, New Jersey 07102
(973) 624-1815

Attorneys for Petitioners

K.F., on behalf of minor D.D.,

Petitioners,

v.

RAHWAY BOARD OF EDUCATION,
Respondents.

BEFORE THE COMMISSIONER OF EDUCATION

STATE OF NEW JERSEY

OAL Dkt. No. EDU 9199-00
Agency Dkt. No. 272-7/00

STIPULATION OF SETTLEMENT AND DISMISSAL OF CLAIMS AGAINST RAHWAY BOARD OF EDUCATION

The matter in difference having been amicably adjusted by and between PETITIONERS and RAHWAY BOARD of EDUCATION, it is hereby stipulated and agreed that PETITIONERS' claims against RAHWAY BOARD of EDUCATION are hereby settled between the parties according to the following terms:

1. The March 28, 2000 expulsion decision of the Rahway Board of Education is modified so that D.D. will be reinstated to the ninth grade at Rahway High School on January 26, 2001.

2. Between October 18, 2000 and January 26, 2001, D.D. shall attend and participate in an appropriate alternative education program, as may be recommended by the Superintendent, with the mutual consent of D.D.'s guardian.

5. Petitioners hereby Dismiss with prejudice the claims raised in this matter against the Rahway Board of Education.

Dated: October 26, 2000

EDUCATION LAW CENTER

By: Ellen M. Boylan
Ellen M. Boylan
Attorney for PETITIONERS

By: _____
Alan J. Schnirman
Attorney for RAHWAY
BOARD of EDUCATION

OAL DKT. NO. EDU 9199-00
AGENCY DKT. NO. 272-7/00

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

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

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

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: MAR 16 2001

Date of Mailing: MAR 19 2001

98-01

IN THE MATTER OF THE TENURE	:	
HEARING OF CAMILLE NURSE,	:	COMMISSIONER OF EDUCATION
ATLANTIC COUNTY VOCATIONAL	:	DECISION
TECHNICAL SCHOOL DISTRICT,	:	
ATLANTIC COUNTY.	:	
	:	

MAR 16 2001

AGENCY DKT. NO. 38-2/01

IN THE MATTER OF THE TENURE	:	
HEARING OF CAMILLE NURSE,	:	COMMISSIONER OF EDUCATION
ATLANTIC COUNTY VOCATIONAL	:	DECISION
TECHNICAL SCHOOL DISTRICT,	:	
ATLANTIC COUNTY.	:	
	:	

For the Board, Frank Dingler, Board Secretary

This matter having been opened before the Commissioner of Education on February 21, 2001, through certification of tenure charges of unbecoming conduct on the part of a school secretary by the Board of Education of the Atlantic County Vocational Technical School District; and

The Commissioner having directed respondent, via both certified and regular mail, on February 22, 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

In that no reply has been received from respondent in response to the Board's charges, each count of the charges against respondent is deemed admitted; and

The Commissioner's review of the tenure charges certified against respondent by the Board and the statement of evidence in support of those charges indicating that respondent was charged, on or about January 12, 2001, with theft by unlawful taking, a third degree crime, in violation of *N.J.S.A.* 2C:20-3(a), when investigation revealed that, while registering students for classes, respondent, having occasion to accept money from registrants, failed to turn over and/or account for all funds received, and was subsequently found to have pilfered the sum of approximately $3,600, and the Hamilton Township Police Department reporting to the Board that respondent acknowledged in a tape recorded confession, taken shortly after her arrest, that she stole approximately $3,600 in registration funds which were the lawful property of the Atlantic County Vocational Technical School; and

The Commissioner finding that respondent's actions constitute conduct unbecoming a tenured secretary sufficient to warrant her dismissal from her tenured position; now, therefore

IT IS ORDERED this 16th day of March, 2001 that summary decision shall be granted to the Board, and Camille Nurse shall be dismissed from her tenured position as a secretary in the Board's employ as of the date of this order.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: MAR 16 2001

Date of Mailing: MAR 19 2001

[1] 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.

100-01

BOARD OF EDUCATION OF THE TOWNSHIP OF BERLIN, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NUMBER ONE, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 19, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4603-00
AGENCY DKT. NO. 205-6/00

BOARD OF EDUCATION OF THE TOWNSHIP OF BERLIN,
Petitioner,
v.
BOARD OF EDUCATION OF LOWER CAMDEN COUNTY REGIONAL DISTRICT, NUMBER ONE, CAMDEN COUNTY,
Respondent.

Vito A. Gagliardi, Jr., Esq., on behalf of petitioner (Porzio, Bromberg & Newman, attorneys)

Barry Chatzinoff, Esq., on behalf of respondent (Weinberg, McCormick, Chatzinoff & Zoll, attorneys)

Record Closed: January 9, 2001 Decided: January 29, 2001

BEFORE **DANIEL B. MCKEOWN**, ALJ:

This matter was transmitted to the Office of Administrative Law on June 21, 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 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.

January 29, 2001
DATE

Daniel B. McKeown
DANIEL B. MCKEOWN, ALJ

Receipt Acknowledged:

1-31-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 1 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

WEINBERG, McCORMICK, CHATZINOFF AND ZOLL
A PROFESSIONAL ASSOCIATION
109 Haddon Avenue
Haddonfield, New Jersey 08033
(856) 795-1600
ATTORNEYS FOR RESPONDENT

BERLIN TOWNSHIP BOARD OF EDUCATION, individually and on behalf of its members,	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
Petitioners,	:	Agency Docket No. 205-6/00 OAL Docket No. 04603-00
v.	:	
LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NUMBER ONE BOARD OF EDUCATION,	:	**CONSENT ORDER**
Respondent	:	

THIS MATTER having come before the Commissioner of Education upon the Verified Petition of Petitioners, Berlin Township Board of Education (hereinafter Berlin Board), by its attorneys, Porzio, Bromberg and Newman, P.C., Vito A. Gagliardi, Jr., Esquire appearing and upon the response of Respondent, Lower Camden County Regional High School District Number One Board of Education (hereinafter Regional Board), by its attorneys, Weinberg, McCormick, Chatzinoff & Zoll, P.A., Barry Chatzinoff, Esquire appearing, and upon the appearance of Robert M. Schwartz, Esquire, attorney for the Lower Camden County Principal's and Supervisor's Association (hereinafter Association) and the parties having reached an

agreement resolving all issues presented in this matter, and based upon the parties' agreement, and for good cause shown;

WHEREAS, the Berlin Board filed a Verified Petition and Notice of Motion for Emergent Relief seeking Temporary Restraints against the Regional Board seeking to enjoin the Regional Board from implementing paragraph A of the Dissolution Incentive Program adopted by the Regional Board on March 14, 2000;

WHEREAS, on June 29, 2000, the Commissioner of Education issued an Order temporarily enjoining the Regional District from implementing the Dissolution Incentive Program and returning the matter to the Office of Administrative Law for a Plenary Hearing on the merits;

WHEREAS, the Berlin Board, the Regional Board and the Association are desirous of resolving this matter without the necessity of a plenary hearing on the merits;

IT IS ON THIS 29th day of JANUARY , 2001 ORDERED as follows:

1. The Regional Board is permanently enjoined from implementing paragraph A of the Dissolution Incentive Program adopted by the Regional Board on March 27, 2000. The Regional Board shall be enjoined from adopting any further future resolution providing for benefits similar to those set forth in paragraph A of the aforesaid Dissolution Incentive Program for any employees.

2. The Petitioners withdraw any and all claims brought against the Regional Board, Board Member Ralph Condo or any other Regional Board member with prejudice.

3. The Management Team Agreement between the Association and the Lower Camden County Regional Board of Education (July 1, 1998 - June 30, 2000), Article entitled "Leaves of Absence" allowing for Administrators to receive accrued sick leave if the Administrator has completed five (5) years of service upon leaving the District in good standing shall be construed to provide that an eligible employee may retire or resign from the Lower Camden County Regional High School District Number One in good standing and be entitled to the accrued sick leave benefits if the eligible employee has completed five (5) years of service. The aforesaid interpretation of the accrued sick leave benefit shall be applicable to all current administrative staff and central office personnel covered by the previously adopted Dissolution Incentive Program. The rights afforded by this Consent Order are subject to the limitations of the Management Team Agreement or Central Office Personnel - Terms of Employment or as otherwise provided by law.

4. Upon resignation or retirement of an eligible employee, the eligible employee shall be entitled to his or her accrued sick leave benefit provided he or she has otherwise complied with the terms of the aforesaid article of the Management Team Agreement or Central Office Personnel - Terms of Employment, as applicable. Upon resignation or retirement, an eligible employee shall forfeit his or her right to a position with a constituent district of the Regional Board upon the dissolution of the Lower Camden County Regional High School District Number One and he or she shall not be entitled to any further accrued sick leave benefits.

5. This Consent Order is based upon the Association's agreement that the Consent Order resolves the Administrative Grievance filed by the Association on behalf of Nancy

Thomas. The resolution of that Grievance is set forth in a separate agreement. The Association is barred from filing any grievance or other claim on behalf of any employee who previously resigned from employment from the Regional Board.

6. This Consent Order shall serve to resolve all issues presented by the Petition in this matter.

DANIEL B. McKEOWN, ALJ (t/a)

The parties hereby consent to the form and entry of the above Order.

PORZIO, BROMBERG & NEWMAN, P.C.

BY: _____
VITO A. GAGLIARDI, JR., ESQUIRE
ATTORNEY FOR PETITIONER

WEINBERG, MCCORMICK, CHATZINOFF & ZOLL, P.A.

BY: _____
BARRY CHATZINOFF, ESQUIRE
ATTORNEY FOR RESPONDENT

LAW OFFICE OF ROBERT M. SCHWARTZ

BY: _____
ROBERT M. SCHWARTZ, ESQUIRE
ATTORNEY FOR ASSOCIATION

OAL DKT. NO. EDU 4603-00
AGENCY DKT. NO. 205-6/00

BOARD OF EDUCATION OF THE TOWNSHIP OF BERLIN, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NUMBER ONE, CAMDEN COUNTY,	:	DECISION
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 by the Assistant Commissioner to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34.

Upon review, the Assistant 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.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 3/19/01

Date of Mailing: 3/20/01

101-01

IN THE MATTER OF THE TENURE	:	
HEARING OF WENDY L. CLOTHIER,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP OF	:	DECISION
STILLWATER, SUSSEX COUNTY.	:	

SYNOPSIS

The Board filed tenure charges against respondent alleging that she engaged in conduct unbecoming a teacher; specifically, it alleged that, on several occasions, respondent attempted to, and did, engage in inappropriate sexual contact with a student. Respondent was subsequently admitted into pre-trial intervention probation with regard to criminal charges filed as a result of the alleged inappropriate sexual contact with a minor and, as a condition thereof, agreed to resign her tenured position, which she did.

The ALJ determined that the case is moot and recommended dismissal of the tenure charges.

The Commissioner dismissed the tenure charges as moot and transmitted the matter to the New Jersey Board of Examiners for action it deems appropriate against respondent's teaching certificate.

March 19, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9526-00
AGENCY DKT. NO. 337-10/00

TOWNSHIP OF STILLWATER BOARD OF EDUCATION,
SUSSEX COUNTY,

Petitioner,

v.

WENDY L. CLOTHIER,

Respondent.

M. Richard Valenti, Esq., for petitioner (Morris, Downing & Sherred, attorneys)

Kevin P. Benbrook, Esq., for respondent (Benbrook & Benbrook, attorneys)

Record Closed: January 29, 2001 Decided: January 31, 2001

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

NATURE OF THE CASE AND PROCEDURAL HISTORY

On October 2, 2000, the Township of Stillwater, Sussex County, Board of Education (petitioner) certified tenure charges against Wendy L. Clothier (respondent), a tenured teacher, to the Commissioner of the State Department of Education (DOE). The charges alleged that respondent engaged in unbecoming conduct and actions constituting other just and good cause for discipline *vis-a-vis* a classified male student who was twelve years old and in the sixth grade at the time in question, which conduct

justified dismissal of respondent and a reduction of her salary or other compensation. The tenure charges also alleged, more specifically, that on several occasions, respondent attempted to engage in, and did engage in, inappropriate sexual contact with the student in question.

Respondent filed an answer to the tenure charges on October 18, 2000, and the DOE transmitted the matter to the Office of Administrative Law on October 25, 2000 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to 13.

A prehearing conference was conducted on November 15, 2000. During the conference, respondent's counsel moved for a stay of the hearings because the Sussex County Prosecutor's Office was then investigating the matter. The parties filed initial and reply briefs regarding the question of whether a stay should be granted, and this judge issued an Order denying the request to stay the proceedings on December 12, 2000.

A second prehearing conference was conducted on December 18, 2000. At that time, another telephone conference was scheduled for January 22, 2001, and hearings were scheduled to commence on January 26, 2001.

On January 19, 2001, respondent's counsel filed a copy of a letter, dated January 18, 2001, to petitioner's counsel, wherein respondent tendered her resignation "to be effective immediately." The letter also noted that the resignation was in furtherance of an Order of Postponement entered by the Honorable Lorraine C. Parker, J.S.C., and advanced counsel's understanding that the resignation effectively disposed of the tenure proceedings. In response to telephone communications from this judge, respondent's counsel filed a letter memorandum, on January 22, 2001, setting forth respondent's position that her resignation rendered the tenure charges moot, citing *N.J.A.C.* 6A:3-5.6(d). Counsel also provided a copy of Judge Parker's Order.

During the telephone conference on January 22, 2001, petitioner's counsel concurred with respondent's analysis that the tenure charges were rendered moot by respondent's resignation. At this judge's request, petitioner's counsel memorialized that

position, in a letter filed on January 23, 2001, and also confirmed that petitioner, by formal resolution at a meeting conducted on January 22, 2001, acknowledged and accepted respondent's "unilateral resignation." The record was closed on January 29, 2001, the date of final communications with the parties, *i.e.*, a letter from this judge confirming telephone communications that the Order of Postponement and the January 18, 2001 letter would be moved into evidence.

The issue, broadly, is whether the pending tenure charges should be dismissed in light of respondent's resignation. I am persuaded that they should be.

FINDINGS OF FACT

Based upon a review of the record, I **FIND** the following to be facts.

On January 18, 2001, the Honorable Lorraine C. Parker, J.S.C., Justice of the Superior Court, Law Division, Criminal, Sussex County, issued an Order of Postponement, ordering that the custody of respondent, who was a defendant in *The State of New Jersey v. Wendy L. Clothier*, case number 00-I-00998, be continued in the Sussex County Pretrial Intervention Program (PTI), on probation, subject to "the usual terms and conditions" of PTI probation and certain special conditions. (Exh. R-1.) The special conditions were that respondent immediately resign her tenured teaching position with petitioner; that respondent have no contact with the student in question, nor his family; and that she promptly submit to a psychological/sexual offender examination and fully comply with all treatment/counseling recommendations. Respondent was also ordered to be under 36 months' supervision and to pay certain specified fees.

By letter dated January 18, 2001 to petitioner's counsel, from respondent's counsel, respondent tendered her resignation as an employee of petitioner "to be effective immediately", in "furtherance" of the Order of Postponement entered by Judge Parker on the same date. (Exh. R-2.)

DISCUSSION

The Commissioner of the DOE (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, effective April 3, 2000, 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 and that petitioner should be ordered to report the conduct alleged in the tenure charges to the State Board.

CONCLUSION

I **CONCLUDE** that the tenure charges certified by petitioner against respondent on October 2, 2000 should be dismissed because respondent resigned her position with petitioner, effective January 18, 2001, and the tenure charges are therefore moot.

ORDERS

It is hereby **ORDERED** that the tenure charges certified by petitioner against respondent on October 2, 2000 be and are hereby **DISMISSED** and that petitioner report the conduct alleged in the tenure charges to the State Board, pursuant to *N.J.A.C.* 6:11-3.5.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 31, 2001
DATE

DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

2-2-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

FEB - 5 2001
DATE

OFFICE OF ADMINISTRATIVE LAW

\mvh

APPENDIX

Exhibits in Evidence:

R-1 Order of Postponement

R-2 Letter dated January 18, 2001

OAL DKT. NO. EDU 9526-00
AGENCY DKT. NO. 337-10/00

IN THE MATTER OF THE TENURE	:	
HEARING OF WENDY L. CLOTHIER,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP OF	:	DECISION
STILLWATER, SUSSEX COUNTY.	:	

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

Upon his independent review, the Commissioner affirms the conclusion of the Administrative Law Judge that the within tenure charges against respondent have been rendered moot as a consequence of an Order of Postponement issued by the Honorable Lorraine C. Parker, J.S.C., placing respondent in the custody of the Sussex County Pre-Trial Intervention Project, on probation, subject to the usual terms and conditions of Pre-Trial Intervention Probation, with certain special conditions, including a stipulation that respondent immediately resign her tenured teaching position with petitioner.

Accordingly, the tenure charges against respondent are hereby dismissed. This matter shall be transmitted to the State Board of Examiners, pursuant to *N.J.A.C.* 6A:5.6(d), for action against respondent's certificate as that body deems appropriate.[1]

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/19/01

Date of Mailing: 3/20/01

[1] Pursuant to *N.J.A.C.* 6:11-3.5, should the Board of Examiners issue an Order to Show Cause in this matter, it is the District's responsibility to cooperate with the Board of Examiners in ascertaining and presenting the facts underlying the District's allegations.

[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.

103-01

IN THE MATTER OF THE TENURE	:	
HEARING OF MARITZA DAVIS,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF ELIZABETH, UNION COUNTY	:	
	:	

March 22, 2001

AGENCY DOCKET NO. 49–2/01

IN THE MATTER OF THE TENURE	:	
HEARING OF MARITZA DAVIS,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF ELIZABETH, UNION COUNTY	:	
	:	

For the Board, Mary E. Hennessy, Esq. (Murray, Murray and Corrigan)

This matter having been opened before the Commissioner of Education on February 27, 2001 through the certification of tenure charges by the Board of Education of the City of Elizabeth (Board) against respondent, a purchasing specialist in the Board's employ, for incapacity, excessive absenteeism, unbecoming conduct, abandonment of position and abuse of sick leave; and

Whereas, the respondent, having been served, via regular and certified mail, with a copy of the charges, the Board's resolution, the Statement of Evidence and the Certificate of Determination on February 26, 2001; and

Whereas, the Commissioner, having directed respondent, via both certified and regular mail, on February 27, 2001, to file an Answer to the tenure charges certified against her; and

Whereas, such communications having 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 from the date such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,*" and that failure to answer within the prescribed period will, absent granting of an extension for good cause shown, result in the charges being deemed admitted; and

Whereas, on March 7, 2001, the respondent having signed for receipt of the communication sent to her via certified mail by the Commissioner; and

Whereas, no reply having been received from respondent in response to the Board's charges, each count of the charges against respondent is deemed to be admitted; and

Whereas, the Commissioner's review of the tenure charges and the statement of evidence in support of those charges indicates that respondent has been absent from her position as a purchasing specialist in the Elizabeth School District for more than 275 days in the past two years, having been absent 154 days during the 1999-2000 school year and the entire 2000-2001 school year, of which many days have been for approved leaves of absence due to hypothyroidism, insomnia and depression; and

Whereas, respondent's leave of absence last approved by the Board ended on November 1, 2000 and no request for an extension of same was submitted to the Board by respondent until January 9, 2001, whereupon she requested an extension until March 31, 2001; and

Whereas, on January 9, 2001, the assistant superintendent of schools informed respondent in writing that she would not be granted any more leaves of absence; and

Whereas, on January 23, 2001, the Director of Human Services again informed respondent that no further leaves of absences would be granted to her because she had been out of work on leaves of absence granted by the Board since January 2000, and whereas, he directed her to contact his office to arrange for her immediate return to work; and

Whereas, respondent did not return to work as directed; and

Deeming such tenure charges to be admitted by respondent, because she has not replied to the specific allegations contained therein, the Commissioner finds that respondent's actions constitute incapacity due to excessive absenteeism, which warrants dismissal from her tenured position as a purchasing specialist in the City of Elizabeth School District; now, therefore

IT IS ORDERED this 03/22/01 day of March, 2001 that summary decision shall be granted to the Board, and Maritza Davis shall be dismissed from the Board's employ as of the date of this order.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/22/01

Date of Mailing: 3/22/01

* 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.

102-01

J.P. AND R.P., on behalf of minor child, A.P., :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF TOMS RIVER, OCEAN COUNTY, : DECISION

:

RESPONDENT.

:

March 19, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2749-00

AGENCY DKT. NO. 15-1/00

J.P. AND R.P., ON BEHALF OF MINOR CHILD, A.P.,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF TOMS RIVER, OCEAN COUNTY,

Respondent.

Edmund P. Glasner, Esq., for petitioners

Thomas Monahan, Esq., for respondent (Gilmore & Monahan, attorneys)

Record Closed: January 30, 2001 Decided: January 31, 2001

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

This matter was transmitted to the Office of Administrative Law on April 26, 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.

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 settlement 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.

JAN 3 1 2001
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

2-2-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 5 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jh

Attorney(s): LAW OFFICES OF EDMUND P. GLASNER
Office Add. & Tel. No.: 22 ROBBINS STREET, TOMS RIVER, NJ 08753 (732) 505-6800
Attorney(s) for Petitioner

J.P. & R. P. O/B/C A.P.	: STATE OF NEW JERSEY
	: OFFICE OF ADMINISTRATIVE LAW
Petitioner	:
	: OAL DKT. NO. EDUOS 02749-00S
vs.	: AGENCY REF. NO. 15-1/00
	:
TOMS RIVER BOE, OCEAN COUNTY EDUCATION,	:
	: STIPULATION OF SETTLEMENT
Respondent	:

This matter having come before the court upon an application for a Due Process Hearing, by the Law Offices of Edmund P. Glasner, Edmund P. Glasner, Esq., attorney for Petitioner appearing, and by Thomas Monahan, Gilmore & Monahan, P.A., attorney for Respondent Toms River Board of Education, Ocean County, appearing, pursuant to 20 **U.S.C.** sections 1401 to 1461, **N.J.S.A.** 18A:46-1 to 46, 34 **C.F.R.** sections 300.1 to 338, and **N.J.A.C.** 6:28-1.1 to 11.13, and the court having reviewed the terms and conditions of the settlement, this matter is settled as follows:

1. The parties have signed and entered into an IEP which shall bind all parties to this action, and as amended from time to time.

Dated:

EDMUND P. GLASNER, ESQ.
ATTORNEY FOR PETITIONER

THOMAS MONAHAN, ESQ.
ATTORNEY FOR RESPONDENT

OAL DKT. NO. EDU 2749-00
AGENCY DKT. NO. 15-1/00

J.P. AND R.P., on behalf of minor child, A.P.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TOMS RIVER, OCEAN 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 adopts the Stipulation of Settlement as the final decision in this matter. In so holding, however, the Commissioner notes for the record that the settlement terms stipulate that an Individualized Educational Program (IEP) for A.P. shall bind all parties to this action, an issue over which the Commissioner does not have jurisdiction. Consequently, it is emphasized that adoption of the Stipulation of Settlement as the final decision in this matter merely signifies approval of an amicable resolution of the controversy reached by the parties and is *without comment as to the appropriateness of any of the IEP terms* set forth in the settlement.

The matter is hereby dismissed, subject to the parties' compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/19/01

Date of Mailing: 3/20/01

104-01

IN THE MATTER OF THE TENURE	:	
HEARING OF CATHERINE COOPER,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
CITY OF BRIDGETON, CUMBERLAND	:	
COUNTY.	:	
	:	

SYNOPSIS

The Board certified tenure charges of unbecoming conduct, neglect and other just cause against respondent, a middle school teacher of classified students in a self-contained classroom of emotionally disturbed children, for an incident in which she allegedly directed an inappropriate comment at two classified students.

The ALJ found that the incident demonstrated respondent's insensitivity to her emotionally handicapped students and resulted in one student being so embarrassed that he remains on home instruction. Having found the incident "sufficiently flagrant" to remove respondent from her tenured position, the ALJ ordered said removal.

The Commissioner adopted findings and determination in the Initial Decision as his own and ordered respondent dismissed as of the date of this decision. The Commissioner directed that a copy of the decision be transmitted to the State Board of Examiners for action as it deems appropriate, pursuant to *N.J.A.C.* 6:11-3.6.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6550-00

AGENCY DKT. NO. 291-8/00

IN THE MATTER OF THE TENURE HEARING OF CATHERINE COOPER, BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY

A. Paul Kienzle, Jr., Esq., for petitioner Bridgeton Board of Education (Waltman, Reilly & Rogovoy, attorneys)

Ned P. Rogovoy, Esq., for respondent Catherine Cooper (Casarow, Kienzle & Raczenbek, attorneys)

Record Closed: December 19, 2000 Decided: February 2, 2001

BEFORE **JOSEPH LAVERY,** ALJ:

STATEMENT OF THE CASE

Petitioner, the Board of Education, City of Bridgeton, charges respondent Catherine Cooper, with (a) conduct unbecoming a teacher, (b) neglect, and (c) other just cause. The Board seeks removal of Ms. Cooper as a tenured employee in the Bridgeton Public School System.

Respondent Cooper contests the charge and the penalty.

Today's initial decision affirms the removal of the respondent from her tenured position as a teacher in the Bridgeton Public School System.

PROCEDURAL HISTORY

This matter was filed in the Office of Administrative Law (OAL) by the agency head on August 31, 2000. On September 25, 2000, a prehearing convened and an order followed on that date. Hearing was scheduled for November 20, 28 and 30, 2000 and concluded on November 28, 2000 in the Atlantic City hearing rooms of the OAL. Briefs followed, the last of which was filed on December 19, 2000. On that date, the record closed.

ANALYSIS OF THE RECORD

Background:

On June 8, 2000, respondent was a teacher of classified students in a self-contained classroom of emotionally disturbed children in the Bridgeton Middle School which included eighth-grade students. The population varied from five to seven. In that room, she was aided by an instructional assistant (IA), Jennifer Pettit.

On June 8, 2000, a Thursday, respondent and Ms. Pettit, with two adolescent male students of the class, J.T. and J.H., went to the high school for a brief tour. Both boys were to transfer there in the following year. The group then returned to the class where other children were tie-dying T-shirts. Respondent directed that these activities stop, and that the usual snack time begin. She took doughnuts from a nearby closet, remainders from a prior school event, and distributed them to the students. The group sat at two adjacent tables while this occurred.

At some point, student J.T., aged 14, took one or more of the doughnuts and went to the door of the classroom, passing over a duct-tape line placed there as a boundary. After crossing over into the prohibited area, J.T. passed a doughnut or doughnuts to another student standing in the hallway, who then ran upstairs.

Reacting, respondent told J.T. when he returned to his seat that he would not be going on the eighth-grade school trip to Clementon Park the following day, Friday, June 9. He was the second student to be barred, since J.H., approximately the same age as J.T., had also been denied the bus trip for refusing to listen to instructions and for other unacceptable behavior.

In any event, while the testimony described below differs on precisely what happened after J.T. returned to the table, there is no doubt that respondent had used language indicating that both boys would have to "kiss her butt" if they intended to be reconsidered for the class trip to Clementon Park. The Board contends that J.H. (but not J.T.) did exactly that, twice, at respondent's invitation. In reply, respondent maintains that this turn of phrase was colloquial, not literal, and was recognized as such by the boys. However, she concedes at least that J.H. had made "kissing sounds" behind her back, without making contact with her body. The boys themselves insisted that there was definite touching by J.H., invited by respondent when she patted her buttocks. Whatever the result, once done, there was general laughter in the class, and respondent sent IA Pettit to the office with J.H. so that he could obtain a permission slip allowing him to go on the trip. Later that day, respondent relented with J.T., as well, allowing him to join the students going to Clementon Park. J.H. went home, and told his guardian.

The following day, the boys went on the trip. But on that day and thereafter, J.H. was the subject of ridicule by other children over his action, once it became known to the rest of the school. On the following Tuesday, June 13, 2000, the mother and the guardian of the two boys arrived at the school irate over what had been told to them. After agitated discussion with the Acting Principal, Rita Sherman, among others, the relatives were persuaded to enter the Office of the Assistant Principal to explore their complaint. In the meantime, James Dunkins, the Affirmative Action Officer for Bridgeton Board of Education, was called by the Assistant Principal, Christine Miles, and eventually a meeting of the parents, school officials and

respondent took place. The parent and guardian were not mollified, although respondent apologized, and J.H. never returned to school, remaining to this day on home instruction.

The upshot of the confrontation after the incident was that on August 8, 2000, the Bridgeton Board of Education found probable cause to accept the certified charges of July 21 from Dr. Geraldine O'Foster, Superintendent of Bridgeton Public Schools. After consideration, on August 15, 2000, the Board of Education issued a Resolution certifying the charges to the New Jersey Commissioner of Education, indicating that the charges warranted respondent's dismissal or reduction in salary.

After declaring the matter a contested case, the agency head forwarded the dispute to the OAL, and these proceedings followed.

Arguments of the Parties

Petitioner Board of Education's Argument:

The Board presented its case through testimony and post-hearing letter briefs:

Both boys, J.T. and J.H., agreed that they had always gotten along with respondent as a teacher. Giving details of the incident, however, **J.T.** recalled at hearing that after he refused respondent's order to recover the doughnut from the other student, she told him he could not go on the class trip to Clementon Park. However, he said, respondent next declared that if he wanted to go, he would have to "kiss her butt." He related that respondent had arisen from her chair, bent over, and patted her buttocks with her hands. Recalling her response, J.T. testified that "I told her to get out of my face." He continued that respondent had then asked who else wanted to go to Clementon Park. J.H. replied that he did, and, according to J.T., respondent made the same offer, still bent over. J.H. accepted, did press his lips to her buttocks, making contact twice, and everyone in the classroom laughed. Later, J.T. stated, J.H. encountered considerable teasing over his actions, as did he, J.T., for a time, when it was at first thought by the other students that he had done the same.

In support of this description, **J.H.** described the scene exactly as did J.T., confirming that, in fact, he had kissed respondent's buttocks twice, after she had patted them, and had invited him to do so each time. He declared that there was definite contact over her right side back pocket. He also agreed that everyone in the classroom had laughed, and that when taking him to the school office, Ms. Pettit had told him, "I can't believe Ms. Cooper did that!" The following week when he returned to school, his classmates made fun of him, calling him "booty lips" and "butt kisser." Because of the impact of this teasing, J.H. noted, he now was on home study, and he did not wish to return to the school. It upset him to be ridiculed by his classmates. He felt embarrassment and shame.

The IA, Jennifer Pettit, testified similarly. She had not personally observed the first incident of contact, but did see the second. She had seen the second contact only after she had been alerted by the other children who had said, "Ms. Pettit, watch this!" attempting to get her attention. Nevertheless, she did recall that respondent had warned J.T. beforehand, that he was walking a "fine line," and that if he did not improve, there would be no school trip. Ms. Pettit stated that respondent next made the remark, "You guys should be kissing my butt if you want to go on the trip." Ms. Pettit observed that J.H., sensing an opportunity, asked if respondent meant it seriously. In reply, respondent leaned over, but did not pat herself, in Ms. Pettit's recollection. Ms. Pettit was certain that J.H. had literally put his lips on her buttocks and that considerable laughing and joking followed, with the students saying, "Oh my God, I can't believe he did it." Moreover, Ms. Pettit recalled, it was respondent who asked her to watch, jutted her buttocks outward, and the kiss followed. Respondent then directed that J.H. be taken to the office for a permission slip.

Ms. Pettit remembered also that, on the trip to Clementon Park the following day, respondent, seated behind her, related the story to other teachers, making light of its significance, saying that she even had kids "kissing her butt." Notwithstanding, Ms. Pettit thought that respondent was an excellent teacher. She added that the remarks attributed to her, Ms. Pettit, by J.H., on the way to the office for a permission slip were inaccurately recounted. Her comment

was that "I couldn't believe that *he* [J.H.] did that!" Ms. Pettit stated that she had not critiqued respondent.

Ms. Pettit agreed that respondent's initial statement was figurative, not literal, and that at no time did she observe respondent patting her body.

Recalling the June 8th teacher-lounge incident, **Charles Peraset** another teacher, recalled three occasions on which respondent had spoken of the event. On the first, respondent had burst into the lounge and said, "I made a student kiss my butt to go on a trip." On a second occasion, Mr. Peraset heard respondent repeat the same description. However, on the third, Mr. Peraset stated that she had come to him for advice because he had been an NJEA labor consultant for 22 years. At that time, he testified, respondent had said, "Yeah, I tend to shoot my mouth off, but I really didn't do it." Mr. Peraset stressed that she had not described her actions in any great detail in these three instances.

Sandra A. Delessio, a fellow teacher, testified that, at an immediately subsequent team teacher meeting, respondent had disclosed that she had told J.H. that the only way he could go on the Clementon trip was to "kiss her butt," and that he actually did. In the telling, respondent had laughed at her own story, Ms. Delessio said, and at first she had thought respondent was joking.

Nina Hendricks heard respondent's description of the incident in the teachers' dining room, seated at a nearby table at lunch. Respondent announced that she had told two students to "kiss her butt, " and that they had. Ms. Hendricks remembered that respondent was laughing, saw it as a joke, carried out without malice. In talking to the IA, Jennifer Pettit afterward, Ms. Hendricks added, the IA confirmed the remarks with a kind of grimace, and both she and Ms. Pettit shared a shocked reaction, although they thought it not unusual for respondent, even without being certain whether the tale was a fact.

Rita Sherman, Acting Principal, recalled that at the tumultuous meeting in the school on the following Tuesday, respondent admitted that she was wrong, and apologized. The apology was not accepted by the parent and the guardian, who expressed their outrage at such

behavior and language in a teacher. However, Ms. Sherman believed that respondent, in her explanation at the meeting, conveyed her view that the "kiss my butt" statement was not meant to be literal, but instead was a demand that the offending students thereafter should "toe the line."

Ms. Sherman believed also that respondent was not agreeing with the parent's and guardian's description of what occurred, but meant to say only that, when J.H. declared that he would undertake the act, respondent had bent over slightly, and the student, J.H., had made "kissing noises" at her back, without contact. Respondent described her reaction as one of surprise.

In Ms. Sherman's recollection, the parent's and guardian's anger was focused on the end result that other children had ridiculed J.H. Ms. Sherman believed that the complainants had not thought at the meeting that there had been physical contact, but were dismayed and offended by the choice of language coming from a teacher.

James Dunkins, the then affirmative action officer for the district, confirmed his efforts at mediation during this meeting. He corroborated that respondent had said then that J.H. had gone behind her, without contact, and that she had heard only "kissing sounds."

Some months later, on October 27, **James L. Hewitt, M.D., psychiatric consultant,** saw J.H., and on November 2, 2000, issued his report (P-5). In both hearing testimony and in his medical report, Dr. Hewitt thought that the story spread among J.H.'s peers, which caused him to be the object of considerable teasing, precipitated an anxiety reaction triggering embarrassment beyond that of a less handicapped student. He proposed medications: Adderil, Paxil, and Zoloft (Exh. P-5). The doctor found that J.H. was impaired by attention deficit disorder and adjustment disorder with disturbance of emotions.

While the doctor discerned that J.H. had no bad feelings toward the teacher, he concluded that the acute embarrassment to a 15-year-old boy, derived from the taunts of his friends and other students, was inherently harmful to J.H's already very fragile self-confidence. He observed that J.H. tends to overreact to his peers. In addition, Dr. Hewitt believed that J.H. suffered from

persisting emotional disturbance and anxiety reaction as a result of the incident, and that this condition should be mitigated through the aforementioned drugs addressing social anxiety. Dr. Hewett thought that J.H. should attempt to return to school, but only in an out-of-district placement, accompanied by regular counseling.

In post-hearing letter brief, the Board reiterated its view of the testimony, stressing the serious consequences in the mind of a cognitively disabled student and the emotional fallout preventing J.H.'s return to school. Such callous conduct, in the Board's view, was unbecoming and manifested gross disregard for her special teaching obligation. The Board offered case law which it urged as supporting its view that even a single incident resulting in ridicule under these circumstances can be cause for discharge, particularly when there is a lack of civility and respect for children.

Respondent's argument:

Respondent Catherine Cooper, testifying on her own behalf, emphasized that she had never been disciplined previously and was the head union representative in her building. She agreed with the general testimonial outline of the occurrence. On the other hand, she pointed out crucial differences. Respondent stated that when she called J.T. back into the room, she cautioned that when he refused to listen to her instructions, she could not foresee how he could be on the bus to Clementon Park the following day. J.H. had intervened then, and said, "If I kiss your butt, can I go on the trip?" Respondent stated that she replied, "Sure," and turned away, a gesture which was followed by "kissing sounds." There was no physical contact. This scene had caused general laughter throughout the classroom, with J.H. rolling on the ground with delight.

Respondent testified that she was certain J.H. understood that, in using the objectionable phrase, she was responding to *his* language, and the figure of speech "kiss butt" would be understood by him to mean merely that his behavior would have to improve to her satisfaction. No one had been upset by what happened, and the class had not been disrupted, she said. In fact, respondent recalled, after being granted permission, J.H. was happy to be going on the trip. J.T. also was allowed to go, after he became emotional and cried over having been barred.

respondent recalled, after being granted permission, J.H. was happy to be going on the trip. J.T. also was allowed to go, after he became emotional and cried over having been barred.

Respondent acknowledged that in the teacher's lounge she had said, " I made those kids kiss my butt today," but had never made such a statement on the bus, and had not talked to Ms. Delessio or Ms. Hendricks about the incident. Ms. Hendricks had overheard her comments in the lounge. Respondent was also certain that, at the meeting with the parent and guardian, she had insisted that the actual kissing did not take place, and had apologized only for the words that were used. Respondent was certain that J.H. was aware that her intent was not literal.

In post-hearing brief, respondent argues that all who testified agreed that her intent was simply to get her charges to toe the mark for the short remainder of the year, if they expected to go on the Clementon Park trip. At no point did anyone suspect that she had solicited sexual advances, nor had she consciously meant to humiliate a student.

Respondent emphasized that her record as a teacher is without blemish, and that Ms. Pettit, who works with her in the class, testified that she was an excellent teacher. Against that background, the law to be considered is that the need to remove a teacher for a single incident must be "sufficiently flagrant," and the nature and length of a teacher's prior service must be considered as well as whether there are indications that the act was "premeditated, cruel or vicious, or done with intent to punish or inflict corporal punishment". Applying these standards, respondent maintains she should not be removed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact:

To resolve disputes of material fact, I make the following **FINDINGS**:

1. On June 8, 2000, after disruptive behavior by J.T., respondent advised him that if he intended to go on the class trip, he would have to "kiss my butt" for

the remainder of the year. Respondent did not at the time of utterance mean this in the literal sense.

2. Hearing this, student J.H. asked if she was serious, to which she responded that she was.

3. Respondent then presented her buttocks, clad in jeans, to J.H. twice and J.H. made kissing contact over the right rear pocket twice, before the entire special education class.

4. The incident was intended by respondent as a joke, not as a humiliation of J.H., nor as a sexual gesture.

5. Afterward, respondent, in the teacher's lounge at lunch, and on the bus going to the Clementon Park class trip, made light of the incident, relating that she invited students to kiss her butt and that one student actually had done so.

Conclusions of Law

Burden of proof:

The burden of proof falls on the agency in enforcement proceedings to prove violation of administrative regulations, *Cumberland Farms, Inc. v. Moffett,* 218 *N.J. Super.* 331, 341 (App. Div. 1987). The agency must prove its case 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).

Applying the law to the facts:

Respondent is fully credible in her assertion that her initial admonishment to the students in her special education class, comprised of emotionally disturbed students, at first was meant only in the figurative sense: that they would have to "kiss her butt," *i.e.* be especially nice and remain on good behavior for the remainder of the year, if they were to attend the class trip. There was no intent to invite physical contact, or to humiliate, or to obtain sexual gratification for herself or her charges.

Nevertheless, following that announcement, the situation changed, and her conduct went beyond professional boundaries, apparently as an impulsive attempt at humor. When J.H. asked if kissing her buttocks would earn him a berth on the bus, it is believable from the testimony of a disinterested IA, Ms. Pettit, and the unvarying corroboration of the two youths, that she then permitted the act itself, as found above at FINDING number 3. That testimony is supplemented by the fully credible testimony of Mr. Peraset, Ms. Delessio and Ms. Hendricks, who had heard her shortly after portray the event as a comic aberration.

It is true that removal of any teacher from a tenured position may not be undertaken casually. Full evaluation of the charges, including the nature of the act, a total impression of the context, and the impact on a teacher's career is necessary. *In re Fulcomer*, 93 *N.J. Super* 404, 421 (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. *Ibid.* What occurred here is such a single incident.

Respondent traveled far beyond the pale of lighthearted spontaneity in allowing and encouraging an adolescent male student, classified as learning disabled with emotional problems (Exh. P-5), to engage in such behavior, especially when the youth's response is prompted by an

itself, the event engaged the excited response of the other classified children, who clamored to have the IA watch what they themselves knew to be an extraordinary happening.

The crux of this matter is the eventual effect on J.H. The fallout has been devastating. He remains to this day isolated in a home-study setting, as a consequence of respondent's poor judgment. Respondent exposed an emotionally disturbed student to the ridicule, embarrassment and shame which followed this bizarre encounter. Her blithe retelling of the tale to colleagues immediately afterward betokens an insensitivity which cannot be countenanced in a teacher of emotionally-handicapped and learning-disabled students. The record here discloses an inability to maintain personal controls, a deficiency highlighted by behavior which compels the termination of respondent's tenured position.

ORDER

I ORDER, therefore, relying on the reasons outlined above, that the removal of respondent, **Catherine Cooper** from her tenured position as a teacher in the Bridgeton School District be, and hereby is, **AFFIRMED.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (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 2, 2001

DATE

JOSEPH LAVERY, ALJ

Receipt Acknowledged:

2-5-01

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 7 2001

DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

mph

DOCUMENTS IN EVIDENCE

For petitioner:

P-1 Handwritten Incident Report: Jennifer Pettit

P-2 Incident Report: Rita F. Sherman

P-3 Memo from James A. Dunkins to Dr. Foster, dated June 19, 2000

P-4 Curriculum Vitae: James L. Hewitt, M.D.

P-5 Medical Report, James J. Hewitt, M.D., dated November 2, 2000

P-6 Handwritten Incident Report: S. Delessio, dated June 20, 2000

P-7 Incident Report: Nina Hendricks, dated June 20, 2000

For respondent:

None

WITNESS LIST

For petitioner Board of Education:

J.T.

J.H.

Jennifer Pettit

Rita F. Sherman

James Dunkins

James L. Hewitt, M.D.

Charles Peraset

Sandra A. Delessio

Nina Hendricks

For respondent:

Catherine Cooper testified on her own behalf

OAL DKT. NO. EDU 6550-00
AGENCY DKT. NO. 291-8/00

IN THE MATTER OF THE TENURE	:	
HEARING OF CATHERINE COOPER,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
CITY OF BRIDGETON, CUMBERLAND	:	
COUNTY.	:	
	:	

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

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm the Initial Decision, for the reasons expressed therein. Accordingly, respondent is deemed dismissed from her position as a tenured teacher with the Board as of the date of this decision. A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate, pursuant to *N.J.A.C.* 6:11-3.6.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/22/01

Date of Mailing: 3/22/01

* 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.

106-01

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION
IN THE MATTER OF THE DISTRICT EARLY CHILDHOOD PLAN APPLICATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

MAR 2 3 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6453-00

AGENCY DKT. NO. 281-8/00

IN THE MATTER OF THE EARLY CHILDHOOD PLAN OF THE VINELAND SCHOOL DISTRICT, CUMBERLAND COUNTY,

---

Robert A. DeSanto, Esq., for petitioner Board of Education (Gruccio, Pepper, Giovinazzi, DeSanto and Farnoly, attorneys)

Michael C. Walters, Deputy Attorney General, for respondent (John J. Farmer, Jr., Attorney General of New Jersey, attorney)

Record Closed: January 25, 2001 Decided: February 8, 2001

BEFORE **JOSEPH F. MARTONE,** ALJ:

This matter was transmitted to the Office of Administrative Law on August 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 Consent Order 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.

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 8, 2001
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

2/13/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 14 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

mph

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	)	OAL DOCKET NO. EDUOT 06453-00S
Petitioner,	)	Agency Ref. No. 281-8/00
v.	)	
NEW JERSEY DEPARTMENT OF EDUCATION,	)	**CONSENT ORDER OF SETTLEMENT**
Respondent.	)	

Petitioner, Board of Education of the City of Vineland ("Petitioner"), through its Attorney, Robert A. DeSanto, Esq., (Robert A. DeSanto, appearing) 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 (Michael C. Walters, Deputy Attorney General, appearing), hereby stipulate to the following terms of settlement:

1. On or about August 3, 2000, Petitioner filed a Petition of Appeal ("Petition") with the Commissioner of Education seeking review of the Department's determinations with respect to Petitioner's One-Year Early Childhood Operational Plan for the 2000/2001 school year.

2. The Petition was subsequently transferred to the Office of Administrative Law as a contested case.

3. The parties thereupon entered into discussions to amicably resolve this matter in the public interest.

4. Based on those discussions, the Department agrees that the Petitioner has demonstrated a need for additional funding for transportation in the amount of $241,800; Petitioner has demonstrated a need for additional funding for rental of facilities for in-district

operated early childhood programs in the amount of $254,100; Petitioner has demonstrated a need for additional funding for 1.85 child study teams in the amount of $708,504; Petitioner has demonstrated a need for additional funding for refreshments for training seminars in the amount of $4,560; Petitioner has demonstrated a need for additional funding for playground equipment in the amount of $81,000; and Petitioner has demonstrated a need for additional funding for kitchen equipment in the amount of $21,000.

5. The Department agrees to provide Petitioner with supplemental funding in the amount of $1,310,864. Petitioner may anticipate revenue in the amount of $1,310,864 and record an accounts receivable in the 2000/2001 budget year of that same amount. The Vineland Board of Education is hereby authorized to borrow from any of its designated banks or lending institutions, such amounts up to the amount of the account receivable in order to provide cash for the fiscal year 2000/2001 needed to pay for programs, personnel and expenses that the district would have paid for if the settlement proceeds were furnished by the Department during this fiscal year. The receipt of this additional amount of funds will occur in the 2001-2002 budget year subject to appropriation in the FY 2002 Appropriations Act.

6. The Petitioner agrees to dismiss with prejudice Petitioner's 2000/2001 Early Childhood appeal (OAL Docket No. EDUOT 06453-00S; Agency Ref. No. 281-8/00) pending before the Office of Administrative Law and the Commissioner of Education.

7. Petitioner agrees to reduce the amount of supplemental funding on appeal in Petitioner's 2000/2001 Supplemental Aid Appeal (OAL Docket No. EDUOT 06095-00S; Agency Ref. No. 235-6/00) by $708,504. Accordingly, the amount of Supplemental Funding on appeal in Petitioner's

2000/2001 Supplemental Aid appeal (OAL Dkt. No. EDUOT 06095-00S; Agency Ref. No. 235-6/00) is $25,791,766.

8. In the event that Petitioner can demonstrate that actual enrollment in Petitioner's early childhood program exceeds the Department's projected enrollment during the 2000/2001 school year, 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).

9. 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

ROBERT A. DE SANTO ESQ.
Attorney for Petitioner,
Board of Education of the
City of Vineland, New Jersey

MICHAEL C. WALTERS, DAG

DATED: 1/17/01

ROBERT A. DE SANTO, ESQ.

DATED: 1/22/01

SO ORDERED THIS 25th DAY OF January 2001.

HONORABLE JOSEPH MARTONE, A.L.J.

OAL DKT. NO. EDU 6453-00
AGENCY DKT. NO. 281-8/00

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION **IN THE MATTER OF THE DISTRICT EARLY CHILDHOOD PLAN APPLICATION,**	:	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 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: MAR 2 3 2001

Date of Mailing: MAR 2 3 2001

107-01

MAURICE S. KAPROW,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

MAR 26 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 00117-00

AGENCY DKT. NO. 370-12/99

MAURICE KAPROW,

Petitioner,

v.

BOARD OF EDUCATION OF

BERKELEY TOWNSHIP,

OCEAN COUNTY,

Respondent.

Elaine Stein, Esq., for petitioner (Lomurro, Davison, Eastman & Munoz, attorneys)

Kevin Riordan, Esq., for respondent (Berry, Kagan, Sahradnik, Kotzas & Riordan, attorneys)

Record Closed: February 1, 2001 Decided: February 6, 2001

BEFORE **LILLARD E. LAW,** ALJ:

These matters were transmitted to the Office of Administrative Law on January 11, 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 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 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.

2/6/01
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

2/8/01
DATE

Debbie Anderson /gp
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 9 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

FILED
FEB 1 11 57 AM '01
STATE OF NEW JERSEY
OFFICE OF
ADMINISTRATIVE LAW

LOMURRO, DAVISON, EASTMAN & MUÑOZ, P.A.
Monmouth Executive Center
100 Willowbrook Road, Building 1
Freehold, New Jersey 07728
(732)462-7170
Attorneys for Petitioner

MAURICE S. KAPROW, PETITIONER, v. BOARD OF EDUCATION OF BERKELEY TOWNSHIP RESPONDENT.	: : : : : : : : : : :	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OAL Docket No. EDUCA 00117-00S Agency Ref. No. 370-12/99 CONSENT ORDER

THIS MATTER having been opened to the Office of Administrative Law Court by petition to the Commissioner pursuant to the school laws and upon a motion for partial summary judgment on behalf of Petitioner, Maurice S. Kaprow, appearing by counsel Duane O. Davison, Esq., of the law firm Lomurro, Davison, Eastman & Munoz, P.A., and Respondent Board of Education, appearing by counsel Kevin B. Riordan, Esq. of the law firm Berry, Kagan, Sahradnik, Kotzas & Riordan, and the parties having consented hereto and for good cause shown;

IT IS ON THIS 1st day of February, 2001;

ORDERED that Respondent, Board of Education of Berkeley Township, has violated the mandate of the New Jersey Supreme Court in Kaprow v. Board of Education of Berkeley Township, 131 N.J. 572, 580 (1993) in that the local board failed to fulfill its obligations pursuant to N.J.S.A. 18A:28-10; and

IT IS FURTHER ORDERED that defendant is hereby directed to maintain the seniority and eligibility lists it is required to maintain with regard to employees who are subject to a reduction in force; and

IT IS FURTHER ORDERED that Respondent shall notify Petitioner of any and all positions to which Petitioner has seniority rights; and

IT IS FURTHER ORDERED that all other claims in the petition are dismissed; and

IT IS FURTHER ORDERED that this Order shall be served on all parties of record within 10 days of the date hereof.

Lillard E. Law

Honorable Lillard E. Law, A.L.J.

LOMURRO, DAVISON, EASTMAN & MUNOZ
Attorneys for Plaintiff

DUANE O. DAVISON, ESQ.

DATED: 11-27-00

BERRY, KAGAN, SAHRADNIK, KOTZAS & RIORDAN
Attorneys for Respondent

KEVIN B. RIORDAN, ESQ.

DATED: 11/21/01

F:\HOME\JMN\GENERAL\KAPROW\CONSENT.WPD

OAL DKT. NO. EDU 00117-00
AGENCY DKT. NO. 370-12/99

MAURICE S. KAPROW,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY, OCEAN COUNTY,	:	DECISION
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. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: MAR 26 2001

Date of Mailing: MAR 26 2001

108-01

#108-01

IN THE MATTER OF THE TENURE :

HEARING OF PATRICIA M. WITKOWSKI, :

SCHOOL DISTRICT OF THE BOROUGH OF COMMISSIONER OF EDUCATION

TOTOWA, PASSAIC COUNTY. : DECISION

AND

PATRICIA M. WITKOWSKI, :

PETITIONER, :

V.

BOARD OF EDUCATION OF THE BOROUGH OF TOTOWA, PASSAIC COUNTY, :

RESPONDENT. :

March 26, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NOS. EDU 7215-00 &
EDU 7298-00
AGENCY DKT. NOS. 240-7/00 &
262-7/00

IN THE MATTER OF THE TENURE HEARING OF PATRICIA M. WITKOWSKI, SCHOOL DISTRICT OF TOTOWA, PASSAIC COUNTY,

And

PATRICIA WITKOWSKI,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF TOTOWA, PASSAIC COUNTY,

Respondent

Gail Oxfeld Kanef, Esq., for petitioner
(Oxfeld, Cohen, Attorneys)

Allan P. Dzwilewski, Esq., for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: January 17, 2001 Decided: January 25, 2001

BEFORE **IRENE JONES**, ALJ:

On July 5, 2000, the Board of Education of the Borough of Totowa, Passaic County (District), certified charges of unbecoming conduct, insubordination, and/or

other just cause against the respondent, Patricia M. Witkowski (Witkowski). Witkowski is a tenured teacher employed by the District. On July 10, 2000 the District filed the written charges with the Commissioner of Education. Witkowski filed an Answer to the charges on July 25, 2000.

On July 25, 2000, Witkowski (now petitioner) also filed a petition of appeal with the Commissioner of Education. She alleged that as a School Nurse, she was assigned to teach health after returning from her medical leave of absence. This assignment, she alleges, was in violation of her 2000-2001 employment contract. She is not certified as a health teacher. Further, the contract reduced her salary in that it paid her on a step 6 of the salary guide. Prior to September 1997, she was paid on step 7 level pursuant to Collective Bargaining Agreement. Thus, the reduction in her salary violated her tenure rights. On July 31, 2000, petitioner withdrew Count two, the salary reduction, from the petition. An Answer was filed by the District on August 7, 2000.

On August 2, 2000 and August 10, 2000, the matters were 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 tenure charges was assigned OAL Docket Number EDU 7215-00 (Agency reference number 240-7/00). Witkowski's petition of appeal was assigned OAL docket number EDU 7398-00 (Agency reference number 262-7/00).

A prehearing conference was held on October 2, 2000 and a prehearing Order issued on October 5, 2000. An Order of Consolidation was filed on November 13, 2000 and signed on November 15, 2000.

Prior to the hearing, the parties advised that they had settled the matter. A stipulation of settlement was filed on January 17, 2001 and is attached hereto.

DISCUSSION

In accordance with the decision of the State Board of Education in *Cardonick v. Brookline Board of Education,* 1990 *S.L.D.* 842, the record of any proposed settlement must include:

> [T]he nature of the charges, circumstances justifying the settlement, consent or authorization by the Board of Education and the teacher to the proposed agreement, the Administrative Law Judge's findings that the teacher entered into the agreement with a full understanding of his rights and that the agreement is consistent with the public interest. See Cardonick at 850-51.

In this matter, the District filed charges alleging that Witkowski, a School Nurse, engaged in unbecoming conduct and insubordination. Specifically, the tenure charges allege that on July 29, 1999, Witkowski was granted District approval for a medical leave of absence commencing September 7, 1999 through March, 2000. On September 27, 1999, the District requested that Witkowski provide it with a more definitive medical leave return date so that it could use and provide this date to any replacement hire. Further, the District requested that Witkowski provide more specific information concerning her pregnancy leave, such as, existing medical complications; a letter from her physician detailing a diagnosis; current treatment; and long term prognosis. The District requested that the information be provided no later than October 13, 1999.

On October 6, Witkowski replied that her medical condition had not changed from her original request for medical leave. She did not foresee any possibility of her returning to work prior to March, 2000. Finally, Witkowski provided that she and her physician concluded that further information was not necessary in that same was personal and confidential. She did advise that if there were any changes in her circumstances, she would so advise.

The District deemed Witkowski's reply to be unresponsive and had its attorney send a second letter to Witkowski imploring her to provide a letter from her physician. After a further exchange of letter and phone calls, the parties agreed on a November 1st date for the submission of the information. This deadline passed without response. On November 19, the District set a final extension date of November 29 and advised that a failure to provide the medical documentation would be deemed insubordinate. Finally, the District requested that Witkowski submit to a medical examination by an independent medical examiner at its expense. The District set forth the name of two physicians. Due to a change in Witkowski's counsel this deadline was extended to December 5. Again, the District advised that a failure to comply with this deadline would be deemed insubordination. On December 3, Witkowski's physician sent a letter advising of the pregnancy complications. Further, a "due date" of March 30, 2000 was set.

On April 25, Witkowski advised that she had given birth on April 1, 2000. Further, that she would be extending her leave for the remainder of the school term. The District rejected the extended leave and demanded that Witkowski return to work immediately or face tenure charges. Witkowski's physician submitted a letter stating that she was suffering from postpartum depression and would not return to work until May 22, 2000. The District objected to this return date and filed tenure charges on May 15, 2000.

Subsequent to the prehearing conference, the parties engaged in settlement negotiations and were able to settle the matter. As a part of the agreement, Witkowski acknowledges that these are tenure charges and thus they are subject to the standards in *Cardonick v. Brookline Board of Education*, 1990 *S.L.D.* 842. Specifically, it is acknowledged that the Commissioner of Education may refer this matter to the State Board of Examiners for further action concerning her school nurse certificate. In mutual consideration of the settlement, Witkowski agrees to resign from her position as a school nurse, effective July 1, 2000. Further, she agrees to withdraw her petition of appeal. The District agrees to pay Witkowski a lump sum payment equivalent to her full

year's salary for the 2000-2001 school term, subject to all appropriate deductions and credits.

After a review of the entire record and in consideration of the *Cardonick* standards, I **FIND** that the proposed settlement is in the public's interest because it will save significant legal expenses and costs as well as time expended by administrative witnesses. I further **FIND** that the charges herein are primarily concerned with allegations of absenteeism and a continuing act of alleged insubordination related to that absenteeism. These charges, while serious, do not have an overriding public interest. I **FIND** the public interest would be best served by resolving the present controversy.

I further **FIND** that Witkowski had full opportunity to consult with her legal counsel prior to entering into this agreement. She is aware that pursuant to *N.J.A.C.* 6:11-3.6, the Commissioner may refer this matter to the State Board of Examiners for any action which he may deem appropriate. Further, the parties are all aware that notwithstanding their agreement to settle this matter, the Commissioner may not approve the settlement agreement. Thus, any execution of the settlement agreement prior to the Commissioner's approval is done at their peril.

I **CONCLUDE** that the proposed settlement fully disposes of all issues and controversies and that the terms of the settlement are in the public interest.

It is therefore **ORDERED** that upon approval by the Commissioner that the parties shall comply with the terms of the settlement 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.

2/7/01
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

2/9/01
DATE

Debbie Antonatti /jp
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 13 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sej

OXFELD COHEN, LLC
50 Commerce Street
Newark, New Jersey 07102
(973) 642-0161
Attorneys for Respondent

STATE RECEIVED
OFFICE OF NEW JERSEY
OF ADMIN. LAW
JAN 17 3 47 PM '01

BOARD OF EDUCATION OF THE BOROUGH OF TOTOWA, Petitioner, -vs- IN THE MATTER OF PATRICIA WITKOWSKI, and PATRICIA WITKOWSKI, Respondent.	:	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDU 7215-00 OAL DOCKET NO. EDU 7298-00 **SETTLEMENT AGREEMENT**

This Agreement is made on this 16th day of January, 2001, by and between the parties, Petitioner Board of Education of the Borough of Totowa and Respondent Patricia Witkowski, a tenured school nurse, residing at 58 Brunswick Road, Cedar Grove, New Jersey 07009;

WHEREAS, Ms. Witkowski is a tenured school nurse employed by the Respondent school district;

WHEREAS, on or about May 15, 2000, tenure charges were filed against Ms. Witkowski alleging unbecoming conduct and insubordination;

WHEREAS, on or about May 30, 2000, Ms. Witkowski denied the charges.

WHEREAS, the Petitioner certified the charges to the Commissioner of Education. Ms. Witkowski is currently serving a 120 day suspension without pay pending a hearing pursuant to N.J.S.A. 18A:6-14.

WHEREAS, Ms. Witkowski has filed a Petition of Appeal concerning issues related to her work assignment;

WHEREAS, in light of the nature of the charges and the possibility of protracted litigation, it is in the best interest of the parties to resolve the certified charges before the Commissioner of Education and to resolve the Petition of Appeal;

NOW THEREFORE BE IT RESOLVED, the parties hereby stipulate and agree as follows:

1. Ms. Witkowski agrees to resign from her school nurse position effective July 1, 2000. Upon the final approval of the signed agreement, the Respondent shall and hereby does withdraw the tenure charges.

2. Ms. Witkowski will receive a lump sum payment from the respondent Board of Education equivalent to her full year's salary for the 2000-2001 school year. All appropriate deductions shall be made from the payment and all appropriate pension contributions and credits shall be made on behalf of Ms. Witkowski by the district.

3. Ms. Witkowski specifically acknowledges that she has been advised of the duty of the Commissioner of Education pursuant to N.J.A.C. 6:11-3.6(a)(1) and In re Cardonick concerning referral to the State Board of Examiners for possible action regarding Ms. Witkowski's school nurse certificate.

4. The Respondent will not pursue tenure charges against Ms. Witkowski as long as the settlement remains in effect and is not voided by any court of competent jurisdiction or agency with jurisdiction over this matter. However, if the settlement is voided, the Respondent retains the right to reinstate the tenure charges against Ms. Witkowski.

5. Ms. Witkowski agrees not to pursue the Petition of Appeal that she has filed against the Board of Education which has been consolidated with this matter and which bears the docket number EDU-7398-00 as long as this settlement remains in effect and is not voided by any court of competent jurisdiction or agency with jurisdiction over this matter. However, if the settlement is voided, Ms. Witkowski retains the right to reinstate the Petition of Appeal.

6. The parties respectively acknowledge that each has had ample opportunity to seek independent legal counsel, financial or other advice regarding this Agreement, and that each is signing this Agreement freely and voluntarily, without coercion, duress or pressure from the other party.

7. This Agreement constitutes the full Agreement between the parties.

8. By entering into this Agreement, 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 which has happened up to now. It specifically includes without limitation all claims which Ms. Witkowski 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 except as stated herein. However, the releases will be null and void if this Agreement is declared null and void by a court of competent jurisdiction or agency with jurisdiction over this matter.

9. This Agreement is subject to approval by the Totowa Board of Education and the Commissioner of Education.

Patricia Witkowski

Gail Oxfeld Kanef
OXFELD COHEN, LLC

Allan P. Dzwilewski
Schwartz Simon Edelstein Celso & Kessler

DATED: 1-16-00

OAL DKT. NOS. EDU 7215-00 AND EDU 7298-00 (CONSOLIDATED)
AGENCY DKT. NOS. 240-7/00 AND 262-7/00

IN THE MATTER OF THE TENURE	:	
HEARING OF PATRICIA M. WITKOWSKI,	:	
SCHOOL DISTRICT OF THE BOROUGH OF		COMMISSIONER OF EDUCATION
TOTOWA, PASSAIC COUNTY.	:	DECISION
AND		
PATRICIA M. WITKOWSKI,	:	
PETITIONER,	:	
V.		
BOARD OF EDUCATION OF THE BOROUGH OF TOTOWA, PASSAIC COUNTY,	:	
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, in this consolidated matter 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 the matters which have been consolidated. *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 matters are hereby dismissed, subject to the parties' 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: MAR 26 2001

Date of Mailing: MAR 26 2001

109-01

THOMAS CUNNINGHAM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MEDFORD, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

March 30, 2001

OAL DKT. NO. EDU 10244-97
AGENCY DKT. NO. 393-10/97

THOMAS CUNNINGHAM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MEDFORD, 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 February 2, 2001 providing petitioner ten 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.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: March 30, 2001

Date of Mailing: March 30, 2001

* 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 the date of mailing to the parties.

110-01

J.W.A., on his own behalf and on behalf of his minor daughter, S.A., AND VINCENTIA LEWIS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

April 3, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3215-00
AGENCY DKT. NO. 43-2/00

J.W.A. ON HIS OWN BEHALF AND ON BEHALF OF HIS MINOR DAUGHTER, S.A., AND VINCENTIA LEWIS,

Petitioners,

v.

SOUTH ORANGE AND MAPLEWOOD BOARD OF EDUCATION,

Respondent.

Ellen M. Boylan, Esq., for petitioners

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

Record Closed: February 2, 2001 Decided: February 8, 2001

BEFORE **RICHARD McGILL,** ALJ:

J.W.A. 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 in regard to his daughter, S.A. District resident Vincentia Lewis is also a petitioner in this matter. Respondent counterclaimed for tuition reimbursement for the alleged period of ineligible attendance.

Prior to hearing, the parties agreed to the amicable resolution of the matter and submitted a written Stipulation of Settlement and Mutual Dismissal of 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.

Feb. 8, 2001
DATE

RICHARD MCGILL, ALJ

Receipt Acknowledged:

2/14/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FEB 15 2001
DATE

OFFICE OF ADMINISTRATIVE LAW

cml

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
RECEIVED
FEB 2 3 09 PM '01

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

J.W.A., ON HIS OWN BEHALF AND ON BEHALF OF HIS MINOR DAUGHTER, S.A., AND VINCENTIA LEWIS,

Petitioners,

v.

SOUTH ORANGE/ MAPLEWOOD BOARD OF EDUCATION,

Respondent/Counterclaimant.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL DKT NO. EDU 3215-00N

Agency Ref. No. 43-2/00

STIPULATION OF SETTLEMENT AND MUTUAL DISMISSAL OF PETITION AND COUNTERCLAIM

Petitioners John Wilson Adoboe and Vincentia Lewis and Respondent/Counterclaimant Board of Education of the School District of South Orange and Maplewood, 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 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 claims, 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.

3. As a result of the foregoing, Petitioners Adoboe and Lewis hereby withdraw their 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.

JOHN WILSON ADOBOE

BOARD OF EDUCATION OF SOUTH ORANGE AND MAPLEWOOD

VINCENTIA LEWIS

Document #: 438648/JLB

OAL DKT. NO. EDU 3215-00
AGENCY DKT. NO. 43-2/00

J.W.A., on his own behalf and on behalf of his minor daughter, S.A., AND VINCENTIA LEWIS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, Initial Decision and Stipulation of Settlement and Mutual Dismissal of Petition and Counterclaim have been reviewed. Upon such review, and noting the absence of any terms which would permit him to conclude that the settlement is fully dispositive of all issues in controversy pursuant to *N.J.A.C.* 1:1-19.1, the Commissioner determines, instead, to consider this matter a withdrawal pursuant to *N.J.A.C.* 1:1-19.2.

The Commissioner, therefore, approves the withdrawal of the petition and counterclaim, and determines that this matter shall be dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/2/01

Date of Mailing: 4/3/01

111-01

J.G.N. AND K.N., on behalf of minor child, J.N.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CUMBERLAND REGIONAL SCHOOL DISTRICT, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

April 2, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6303-00

AGENCY DKT. NO. 259-7/00

J.G.N. AND K.N. ON BEHALF OF MINOR CHILD, J.N.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CUMBERLAND REGIONAL SCHOOL DISTRICT, CUMBERLAND COUNTY,

Respondent.

Theodore Baker, Esq., for petitioner (Lummis, Krell & Baker, attorneys)

Gary Wodlinger, Esq., for respondent (Lipman, Antonelli, Batt, Dunlap, Wodlinger & Gilson, attorneys)

Record Closed: February 5, 2001 Decided: February 8, 2001

BEFORE **LILLARD E. LAW,** ALJ:

This matter was transmitted to the Office of Administrative Law on August 10, 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 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 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.

8 February 2001
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

2/15/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 16 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

LIPMAN ANTONELLI BATT DUNLAP WODLINGER & GILSON
110 N. Sixth Street, P.O. Box 280
Vineland, NJ 08362-0280
(609) 692-8000 fax (609) 692-7580
Attorneys for Respondent(s)

FILED
FEB 5 11 58 AM '01
STATE OF NEW JERSEY

JGN and KN, husband and wife and natural guardians Ad litem on behalf of their daughter child, JN

PETITIONER(S),

vs.

CUMBERLAND REGIONAL BOARD OF EDUCATION

RESPONDENT(S).

Agency Docket No. 259-7/00

Order of Dismissal Without Prejudice

THIS MATTER being opened by the Court on the Petition of JGN and KN husband and wife on behalf of their daughter, JN v. The Cumberland Regional Board of Education and the matter having been scheduled for trial on multiple dates, the first day of which was January 12, 2001 and the parties having appeared before Lillard Law, Administrative Law Judge on that date and having represented an amicable resolution to the dispute and the Court having been satisfied with respect to the resolution which will leave the ~~punishment~~ suspension in question undisturbed but in which the Cumberland Regional Board of Education promises to engage in the Administrative process necessary to review how students qualify for "academic letters" and the parties having represented through their counsel their satisfaction with the resolution of the matter and for good cause shown:

IT IS ON this 8th day of February, 2001 ORDERED that the petition in the above captioned is dismissed without prejudice.

Lillard E. Law

The Honorable Lilliard Law, J.O.A.L.

LAW OFFICES
LIPMAN, ANTONELLI, BATT, DUNLAP,
WODLINGER & GILSON
A PROFESSIONAL CORPORATION
VINELAND, NEW JERSEY 08362-0280

OAL DKT. NO. EDU 6303-00
AGENCY DKT. NO. 259-7/00

J.G.N. AND K.N., on behalf of minor child, J.N.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CUMBERLAND REGIONAL SCHOOL DISTRICT, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the Initial Decision and the Order of Dismissal Without Prejudice have been reviewed. Because the proposed Order does not meet the requirements for settlements set forth at *N.J.A.C.* 6A:3-1.13, the Commissioner shall consider this matter withdrawn.

The Commissioner, therefore, approves the withdrawal, and determines that this matter shall be dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/.2/01

Date of Mailing: 4/3/01

112-01

R.D., on behalf of minor children, S.C., S.D'O. AND J.D'O.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,

RESPONDENT-PETITIONER,

V.

J.C.D'O. AND T.D'O.,

THIRD-PARTY RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, on behalf of his child, niece and nephew (S.C., S.D'O. and J.D'O.), challenged the Board's determination that the children were not entitled to a free public education in the District. The Board claimed that petitioner did not have standing to file an appeal on behalf of his niece and nephew and filed a counterclaim for tuition against petitioner, as well as a third-party petition for tuition against the parents of the niece and nephew.

The ALJ found that there were no material facts at issue and that the District was entitled to summary decision as a matter of law. The ALJ found that the survey and deed showed that petitioner's residence was almost completely located in Englewood and his taxes were predominantly paid to Englewood. Since Englewood gains the benefit of petitioner's property taxes, the ALJ stated it would be unfair for Fort Lee to shoulder the financial burden of educating petitioner's children. Thus, the ALJ concluded that petitioner's children were not entitled to a free public education in Fort Lee since they do not reside in the District. The District's request for reimbursement of past tuition, however, was denied. The ALJ found that it would be inequitable under the facts of this case to direct petitioner to reimburse Fort Lee for tuition incurred before the date of the final order in this matter.

The Commissioner adopted the Initial Decision in part and modified it in part. The Commissioner concurred with the ALJ that, based on the undisputed facts, the minor children in this matter were not entitled to attend school in the District free of charge pursuant to *N.J.S.A.* 18A:38-1(a). However, with respect to the Board's counterclaim against R.D. and its third-party petition against the parents of S.D'O. and J.D'O. for tuition dating back to the 1998-99 school year, although the Commissioner agrees with the ALJ that, under the circumstances, it would be inequitable to assess tuition against them for the period prior to the date on which the Board issued its final decision to exclude the children from the District, the Commissioner found it appropriate to assess tuition after that date.

April 2, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7327-00
AGENCY DKT. NO. 254-7/00

R.D., ON BEHALF OF MINOR CHILDREN,
S.C., S.D'O. AND J.D'O.,
Petitioner,
v.
BOARD OF EDUCATION OF FORT LEE,
BERGEN COUNTY,
Respondent.

David Fronefield, Esq., appearing for petitioner

Robert T. Tessaro, Esq., appearing for respondent

Record Closed: February 1, 2001 Decided: February 21, 2001

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

STATEMENT OF THE CASE

Petitioner appealed the determination of Respondent Board of Education of Fort Lee (District) that minor children S.C., S.D'O. and J.D'O. were not entitled to a free public education in the District. Petitioner claimed that the minor children were entitled to a free public education pursuant to *N.J.S.A.* 18A:38-1(a) since they were domiciled

within the District. Respondent answered that the minor children did not meet the requirements of domicile in the District and filed a counterclaim for payment of tuition.

FACTS

The following facts are undisputed and I **FIND** them to be **FACTS** in this case.

When petitioner purchased his residence by deed dated July 1, 1993, the deed specified the house address as 460 Westview Place, Englewood, New Jersey. The deed describes petitioner's property as being located in the municipalities of Englewood and Fort Lee. Petitioner had purchased this house with the understanding that the previous owner's children had attended the Fort Lee public schools. Subsequent to the purchase petitioner enrolled his daughter in the Fort Lee District. Petitioner's niece and nephew moved from their residence in Fort Lee to petitioner's residence in early 2000. In April 2000, it came to the District's attention of that petitioner's residence might be outside the boundary line of Fort Lee.

According to the records of the Tax Assessor's Office of Fort Lee, the property known as 460 Westview Place is assessed in Fort Lee as land only with no assessment for any building or improvement. The total assessed value on the vacant land within Fort Lee for the 1999/2000 tax bill was $13,700 with annual property tax of $335.65. The City of Englewood assessed the value of the land at 460 Westview Place at $66,500 and the improvement at $76,300 for a total value of $142,800 on which Englewood collects taxes of $4,412. A survey done on May 25, 2000, at the request of the District showed that the front corner of the structure of the building overhangs the boundary line of Fort Lee by approximately 2.38 feet with the remainder of the structure in Englewood. Most of the garage and driveway is in Fort Lee.

Based on the foregoing information, the Superintendent of Schools recommended that the District terminate the enrollment of petitioner's child, niece and nephew. The District granted petitioner an opportunity to appear before the Board of Education on June 12, 2000. Subsequently, on June 26, 2000, the District adopted

Resolution 644 upholding the recommendation and terminating the enrollment of the minor pupils at the end of the June 2000 school year.

Since 1993 petitioner has consistently considered that he lived in Fort Lee and has used a Fort Lee address. Petitioner listed his address as Fort Lee on his driver's license as well as his tax returns. In 1998 petitioner received a certificate of continued occupancy from the Fort Lee Fire Prevention Bureau, which was revoked after the District questioned his residency. On his marriage license petitioner gave his address as Fort Lee as well as on his checks, utility bill, certain lease payments and also to Social Security.

S.C., the step-daughter of petitioner, was enrolled in Kindergarten in the Fort Lee School District for the 1998-1999 school year for 180 school days, which based on the per diem tuition rate then in effect of $41.10, totals $7,398 tuition. For the 1999-2000 school year she was enrolled in the First Grade for 180 school days at a per diem rate of $42.69 for a total of $7,684.20. For the present 2000-2001 school year she has been enrolled at the per diem rate of $42.69.

J.D. and S.D., petitioner's relatives and tenants, moved from the Borough of Fort Lee to petitioner's residence on March 24, 2000 and have continued to attend the Fort Lee public schools since that time. They remained enrolled for 60 days during the 1999-2000 school year, which at a per diem rate of $42.69 totals $4,122.80 tuition for both. They are enrolled during the current 2000-2001 school year at a per diem rate of $42.69

LEGAL DISCUSSION AND CONCLUSION

Summary Decision must be granted if the pleadings and affidavits show that there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-1-12.5; *Contini v. Bd. of Educ. of Newark*, 286 *N.J. Super.* 106, 121 (1995). While viewing the evidentiary material presented in the light most favorable to the non-moving party, the court must determine

whether there is sufficient evidence to permit a rational fact-finder to resolve the alleged disputed issues in favor of the moving party. *Brill v. Guardian Life Ins. Co.*, 142. *N.J.* 520, 523, (1995). 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 determine in an evidentiary hearing." If the adverse party does not so respond, a Summary Decision, if appropriate, shall be entered. *N.J.A.C.* 1:1-12.5.

Public schools 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). Here it is undisputed that petitioner's property is within both Fort Lee and Englewood. In addition, it is also undisputed that except for a small area less than three feet wide which narrows to nothing at the rear of the structure, the entire house occupied by petitioner and the children is located in Englewood. Further, petitioner pays Fort Lee property tax of $335.65 while petitioner pays Englewood property tax of $4,412. Thus, the amount of property tax paid to Englewood is 13 times greater than the amount of property tax paid to Fort Lee.

"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 choose their own domicile and thus their domicile is that of their parent or guardian. Based on the survey of the petitioner's property, it is clear that when the family returns to its residence, they are returning to Englewood. Indeed, so little of the house is in Fort Lee that Fort Lee does not assess any value to the building and merely taxes the vacant land.

In a similar case, *Zadran v. Board of Educ. of the Tp. of Belleville*, EDU 11369-95, State Board of Education Decision, May 7, 1997, the petitioner lived in the condominium complex located on the border between Belleville and Newark, had a Belleville address, and thought that he lived in Belleville. However, a survey showed

that his unit was on the boundary line but mainly located in Newark, and the condominium association paid real property taxes for his unit to Newark alone. In holding that it would be inequitable to impose the financial burden of educating petitioner's children on the citizens of one town while the citizens of another town were enjoying the benefit of the tax revenues, the State Board affirmed the ALJ's and Commissioner's finding that petitioner's domicile was in Newark. As in *Zadran*, here the petitioner's subjective belief that he lived in Fort Lee must give way to the legal reality that he lives in Englewood. Moreover, here the petitioner does not have a Fort Lee address but rather has an Englewood address as shown by his deed. The fact that he held himself out to others as living in Fort Lee does not change geography.

Based on the foregoing, I **FIND** that there are no material facts as issue and that the District is entitled to summary decision as a matter of law. I **FIND** that the survey and the deed show that petitioner's residence is almost completely located in Englewood. As Englewood gains the benefit of petitioner's property taxes, it would be unfair for Fort Lee to shoulder the financial burden of educating petitioner's children. Thus, I **CONCLUDE** that petitioner's children are not entitled to a free public education in Fort Lee as they do not reside in the District.

The District has filed a counterclaim for back tuition and provided the per diem rates to calculate back tuition for each child. However, here the equities shift to the petitioner's side because he had an arguable, although mistaken, belief that because his property straddled the boundary line his children were entitled to attend Fort Lee schools. Indeed, it is undisputed that the former owner of petitioner's residence sent his children to Fort Lee schools. As the School Board stated in *Zadran*, "while a claimant's perception of domicile cannot override legal and geographical realities, we conclude that it would be inequitable under the particular facts in the record before us to assess tuition against petitioner for the period of his children's attendance in the Belleville public schools." *Id* at 4. Thus, I **CONCLUDE** that under the facts of this case, petitioner will not be directed to reimburse Fort Lee for tuition incurred before the date of the final order in this case.

ORDER

Based on the foregoing, it is **ORDERED** that as petitioner is domiciled in Englewood the District's determination that petitioner's children are not entitled to attend Fort Lee school is hereby **AFFIRMED**. 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.

Feb 21, 2001
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

2-23-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 26 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

jb

OAL DKT. NO. EDU 7327-00
AGENCY DKT. NO. 254-7/00

R.D., on behalf of minor children, S.C., S.D'O. AND J.D'O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT-PETITIONER,	:	
V.	:	
J.C.D'O. AND T.D'O.,	:	
THIRD-PARTY 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 concurs with the Administrative Law Judge (ALJ) that, based on the undisputed facts, the minor children in this matter are not entitled to attend school in the District free of charge pursuant to *N.J.S.A.* 18A:38-1(a). Thus, the Petition of Appeal is properly dismissed.

However, with respect to the Board's counterclaim against R.D. and its third-party petition against J.C.D'O. and T.D'O., the parents of J.D'O. and S.D'O., for tuition dating back to the 1998-99 school year, although the Commissioner agrees with the ALJ that, under these circumstances, it would be inequitable to assess tuition against them for that period *prior* to June 26, 2000, the date on which the Board issued its final decision to exclude the children from

its District, the Commissioner nevertheless finds it appropriate that R.D. and T.D'O. be assessed tuition for the children's ineligible attendance in the District *after* that date.[1] Notwithstanding R.D.'s prior misunderstanding, once the undisputed facts of this matter were established and the results of the property survey completed on May 25, 2000 were known, R.D. had no reasonable basis on which to claim domicile in the Fort Lee School District.[2] Thus, while R.D. may not have acted in bad faith in exercising his legal right to contest the Board's decision, neither he nor T.D'O. can be shielded from the fiscal consequences of the children's ineligible attendance subsequent to that decision. *See M.F. and P.J.F., on behalf of minor children v. Board of Education of the Township of Hope, Warren County*, Commissioner Decision July 31, 2000; *aff'd* State Board February 7, 2001.

Accordingly, the Initial Decision is adopted in part and modified in part. R.D. is hereby ordered to reimburse the Board at a per-diem rate of $42.69 for the ineligible attendance of S.C. in the District for the 2000-2001 school year, up to and including the date of this decision. T.D'O. is hereby ordered to reimburse the Board at a per-diem rate of $42.69 each for

[1] In its Answer, Counterclaim and Third-Party Petition, the Board asserts that Petitioner R.D. does not have standing to bring a Petition of Appeal on behalf of his niece and nephew, S.D'O. and J.D'O., in that he is not their guardian. Thus, the Board brings a "third party petition" against J.C.D'O. and T.D'O., the parents of the minor children S.D'O. and J.D'O., alleging that their domicile is outside the Borough of Fort Lee, that the children have no legal entitlement to attend school there free of charge, and demanding judgment against J.C.D'O. and T.D'O. as "third party respondents" for tuition associated with ineligible attendance. However, the Commissioner notes there is no indication in the record that J.C.D'O. resides with T.D'O. in R.D.'s home and, in fact, the only address in the record for J.C.D'O. is in Queens, New York. (Board's Third-Party Petition, Exhibit 4) Moreover, the Board does not indicate at which address J.C.D'O. was served. Under these circumstances, and noting that T.D'O.'s Answer to the Board's Third-Party Petition does not incorporate J.C.D'O. as a third-party respondent, the Commissioner does not consider J.C.D'O. a party for purposes of tuition assessment.

[2] The Commissioner notes that R.D. expressly bases his appeal on the best interests of the children and his payment of a nominal property tax to the District. The former is not a factor in determining domicile, and the latter, in and of itself, could not reasonably be construed under the circumstances to establish domicile in the District. (Petition of Appeal at 2; Petitioner's Brief, December 5, 2000 at 1, 2)

the ineligible attendance of J.D'O. and S.D'O. in the District for the 2000-2001 school year, up to and including the date of this decision.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 4/2/01

Date of Mailing: 4/3/01

[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.

113-01

DONNA CUSTODE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF HACKETTSTOWN, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 2, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7322-00
AGENCY DKT. NO. 214-6/00

DONNA CUSTODE,
Petitioner,
v.
HACKETTSTOWN BOARD OF EDUCATION,
Respondent.

Sheldon H. Pincus, Esq., for petitioner
(Bucceri & Pincus, attorneys)

David A. Wallace, Esq., for respondent

Record Closed: February 13, 2001 Decided: February 13, 2001

BEFORE **KEN R. SPRINGER**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 8, 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 parties have agreed to settle this matter and have prepared the attached Stipulation indicating the terms of settlement.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or 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. 13, 2001
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

2/16/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 20 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
FEB 13 1 59 PM '01

BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(973) 773-5665
Counsel for Petitioner

DONNA CUSTODE,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF
Petitioner,	:	ADMINISTRATIVE LAW
v.	:	O.A.L. DOCKET NO. EDU 07322-00N AGENCY DOCKET NO. 214-6/00
HACKETTSTOWN BOARD OF EDUCATION,	:	
Respondent.	:	**STIPULATION OF SETTLEMENT**

WHEREAS, on June 16, 2000, the Petitioner, Donna Custode (hereinafter "Custode") filed a Verified Petition of Appeal with the New Jersey Commissioner of Education alleging a violation of her tenure rights, pursuant to N.J.S.A. 18A: 17-2, by virtue of the level and amount at which her salary had been established for the 2000-2001 school year by the Respondent, Board of Education of Hackettstown (hereinafter "the Board"); and,

WHEREAS, on July 10, 2000, the Board filed an Answer to the Verified Petition of Appeal with the Commissioner of Education denying the allegations; and,

WHEREAS, the matter was transmitted by the Commissioner of Education to the Office of Administrative Law as a contested case on or about August 8, 2000; and,

WHEREAS, the matter was the subject of a prehearing conference on January 2, 2001; and,

WHEREAS, in the course of said prehearing conference, counsel for Custode and the Board represented and agreed that the issues raised in this matter are identical to those which were the subject of an October 30, 2000 Decision of the Office of Administrative Law/Commissioner of Education in consolidated Petitions of Appeal, Donna Custode v Board of Education of the Town of Hackettstown, Warren County, O.A.L. Docket No. EDU 9827-98 AND EDU 9576-99, Agency Docket Nos. 392-8/98 and 205-7/99; which Decision pertained to the level and amount at which Custody's salary had been established by the Board for the 1998-99 and 1999-2000 school years; and,

WHEREAS, on or about December 4, 2000, the Board filed a Notice of Appeal with the New Jersey State Board of Education, Docket No. 71-00, seeking to reverse the October 30, 2000 Decision; and, said appeal is presently pending before that agency; and,

WHEREAS, Custode and the Board agree that the decision of the State Board of Education and/or any subsequent determinations by an appellate court, will serve to control the disposition of the instant matter;

NOW, THEREFORE, the parties agree that the determination of what should be the proper level and amount of Custode's 2000-2001 salary shall be controlled by the decision of State Board of Education in Docket No. 71-00 and/or any subsequent, timely appeals which either party may initiate for appellate review; and it is

FURTHER AGREED that the parties entry into this stipulation of agreement is made without prejudice to or waiver of the position(s) which have been asserted in the prior cases.

Sheldon H. Pincus, Esq.
Counsel for Petitioner,
Donna Custode

Dated: 2/8/01

David A. Wallace, Esq.
Counsel for the Respondent,
Board of Education of Hackettstown

Dated: 2/2/01

2C

OAL DKT. NO. EDU 7322-00
AGENCY DKT. NO. 214-6/00

DONNA CUSTODE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF HACKETTSTOWN, WARREN 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: 4/2/01

Date of Mailing: 4/3/01

114-01

IN THE MATTER OF THE TENURE	:	
HEARING OF LUIS CARMONA,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF ATLANTIC CITY, ATLANTIC	:	
COUNTY.	:	

April 6, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6454-00

AGENCY REF. NO. 269-8/00

IN THE MATTER OF THE TENURE HEARING OF LUIS CARMONA, ATLANTIC CITY SCHOOL DISTRICT, ATLANTIC COUNTY,

---

George Frino, Esq., for petitioner

Kimberly Kersey, for respondent

Record Closed: February 15, 2001 Decided: February 16, 2001

BEFORE **EDGAR R. HOLMES,** ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Atlantic City School District Board of Education (Board) certified tenure charges against the respondent Luis Carmona terminating him from his position as a school custodian effective July 11, 2000. The charges included excessive absenteeism, abandonment of position, insubordination and other just cause (criminal conduct). The respondent requested a *de novo*

hearing and 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; the act creating the OAL *N.J.S.A.* 52:14F-1 to –13 and *N.J.S.A.* 18A:6-16 the Act providing the Commissioner with the opportunity to transmit the case to the OAL.

At a hearing convened on December 20, 2000, at the OAL in the Atlantic County Civil Courthouse, Atlantic City, the parties negotiated a settlement in which the parties agreed as follows:

1. The respondent's criminal charges have resulted in his admission to a Pre-Trial Intervention Program (PTI).

2. The Board withdraws and will not pursue the filing of tenure charges with the Commissioner of Education (Commissioner) against Carmona.

3. Respondent Carmona's health insurance shall continue through January 31, 2001, at which time respondent Carmona will have the opportunity to continue such coverage pursuant to COBRA.

4. Respondent Carmona will not reapply for employment at any time with the Atlantic City BOE.

5. Respondent Carmona has tendered his resignation from the BOE effective January 31, 2001 and his execution of this agreement shall be deemed to predate his letter of resignation.

6. Respondent Carmona's resignation will be accepted in good standing and placed in his personnel file.

7. Respondent Carmona releases and gives up any and all claims and rights which he may have against the Board. This releases all claims, including those of which he is not aware and those not mentioned in this Agreement, except that respondent Carmona shall have the right to continue his pending Workers' Compensation Petition and shall have the right to pursue a claim solely against his disability insurance company. Carmona shall also have the right to continue as a Petitioner in the matter of *ACEA, et al v. ACBE, et al,* OAL Docket. Number EDU 10335-98S as to back pay and other compensatory awards. The Board is not obligated to cooperate with Carmona and reserves its rights to such claims.

8. The Board releases and gives up any and all claim and rights which it may have against Carmona. This releases all claims, except as stated in Paragraph 7 including those of which it is not aware and those not mentioned in this Agreement.

9. It is expressly understood that the execution of delivery and acceptance of this Agreement and the consideration exchanged pursuant to the terms listed herein is in no way admission of liability on the part of the parties and is solely for the purpose of resolving a dispute between the parties.

10. Both Carmona and the Board have caused legal counsel to review this Agreement and are satisfied with the advise(sic) and counsel, thus entering into this Agreement knowingly and voluntarily and free from any compulsion, duress or another promised benefit or threat.

11. This Agreement contains the entire Agreement between Carmona and the Board. There are no other promises or benefits other than those reflected in this document.

12. The parties listed herein are bound by this Agreement. Anyone who succeeds to their rights and responsibility, such as their heirs or executor of their estate, is also bound. This Agreement is made for their benefit and all who succeed to their rights and responsibilities such as their successor, employee, heirs or the executor of their estate.

The Agreement was explained to the respondent who acknowledged that he understood the Agreement and he freely and voluntarily signed a copy of the Agreement in the presence of this tribunal. There was discussion of *In Re Cardonick*, 1990 *S.L.D.* 846 in the presence of the respondent. The consensus was that since he held no license issued by the Commissioner the matter would not be referred for action against a non-existent certificate.

After the hearing but prior to the filing of this Initial Decision the respondent wrote to this tribunal requesting leave to withdraw his consent to the Agreement on the grounds of feeling "pressured." He denied such pressure at the signing of the Agreement. In addition, in the letter the respondent says he seeks to "prove his innocence as far as insubordination, job abandonment and excessive absences." The respondent's attorney in her letter affixed hereto points out that as

part of the settlement the BOE has withdrawn these charges. The BOE's attorney agrees. The respondent has had the benefit of the Agreement insofar as his medical coverage was extended.

I **FIND and CONCLUDE** that respondent has voluntarily resigned his position at the Atlantic City Board of Education effective January 31, 2001.

I **ALSO FIND and CONCLUDE** that the Settlement disposes of all issues in controversy and is consistent with the law.

I **FURTHER FIND and CONCLUDE** that respondent has been suspended without pay since July 11, 2000 and by Agreement incorporated above he seeks no further remuneration except as stated herein.

I **ALSO 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 settlement with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

2/16/01
DATE

EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

2-21-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 22 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

For Petitioner:

None

For Respondent:

Luis Carmona

DOCUMENTS IN EVIDENCE

Joint Exhibits:

C-1 Agreement
C-2 Respondent's Letter seeking to withdraw consent
C-3 Administrative Law Judge's letter to attorneys
C-4 Letter from respondent's attorney Kimberly Kersey, Esquire
C-5 Letter from petitioner's attorney George Frino, Esquire

IN THE MATTER OF THE TENURE	:	
HEARING OF LUIS CARMONA,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF ATLANTIC CITY, ATLANTIC	:	
COUNTY.	:	

The record, Settlement Agreement and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 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. In so holding, however, the Commissioner observes that the settlement included with the Initial Decision sets forth terms that were to be effectuated prior to approval of the settlement terms by the Commissioner pursuant to *N.J.A.C.* 1:1-19.1. The Administrative Law Judge (ALJ) and the parties are cautioned against effectuating terms of a settlement agreement in controverted matters that have been duly transmitted to the OAL prior to its submission to, and approval by, the Commissioner.

With respect to respondent's request to the ALJ to withdraw his consent to the Settlement Agreement on the grounds of feeling "pressured," the Commissioner concurs that the agreement was fully explained to respondent and that he freely and voluntarily signed a copy of the agreement in the presence of the ALJ following separate conversations with each of the two attorneys from the firm representing him and consultation with his wife. Moreover, although

respondent's expressed reason for seeking to withdraw his consent is to "prove [his] innocence as far as insubordination, job abandonment and excessive absences,"[1] the Commissioner observes that the settlement specifically provides for the Board's withdrawal of the tenure charges and the acceptance of respondent's resignation in good standing. Thus, in the absence of tenure charges against him, respondent has nothing to prove.

Accordingly, 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.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 4|6|01

Date of Mailing: 4|6|01

[1] Respondent's criminal charges (unbecoming conduct) resulted in his admission to a Pre-Trial Intervention Program.

[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.

115-01

GAIL CARSON AND THE NEPTUNE TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

April 6, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4249-00

AGENCY DKT. NO. 119-4/00

GAIL CARSON AND THE NEPTUNE TOWNSHIP EDUCATION ASSOCIATION,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,

Respondent.

David Rosenberg, Esq., for petitioners (Klausner & Hunter, attorneys)

James T. Hundley, Esq., for respondent (Hundley and Parry, attorneys)

Record Closed: February 16, 2001 Decided: February 22, 2001

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

This matter was transmitted to the Office of Administrative Law (OAL) on May 30, 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 indicating the terms thereof, which is attached and fully incorporated herein.

The stipulation of settlement entered into by the parties is hereby adopted

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 settlement 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.

2/22/01
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

2/26/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 27 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

es

HUNDLEY AND PARRY, P.C.
35 Pilgrim Pathway
P.O. Box 488
Ocean Grove, NJ 07756
(732) 775-3100
Attorneys for Respondent

GAIL CARSON AND THE NEPTUNE TOWNSHIP EDUCATION ASSOCIATION Petitioners	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
VS.	OAL DOCKET NO. EDUOR 04249-00S
THE BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE IN THE COUNTY OF MONMOUTH	AGENCY REF. NO. 119-4/00
Respondent	STIPULATION OF SETTLEMENT

WHEREAS, on or about March 7, 2000, Petitioners filed a Petition of Appeal before the Commissioner of Education alleging that on January 24, 2000 Petitioner Gail Carson, a teacher employed by Respondent Board, was assaulted by J.W. a third grade pupil enrolled in the District's Green Grove Elementary School; and

WHEREAS, the March 7, 2000 Petition of Appeal requested that Respondent Board institute expulsion proceedings against pupil J.W. in accordance with the provisions of N.J.S.A. 18A:37-2.1; and

WHEREAS, on or about May 19, 2000, Respondent Board filed an Answer to Respondent's Petition of Appeal; and

WHEREAS, on May 22, 2000 the Commissioner transmitted the matter as a contested matter to the Office of Administrative Law; and

WHEREAS, on September 20, 2000 Respondent Board was notified by the Monmouth County Prosecutor that following a September 20, 2000 hearing conducted in the Superior Court of New Jersey, Chancery Division, Family Part, in a matter known as State in the Interest of J.W., Docket No. JV-03-00-423/FJ-13-3423 OOB, pupil J.W. was found guilty of committing an assault upon Petitioner Gail Carson on January 24, 2000 in violation of N.J.S.A. 2C:12-1; and

WHEREAS, on November 29, 2000 the Respondent Board conducted an expulsion hearing in the matter of pupil J.W. as a result of the January 24, 2000 assault upon Petitioner Gail Carson; and

WHEREAS, the convening of the November 29, 2000 expulsion hearing resolved all issues in dispute between the Petitioners and Respondent Board in the instant matter.

NOW, THEREFORE, the Petitioners and Respondent Board agree that Petitioners shall, and hereby do, withdraw the Petition of Appeal in this matter and that the matter be dismissed with prejudice.

KLAUSNER, HUNTER AND ROSENBERG
Attorney for Petitioners

By: _____ Date: 2-9-2001
DAVID L. ROSENBERG

HUNDLEY AND PARRY, P.C.
Attorney for Respondent

By: _____ Date: 12-12-2000
JAMES T. HUNDLEY

OAL DKT. NO. EDU 4249-00
AGENCY DKT. NO. 119-4/00

GAIL CARSON AND THE NEPTUNE TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Stipulation of Settlement have been reviewed. Noting that there are no terms to be effectuated in the Stipulation of Settlement and the parties have agreed to withdrawal of this matter, with prejudice, the Commissioner shall consider this matter a withdrawal, pursuant to *N.J.A.C.* 1:1-19.2.

The Commissioner, therefore, approves the withdrawal, and determines that this matter shall be dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4|6|01

Date of Mailing: 4|6|01

116-01

CARRIER FOUNDATION-EAST MOUNTAIN SCHOOL, SOMERSET COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Carrier Foundation (Foundation), a private, statewide, behavioral healthcare system providing inpatient, outpatient and residential services, challenged the results of the respondent Department's audit of Carrier's East Mountain School program (East Mountain) for fiscal year 1998. The Foundation filed a motion for summary decision and the Department filed a cross-motion for summary decision.

The ALJ concluded that summary decision be granted on the cross-petition and denied on the petition. Moreover, the ALJ concluded that 1) the Foundation's investment expenses were per se non-allowable costs under *N.J.A.C.* 6:20-4.4(a)16 in the calculation of the certified annual cost per pupil; 2) severance expenses paid by the Foundation were non-allowable costs under *N.J.A.C.* 6:20-4.4(a)5 because they were fringe benefits paid to staff members for time not expended and/or services not performed (severance expenses are also non-allowable costs under *N.J.A.C.* 6:20-4.4(a)5 because they are costs not listed in the *Chart of Accounts for Private Schools for the Handicapped* issued by the Department); 3) the Department properly disallowed $132,375 in General and Administrative (G & A) expenses under *N.J.A.C.* 6:20-4.1(c). Medicare reporting principles are not applicable to the tuition reimbursement procedures promulgated by the State Board of Education. The Foundation attempted to "double charge" the Department when it allocated the same expenses as "direct expenses" under its "Medicare step-down methodology" and as "indirect expenses" under the State Board's methodology; 4) $84,518 should be excluded from G & A expenses under *N.J.A.C.* 6:20-4.1(l), *N.J.A.C.* 6:20-4.4(a)8 and *N.J.A.C.* 6:20-4.4(a)10 as excess salary paid to the Foundation's CEO.

The Commissioner adopted findings and determination in the Initial Decision as his own.

April 12, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING RESPONDENT'S
MOTION FOR SUMMARY JUDGMENT
OAL DKT. NO. EDU 508-00
AGENCY DKT. NO. 380-12/99

CARRIER FOUNDATION – EAST MOUNTAIN SCHOOL, SOMERSET COUNTY,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,

Respondent.

David Steiner, Esq., for petitioner (Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Michael C. Walter, Deputy Attorney General, for respondent (John J. Farmer, Jr., Attorney General of New Jersey, attorney)

Record Closed: February 20, 2001 Decided: February 21, 2001

BEFORE **KATHRYN A. CLARK**, ALJ:

In this matter, petitioner Carrier Foundation, East Mountain School (Carrier) moved for Summary Decision on August 21, 2000, stating that there were no issues of fact in this matter. Respondent New Jersey Department of Education (DOE), through the Attorney General's Office, filed its answer on September 26, 2000, and on that day, also filed a cross-motion for Summary

Decision. On October 2, 2000, petitioner filed a Reply Brief in opposition to the DOE's cross-motion for Summary Decision, and further supporting petitioner's own motion for Summary Decision. Additionally, on October 13, 2000, the DOE filed a reply brief in opposition to petitioner's reply brief.

The issue as stated by the parties is this - should Summary Decision be granted where petitioner claims its investment expenses and severance costs should be counted as allowable expenses, that it is entitled to other additional allowable expenses, and petitioner challenges an excess salary audit determination.

I **CONCLUDE** that Summary Decision should be **GRANTED** on the Cross-Petition, and **DENIED** on the petition.

1. Carrier's investment expenses are per se non-allowable costs under N.J.A.C. 6:20-4.4(a)16 in the calculation of the certified annual cost per pupil.

2. Severance expenses paid by Carrier are non-allowable costs under N.J.A.C. 6:20-4.4(a)5 because they were fringe benefits paid to staff members for time not expended and/or services not performed. Severance expenses are also non-allowable costs under N.J.A.C. 6:20-4.4(a) 51 because they are costs not listed in the Chart of Accounts for Private Schools for the Handicapped issued by the DOE.

3. The DOE properly disallowed $132,375.00 in General and Administrative (G & A) expenses under N.J.A.C. 6:20-4.1(c). First, Medicare reporting principles are not applicable to the tuition reimbursement procedures promulgated by the State Board of Education. Second, Carrier attempted to "double charge" the DOE when it allocated the same expenses as "direct expenses" under its "Medicare step-down methodology" and as "indirect expenses " under the State Board's methodology.

4. $84,518 should be excluded from G & A expenses under N.J.A.C. 6:20-4.4(a)10 as excess salary paid to Carrier's CEO.

STATEMENT OF THE FACTS

This question arises out of an audit of the Carrier Foundation (Carrier) by the New Jersey Department of Education, Office of Compliance (DOE). Carrier is a private statewide behavioral healthcare system providing inpatient, outpatient, and residential services. At issue are the results of the DOE's audit of Carrier's East Mountain School program (East Mountain) for fiscal year 1998.

The following stipulated facts are provided in Carrier's motion for summary decision. The DOE audited Carrier's East Mountain program for the fiscal year of July 1, 1997 to June 30, 1998, and issued a Report of Examination Fiscal Monitoring Review on March 31, 1999. The DOE found that Carrier allocated to East Mountain non-allowable[1] direct costs of $95,048.00 and non-allowable general and administrative (G & A) expenses totaling $1,253,936.00. On May 14, 1999, James M. Maher (Maher), Carrier's Vice President and Chief Financial Officer, appealed findings five, six, seven, and ten.

In finding five, the DOE states:

> . . . non-allowable investment fees totaling $103,427 were charged to (G & A) expenses and then allocated to the (East Mountain) program. N.J.A.C. 6:20-4.4(a)16 states that investment expense associated with the purchase/sale of stocks, securities, other investment instruments or other investments not associated with the education of handicapped students is a non-allowable expense. (It is recommended that) (t)he (above) non-allowable costs . . . must be excluded from G & A expenses when calculating the amount of G & A overhead expenses allocated to (East Mountain).
>
> (Petitioner's Brief, Report of Examination Fiscal Monitoring Review July 1, 1997 to June 30, 1998, (Exhibit "A") at 5-6.)

In finding six, the DOE states:

[1] The DOE reimburses private institutions for educating handicapped students who normally would be educated in public schools. In turn, the DOE has determined that some costs incurred by private institutions are not essential to the education of handicapped students and are thus not to be charged to the DOE. These costs are "non-allowable." See N.J.A.C. 6:20-4.4 (listing non-allowable costs).

> . . . non-allowable severance expenses totaling $399,541 were charged to the (G & A) expense and then allocated to the (East Mountain) program. N.J.A.C. 6:20-4.4(a)51 states that costs charged to account categories other than those reflected in the chart of accounts issued by the Commissioner (of Education) are non-allowable costs. The chart of accounts does not include (a) provision for severance payments. (It is recommended that) (t)he (above) non-allowable costs . . . must be excluded from (G & A) expenses when calculating the amount of G & A overhead expenses allocated to (East Mountain).
>
> (Id. at 7.)

In finding seven, the DOE made the following determinations:[2]

> General and Administrative overhead expense incurred by (Carrier) and allocated to (East Mountain) is determined by multiplying the direct expenses of (the East Mountain program) for the fiscal year ended June (thirtieth) by an overhead percentage calculated by using (Carrier's) financial information for the prior fiscal year ended December (thirty-first). The different fiscal years are used because (Carrier's) fiscal year ends on December (thirty-first) and (East Mountain) must report using a June (thirtieth) fiscal year end.
>
> The allocation method used by the organization reduces total Carrier . . . expenses of $31,242,648 by $5,699,698. These costs, which represent "Medicare" adjustments, should be included in the calculation of the amount of overhead allocated to (East Mountain).
>
> Therefore, the total costs of $31,242,648 were used to recalculate G & A overhead expenses (See Schedule A) using (Carrier's) allocation methodology. As a result, total G & A expenses should be $4,397,226.
>
> Using (Carrier's) methodology, communications and data processing cost center expenses are added to G & A expenses to arrive at total overhead expenses as follows:

[2] In finding seven, the DOE explains how Carrier incorrectly allocated "indirect costs" to "direct costs." "Direct costs" are those costs incurred exclusively by a private school during its day-to-day operation. "Indirect costs" are costs incurred by the parent corporation of a private school that are related to the operation of the private school. See N.J.A.C. 6:20-4.1(b); N.J.A.C. 6:20-4.1(c).

G & A Costs (Schedule A)	$4,397,226
Add: Communications and Data Processing Cost Center expenses not already included in G & A	
Data Processing (Schedule A)	469,223
Communications (Schedule A)	457,346
Total Overhead Expenses	$5,323,795

In addition to the items mentioned above, overhead expenses include the following non-allowable costs described elsewhere in this report.

Marketing and relations expenses (finding #4)	$ 540,843
Severance (finding #6)	399,541
Investment services fee (Finding #5)	103,427
Chief Executive's salary exceeds Max. (Finding #10)	84,518
(Total)	$1,128,329

N.J.A.C. 6:20-4.1(c) states that indirect costs should be allocated based on direct costs of each program to total direct costs of all programs. Presented below is the calculation of G & A overhead expenses allocable to (East Mountain) based on the findings in the fiscal monitoring and the requirements of (the) administrative code.

Total cost of (Carrier) (excluding (East Mountain))	$31,242,648
Total Carrier . . . overhead (above)	5,323,795
Total direct costs (excludes (East Mountain) Direct costs)	25,918,795
Direct costs of (East Mountain) ($1,427,212 per 6/30/98 financial statements) less non-allowable salary and fringe benefit costs ($95,048 – finding #9)	1,332,164
Total direct costs	27,251,017
Percentage of (East Mountain) direct costs to Total direct costs	4.885%
(East Mountain) allowable overhead ($5,323,795 minus $1,128,329 times 4.885%)	205,095
Amount of overhead charged to (East Mountain)	337,470
Non-allowable overhead	$132,375

(It is recommended that) (Carrier) . . . revise its procedures and allocate overhead to (East Mountain) based on direct costs as required by code. In addition, (Carrier) must not exclude "Medicare" adjustments in the calculation of overhead applicable to (it). Further, G & A overhead costs totaling $132,375 must be excluded in the calculation of the fiscal year 1998 certified cost per pupil.

(Id. at 6-9.)

Finally, in finding ten, the DOE determined:

> (t)he salary of the Chief Executive Officer of the Carrier Foundation exceeded the maximum salary limit of $128,544. (Maher's) total salary of $213,062 was charged to (G & A) expenses, which was then allocated to the (East Mountain) program. In accordance with N.J.A.C. 6:20-4.4(a)8, the salary of the director in excess of the maximum salary determined in N.J.A.C. 6:20-4.1(1) is a non-allowable cost. (It is recommended that) (t)he salary in excess of the maximum salary totaling $84,518 must be excluded from (G & A) expenses when calculating the percentage of (G & A) expenses allocated to (East Mountain).

(Id. at 11.)

Carrier appealed these findings to the DOE's Director of Investigations and Special Audits, who upheld audit findings five, six, and ten, but reversed finding seven in part by allowing for $11,937.00 of G & A expenses. As a result, $707,924.00 of the original non-allowable expenses of $719,861.00 was disallowed. Carrier then appealed these findings to the Director of the Office of Compliance, who issued a Notice of Final Determination in which $48,306.00 of the $707,924.00 in expenses were allowed and the remaining costs of $659,618.00 were disallowed.

LITIGANTS' ARGUMENTS

1. Carrier's motion for summary decision.

A. Investment Expenses.

Carrier argues that investment expenses incurred by it are allowable costs under N.J.A.C. 6:20-4.4(a)16. First, Carrier explains that it partially financed East Mountain by providing working capital on an interest free basis, made available though "financial arrangements," that caused Carrier to incur investment fees totaling $103,427.00. Carrier used that working capital to maintain the economic stability of East Mountain. Carrier argues that these fees are allowable costs because they are "associated with the education of handicapped children" as required by N.J.A.C. 6:20-4.4(a)16.

Second, Carrier disputes the DOE's contention that it reads N.J.A.C. 6:20-4.4(a)16 too broadly. Carrier explains that this allocation is necessary because a working capital fund of 15%, as allowed by the regulation, is insufficient to cover costs where Carrier may not be reimbursed by sending districts for up to two years.

B. Severance Costs.

Carrier argues that severance costs, totaling $399,541.00, represent salaries and benefits paid to former administrators and, as such, do not constitute the non-allowable costs established under N.J.A.C. 6:20-4.4(a)5 and 4.4(a)51. Carrier argues that the DOE misunderstood the nature of severance pay when it disallowed these costs. Citing Botany Mills, Inc. v. Textile Workers Union, 50 N.J.Super. 18, 30 (App. Div. 1958), Carrier alleges that severance pay is earned by employees each week, but is payable at some later time, and entitlement to that pay accrues during the work year, not merely on the date it becomes payable. Payments made to former employees represent compensation for services rendered during the course of their employment, and these payments cannot be segregated from other employee compensation. As such, severance costs should be included as part of the pro-rata allocation of East Mountain's administrative overhead because the compensated administrators clearly conferred a benefit to the handicapped children attending East Mountain when they administered that facility while still in Carrier's employ.[3]

C. General and Administrative Expenses.

Carrier argues that it is entitled to $72,132.00 in allowable G & A overhead expenses. Carrier makes two arguments to support this allegation. First, Carrier argues that the G & A allocation methodology it applied in fiscal year 1998, which includes the use of Medicare allocation calculations, complies with N.J.A.C. 6:20-4.1(c). Second, Carrier argues that if the DOE does not accept its current allocation system, then Carrier must be allowed to use the allocation system codified at N.J.A.C. 6:20-4.1(d).

[3] In its brief, Carrier mistakenly argues that severance costs are allowable because the compensated employees clearly conferred a benefit on Carrier itself while still employed by Carrier.

In support of its first argument, Carrier explains that the DOE failed to recognize in excess of $7,000,000 in expenses associated with various cost centers, such as building/fixed ($1,320,954); movable ($433,238); employee benefits ($3,854,756); maintenance and repairs ($660,858); plant ($750,298); housekeeping ($459,904); and cafeteria ($125,800).[4] Carrier argues that each cost center was associated with its operation of East Mountain and these costs should be charged back to East Mountain under N.J.A.C. 6:20-4.1(c) because they were incurred for a common or joint purpose not readily assignable to an approved private school facility. Carrier urges inclusion of these costs in the actual cost per student calculation. Forcing Carrier to absorb the entire overhead incurred by the various G & A expenditures that benefited East Mountain is inconsistent with the rationale behind N.J.A.C. 6:20-4.1(c); the cost of educating handicapped children is to be passed along to the public. Because East Mountain is a subsidiary of Carrier however, a fair allocation of expenses between East Mountain, a private school, and Carrier, its parent company, is required as well.

Carrier also cites to a statement by Paul Merrill (Merrill), a Partner at KPMG, L.L.P.,[5] who testified that Carrier is "required to provide fair and equitable allocations of indirect costs to the divisions" that it supports, in accordance with generally accepted accounting principles. Merrill explained that Carrier is required to follow certain Medicare standards[6] to receive Medicare reimbursements under Medicare for educating handicapped students who are social security eligible. These standards allow Carrier to include the above cost centers in its G & A cost analysis. Because Carrier used the Medicare reporting method to calculate the amount it should charge the DOE, Merrill concluded that the above cost centers should again be included within the DOE basis to determine indirect G & A costs.

[4] Carrier recognizes that the DOE allowed for $566,985 in allowable costs for communications, which is $15,232 more than what Carrier recognized for that cost center.

[5] KMPG offers its clients a comprehensive range of business and financial services, including "thought leadership, audit and information risk management, exempt organization tax counseling, process redesign, systems consulting, costing, and competition and outsourcing." KMPG, L.L.C. Homepage, visited Nov. 21, 2000 <http://www.us.kmpg.com>.

[6] While the DOE accepts the use of these "Medicare standards," neither party clarifies exactly what these standards are or who promulgated them. Moreover, neither party identifies to whom Carrier is applying for Medicare reimbursements.

Carrier further argues that it has not been previously credited for indirect costs related to the above cost centers, and it is not "double charging" for those expenses now. In order to be credited, indirect costs should be allocated to East Mountain because that program benefited from Carrier's acquisition of those costs. If the DOE used Carrier's calculation of indirect costs totaling $12,073,087 to establish the private school direct expense to total expense ratio, Carrier argues that it cannot turn around and argue that some of those expenses within that total ratio are non-allowable as well.

Moreover, Carrier explains that because it participates in Medicare, it is required to submit an annual cost to its fiscal intermediary utilizing a complex step-down methodology that applies Medicare's rules concerning allowable and non-allowable costs. Carrier used this methodology because it saves time, follows applicable DOE regulations, and has been utilized for the past twenty years without objection.

Second, Carrier asserts that the DOE's "hybrid" methodology in computing the appropriate allocation of G & A costs is flawed while its accounting methodology is correct. Carrier explains that the hybrid methodology is incorrect because the DOE's calculation of overhead attempts to superimpose Medicare reimbursement principles within DOE audit guidelines. Carrier asserts that if the DOE is attempting to implement a different methodology, it must be pursuant to N.J.A.C. 6:20-4.1(d)(2), and the DOE should have allocated G & A expenses under a revenue accounting method because Carrier is not in the business of educating students. Carrier notes that N.J.A.C. 6:20-4.1(d) is applicable here because that section clearly and unambiguously refers to "indirect costs." Alternatively, Carrier argues that N.J.A.C. 6:20-4.1(c) can only be applied to it if all appropriate G & A expenses are utilized and apportioned equitably. Furthermore, Carrier argues that the word "facility," which is found in N.J.A.C. 6:20-4.1(d), describes an entity such as itself.[7] Moreover, subsections (c) and (d) do not distinguish between facility and indirect costs, and subsection (d) aptly applies to indirect costs when joint activities exist that do not have the common purpose of educating pupils, thus not rendering subsection (c) superfluous.

[7] Carrier argues that the term "facility" is used in the context of an organization that facilitates the education of handicapped students, rather than an actual physical facility, such as a building or school grounds.

D. Excess Salary.

Carrier argues that the DOE's determination regarding non-allowable excess salary is improper. Citing N.J.A.C. 6:20-4.4(a)8, Carrier argues that the salary limitation applies only to the director of a private school and not to the executive of a private school's parent company. Thus, the maximum salary limitation should apply to the Executive Director of East Mountain, Dr. Carl Salierno, and not to Carrier's chief executive officer. In addition, Carrier argues that the DOE's contention would frustrate its ability to attract and employ qualified executives to handle its extensive budget.

1. The DOE's cross-motion for summary decision.

A. Investment Expenses.

The DOE argues that pursuant to N.J.A.C. 6:20-4.4(a)16, investment expenses are not allowable costs in the calculation of the certified actual cost per pupil. If Carrier were allowed to charge investment expenses in this manner, then any investment expense related to investment income that ultimately supplied operating capital to a private school would be an allowable cost. The intent of the State Board was to limit, not expand, what are allowable costs, and that intent is demonstrated in a list of fifty-four non-allowable costs contained in N.J.A.C. 6:20-4.4(a).

Moreover, the DOE alleges that a fifteen percent capital fund cap imposed by regulation is sufficient to operate East Mountain. In fact, a draft of East Mountain's 1998 audit report shows Carrier actually owing money to East Mountain, which is evidence that East Mountain provided working capital to Carrier, not the other way around. Also, Carrier could have legally charged interest expenses to East Mountain, but it elected not to do so. Furthermore, if Carrier did need to fund East Mountain through investment expenses, then a percentage of the investment income generated should have been charged to East Mountain as well.

B. Severance Costs.

The DOE argues that pursuant to N.J.A.C. 6:20-4.4(a)(51) and (5), severance expenses are not allowable costs in the calculation of the certified actual cost per pupil. The DOE explains that pursuant to N.J.A.C. 6:20-4.4(a)(51), costs charged to account categories other than those reflected in the chart of accounts issued by the Commissioner of Education are non-allowable costs, and that chart does not include a provision for severance pay. See Respondent's Brief, Chart of Accounts for Private Schools for the Handicapped, issued June, 1988 (Exhibit "A").

The DOE also explains that the clear intent of N.J.A.C. 6:20-4.4(a)(5) is to disallow benefits, such as severance payments, when ex-employees perform no duties during the time they receive those benefits. The DOE distinguishes Botany Mills as a case concerned with the interpretation of contract provisions under a collective bargaining agreement, including an employee's entitlement to severance pay after he/she had been laid off.[8] While Botany Mills held that an employee is entitled, under contract, to enjoy vested severance benefits accrued before a contract expires, Botany Mills did not specifically determine whether employees in general are entitled to severance earned while they were employed.

C. General and Administrative Expenses.

The DOE argues that it properly disallowed $132,375.00 in non-allowable G & A expenses within Carrier's calculation of overhead charged to East Mountain. The DOE cites Carrier's inclusion of non-allowable costs within its calculation of total allocable G & A expenses, as well as Carrier's mistaken elimination of $5,699,698 in costs for Medicare adjustments, as the reason for its decision.

[8] Botany Mills concerned the interpretation of several collective bargaining issues, including an employee's right to use accrued vacation time after the expiration of the agreement. The Botany Mills court treats severance and vacation pay identically with respect to an employee's entitlement to it. See 50 N.J.Super. at 30-36. In an effort to avoid confusion, any reference made to vacation pay has been substituted with a reference to severance pay in this memo.

First, the DOE accepts the "Medicare step-down method" used by Carrier. It takes exception, however, to Carrier's determination of its overhead percentage and the resulting amount of G & A expenses it charged to East Mountain. The DOE alleges that Carrier is attempting to use both the "Medicare step-down method" and the State Board's indirect expense reimbursement regulation to charge the DOE twice, or "double charge."

The DOE uses N.J.A.C. 6:20-4.1(c) as its starting point. That provision requires that G & A expenses, or indirect costs, be allocated based on direct costs. Carrier may only use direct costs as the proper basis for allocating G & A expenses because the other alternative, using average daily enrollment, is inapplicable to Carrier. While Carrier can allocate indirect costs, such as depreciation, when that cost is based on a different direct cost, Carrier cannot allocate depreciation as an indirect cost of itself.

The DOE disagrees with Carrier that N.J.A.C. 6:20-4.1(d) is applicable here. That provision applies to facility costs, and the expenses Carrier seeks to allocate are G & A costs. Carrier's analysis of N.J.A.C. 6:20-4.1(d) would render N.J.A.C. 6:20-4.1(c) superfluous because subsections (c) and (d) would address an identical issue – allocation of G & A costs. Moreover, the term "facility" does not mean "indirect costs" as proposed by Carrier. "Facility" refers only to the actual physical building or grounds where indirect costs are being accrued, not to parent organizations of a private school such as Carrier.

Next, the DOE asserts that N.J.A.C. 6:20-4.1(c) blocks any attempt to "double charge" by mandating that any indirect cost is not, in essence, a direct cost already charged to the DOE. Thus, N.J.A.C. 6:20-4.1(c) prohibits Carrier from charging the DOE twice by using one accounting methodology, such as the "Medicare step down method," to charge for direct costs, while using a separate methodology, such as the State Board's indirect expense reimbursement regulation, to charge for those same costs labeled as indirect costs.

For example, the DOE accepted Carrier's depreciation costs totaling $39,202 as an "expenditure" incurred during the fiscal year that ended on June 30, 1998. But then, Carrier charged that same $39,202 by re-labeling this cost as an "indirect expense," hence the double charge. Carrier attempts to charge the DOE $39,202 twice; once as an "expenditure" under the "Medicare step-down methodology" that the DOE already recognized, and again as an "expense" under the indirect expense regulations promulgated by the State Board of Education.

The DOE alleges that it properly identified seven non-allowable "double charged" costs that Carrier included in its total allocable G & A expenses. These expenses included maintenance and repairs, plant, housekeeping, cafeteria expenses, employee benefits, and depreciation. The DOE made this determination based on East Mountain's June 30, 1998 financial statements, which included $337,470 of expenses titled "charges from parent organization." After conducting its own investigation, the DOE determined that the correct amount of G & A expenses chargeable to East Mountain was $265,338, and concluded that Carrier overcharged East Mountain by $72,132.

Second, the DOE asserts that it properly included $5,699,698 in costs, labeled as Medicare adjustments, in the calculation of Carrier's overhead charged to East Mountain. The DOE explains that Carrier included $25,542,950 in total expenses in its calculation, thereby excluding $5,699,698 in actual hospital costs incurred. The DOE agrees that the money Carrier excluded from its total overhead represents Medicare adjustments, which are allowable deductions for Medicare cost reimbursement purposes. Even so, no State Board of Education regulation allows for the exclusion of those costs in determining Carrier's overhead percentage as it applies to being reimbursed by the DOE for educating handicapped children. The DOE asserts that if Carrier does not use its true overhead cost of $31,242,648.00 to determine the "direct costs for each program determined to total costs" ratio in N.J.A.C. 6:20-4.1(c), then the total G & A cost charged to the DOE will be inaccurate and Carrier will be overcompensated.

D. Excess Salary.

The DOE argues that, pursuant to N.J.A.C. 6:20-4.4(a)8, $84,518 must be excluded from G & A expenses because the salary of Carrier's CEO was charged to East Mountain and exceeds the maximum salary limit of $125,544. The intent of N.J.A.C. 6:20-4.4(a)8 is to eliminate

excessive salaries, whether they are direct charges to East Mountain or indirect charges through G & A allocation, from the certified cost per pupil determination. That intent would be undermined if Carrier could allocate salaries, without any cap, to East Mountain. Also, this regulation does not restrict Carrier's ability to hire top-notch executives; it only limits the amount of money Carrier may charge to East Mountain for hiring those executives. Finally, the DOE argues that the above regulation applies to all of Carrier's officers, not just the director of East Mountain.

ANALYSIS

When deciding a motion for summary decision, the following regulation applies:

> At any time after a case is determined to be contested, a party may move for summary decision upon all or any of the substantive issues therein. . . . The decision sought may be rendered if the papers and discovery, . . . together with (any) 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. 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. . . .
>
> (N.J.A.C. 1:1-12.5(a), (b).)

Under this regulation, which is akin to the judiciary's motion for summary judgment, see R. 4:46-1, "the determination (of) whether there exists a genuine issue with respect to a material fact challenged requires . . . a consideration of whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995). In making this determination, the analysis is "'whether the evidence presents a sufficient disagreement to require submission to a (fact finder) or whether it is so one-sided that one party must prevail as a matter of law." Id. at 533-34. Summary decision is also proper when the opposing party "points only to disputed issues of fact that are 'of an insubstantial nature.'" Id. at 529.

In the present case, both parties stipulate that there are no issues of material fact left to be determined. The only question remaining is whether the DOE properly disallowed Carrier from charging investment expenses, severance payments, general and administrative (G & A) expenses, and overpaid executive's salary to East Mountain.

N.J.S.A. 18A:46-21 empowers the DOE to regulate the tuition rate a private school can charge a sending district for educating handicapped students.[9] In turn, the State Board requires private schools to file a certified audit. N.J.A.C. 6:20-4.8. This audit serves two purposes; calculating the school's actual cost per pupil and verifying that the school spent tuition monies it received on allowable costs. Coastal Learning Center, Inc. v. State Bd. of Educ., 96 N.J.A.R.2d (EDU) 406, 407, 415, aff'd, State Bd. of Educ., 96 N.J.A.R.2d (EDU) 740.

The State Board promulgated two regulations regarding how private schools shall determine tuition rates charged; N.J.A.C. 6:20-4.1, mandating tuition rate procedures, and N.J.A.C. 6:20-4.4, listing non-allowable costs. While N.J.A.C. 6:20-4.1 and -4.4 have remained significantly unchanged for ten years, there is neither judicial nor administrative case law interpreting them. Principles of statutory construction will, therefore, be applied to aid in the interpretation of these regulations. See State Dep't. of Health v. Tegnazian, 205 N.J.Super. 160 (App. Div. 1985). In general, an agency "has the power to clarify ambiguous statutes by promulgating regulations." Prestia Realty, Inc. v. Hartz Mountain Indus., Inc., 303 N.J.Super. 140, 144 (App. Div.), cert. denied, 152 N.J. 13 (1997). Once an agency promulgates a regulation, that regulation should be construed according to its plain meaning. N.C. Housing Assoc., # 100 v. Hightower-Cooper, 281 N.J.Super. 317, 324 (L. Div. 1995). The agency's intent behind promulgating a regulation will further aid in that determination. See Chasin v. Montclair State Univ., 159 N.J. 418, 426-27 (1999) (explaining that statutes should be construed according to their plain meaning so long as that meaning comports with the Legislature's intent, which may be gathered from the "full light of (a statute's) history, purpose, and context"); Cosmair, Inc. v.

[9] N.J.S.A. 18A:46-21 states that:

> Any board of education, jointure commission, or private school for the handicapped which receives pupils from a sending district under this chapter shall determine a tuition rate to be paid by the sending board of education, but in no case shall the tuition rate exceed the actual cost per pupil as determined under rules prescribed by the commissioner and approved by the State Board of Education.

New Jersey Div. of Taxation, 109 N.J. 562, 568 (1998) (explaining that each provision of a statute must be given effect when construing the entire statute).

The disposition of this matter rests on the answer to the following four questions: (1) whether Carrier's investment expenses are non-allowable costs under N.J.A.C. 6:20-4.4(a)16 in the calculation of the certified annual cost per pupil; (2) whether the severance expenses paid by Carrier are non-allowable costs under either N.J.A.C. 6:20-4.4(a)5 or 51 in the calculation of the certified annual cost per pupil; (3) whether the DOE properly disallowed $132,375.00 as non-allowable G & A expenses under N.J.A.C. 6:20-4.1(c); and (4) whether $84,518 should be excluded from G & A expenses under N.J.A.C. 6:20-4.4(a)10 as excess salary for Carrier's CEO?

A. Whether Carrier's investment expenses are non-allowable costs under N.J.A.C. 6:20-4.4(a)16 in the calculation of the certified annual cost per pupil?

Investment expenses as allowable costs are governed by the following regulation:

> A cost which is not allowable in the calculation of the certified actual cost per pupil includes . . . (a)n investment expense associated with the purchase/sale of stock, securities, other investment instruments or other investments not associated with the education of handicapped children.
>
> (N.J.A.C. 6:20-4.4(a)16.)

While the State Board did not specifically explain why it promulgated N.J.A.C. 6:20-4.4(a)16, it did state that N.J.A.C. 6:20-4.4 "will prohibit business practices which are inconsistent with the administration of public funds dedicated for special education" and "will ensure that all funds are directly related to and enhance the educational programs of pupils, thereby affording educationally handicapped pupils increased social opportunity." Social Impact statement, 22 N.J.R. 2634 (Sept. 4, 1990); see Regulatory Flexibility Statement, 22 N.J.R. 2635 (Sept. 4 1990) (explaining that the Legislature considered private schools for the handicapped as "quasi-public schools"). The State Board recognized that the "additional non-allowable cost items at N.J.A.C. 6:20-4.4 . . . may reduce the tuition charged (to) public schools" by private schools, but it promulgated the rule to "ensure that private school operators utilize public funds

for bona fide special education expenses to improve or supplement special education programs." Economic Impact Statement, 22 N.J.R. 2634 (Sept. 4, 1990).

In the present case, it is proper for the DOE to disallow Carrier's investment expenses as non-allowable costs under N.J.A.C. 6:20-4.4(a)16. The phrase "not associated with the education of handicapped children" does not modify the entire regulation as asserted by Carrier. Instead, a plain language analysis of N.J.A.C. 6:20-4.4(a)16 reveals two independent clauses. In clause one, the State Board mandated that investment expenses associated with the purchase/sale of stocks or securities are per se non-allowable costs. In clause two, the State Board mandated that other investment instruments or other investments not associated with the education of handicapped children are, likewise, non-allowable costs. This interpretation is supported by the State Board's expressed reasons for promulgating N.J.A.C. 6:20-4.4(a)16.

For example, it would be proper for Carrier to charge East Mountain for investment expenses associated with the purchase of new computers that are to be incorporated into East Mountain's curriculum, as long as they were not associated with the purchase/sale of stocks or securities. That expense would be part of a transaction that the DOE need not question because the expense either directly supplements or bolsters East Mountain's handicap program. It is not proper, however, for Carrier to charge investment expenses incurred via the purchase/sale of stocks, securities, or other investment instruments or investments not associated with the education of handicapped children because the DOE is in no way assured that those investments are connected to or directly related to supplementing or bolstering East Mountain's handicap program.

While neither Carrier nor the DOE fully explain what type of "financial arrangements" Carrier entered into, Carrier admits that the charged investment expenses were incurred as a by-product of supplying working capital to East Mountain, and Carrier used that capital to maintain the economic stability of East Mountain while waiting to be reimbursed by the DOE. Clearly, the "financial arrangements" in question are not directly related to supplementing or bolstering East Mountain's handicap program because they were instead used to maintain East Mountain's economic viability. Thus, $103,427 in investment expenses was properly disallowed.

B. Whether the severance expenses paid by Carrier are non-allowable costs under either N.J.A.C. 6:20-4.4(a)5 or 51 in the calculation of the certified annual cost per pupil?

1. Analysis of Carrier's severance payments as non-allowable costs under N.J.A.C. 6:20-4.4(a)5.

N.J.A.C. 6:20-4.4(a)5 provides that:

> A cost which is not allowable in the calculation of the certified actual cost per pupil includes . . . (t)he salary or fringe benefits of a staff member for time not expended and/or services not performed.
>
> (Ibid.)

In order to determine whether Carrier's charge for severance compensation totaling $399,541 was allowable, the nature of severance pay must be examined. Severance pay "has often been said to be in the nature of deferred compensation in lieu of wages, earned in part each week the employee works, and payable at some later time." Botany Mills, supra, 50 N.J.Super. at 30 (quoting Owens v. Press Publ'g Co., 20 N.J. 537, 547 (1956)). However, it is more accurately defined as "'terminal compensation measured by the service given during the period covered by (a) collective bargaining agreement.'" Morris Sch. Dist. Bd. of Educ. v. Education Ass'n of Morris, 310 N.J.Super. 332, 344 (App. Div. 1998) (quoting Owens, supra, 20 N.J. at 545). Severance pay is payment for an employee's years of service to his/her employer, not payment for the work an employee actually did on a particular day. Consequently, severance payments are not deferred compensation, but are instead "fringe benefits." See Noorily v. Thomas & Betts Corp., 188 F.3d 153, 158 (3d. Cir. 1999) (interpreting the Employee Retirement Insurance Security Act, 29 U.S.C.A. §1104, and implicitly acknowledging that severance pay is a fringe benefit for ERISA purposes), cert. denied, __ U.S. __, 120 S.Ct. 1555, 146 L.Ed.2d 460 (2000); E.E.O.C. v. Westinghouse Elec. Corp., 869 F.2d 696, 710 (3d. Cir. 1989) (holding that severance pay was a fringe benefit and not part of "an integrated benefits scheme designed to provide post-employment benefits to the greatest number of employees").

In the present case, Carrier cannot charge the DOE for severance payments made to East Mountain administrators. As discussed, severance pay is not compensation deducted from an administrator's paycheck to be returned at a later date, but is a fringe benefit paid at the end of an administrator's career based on the total time he/she worked for Carrier. These payments are prohibited by N.J.A.C. 6:20-4.4(a)5.[10]

> Moreover, the fact that a worker's right to severance pay vests under a collective bargaining agreement on the day he/she works is inapposite to the question of whether severance pay is a non-allowable fringe benefit. In both Botany Mills, Inc. and Morris Sch. Dist. Bd. of Educ., the dispute was whether severance package rights under a contract or collective bargaining agreement had vested.[11] Neither case, however, held that severance pay is payment for services rendered by a worker, and the mere fact that severance pay is guaranteed to a worker within a collective bargaining agreement does not change its nature. Thus, the DOE properly disallowed severance expenses totaling $399,541 charged by Carrier to East Mountain as severance pay.

2. Analysis of Carrier's severance payments as non-allowable costs under N.J.A.C. 6:20-44.(a)51.

N.J.A.C. 6:20-4.4(a)51 provides that:

> A cost which is not allowable in the calculation of the certified actual cost per pupil includes . . . (c)osts charged to account categories other than those reflected in the chart of accounts issued by the Commissioner in accordance with N.J.A.C. 6:20-4.3(a)6.
>
> (Ibid.)

[10] There is also a factual question as to whether Carrier's severance scheme violates N.J.A.C. 6:20-4.4(a)21 (disallowing fringe benefits determined in an "arbitrary or capricious manner rather than on an existing written uniform policy based on an equitable standard of distribution, such as years of service or education or when the benefits are not an initial inducement for employment"), as well as a legal question about whether severance payments violate N.J.A.C. 6:20-4.4(a)35 (disallowing a payment or benefit to an employee in lieu of a salary, i.e., a bonus). See Yale Sch. v. Department of Educ., 92 N.J.A.R.2d (EDU) 571, 576-77, 584.

[11] For example, the court in Morris Sch. Dist. Bd. of Educ. determined that teachers could not be divested of severance pay during contract negotiations without their approval because that benefit "vested upon the date that plaintiff fulfilled the service condition. Once that service condition was fulfilled, the benefit derived from plaintiff's term of service was vested and could only be divested by failure to satisfy the eligibility requirements [of the collective bargaining agreement]." 310 N.J.Super. at 347-48 (quoting Lawrence v. Board of Educ. of Sch. Dist. 189, 503 N.E.2d 1201, 1209 (Ill. App. Ct. 1987).

While the Chart of Accounts for Private Schools for the Handicapped issued by the DOE does not list severance payments, it does list "School Contributions to Employee Retirement" under "Fixed Charges, 800 Series." In fact, the chart only includes two types of contributions that a parent corporation can charge a private school, Social Security contributions and pension contributions. See Ibid. Both of these plans are deferred compensation plans.

The DOE's decision to disallow severance payments but allow Social Security and pension contributions falls squarely within the regulatory intent of N.J.A.C. 6:20-4.4. East Mountain is a "quasi-public school," and East Mountain administrators should receive the same type of compensation that their public school counterparts receive. Severance pay is simply not a business practice consistent with the administration of public funds dedicated to special education. Thus, the DOE properly disallowed severance expenses totaling $399,541 charged by Carrier.

C. Whether the DOE properly disallowed $132,375.00 in non-allowable G & A expenses under N.J.A.C. 6:20-4.1(c)?

1. Determining which tuition reimbursement procedure Carrier must use to determine G & A expenses.

The State Board has promulgated two different procedures, codified at N.J.A.C. 6:20-4.1(c) and -4.1(d), that a private school must use in determining the tuition it can charge the DOE for educating handicapped students. In order to determine whether the DOE properly disallowed $132,375.00 in G & A expenses, a determination as to which tuition rate procedure applies in this case is required. The DOE argues for the application of N.J.A.C. 6:20-4.1(c) to calculate G & A expenses, which provides:

> Indirect costs are costs which are incurred for a common or joint purpose and not readily assignable to an approved private school facility, 10 month school year program or extended school year program. Indirect cost pools may be established as appropriate for allocation between common or joint purposes at the end of the fiscal year. Indirect costs shall be included on a consistent basis in the respective actual cost per pupil in accordance with an equitable allocation plan approved by the Commissioner or in accordance with either of the following ratios:

> 1. Direct costs for each program determined pursuant to (b) above to total costs ...
>
> (Ibid.)

Carrier argues for the application of N.J.A.C. 6:20-4.1(d), which provides:

> Whenever a facility used by an approved private school for the handicapped is also used for unrelated activities and/or enterprises by related or unrelated parties, all costs, direct or indirect, associated with such facilities and operations shall be charged accordingly to the associated activities and/or enterprises which they benefit. Indirect cost pools may be established as appropriate for allocation between common or joint purposes at the end of the fiscal year. Indirect costs shall be distributed in accordance with an equitable allocation plan approved by the Commissioner or as follows. . . .
>
> > 2. For joint activities and enterprises which do not have a common purpose of educating pupils, indirect costs for the approved private school for the handicapped shall be based on the ratio of the revenues for the approved private school to the total of all revenues for all purposes.
> >
> > (Ibid.)

The tuition rate procedure outlined in N.J.A.C. 6:20-4.1(d) will only apply if Carrier qualifies as a "facility." The relevant common usage definition of the word "facility" provides that it is "(s)omething created to serve a particular function (a new mental health facility)." Webster's II, New Riverside University Dictionary 460 (1984) (citation omitted).

The Legislature also offers guidance on the applicable definition of "facility." In N.J.S.A. 18A:46-13, the Legislature mandates that a local board of education must "provide suitable facilities and programs of education" to their disabled students, and "(t)he absence or unavailability of a special class facility in any district shall not be construed as relieving a board . . . of (that) responsibility." In N.J.S.A. 18A:46-14, the Legislature provided a comprehensive list of facilities where special education classes could be held, including public schools, hospitals, convalescent homes, jointure commission programs, State operated programs, private schools, and a student's home via home schooling. Furthermore, N.J.S.A. 18A:46-15 provides that the Commissioner, with the State Board's consent, "shall . . . approve all special education facilities and education programs."

The regulation itself discusses "a facility used by an approved private school for the handicapped." N.J.A.C. 6:20-4.1(d). Thus, "facility" refers to the buildings and/or property that a school for the handicapped is in fact using or the place where a special education program is implemented. This definition is bolstered by the intent of N.J.A.C. 6:20-4.1 to allocate facility and operational costs when a private school facility is also used for unrelated activities and/or enterprises by related or unrelated parties." Summary Statement, 22 N.J.R. at 2634.

Carrier is the parent company of East Mountain and does not qualify as a facility under N.J.A.C. 6:20-4.1(d). It is not the physical location where East Mountain classes are held. The thrust of N.J.A.C. 6:20-4.1(d) is concerned with the proper allocation of costs where the approved private school uses a facility for activities both related and unrelated to the education of handicapped children. Under N.J.A.C. 6:20-4.1(d), a private school cannot charge all of its facility costs to the State when some of those costs were generated by other "activities and enterprises which do not have a common purpose of educating pupils." Ibid. Thus, N.J.A.C. 6:20-4.1(d) is inapplicable, and Carrier must conform its audit methodology to the requirements of N.J.A.C. 6:20-4.1(c).

2. Determining whether the DOE acted properly when it disallowed $132,375.00 in non-allowable G & A expenses.

If N.J.A.C. 6:20-4.1(c) governs, Carrier asserts two reasons for charging East Mountain $132,375.00 in G & A expenses. First, Carrier asserts that the DOE must accept both Carrier's deduction of $5,699,698 in Medicare adjustments and Carrier's allocation of certain costs that are allowed by Medicare but are not allowed by the State Board. Second, Carrier asserts that certain expenses associated with various cost centers, such as building/fixed, movable, employee benefits, maintenance and repairs, plant, housekeeping, and cafeteria are allowable, indirect, G & A expenses under N.J.A.C. 6:20-4.1(c).

As for Carrier's first Medicare claim, Carrier will be able to charge the DOE a higher cost for total G & A expenses incurred if it can exclude $5,699,698 in overhead, covered by Medicare reimbursements, from its total overhead. The State Board's regulations prohibit Carrier from excluding reimbursed Medicare costs from total overhead in its calculation of total G & A.

There is no allowance for this deduction under either N.J.A.C. 6:20-4.4 or -4.1(c). While Carrier participates in Medicare and may be reimbursed by that program, there is nothing within the State Board's regulations that allows Carrier to exclude the amount of overhead covered by Medicare. Carrier is required to apply its total overhead cost as one variable in its total G & A calculation. Thus, Carrier's total overhead must include the $5,699,698 in Medicare reimbursements for purposes of determining the total G & A expense that Carrier can charge the DOE.

Carrier's second assertion that the DOE allow for Medicare allowances is flawed as well. Medicare allowance principles are irrelevant to the methodology set forth in N.J.A.C. 6:20-4.1(c). The mere fact that Carrier is attempting to receive reimbursements from Medicare does not alter the fact that it still must abide by the methods of accounting promulgated by the State Board in N.J.A.C. 6:20-4.1(c) and –4.4.

The DOE is not trying to superimpose the State Board's standards over Medicare standards. The DOE is simply requiring Carrier to use the standards promulgated by the State Board when it seeks reimbursement from the DOE for educating handicapped students.[12] Carrier may use the Medicare methodology, as long as it complies with the cost allocation method provided in N.J.A.C. 6:20-4.1(c) and the State Board's definitions of allowable costs.

As for direct and indirect expenses, in an effort to simplify cost allocation procedures, the State Board promulgated N.J.A.C. 6:20-4.1 to help "define direct and indirect costs in private schools for the handicapped . . . ." Summary Statement. 22 N.J.R. 2634. The following definitions were promulgated: Direct costs are "costs which can be identified specifically with an approved private school facility," N.J.A.C. 6:20-4.1(b); indirect costs are costs "incurred for a common or joint purpose and not readily assignable to an approved private school facility." N.J.A.C. 6:20-4.1(c).

[12] The DOE has no quarrel with Carrier's use of a "step-down methodology" as an accounting method. But, the use of that accounting methodology is the only component of Medicare's reimbursement principles that the DOE will accept in determining the amount owed to Carrier for handicapped education. In order to determine what is and is not a direct expense, and what is and is not an allowable expense, Carrier must follow the rules promulgated by the State Board.

Because Carrier is a parent corporation and not a school, it must use the ratio established under N.J.A.C. 6:20-4.1(c)1 to allocate indirect costs. N.J.A.C. 6:20-4.1(c)2 is not applicable as it only applies to schools and is based upon average daily student enrollment..[13] Thus, payments for indirect charges are reimbursable only if related to a separate direct charge.

Carrier is attempting to "double charge" the DOE by labeling certain costs as direct expenses incurred by East Mountain for Medicare purposes, and then re-labeling these same costs as "indirect expenses" incurred by Carrier, the parent corporation, for the benefit of East Mountain. N.J.A.C. 6:20-4.1(c)1 expressly prohibits Carrier from charging an indirect cost based on a direct cost already accounted for under any methodology, including the Medicare methodology. In other words, N.J.A.C. 6:20-4.1(c)1 requires that Carrier allocate indirect costs to separate direct costs either when it uses the State Board's methodology exclusively or when it uses a separate methodology combined with the State Board's methodology. Carrier cannot call an expense a "direct expense" and then call that expense an "indirect expense" for purposes of DOE reimbursement.

The DOE correctly excluded seven non-allowable costs "double charged" by Carrier, including maintenance and repairs, plant, housekeeping, cafeteria expenses, employee benefits, and depreciation, because those costs had already been accounted for under Carrier's step-down Medicare methodology as direct expenses incurred by East Mountain. The DOE correctly determined that the amount of G & A expenses chargeable to East Mountain was $265,338, and Carrier misallocated to East Mountain $72,132.

D. Whether $84,518 should be excluded from G & A expenses under N.J.A.C. 6:20-4.4(a)8 as excess salary for Carrier's CEO?

Salary caps imposed on an institution's executives are governed by the following two regulations:

[13] Carrier admits that it not a school in its motion for summary decision.

> A cost (that) is non-allowable in the calculation of the certified actual cost per pupil includes . . . (t)he salary of the director of an approved private school in excess of the maximum salary determined (by the Commissioner).
>
> (N.J.A.C. 6:20-4.4(a)8.)
>
> The Commissioner shall calculate and publish a list of maximum salaries by job title and county. Maximum salaries shall be based on the highest contracted salaries of certified staff in local public school districts for any prior year indexed by the Statewide average increase in salary between the two proceeding school years for each job title. Under no circumstances shall the maximum salary calculated be less than the corresponding salary in the prior year for the same job title and county. For the purpose of this list, the maximum salary of the private school director shall be based on the title, chief school administrator/superintendent. Other unrecognized job titles shall be correlated to similar job titles in public schools based on their functional activities.
>
> (N.J.A.C. 6:20-4.1(l).)

While the title of CEO is not specifically listed under either of these regulations, the breadth and scope of N.J.A.C. 6:20-4.4(a)8 and –4.1(l) would encompass that title. N.J.A.C. 6:20-4.4(a)8 indicates that the salary of a "director" in excess of the cap established by the Commissioner is a non-allowable cost. N.J.A.C. 6:20-4.1(l) expands upon the term "director" by explaining that "the maximum salary of the private school director shall be based on the title, chief school administrator/district superintendent" and "other unrecognized job titles shall be correlated to similar job titles in public schools based on their functional activities." It is clear from these two regulations that the State Board's intent was to impose a salary limit on every job title. In fact, the regulatory language is void of any exceptions to the cap. This intent is bolstered by the State Board's pronouncement that N.J.A.C. 6:20-4 "will prohibit business practices which are inconsistent with the administration of public funds dedicated for special education." Social Impact Statement, 22 N.J.R. 2634.

Consequently, it is proper for the DOE to disallow $84,518 of the CEO's $213,062 salary for two reasons. First, while public schools do not use the job title of CEO, its functional equivalent would be a that of a district superintendent. Both Carrier's CEO and a district superintendent are charged with accomplishing the task of administering several schools within their respective districts. A district superintendent is the chief administrator for all of the schools

located within a local school district. Carrier's CEO is the chief administrator for its ten private schools. This analogy is further supported by the fact that East Mountain's Executive Director, Dr. Carl Salierno, functions like a public school principal in that he is responsible for East Mountain's day-to-day operations, while Carrier's CEO functions like a district superintendent because he is responsible for the overall administration of all of Carrier's schools.[14]

Second, Carrier's argument that it will not be able to hire experienced executives ignores the regulatory intent of N.J.A.C. 6:20-4.4(a)8. Carrier receives public monies from the State to educate children with special needs who cannot be educated in public schools. In turn, the State Board mandates that if Carrier chooses to be a partner in educating those children, it must function in a manner that emulates a public school district. Specifically, private schools involved in the education of these children are paid on par with their public school counterparts.

CONCLUSION

First, Carrier's investment expenses are per se non-allowable costs under N.J.A.C. 6:20-4.4(a)16 in the calculation of the certified annual cost per pupil because they are investment expenses associated with either the purchase/sale of stocks or securities and are per se non-allowable costs or they are other investment instruments or other investments not associated with the education of handicapped children and are, likewise, non-allowable costs.

Second, severance expenses paid by Carrier are non-allowable costs under N.J.A.C. 6:20-4.4(a)5 because they are fringe benefits. Severance pay is not pay for work actually done, but is instead based on the amount of time an employee has served his/her employer. Severance expenses are also non-allowable costs under N.J.A.C. 6:20-4.4(a) 51 because they are not listed in the Chart of Accounts for Private Schools for the Handicapped issued by the DOE.

Third, the DOE properly disallowed $132,375.00 in G & A expenses under N.J.A.C. 6:20-4.1(c). Medicare reporting principles are not applicable to the tuition reimbursement procedures promulgated by the State Board. It is therefore improper for Carrier to deduct the

[14] This analogy can be extended to include Carrier's Board of Trustees, whose function is equivalent to that of a public school district's board of education.

amount of overhead that will be covered by Medicare reimbursements and charge to the DOE costs that are allowable under Medicare but are non-allowable under the State Board's tuition regulations. Moreover, Carrier attempted to "double charge" the DOE by charging the DOE for direct expenses it received reimbursement for under the Medicare methodology and then charging the DOE for those same expenses, only this time labeling them as indirect expenses under the State Board's methodology.

Fourth, $84,518 should be excluded from G & A expenses under N.J.A.C. 6:20-4.4(a)10 as excess salary for Carrier's CEO.

Accordingly, petitioner Carrier's motion for summary decision is hereby **DENIED** and respondent DOE's cross-motion for summary decision 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.

Feb 21, 2001
DATE

Kathryn A. Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

2/26/01
DATE

DN Antanaitis/ga
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 27 2001
DATE

Jeff S. Mazin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

es

OAL DKT. NO. EDU 508-00
AGENCY DKT. NO. 380-12/99

CARRIER FOUNDATION-EAST MOUNTAIN SCHOOL, SOMERSET COUNTY,	:	
PETITIONER,	:	
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 (OAL) have been reviewed. Petitioner's exceptions and respondent's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4, and were duly considered by the Commissioner in reaching his determination herein.

In its exceptions, petitioner essentially relies on and restates the arguments expressed before the Administrative Law Judge (ALJ). With respect to the disallowance of petitioner's claim of $103,427 in investment expense, petitioner reasserts that, since the East Mountain School was established solely to provide educational services to handicapped students, everything done for the school is directly related to the education of students and should be deemed allowable in terms of costs. Thus, a portion of the investment expenses incurred by the Carrier Foundation (Foundation), which partially finances the East Mountain School by providing working capital,[1] should be considered an allowable cost. Moreover, petitioner

[1] Petitioner maintains that working capital provided through investments is necessary to supply operating cash flow to the school because the working capital fund limitation of 15% permitted by Department of Education regulations is insufficient to provide the necessary funds to support the school's operations while awaiting receipt of under-charges from sending districts, which are due two years following an audit. (Petitioner's Reply Brief at 3)

contends that the ALJ erred in holding that the Foundation's investment expenses are per se non-allowable expenses under *N.J.A.C.* 6:20 4.4(a)16, maintaining that its investment expenses are allowable because the statute provides that expenses incurred for the education of handicapped children, which its investment expenses are, "are per se *allowable*." (emphasis in text) (Petitioner's Exceptions at 2)

Petitioner also disagrees with the ALJ's finding regarding severance expenses. The ALJ found that since the Chart of Accounts does not list severance expenses as an allowable expense and since severance expenses are fringe benefits and not part of an employee's salary as petitioner claims, the $399,541 in severance costs claimed by petitioner is not an allowable expense. Petitioner acknowledges that the Chart of Accounts does not list severance expenses as an allowable expense, but citing *Botany Mills, Inc. v. Textile Workers Union,* 50 *N.J. Super.* 18, 20 (App. Div. 1958), petitioner continues to maintain that "severance expenses are a part of an employee's *salary earned during the course of his employment,* but disbursed at a later date." (emphasis in text) (Petitioner's Exceptions at 2*)* Thus, petitioner reasons, by virtue of the fact that salaries are included in the Chart of Accounts, severance expenses are an allowable expense. (*Id.* at 2-3)

With respect to the ALJ's disallowance of $132,375 in General and Administrative (G & A) expenses, petitioner reiterates its argument that *N.J.A.C.* 6:20-4.1(d) is a proper method to allocate G & A cost. Petitioner also expresses its disagreement with the ALJ's conclusion that *N.J.A.C.* 6:20-4.1(d) does not apply because the Foundation does not qualify as a facility as defined in the education statutes. Petitioner asserts that the ALJ improperly focused on the word "facility" and that her interpretation of the word facility does nothing to properly determine whether subsection (d) applies. (*Id.* at 3) Petitioner maintains that

N.J.A.C. 6:20-4.1(c) and *N.J.A.C.* 6:20-4.1(d) do not distinguish between indirect costs and facility costs and that subsection (d) could apply because the Foundation is not in the business of educating students. Therefore, petitioner submits, the seven Cost Centers at issue must be allocated to the East Mountain School since the school receives a benefit from the G & A expenditures. (*Ibid.*) Noting that respondent failed to recognize costs in excess of $7 million from various Cost Centers, petitioner posits that if subsection (c) is accepted as the method to allocate G & A costs, as found by the ALJ, then "*all appropriate G & A expenses must be apportioned equitably.*" (emphasis in text) (*Id.* at 4)

Petitioner vigorously objects to any implication that it is attempting to double charge respondent by labeling certain G & A costs as direct expenses for Medicare purposes and then relabeling the same costs as indirect expenses. Petitioner explains that it originally asserted that the Medicare method was the proper reporting method, but when it became apparent that respondent was applying *N.J.A.C.* 6:20-4.1, it asserted that, if this code section were to be applied, then all Cost Centers must be accounted for. (*Ibid.*) Petitioner asserts that there is no valid reason for respondent to accept costs from Cost Centers, such as data processing and communications, and not allow costs from the other seven Cost Centers at issue because each department provides services or benefits to the East Mountain School. Therefore, petitioner proffers, there must be some allocation of these indirect G & A services. (*Ibid.*)

Finally, petitioner excepts to the ALJ's holding that $84,518 should be excluded form G & A expenses, pursuant to *N.J.A.C.* 6:20-4.4(a)(8), as excess salary paid to the Foundation's Chief Executive Officer (CEO). (*Ibid.*) In so doing, petitioner reasserts its argument that the salary limits in *N.J.A.C.* 6:20-4.4(a)(8) refer to the salary of an Executive Director, not to the CEO of a Foundation, nor is it proper to compare the CEO to a

superintendent of schools as the ALJ concluded. (*Id.* at 5) Since the Foundation's CEO is charged with the running of a vast hospital, which includes a school for the handicapped, petitioner contends that the salary of the CEO of the Foundation should be fully included in G & A expenses as it is not subject to the "cap" provisions. (*Ibid.*)

In its reply, respondent disputes petitioner's characterization of the ALJ's decision as disallowing investment expenses incurred for the education of handicapped children. In point of fact, petitioner submits, the ALJ determined that investment expenses associated with the education of handicapped children, such as the type set forth in the Initial Decision, are allowable under the provisions of *N.J.A.C.* 6:20-4.4(a)16. (Respondent's Reply at 2) Respondent asserts, however, that petitioner did not demonstrate the necessity of, nor the direct utilization of its investments for the education of handicapped children, but merely stated that "everything done for the school is directly related to the education of the students." (*Id.* at 3, quoting Petitioner's Exceptions at 2) Moreover, in contrast to petitioner's contention that the Foundation provides the necessary working capital for the East Mountain School, respondent avers that the June 30, 1998 audit report indicates that the Foundation owed money to the school, thus demonstrating that the school provided working capital to the Foundation, not the reverse. (*Id.* at 3) Additionally, respondent suggests that if the Foundation actually needed to fund East Mountain School through investments as petitioner claims, then a portion of the $1,423,671 in investment income should also have been allocated to the school. (*Ibid.*)

With respect to the disputed severance expenses, respondent asserts that petitioner erroneously relies on *Botany Mills, supra,* in support of its contention that severance expenses are part of an employee's salary earned during the course of employment. Pointing out that *Botany Mills* concerned an interpretation of contract provisions under a collective bargaining

agreement related to an employee's entitlement to vacation pay upon lay off, respondent underscores that the ALJ considered petitioner's reliance on *Botany Mills* and distinguished the holding in that case by noting that severance pay is more accurately defined as "terminal compensation measured by the service given during the period covered by (a) collective bargaining agreement." *Morris Sch. Dist. Bd. of Ed. v. Education Ass'n of Morris*, 310 *N.J. Super.* 332, 344 (App. Div. 1998). (*Id.* at 4-5) Averring that the ALJ established that severance pay is a fringe benefit, not salary, respondent concludes that the ALJ properly determined that severance payments are disallowed expenses under *N.J.A.C.* 6:20-4.4(a)5 and (51). (*Ibid.*)

In determining whether indirect costs should be calculated in accordance with *N.J.A.C.* 6:20-4.1(c) or (d), respondent points to the regulation in question, *N.J.A.C.* 6:20-4.1(d), which it submits, clearly denotes the meaning of "facility" as referring to the building and/or property of a school for the handicapped. Since the Foundation is the parent company, not the physical building or facility where classes are held, respondent asserts that petitioner's argument that subsection (d) can apply to indirect costs, other than for facilities, would render *N.J.A.C.* 6:20-4.1(c) superfluous. Respondent further maintains that there is no evidence to support that the State Board of Education contemplated that indirect costs, other than facility costs, would be calculated under *N.J.A.C.* 6:20-4.1(d). (*Id.* at 6) Respondent proffers that *N.J.A.C.* 6:20-4.1(c) is, therefore, the appropriate procedure for determining indirect costs attributed to the Foundation. Respondent maintains that it correctly disallowed certain costs from the indirect cost calculation because they were costs already accounted for as direct expenses. Moreover, respondent posits, in determining the ratio of private school direct expenses to total Foundation expenses, there is nothing in the regulations that permits the Foundation to exclude the amount of overhead covered by Medicare. Thus, respondent argues,

the Foundation's total overhead must include the Medicare reimbursement for purposes of determining the total G & A expense that can be charged to respondent. (*Id.* at 6) Respondent notes that the ALJ found that the Foundation must use the calculation set forth in *N.J.A.C.* 6:20-4.1(c)1 because it is a parent corporation, not a school, and is prohibited under the provisions of *N.J.A.C.* 6:20-4.1(c)1 from charging an indirect cost based on a direct cost already accounted for under any methodology, including the "step-down" method used for Medicare cost reimbursement purposes. (*Id.* at 7) Moreover, respondent submits, the allocation of the costs in the overhead categories of Depreciation-Buildings/Fixed, Depreciation-Moveable, Employee Benefits, Maintenance and Repairs, Plant, Housekeeping, and Cafeteria are shown separately on East Mountain School's financial statements. Therefore, respondent contends, to also include these Cost Center expenses in indirect expenses as petitioner suggests would be double counting for these expenses. (*Ibid.*)

Finally, respondent maintains that $84,518 was properly disallowed as excess salary paid to a director of a private school pursuant to *N.J.A.C.* 6:20-4.4(a)8 and *N.J.A.C.* 6:20-4.1(l). Respondent points to petitioner's own admission that the Foundation's CEO does not devote his entire time to running East Mountain School. Therefore, respondent argues, the East Mountain School should only be charged a portion of the CEO's salary "commensurate with a director or superintendent running a school, not with an executive running a 'vast hospital.'" (*Id.* at 8)

Upon careful and independent review of the record, the Initial Decision, the exceptions and the reply thereto filed in this matter, the Commissioner determines to affirm the Initial Decision.

Initially, the Commissioner notes the parties' stipulations that there are no issues of material fact in this mater, and, therefore, agrees that summary decision is appropriate in this instance for reasons expressed by the ALJ in the Initial Decision.

Moreover, the Commissioner agrees that petitioner's investment expenses in the amount of $103,427 are non-allowable costs. Under *N.J.A.C.* 6:20-4.4(a)16, investment expenses associated with the purchase/sale of stock, securities, other investment instruments or other investments not associated with the education of handicapped children are not allowable in the calculation of the certified actual cost per pupil. As the ALJ properly observed, the State Board acknowledged in the Economic Impact Statement published upon promulgation of *N.J.A.C.* 6:20-4.4, that although addition of non-allowable cost items at *N.J.A.C.* 6:20-4.4 might reduce the allowable tuition charges to public schools by the private schools for the handicapped, it was promulgating the rule to "ensure that private school operators utilize public funds for bona fide special education expenses to improve or supplement special education programs." 22 *N.J.R.* 2634 (Sept. 4, 1990). (Initial Decision at 16-17) The Commissioner, therefore, finds that petitioner's statement that "everything done for the school is directly related to the education of the students, and thus, should be considered an allowable cost" (Petitioner's Exceptions at 2) is insufficient to demonstrate that the investment expenses at issue were associated with or directly utilized in the education of handicapped children at the East Mountain School as required by *N.J.A.C.* 6:20-4.4(a)16. Additionally, petitioner's argument that investment expenses were incurred as a result of the need to provide working capital to the East Mountain School above the 15% capital fund cap imposed by regulation is rejected. Such financial arrangements for the maintenance of the *economic viability* of the East Mountain School are not directly related to

improving or supplementing special education programs.[2] Accordingly, the Commissioner concurs that the $103,427 claimed by petitioner as investment expense was properly disallowed.

The Commissioner also concurs that severance expenses totaling $399,541 claimed by petitioner are not an allowable expense. It is undisputed that severance expenses are not listed in the Chart of Accounts and that *N.J.A.C.* 6:20-4.4(a)51 specifically excludes costs charged to account categories other than those reflected in the Chart of Accounts in the calculation of the certified actual cost per pupil. Moreover, the Commissioner finds that petitioner's reliance on *Botany, supra,* in support of its argument that severance pay is an employee's deferred "salary earned during the course of his employment, but disbursed at a later date," and thus, an allowable expense under the salary category in the Chart of Accounts, is misplaced. As noted by the ALJ, the *Botany Mills* case *did not hold* that severance pay is payment for services rendered by a worker, and "the mere fact that severance pay is guaranteed to a worker within a collective bargaining agreement does not change its nature." (Initial Decision at 19) Unlike pension contributions and Social Security payments, severance pay is not compensation deducted by petitioner from an administrator's paycheck to be returned at a later date, but is a fringe benefit paid to an administrator at the end of his career based on the total time worked for petitioner. *See Morris, supra*, at 344 (quoting *Owens v. Press Publ'g Co.*, 20 *N.J.* 537, 547 (1956)); *Noorily v. Thomas & Betts Corp.*, 188 *F.*3d 153, 158 (3d. Cir. 1999) (interpreting the Employee Retirement Insurance Security Act, 29 *U.S.C.A.* §1104, and implicitly acknowledging that severance pay is a fringe benefit for ERISA purposes), *cert. denied*, ___ *U.S.* ___, 120 *S.Ct.* 1555, 146 *L.Ed.*2d 460 (2000); and *E.E.O.C. v. Westinghouse Elec. Corp.*,

[2] The Commissioner notes that the parties disagree with respect to whether funds in excess of the 15% capital cap were necessary to maintain the economic viability of the East Mountain School. Although petitioner submits that additional funds were required to provide adequate cash flow for the East Mountain School (Petitioner's Exceptions at 2), respondent asserts that the East Mountain School provided working capital to the Foundation, not the reverse. (Respondent's Reply Exceptions at 3)

869 *F.*2d 696, 710 (3d. Cir. 1989) (holding that severance pay was a fringe benefit and not part of "an integrated benefits scheme designed to provide post-employment benefit to the greatest number of employees"). (Initial Decision at 18) Accordingly, for the reasons expressed by the ALJ, the Commissioner finds petitioner's claim for $399,541 in severance expenses was properly disallowed.[3]

With respect to whether respondent properly disallowed $132,375 in G & A expenses under *N.J.A.C.* 6:20-4.1(c), the Commissioner concurs that *N.J.A.C.* 6:20-4.1(c), not *N.J.A.C.* 6:20-4.1(d), is the appropriate regulation to be applied in determining the tuition petitioner may charge for the educating of handicapped students. The Commissioner emphasizes that the expenses being challenged herein are *general indirect costs*, not facility costs. As found by the ALJ, *N.J.A.C.* 6:20-4.1(d) applies to the allocation of costs within *the facility that a private school uses* for both activities related and unrelated to the education of handicapped children. Under *N.J.A.C.* 6:20-4.1(d) all the facility costs cannot be allocated to the private school if some of the costs were generated by activities and enterprises which do not have a common purpose of educating pupils. (Initial Decision at 22) *N.J.A.C.* 6:20-4.1(c), however, provides for the calculation of indirect costs "***which are incurred for a common or joint purpose and not readily assignable to an approved private school *facility****." (emphasis supplied) The Foundation is the parent company of the East Mountain School, and not the physical location or facility where classes for the handicapped students are held, and thus,

[3] On April 4, 2001, the State Board of Education adopted amended regulations pertaining to Finance and Business Services proposed at *N.J.A.C.* 6:20 *et seq.*, for recodification at *N.J.A.C.* 6A:23 *et seq.* with an effective date of July 1, 2001. Although previously excluded, these amended and recodified regulations permit the cost of severance pay, not to exceed four weeks salary, to be included in the calculation of the certified actual cost per student. *See N.J.A.C.* 6A:23-4.5(a)58 and *N.J.A.C.* 6A:23-4.5(a)7.

N.J.A.C. 6:20-4.1(d) is inapplicable. Accordingly, *N.J.A.C.* 6:20-4.1(c) is the appropriate regulation to be applied in calculating petitioner's G & A expenses.

The Commissioner similarly concludes that respondent correctly applied *N.J.A.C.* 6:20-4.1(c) in excluding non-allowable indirect costs in seven Cost Centers because costs for these overhead categories are allocated separately on the East Mountain School's financial statements. Moreover, petitioner seeks the exclusion of Medicare reimbursement from its overhead expenses which would permit a higher allocation of total G & A expenses. N.J.A.C. 6:20-4.1(c)1, however, prohibits the exclusion of $5,699,698 in overhead expenses, covered in Medicare reimbursements, from its total overhead. As noted by the ALJ, "N.J.A.C. 6:20-4.1(c)1 expressly prohibits [the Foundation] from charging an indirect cost based on a direct cost already accounted for under any methodology, including the Medicare methodology." (Initial Decision at 24) Accordingly, respondent correctly disallowed $132,375 in G & A expenses.

Finally, the Commissioner concurs with the ALJ's conclusion that $84,581 was properly excluded from G & A expenses under *N.J.A.C.* 6:20-4.4(a)8 as excess salary for petitioner's CEO. Notwithstanding petitioner's assertions that the CEO is not subject to the salary "cap" provisions because he is not the director, but rather an administrator charged with the running of a vast hospital, which includes "ten private schools" (Petitioner's Exceptions at 5), salaries of chief administrators for private schools which receive public monies for the education of children with special needs are limited in the public interest by *N.J.A.C.* 6:20-4.4(a)8, *N.J.A.C.* 6:20-4.4(a)10 and *N.J.A.C.* 6:20-4.1(l) so that these administrators are paid commiserate with their public school counterparts. Moreover, $128,544 is the highest allowable salary for the highest paid executive for the fiscal year monitored. (First Level Appeal Decision at 3)

Accordingly, the Commissioner determines that $84, 518 of the CEO's salary of $213,062 was properly excluded from G & A expenses as excess salary.

The Initial Decision of the OAL is, therefore, affirmed for the reasons expressed therein.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: April 12, 2001

Date of Mailing: April 12, 2001

[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.

118-01

IN THE MATTER OF THE TENURE	:	
HEARING OF MARCIA MOSKOWITZ,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
PLAINFIELD, UNION COUNTY.	:	DECISION
	:	

April 12, 2001

AGENCY DKT. NO. 36-2/01

IN THE MATTER OF THE TENURE	:	
HEARING OF MARCIA MOSKOWITZ,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
PLAINFIELD, UNION COUNTY.	:	DECISION
	:	

For the District, Lance J. Kalik, Esq. (Riker, Danzig, Scherer, Hyland & Perretti)

For Respondent, Marc S. Klein, Esq.

This matter having been opened before the Commissioner of Education on February 16, 2001, through certification of tenure charges of inefficiency, unbecoming conduct, excessive absenteeism and insubordination against Marcia Moskowitz, a tenured special education teacher, by the Board of Education of the City of Plainfield; and

The Commissioner having directed respondent, via both certified and regular mail on February 16, 2001, the certified copy having been signed for on March 6, 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

In that no communication has been received from respondent in response to the Board's charges, each count of the charges against respondent is deemed to be admitted; and

In that the tenure charges certified against respondent by the Board and the statement of evidence in support of those charges indicate that respondent, as a special education teacher, has failed to: display proficiency in the subject matter of her teaching; plan for closure of lessons and activities; provide students with clear direction; encourage cooperative learning; effectively organize lessons; maintain a classroom environment conducive to learning; control or administer her students effectively; or complete timely, good quality required reports, and that despite numerous intervention efforts and recommendations for improvement, respondent's performance has continued to deteriorate;[1] and

In that the Board's charges and statement of evidence in support of such charges next indicate that respondent's failure to maintain a safe and orderly classroom has served to jeopardize the safety and well-being of her students in that on one occasion, her failure to maintain classroom control resulted in violence concluding in injury to four students; and

In that the charges and statement of evidence in their support further indicate that respondent has repeatedly failed to report to her position on time, notwithstanding continual warnings to do so, has taken prolonged absences and failed to return to work when expected, and finally, respondent has refused to report to her teaching position at all since the onset of the 2000-2001 school year, all of which have seriously compromised the Board's ability to assure the continuity of instruction for the District's students; and

[1] It is noted that although the Board provided respondent the requisite 90-day period to correct such inefficiencies prior to certifying these charges to the Commissioner, respondent apparently chose not to avail herself of this opportunity by virtue of her refusal to report to her position at the beginning of the 2000-2001 school year. (See letter from respondent's attorney to the District's superintendent dated August 18, 2000, Exhibit 2.)

Having deemed such charges to be admitted by operation of rule, the Commissioner finds respondent's actions constitute inefficiency, unbecoming conduct, excessive absenteeism and insubordination and are sufficient to warrant her dismissal from her tenured position; now therefore

IT IS ORDERED this 12th day of April 2001, that summary decision shall be granted to the Board, and Marcia Moskowitz shall be dismissed from her tenured position as a teacher in the Board's employ as of the date of this order. This matter will be transmitted to the State Board of Examiners for action, as that body deems appropriate.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 4|12|01

Date of Mailing: 4|12|01

[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.*

117-01

IN THE MATTER OF THE TENURE	:	
HEARING OF ANDRIA WASHINGTON,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF ATLANTIC CITY, ATLANTIC	:	
COUNTY.	:	

April 12, 2001

OAL DKT. NO. EDU 6745-97
AGENCY DKT. NO. 271-7/97

IN THE MATTER OF THE TENURE	:	
HEARING OF ANDRIA WASHINGTON,	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY	:	DECISION
OF ATLANTIC CITY, ATLANTIC	:	
COUNTY.	:	

Upon notification by the Board that its tenure charges against Andria Washington were moot because respondent had resigned effective July 1, 1998, the Office of Administrative Law returned the record in this matter for consideration by the Commissioner.

Upon careful and independent review of the record, the Commissioner determines to consider the Board's notification of respondent's resignation as a withdrawal of the tenure charges. In that there is no indication that respondent's resignation is the result of a settlement agreement requiring review by the Commissioner pursuant to *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846, and where respondent unilaterally resigned her position as a third grade teacher on July 1, 1998, thus having abandoned her tenure acquired with the District, the Commissioner concludes that withdrawal of the charges is appropriate in this instance. The Commissioner will, therefore, not compel the District to prosecute tenure charges against respondent.

In so holding, the Commissioner is mindful of the within tenure charges of failure to comply with work assignments/dereliction of duty, excessive absenteeism/job abandonment, a pattern of insubordination/noncompliance and unethical practices/official misconduct. Respondent denied all charges.

In light of the *allegations* of unethical practices/official misconduct (conduct unbecoming), wherein the Board asserts that respondent represented other teachers' work as her own, altered students' grades and misrepresented students' achievements in the whole language portfolios, this matter is being referred to the State Board of Examiners pursuant to *N.J.A.C.* 6A:3-5.6(d), which authorizes the Commissioner to refer a tenure matter to the State Board of Examiners for action against a teacher's certificate in instances where tenure proceedings are concluded prior to adjudication because the charged party has *resigned* or retired.

Moreover, the regulations governing the State Board of Examiners specifically provide for proceedings when tenure charges are mooted by virtue of resignation, as stated in *N.J.A.C.* 6:11-3.5, as follows:

> In cases in which teaching staff members accused of misdemeanors, crimes or *conduct unbecoming* 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 shall be the responsibility of the chief school administrator of that district to notify the State Board of Examiners of the alleged conduct pursuant to N.J.A.C. 6:11-3.6(a)2. Should the Board of Examiners issue an Order to Show Cause, it shall be the responsibility of the district which reported the conduct to cooperate with the Board of Examiners in ascertaining and presenting the facts underlying such allegations. (emphasis added)

Accordingly, by copy of this decision, the State Board of Examiners is notified of the within tenure charges and the circumstances underlying their withdrawal.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4|12|01

Date of Mailing: 4|12|01

* 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.

EDU # 508-00
C # 116-01
SB # 16-01

CARRIER FOUNDATION – EAST MOUNTAIN SCHOOL, SOMERSET COUNTY,

PETITIONER- APPELLANT,

V.

STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, April 12, 2001

For the Petitioner-Appellant, Riker, Danzig, Scherer, Hyland & Perretti, LLP (James S. Rothschild, Jr., Esq., of Counsel)

For the Respondent-Respondent, Allison Colsey Eck, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

After careful review of the record in this matter, we reject appellant's argument that N.J.A.C. 6:20-4.1(d) should control the allocation of the general and administrative costs (hereinafter "indirect costs") at issue in this appeal. The existence of the Foundation does not in and of itself constitute use of the facility used by the East Mountain School for unrelated activities or enterprises within the meaning of N.J.A.C. 6:20-4.1(d). Rather, as the Commissioner held, the question of whether to include these costs in the "actual cost per pupil" for tuition purposes is controlled by N.J.A.C. 6:20-4.1(c).

However, in reviewing this matter, we find that the record does not clearly indicate the rationale relied upon by the Office of Compliance in disallowing $72,132 in expenses not previously included as direct costs to the School and which the School had allocated as indirect costs. Without such rationale, we are unable to review the merits of the School's appeal of the disallowance of this amount. However, on the basis of our review of the record, we reject the contention of the Deputy Attorney General representing the Office of Compliance that by allocating the same expenses as indirect costs for purposes of establishing the actual cost per pupil pursuant to the State Board's regulations as the Foundation had included as direct costs for purposes of Medicare reimbursement, the School had double-charged for these expenses. Quite simply, the record does not support such a conclusion.

Therefore, we remand this matter to the Commissioner for the limited purpose of establishing the basis upon which the Office of Compliance made its determination that $72,132 allocated by the School as indirect General and Administrative costs was non-allowable. In all other respects, we affirm the decision of the Commissioner.

We retain jurisdiction.

October 3, 2001

Date of mailing OCT 05 2001

120-01

#120-01

M.R., on behalf of minor child, J.V.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 16, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9431-00
AGENCY DOCKET NO. 301-8/00

M.R. o/b/o J.V.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

Respondent.

M.R., petitioner, *pro se*

Stephen J. Christiano, Esq., for respondent

Record Closed: February 28, 2001 Decided: February 28, 2001

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

This matter involves an appeal by petitioner M.R., on behalf of J.V., from a residency determination by respondent Board of Education of the Township of West Orange. The Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL) where, on October 18, 2000, it was filed for hearing and determination as a contested case. Subsequent to the assignment of the matter to the undersigned on November 13, 2000, a hearing was

scheduled for February 6, 2001. The parties appeared on February 6, 2001 and made a joint request for an adjournment of the hearing for purposes of finalizing an amicable resolution of the matter. The parties reached a settlement and, thereafter, submitted the attached Stipulation of Settlement indicating the terms of agreement which the undersigned received on February 28, 2001. Having reviewed the record and the terms of 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.

February 28, 2001
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Receipt Acknowledged:

March 2, 2001
DATE

D. N. Centanni
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR - 7 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

FEB 28 12 52 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. EDUOS 09431-00

M.R. ON BEHALF OF MINOR CHILD, J.V., Petitioner, vs. BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY, Respondent.	STIPULATION OF SETTLEMENT

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) Respondent acknowledges J.V.'s right to attend its schools, provided that the school eligibility criteria set forth in NJSA 18A:38-1 continue to be met by petitioner and her niece.

(4) Petitioner shall pay respondent a sum of $6,700 for back tuition charges. Payment shall be made in two installments of $3,350. The first payment is due on March 1, 2001; the second payment is due on April 1, 2001. In the event of default, respondent reserves the right to proceed with its original tuition claim (less any payments made).

(5) Petitioner shall apply for an order of custody for J.V. from the Superior Court, Chancery Division, Family Part. Application shall be made no later than March 15, 2001, and petitioner shall furnish respondent with proof of said application. Petitioner shall also provide respondent with a copy of the custody order upon receipt of same.

(6) This settlement is subject to approval by the Commissioner of Education. In the event of disapproval of the settlement by the Commissioner, any tuition payments made by petitioner shall be refunded by respondent.

Dated: February 15, 2001

Maria Rodriguez, Petitioner

ATTEST:

Secretary

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE

By: President

OAL DKT. NO. EDU 9431-00
AGENCY DKT. NO. 301-8/00

M.R., on behalf of minor child, J.V.,	:	
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: APR 16 2001

Date of Mailing: APR 16 2001

#119-01

E.M.I., on behalf of minor children, E.C.-U and C.C.-U,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY.	:	DECISION
RESPONDENT.	:	
	:	

April 16, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11019-00
AGENCY DOCKET NO. 332-9/00

E.M.I. o/b/o E.C.-U. AND C.C.-U.,

Petitioner,

v.

BOARD OF EDUCATION OF THE SOUTH ORANGE AND MAPLEWOOD SCHOOL DISTRICT,

Respondent.

Luis R. Sanchez, Esq., for petitioner (Sanchez, Sanchez & Santoliquido, attorneys)

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

Record Closed: February 28, 2001 Decided: February 28, 2001

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

This matter involves an appeal by petitioner E.M.I., on behalf of E.C.-U. and C.C.-U., from a residency determination by respondent Board of Education of the South Orange and Maplewood School District. Respondent filed an Answer and Counterclaim and the Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL) where, on December 1, 2000, it

was filed for an expedited hearing. Subsequent to the assignment of the matter to the undersigned on December 18, 2000, a hearing was scheduled for January 18, 2001. During a telephone conference on January 16, 2001, counsel advised the undersigned that the matter had been resolved and, thereafter, submitted the attached Stipulation of Settlement and Mutual Dismissal of Petition and Counterclaim indicating the terms of agreement which was received on February 28, 2001. Having reviewed the record and the terms of 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.

February 28, 2001
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Receipt Acknowledged:

March 2, 2001
DATE

J. N. Antanaitis /jc
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR - 7 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

SCHENCK, PRICE, SMITH & KING, LLP
10 Washington Street
P.O. Box 905
Morristown, New Jersey 07963-0905
(973) 539-1000
Attorneys for Respondent
South Orange and Maplewood Board of Education

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
FEB 28 12 51 PM '01

E.M.I., ON BEHALF OF E.C.-U. and C.C.-U. PETITIONER, v. SOUTH ORANGE AND MAPLEWOOD BOARD OF EDUCATION, RESPONDENT.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION OAL DKT. NO. EDUOS 11019-00N Agency Ref. No. 332-9/00 STIPULATION OF SETTLEMENT AND MUTUAL DISMISSAL OF PETITION AND COUNTERCLAIM

Petitioner E.M.I. o/b/o E.C.U. and C.C.U. and Respondent/Counterclaimant Board of Education of the School District of South Orange and Maplewood, 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 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 claims, 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.

3. As a result of the foregoing, Petitioner E.M.I. o/b/o E.C.U. and C.C.U. hereby 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.

Eric R. Eglestaine
E.M.I.

Nancy A. Dorgan
BOARD OF EDUCATION OF SOUTH ORANGE AND MAPLEWOOD

Document #: 449133/JLB

30

OAL DKT. NO. EDU. 11019-00
AGENCY DKT. NO. 332-9/00

E.M.I., on behalf of minor children, E.C.-U and C.C.-U,	:	
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, Initial Decision and Stipulation of Settlement and Mutual Dismissal of Petition and Counterclaim have been reviewed. Upon such review, and noting the absence of any terms which would permit him to conclude that the settlement is fully dispositive of all issues in controversy pursuant to *N.J.A.C.* 1:1-19.1, the Commissioner determines, instead, to consider this matter a withdrawal pursuant to *N.J.A.C.* 1:1-19.2.

The Commissioner, therefore, approves the withdrawal, and determines that this matter shall be dismissed with prejudice.

IT IS SO ORDERED

COMMISSIONER OF EDUCATION

Date of Decision: APR 16 2001

Date of Mailing: APR 16 2001

#121-01

RAY MISNER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 16, 2001

WHEREAS, on or about July 16, 1998, Respondent Board filed an Answer to Respondent's Petition of Appeal; and

WHEREAS, on July 30, 1998 the Commissioner transmitted the matter as a contested matter to the Office of Administrative Law; and

WHEREAS, on September 21, 2000 Respondent Board was notified that on June 2, 2000 following a hearing in the Superior Court of New Jersey, Chancery Division, Family Part, in a matter known as State in the Interest of M.W., Docket No. FJ-13-4191-98-B, pupil M.W. was found not guilty of committing an assault upon Petitioner Ray Misner on March 6, 1998; and

WHEREAS, the Petitioners and Respondent agree that the Superior Court's June 2, 2000 finding that pupil M.W. was not guilty of assaulting Petitioner Ray Misner on March 6, 1998 negated an essential element of N.J.S.A. 18A:37-2.1; and

WHEREAS, the Petitioners and Respondent are desirous of settling the matters in dispute in the present matter.

NOW, THEREFORE, the Petitioners and Respondent Board agree that Petitioners shall, and hereby do, withdraw the Petition of Appeal in this matter and that the matter be dismissed with prejudice.

KLAUSNER, HUNTER AND ROSENBERG
Attorney for Petitioners

By: _____ Date: 2-9-2001
DAVID L. ROSENBERG

HUNDLEY AND PARRY, P.C.
Attorney for Respondent

By: _____ Date: 12-12-2000
JAMES T. HUNDLEY

OAL DKT. NO. EDU 06488-98S
AGENCY DKT. NO. 181-6/98

RAY MISNER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, 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: APR 16 2001

Date of Mailing: APR 16 2001

#122-01

IN THE MATTER OF THE TENURE	:	
HEARING OF JAMES CAPPIELLO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
UNION CITY, HUDSON COUNTY.	:	
	:	

April 16, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 3206-00

AGENCY DKT. NO. 74-2/00

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

Petitioner,

v.

JAMES CAPPIELLO,

Respondent.

Joan M. Damora, Esq., appearing for Petitioner
(Murray, Murray & Corrigan, attorneys)

Gregory T. Syrek, Esq., appearing for Respondent
(Bucceri & Pincus, attorneys)

Record Closed: February 15, 2001 Decided: February 27, 2001

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on March 23, 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.

An Order of Inactivity was filed on July 11, 2000, ordering that all proceedings cease for six months pending the outcome of an application for Disability Retirement

brought by the Union City Board of Education. In view of the letter[1] from Board counsel setting forth the circumstances of this case, and the fact that Mr. Cappiello's has retired, I **FIND** that the matter has become moot.

Accordingly, I hereby **ORDER** that this petition be and hereby is **DISMISSED WITHOUT PREJUDICE.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (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 27, 2001
DATE

Maria La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

March 2, 2001
DATE

D.N. Antonucci Jr.
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR - 7 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

[1] The letter and application are attached to this order and made a part hereof.

MURRAY, MURRAY & CORRIGAN
COUNSELLORS AT LAW
25 SYCAMORE AVENUE
LITTLE SILVER, NJ 07739
(732) 747-2300

FAX NO. (732) 758-8095
REPLY: LITTLE SILVER
rem@mmc-esqs.com

200 NORTH FIFTH STREET
SUITE 3
CAMDEN, NEW JERSEY 08102
(856) 338-0603
FAX (856) 338-0546

ROBERT EMMET MURRAY•
KAREN A. MURRAY••
DAVID F. CORRIGAN

LINDA SABAT•
LAWRENCE M. FOX•
JOAN M. DAMORA
MARY E. HENNESSY
CHERYL U. BROWN△△
RAPHAEL FELLI•
ADAM S. HERMAN△
JOSEPH M. HANNON•
RUTH M. RUGGERO
THOMAS M. TOMAN JR.•
ROBERT A. GREITZ△

• MEMBER OF N.Y. BAR
•• MEMBER D.C. & N.Y. BARS
△ MEMBER OF PA. BAR
△△ MEMBER OF GA. BAR

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
FEB 15 11 32 AM '01

February 14, 2001

Hon. Maria M. LaFiandra, A.L.J.
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102

Re: I/M/O the Tenure Hearing of James Cappiello, Board of Education of the City of Union City, Hudson County
Our File No. 25,0071R
O.A.L. Docket No. EDU 3206-00N

Dear Judge LaFiandra:

Pursuant to your request made during today's telephone conference, the following is a brief synopsis of the relevant facts and procedural history which occurred during the course of this action before the Commissioner and Office of Administrative Law.

James Cappiello, a tenured teacher of physical education with the Union City School District, was served with tenure charges on or about February 3, 2000. On February 22, 2000, the Board of Education of the City of Union City heard these charges, found probable cause, and voted to certify these charges to the Commissioner of Education as well as to suspend Mr. Cappiello, without pay, effective February 23, 2000. Receipt of these charges were made on February 28, 2000 and on March 14, 2000, these charges were referred by the Bureau of Controversies and Disputes to the Office of Administrative Law for a hearing.

The tenure charges contained two specific charges or counts; First, Mr. Cappiello was charged with chronic and excessive absenteeism for a period of nine years in which his absentee rate fluctuated between twenty-one to fifty six days of absences in each school year. The second charge alleged that Mr. Cappiello suffers from an incapacity because of a underlying mood disorder which results in the lack of mental and/or physical ability to perform his duties as a teacher.

Mr. Cappiello had already been scheduled, at the request of the Administration, to submit to a psychiatric examination scheduled in April, 2000. The result of that examination indicated that Mr. Cappiello suffers from a disability which makes him unable to assume the

functional responsibilities of a school teacher. On May 15, 2000, the parties participated in a telephone conference and among other things, agreed to put the matter on inactive status in order to pursue a disability retirement application with the State. The Order of Inactivity was signed by Your Honor on July 11, 2000.

The Disability Retirement Application was formally made to the Division of Pensions and Benefits on August 23, 2000 directly by the school district. The Division of Pensions sent Mr. Cappiello for another examination, and on January 4, 2001, the Division approved this application effective on January 1, 2001.

During this time period, Mr. Cappiello has remained on suspended status, although pursuant to *N.J.S.A.* 18A:6-14, he was placed back on salary on the 120th day. On January 1, 2001, the date of his retirement, Cappiello was removed from the payroll.

The Board does not object to the dismissal of the tenure charges, without prejudice. In the unlikely event that Mr. Cappiello is deemed fully recovered from his disability, the Board at that time would make a determination whether to pursue the tenure charges, if necessary.

If you require any other information or documentation, please do not hesitate to contact me.

Very truly yours,

MURRAY, MURRAY & CORRIGAN

Joan Damora

JOAN M. DAMORA

cc: Carl Johnson, Board Secretary
Frank Vaccarino, Asst. Superintendent
Thomas Kobin, Esq.
Gregory T. Syrek, Esq.

TO: JAMES CAPPIELLO
461 TEANECK ROAD
RIDGEFIELD PARK, NJ 07660-0000

FROM: Board and Trustee Administration

RE: 1-367154

DATE: January 4, 2001

SUBJECT: APPROVAL OF DISABILITY RETIREMENT APPLICATION

The Board of Trustees of the Teachers' Pension and Annuity Fund at its meeting on January 4, 2001, approved your application for Ordinary Disability Retirement effective January 1, 2001, under Maximum. You have the right to change the retirement option selected provided you file a written notice with the Division of Pensions and Benefits' Retirement Bureau within 30 days from the date of this letter or your retirement date, whichever is later. Otherwise, the retirement option will remain and cannot be changed for any reason thereafter.

If you continue to receive a salary beyond the effective date of retirement, no retirement benefits shall be paid for the period where you received salary and no salary or service credit shall be provided for the service rendered after the approved effective date of retirement. In addition, your employer shall be required to complete an updated Certification of Service and Final Salary.

Your retirement allowance as a disability retirant is subject to adjustment if your earnings from employment after retirement exceed the difference between the pension portion of your retirement allowance and the salary attributable to your former position.

The statute permits the Board of Trustees to require a disability retirant to undergo annual medical examinations to determine if she/he continues to be totally and permanently disabled and therefore eligible for continued receipt of his/her disability retirement allowance.

If you were required to purchase service credit in order to qualify for your retirement, you must complete the purchase transaction before your retirement benefit can be paid.

2C

JAN 09 '01 09:59 FR DIV OF PENSIONS TO 17327588095 P.01/02

The Board has waived the 30-day waiting period for all Retirements with an effective date of January 1, 2001, and earlier. However, the processing of your retirement allowance will take approximately 6 to 8 weeks.

Your file is being transferred to the Retirement Bureau to implement the Board's decision.

c: UNION CITY BD OF ED
3912 BERGEN TURNPIKE
UNION CITY, NJ 07087-0000

2d

OAL DKT. NO. EDU. 3206-00
AGENCY DKT. NO. 74-2/00

IN THE MATTER OF THE TENURE	:	
HEARING OF JAMES CAPPIELLO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
UNION CITY, HUDSON COUNTY.	:	
	:	

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 his full and independent review of the record, the Commissioner agrees with the recommendation of the Administrative Law Judge that, under the existing circumstances, this matter is appropriately dismissed.

Accordingly, the recommended decision of the OAL is affirmed and the within tenure charges are hereby dismissed without prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: APR 16 2001

Date of Mailing: APR 16 2001

* 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.

123-01

C.N., on behalf of minor child, B.G., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

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

RESPONDENT. :

:

April 17, 2001

OAL DKT. NO. EDU 9467-00
AGENCY DKT. NO. 326-9/00

C.N., on behalf of minor child, B.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on March 16, 2001, providing petitioner ten 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. [1] [2]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4|17|01

Date of Mailing: 4|17|01

[1] It is noted that on March 1, 2001 the Board withdrew its counterclaim in this matter in light of the fact that B.G. was no longer attending its schools.

[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.* 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.

124-01

G.G., on behalf of minor child, T.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DUMONT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 17, 2001

OAL DKT. NO. EDU 1583-00
AGENCY DKT. NO. 385-12/99

G.G., on behalf of minor child, T.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DUMONT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by the OAL on February 22, 2001, providing petitioner ten 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

Mailing date: 4|17|01
Decision date: 4|17|01

* 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.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

125-01

GEORGE WATSON, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
PRESIDENT AND BOARD OF TRUSTEES OF THE GATEWAY CHARTER SCHOOL, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 17, 2001

OAL DKT. NO. EDU 7321-00
AGENCY DKT. NO. 158-5/00

GEORGE WATSON, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
PRESIDENT AND BOARD OF TRUSTEES OF THE GATEWAY CHARTER SCHOOL, HUDSON 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 February 22, 2001, providing petitioner ten 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.

IT IS SO ORDERED. *

COMMISSIONER OF EDUCATION

Date of Decision: 4|17|01

Date of Mailing: 4|17|01

* 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 the date of mailing to the parties.

126-01

J.R.M., on behalf of minor child, J.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 17, 2001

OAL DKT. NO. EDU 9194-00
AGENCY DKT. NO. 307-9/00

J.R.M., on behalf of minor child, J.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4, along with copies of notifications sent to the parties by OAL on February 10, 2001, providing petitioner ten 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: 4|17|01

Date of Mailing: 4|17|01

* 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.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

127-01

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

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,
IN THE MATTER OF THE DISTRICT SUPPLEMENTAL AID APPLICATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

April 17, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INIITAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4580-00

AGENCY DKT. NO. 178-5/00

BOARD OF EDUCATION

OF THE CITY OF TRENTON,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION,

Respondent.

Jessica deKoninck, Esq., for petitioner

Michael C. Walters, Deputy Attorney General, for respondent (John Farmer, Attorney General of New Jersey)

Richard Friedman, Esq., for participants New Jersey Education Association and Trenton Education Association (Zazzali, Fagella & Nowak, attorneys)

Record Closed: March 1, 2001 Decided: March 2, 2001

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

STATEMENT OF THE CASE

The Board of Education of the City of Trenton (BOE), operator of an urban special needs "Abbott district" school system, applied to the Department of Education for supplemental aid for school year 2000-2001, to ensure that its public school children receive a thorough and efficient education. N.J.S.A. 18A:7F-3 "Abbott district." Department of Education officials determined that supplemental aid in an amount less than that applied for was necessary. The BOE appealed to the Commissioner and the case was transmitted to the Office of Administrative Law (OAL). The Comprehensive Educational Improvement and Financing Act of 1996 (CEIFA) and the Urban Education Reform Regulations in the Abbott Districts govern the case. N.J.S.A. 18A:7F-1 to -34; N.J.A.C. 6:24-1.1 to -9.6.

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

PROCEDURAL HISTORY

The BOE submitted to the Department a proposed budget, application and supporting exhibits. By letter dated May 19, 2000, Department Assistant Commissioners notified the BOE that they had determined that an amount of supplemental aid less than the amount applied for should was necessary. On May 26, 2000, the BOE filed its petition of appeal to the Commissioner and, on June 12, 2000, the Department filed its answer. N.J.S.A. 18A:6-9, N.J.A.C.6A:24-9.1, -9.2, -9.3. The Department deemed the matter a contested case and transmitted it to the OAL, where it was filed on June 19, 2000. N.J.S.A. 52:14B-2(b), N.J.A.C.6A:24-9.6.

On June 23, 2000, the case was assigned to me and I forwarded a scheduling letter to the attorneys. On June 28, 2000, the New Jersey Education Association and Trenton

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 2, 2001
DATE

John R Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

3/6/01
DATE

Lori Ann Waters/lp
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 7 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 4580-00
AGENCY DKT. NO. 178-5/00

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, **IN THE MATTER OF THE DISTRICT SUPPLEMENTAL AID APPLICATION,**	:	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|17|01

Date of Mailing: 4|17|01

129-01

K.M, on behalf of minor children, H.M. and D.M.,

PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning uncle challenged the Board's residency determination that his brother's children, H.M. and D.M., were not entitled to a free education in the District.

The ALJ found that there was clearly a family hardship whereby the parents, who immigrated to the United States from India, were unable to provide a home and supervision for their children. Petitioner, who was domiciled in the District, kept the children in his home *gratis*. The ALJ concluded that the Board should provide H.M. and D.M. a free public education.

The Commissioner adopted the findings and determination in the Initial Decision as his own. The Commissioner affirmed that H.M. and D.M., under the totality of the factual circumstances presented, were entitled, pursuant to the requirements of *N.J.S.A.* 18A:38-1(b), to attend school free of charge in the District.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7915-00
AGENCY DKT. NO. 299-8/00

K.M., ON BEHALF OF MINOR CHILD, H.M.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,
Respondent.

K.M., *pro se*

Stephen J. Christiano, Esq., appearing for Respondent

Record Closed: January 30, 2001 Decided: March 2, 2001

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

Petitioner is challenging Respondent Board of Education's determination of lack of residency for H.M. and D.M., his brother's children.

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. Petitioner is domiciled in Respondent's school district and has been since July, 1987.

2. Petitioner's brother, the brother's wife and two children entered the United States on July 5, 2000. They had to borrow money for the airline tickets.

3. No one in the immigrant family spoke or read any English when they entered the country.

4. A.M. and J.M. are the parents of the children in question. Because they cannot read or fill out employment applications, they work at a motel in Philadelphia, the owner of which is Indian.

5. The parents earn approximately $900 per month each at the motel. They are required to live at the motel, since they are standby employees. They do not pay rent or utility charges. Their money is spent on food and other necessities of daily living.

6. Petitioner receives no money from his brother in support of the children. Petitioner and his wife work. His wife's salary pays college tuition for their daughter. Petitioner and his wife have a combined income of approximately $55,000. They live in a three family house which is owned by Petitioner and his brother-in-law. They share expenses on the house.

7. The children have begun to speak English and have begun to become acclimated to their new surroundings.

8. The children, two girls, are approximately 13 and 15 years old.

DISCUSSION AND CONCLUSION

The law in New Jersey provides that a free education shall be provided to those who are between the ages of 5 and 20, and who are domiciled within the school district. In addition, *any person* who is kept in the home of a person domiciled within the district and is supported *gratis* as if he were the person's own child shall also receive a free public education upon

> the filing of a sworn statement by the person to the effect that he is domiciled within the district, is supporting the child gratis and will assume all personal obligations for the child relative to school, and intends to support the child gratis for longer than the school term; and
>
> the filing of a sworn statement by the parent of the child that he/she is incapable of supporting the child due to a family or economic hardship and the child is not residing with the resident of the district solely for the purpose of receiving a free public education. The statement shall be accompanied by supporting documentation in accordance with the provisions of the statute. *N.J.S.A.* 18A:38-1.

Emphasis supplied.

In this case, there is clearly a family hardship. The parents of the children involved cannot speak, read or write English. The closest employment they could find is in Philadelphia, and they could only take the employment because the owner can communicate with them.

The parent's employer provided a letter which states that the motel only allows full-time employees to remain on the premises. Respondent asserts that the language of the letter does not mandate that the parents live at the motel; however, the Petitioner's testimony that his brother and wife are standby employees who may be

employees and may be called anytime of the day or night, I **FIND** that there is a requirement that they reside in the motel and, therefore, are unable to provide a home and supervision for their children.

Moreover, K.M. testified that it is his intention eventually to bring his brother and his sister-in-law to live in the district; he intends to keep the children with him until that time.

I **FIND**, therefore, that the statutory requirements have been met and Petitioner has sustained the burden of proof. I **CONCLUDE** that the determination of Respondent should be **REVERSED**; Respondent should provide H.M. and D.M. a free public education.

I do so **ORDER**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 2, 2001
DATE

Maria La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

3/9/01
DATE

Debbie Antonelli /mp
DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAR 12 2001
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Witnesses:

Josefa Lopez

K.M.

Exhibits:

R-1 Affidavit of Parent (D.M.), August 16, 2000

R-2 Affidavit for Non-Resident Pupil Enrollment (D.M.), August 16, 2000

R-3 Affidavit of Parent (H.M.), August 16, 2000

R-4 Affidavit for Non-Resident Pupil Enrollment (H.M.), August 16, 2000

R-5 Letter from Days Inn (A.M.), October 1, 2000

R-6 Letter from Days Inn (J.M.), October 1, 2000

R-7 Letter from West Orange BOE re D.M., August 24, 2000

R-8 Letter from West Orange BOE re H.M., August 24, 2000

R-9 Memo re Tuition Rate 2000-2001 school year (H.M.)

R-10 Memo re Tuition Rate 2000-2001 school year (D.M.)

R-11 Letter to BOE from Days Inn, August 16, 2000

OAL DKT. NO. EDU 7915-00
AGENCY DKT. NO. 299-8/00

K.M., on behalf of minor children, H.M. and D.M.,[1]	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	
	:	

The record and Initial Decision issued by the Office of Administrative Law have been reviewed. Respondent's exceptions, which were timely filed pursuant to *N.J.A.C.* 1:1-18.4, urge reversal of the recommended decision, essentially for the reasons presented to and rejected by the Administrative Law Judge (ALJ) during the hearing of this matter; namely, that the parents of H.M. and D.M. are fully capable of supporting and providing care for their children since they are in good health and are gainfully employed as motel workers; that the parents' inability to speak English does not constitute a hardship; and that the fact of their choosing to live at their place of employment, where children cannot stay, and where they can save on living expenses, cannot suffice as an economic hardship. Additionally, respondent urges that:

> A "hardship" as set forth in *N.J.S.A.* 18A:38-1(b) is one that renders the parent(s) incapable of supporting or providing care for the child. Whether it would be better for the children to live with their uncle in West Orange is not a consideration. Whether the uncle and his family speak English is not a consideration. Whether it is cheaper for the parents to live in the motel is not a consideration. The only issue that matters is whether the parents can support their children. Despite the ALJ's Findings of Fact,

[1] It is noted for the record that, notwithstanding the case title on the Initial Decision, this matter actually involves two children, H.M. and D.M.

there is clearly nothing in the record to suggest that the parents cannot support them. (Respondent's Exceptions at 2)

Upon review of the record, the Commissioner agrees with and adopts the ALJ's recommended decision determining that H.M. and D.M. are entitled to attend school free of charge in the West Orange School District. While the Commissioner would agree that the inability to speak English is not *per se* demonstration of family or economic hardship, it is a consideration in understanding why the children's parents, upon immigrating to the United States from India, found it necessary to take a job in a motel whose owner is Indian and is able to communicate with them. Moreover, the Commissioner finds and concludes that respondent brings nothing to the record to support reversal of the ALJ's credibility determination with respect to petitioner's testimony that the parents of H.M. and D.M. must live at the motel because they are standby employees who may be called upon to work at any time of day and night and, because they are not permitted to have their children live with them in the motel room, they, therefore, are unable to provide a home and supervision for their children. Contrary to respondent's position otherwise, the parents' residing in the motel is not merely to save money on utilities and rent.

Accordingly, it is determined that H.M. and D.M., under the totality of the factual circumstances presented herein, are entitled, pursuant to the requirements of *N.J.S.A.* 18A:38-1(b), to attend school free of charge in the West Orange School District.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 4|20|01

Date of Mailing: 4|20|01

[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.

130-01

MIDDLESEX COUNTY VOCATIONAL EDUCATION ASSOCIATION, ON BEHALF OF ITSELF AND THE MEMBERS NAMED HEREIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MIDDLESEX COUNTY VOCATIONAL TECHNICAL SCHOOLS,	:	DECISION
RESPONDENT.	:	
	:	

April 20, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 122-00

AGENCY DKT. NO. 374-12/99

MIDDLESEX COUNTY VOCATIONAL EDUCATION ASSOCIATION, ON BEHALF OF ITSELF AND THE MEMBERS NAMED HEREIN,

Petitioner,

v.

BOARD OF EDUCATION OF THE MIDDLESEX COUNTY VOCATIONAL TECHNICAL SCHOOLS,

Respondent.

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

Anthony B. Vignuolo, Esq., for respondent (Borrus, Goldin, Foley, Vignuolo, Hyman, Stahl & Clarkin, attorneys)

Record Closed: January 2, 2001

Decided: March 8, 2001[1]

[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:

These petitioners, an Education Association and a member of the Association alleged the Middlesex County Vocational-Technical Schools Board of Education has improperly assigned her to teach classes that are beyond the scopes of her instructional certificates and endorsements. The Board denies the allegation and requests that the petition be dismissed.

The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13. It at first appeared that the matter might proceed on the papers. However, although most essential facts could be stipulated, limited testimony was taken on December 18, 2000. Counsel then timely filed submissions.

Jean Dvorak, a petitioner, testified. She has been an English teacher at the Vocational-Technical School since 1971. She holds a secondary teaching certificate with an English endorsement. She has taught English exclusively in her time at the school.

Graduates of the school receive a regular high school diploma; therefore, they must meet all State academic requirements. In comparison to a generation ago, there is a little less emphasis on technical subjects and a bit more emphasis on academics.

Dvorak has taught workshops, but states she has not taught remedial classes. She teaches some computer skills, but these are not remedial in nature.

Toward the end of September 1999 she received what she described as a strange assignment. Pupils reported to her for instruction denominated Reading Workshop. Dvorak stated this was news to her.

Dvorak checked with the school office and was informed that she was indeed to conduct a reading workshop.

She had a technical writing class and the remedial group. She was given no class list for the remedial group until she requested one. She then learned it was in fact two groups, meeting on alternating weeks. Each group had seven or eight pupils assigned to it. In October, "some books" were dropped off in her room by the basic skills supervisor. Dvorak protested to the supervisor that Dvorak was not qualified.

The witness then received a course of study outline and work books (J-5). A description and purpose are provided at page 14. Dvorak's says this is all she had at first.

In or about November, the basic skills supervisor came to her class and they spoke. The supervisor, Gail Verona, liked what she saw. Dvorak had students using computers. The two instructors decided to look for more programs that Dvorak's pupils could use applying the computers.

Dvorak testified that no student assessments were given to her. She was provided a sample notification letter to parents and was told to send these to the parents of the pupils she was teaching. Dvorak did so. The letter mentions an Individual Student Improvement Plan (ISIP). Dvorak stated she never found an ISIP or ever received an ISIP for any pupil from the basic skills supervisor or anyone else.

Dvorak is assigned to remedial instruction again this year. She did receive ISIPs for each pupil and found them to be quite good and complete. They are not, however, the same as those shown in Appendix B of Exhibit J-5.

Dvorak considered what she was teaching specific to certain weaknesses. It was not working well and she was not sure where deficiencies were. Even when and if deficiencies were identified, Dvorak did not always know how to attack the problem. Some pupils have minimal reading skills.

Dvorak identified Exhibit J-4, the course of study outline, Volume 46, English. Dvorak stated she never before had been assigned to teach reading. In 1999-00, she eventually received a

course outline and some workbooks, but did not get ISIPs or testing materials. In her undergraduate training she had no reading courses.

Eleventh grade pupils receive a book to help them take the High School Proficiency Test. Dvorak uses the book extensively. In a remedial class, there is more emphasis on why a certain answer is correct and how to use question clues to lead a pupil to what the answer should be.

In or about November 1999, in a conversation with Verona, Verona said she would look for additional computer programs. There were meetings of all English teachers and one issue was remedial courses. A later meeting dealt with concerns about workshops. Nothing ever came of these meetings. Dvorak was not offered workshops or courses to help her perform the duties she is now assigned.

The witness feels unprepared, but has not reduced her problems to writing. Her superiors instructed her to simply do the best she could. When she did receive a course of study, she read it all, as she would for any class. She does not do any testing for placement purposes.

The program in the district seems generally successful. Last year, she and two other English teachers taught remedial classes. Dvorak differentiates between "regular" classes and remedial classes. Some reading instruction is inherent in all classes. Dvorak found some reading materials via computer. She has no problem teaching writing skills, but believes she is unqualified and unprepared to teach reading. Dvorak testified about the overlap between basic skills instruction and regular instructional. Dvorak maintains she cannot teach skills in isolation.

Teachers can refer students from regular classes for special assistance. This year, although she has ISIPs, she cannot diagnosis reading problems and she cannot remedy reading problems. Before the 1998-99 school year, Dvorak believes there was a reading teacher in the building. Last year and this year she has asked the administration for assistance. She has not been told that she is doing anything wrong.

At the close of the petitioners' case, the Board moved to dismiss. The motion was denied, this judge finding that there were material facts in dispute.

The Board called its Superintendent, Joseph C. Colombo. He has been in the district since 1971. He was Director of Special Education until 1984 or 1985. Among other things, Colombo testified that the County Superintendent sits on the Board, that faculty, certificates and assignments are submitted to the County Office annually for approval and that there has been no criticism of the remedial program from the State.

The school has had a remedial course for many years. Originally, teachers with elementary and instructional certificates were employed. The bar is being raised by the State, however, and about five or six years ago English and mathematics teachers were advised that they should get additional certifications because they would be assigned remedial work. Elementary education or English-certified personnel must be assigned when the district receives Title I funds for compensatory education. A district administrator submits this information to the County Superintendent's office. The County Superintendent has never stated that the Vocational Technical School has any one teaching outside the area of his or her certification. Superintendent Colombo produced a document prepared the New Jersey Department of Education in 1994. The document, bearing page number 66, contains a paragraph indicating that remedial reading and remedial writing courses that do not award credit or which award credit that is not counted toward the graduation requirements may be taught by persons with an elementary, English or English-Reading certificate. Respondent does argue that this paragraph provides it with the legal authority to appoint the petitioner Dvorak, a certified English teacher, to teach remedial reading and writing workshop class.

The Board asserts that the assignment of instructors certified in English to the supplemental reading and writing workshops has provided a successful way for the Board to meet its State-mandated standards for High School Proficiency Test (HSPT) passing rates. The petition argues that only Elementary or Reading instructors are qualified under *N.J.A.C.* 6:11-6.2. This reliance is misplaced. A certificate or endorsement for reading is required only where reading is taught as a separate, graded course of study. Here the ungraded supplemental instruction is provided to assist students to pass the HSPT examinations. It is not a separate and distinct course of study.

In *Old Bridge Education Association v. Board of Education of the Township of Old Bridge*, 1986 *S.L.D.* 1928 (July 16, 1986), the Commissioner of Education distinguished between courses that teach reading and as a result would require an instructor with a reading endorsement, and those courses in which reading is an element of the course for which no specific reading certification would be required. The Commissioner stated:

> With respect to this determination the Commissioner wishes to emphasis that it is not meant to preclude the Old Bridge Board or any other Board of Education from including reading and the content areas as an integral part of the district's curriculum. Reading in the content areas is a valuable, desirable instructional strategy to be encouraged. 1986 *S.L.D.* at 1930.

Further, the Commissioner specifically noted that the courses in that case were undisputably reading courses in that they were taught and graded in a Kindergarten through grade eight setting, separately from the instructional time devoted the subject areas of science, social studies, mathematics and language arts. This is the reverse of the case are bar. Here, the remedial course is not graded and the student receives no credit for the course toward graduation and the courses provided at a high school level. Petitioner Dvorak is the most qualified and logical person to teach these remedial reading and writing courses because of her English endorsement. The reading skills identified in the remedial class are incidental to other skills or more aptly associated with another discipline, English. It is identical to the objectives set forth in the course of study for the standard English class that Dvorak helped to develop. Her only argument against teaching the remedial course is her assertion that she does not feel comfortable teaching it.

The Federal Chapter 1 Funds which assist in the funding of the remedial program are provided as part of legislation that permits instruction by teachers who possess either an English endorsement or an elementary education endorsement. The course in the Board's schools has evolved to met these requirements. Further, the Board is audited annually to ensure that it complies with State regulations and statutes. The Board has never been notified that it was deficient or that it had improperly assigned teachers. Furthermore, the County Superintendent of Schools is a member of the respondent Board. Each curriculum for every course is reviewed and approved by the Board before implementation. The County Superintendent's participation

provides further tacit approval for the district's action. The Board has therefore also complied with *N.J.A.C.* 6:11-3.5 in receiving the approval of the County Superintendent of its assignments. Dvorak cannot demonstrate how the Middlesex County Vocational Technical Board of Education is not in full compliance with any state or federal regulation or statute governing her ability to be assigned to teach remedial classes.

The petitioners argue that, for the first time during the pendency of this matter, the Board asserted that the remedial reading and writing program is partly funded by Federal funds. The superintendent produced a document which he says is one page from a manual entitled "Chapter I Program Guidelines," which appears to have been prepared by the New Jersey Department of Education in 1994. Page 66 does contain a paragraph that indicates remedial reading and writing courses that do not award credit or that award credit that is not counted toward the graduation requirements may be taught by persons with an Elementary, English or English-Reading endorsement. The respondent thus argues that this gives it the authority it needs to appoint Dvorak, a certified English teacher, to teach its remedial reading and writing workshop class. The document is unauthenticated. Even if it were authenticated, it does not nullify the statutory and regulatory requirement that reading classes, such as the reading and writing workshop to which Dvorak is assigned, be taught by teachers holding elementary or reading endorsements on their teaching certificates.

Dvorak's testimony shows that during the 1999-00 school year and again this year, she has been assigned to teach a remedial reading and writing class in addition to her regular English classes. The pupils assigned to the remedial class are those who have been identified as requiring additional assistance with basic reading and writing skills so that they may improve their chances of passing the HSPT. Testimony revealed that, although the English classes Dvorak has taught for 29 years contain an infusion of reading in the English content area, the remedial reading and writing classes focus completely on the teaching of the skill of reading and the skill of writing. Dvorak does not hold either an elementary certificate or a reading endorsement. She does not hold an educational services certificate with an endorsement as a reading specialist. In the 29 years she has served as a teacher, she has never taught a separate reading course in which the focus is on teaching the skill of reading to students who have individualized and varied reading disabilities.

The regulations governing the proper certifications and endorsements for various teaching assignments preclude the teaching of reading by an individual holding only an English endorsement to an instructional certificate. *N.J.A.C.* 6:11-6.2(a)7 provides that an English endorsement to an instructional certificate only "authorizes the holder to teach English in all public schools" and *N.J.A.C.* 6:11-6.2(a)19 requires a reading endorsement for an individual to teach reading in all public schools. Although *N.J.A.C.* 6:11-6.1(b) authorizes teachers with elementary endorsements to instructional certificates to teach "the common branch subjects, such as reading, writing, arithmetic, and spelling in the secondary school" and *N.J.A.C.* 6:11-6.1(c) provides the teachers with English endorsements who taught reading prior to February 1976 may continue to teach in such assignment, the facts demonstrate that Dvorak does not hold an elementary endorsement and never taught reading prior to February 1976. Therefore, in order for her to teach a separate reading course, the regulations require that she must hold a reading endorsement to her instructional certificate. She does not.

In *Old Bridge Education Association*, above, the Commissioner interpreted these regulations to hold that a course in which "the instruction provided is firstly reading instruction and the skills being taught are reading skills and the subject matter of the particular discipline is merely the vehicle by which the reading skills are taught, it is concluded that an endorsement authorizing the teaching of reading is required." 1986 *S.L.D.* at 1930.

Dvorak testified and the Board could not refute that the remedial reading and writing course which is the subject of this dispute does in fact emphasize reading instruction and does require the teaching of specific and distinct reading skills. As in *Old Bridge*, this remedial reading course also requires the teacher to hold an endorsement authorizing the teaching of reading.

In an effort to defend its improper assignment, the Board presented brief testimony from Joseph Colombo, Superintendent of the Middlesex County Vocational Technical Schools, to the effect that the County Superintendent of Schools sits as a member of the Board and approves the general curriculum of the district, including the remedial reading and writing classes. Mr. Colombo further stated that he therefore assumed that the County Superintendent of Schools

must have approved the assignment of teachers holding only English endorsements to the remedial reading and writing classes. However, he also testified that the respondent Board never made a written application at any time to the County Superintendent, pursuant to *N.J.A.C.* 6:11-3.3(b) for a determination as to the appropriate certification for the remedial reading-writing workshop class and that the County Superintendent never actually observed the remedial reading class taught by Dvorak. Colombo also claimed that the remedial reading and writing workshop is funded in part by federal monies. If that has any effect on the outcome here, no documentation has been put forth.

There was no inquiry here into the true nature of the course. No request was ever made of the County Superintendent to ascertain the proper certification or endorsements. Even if one could conclude that County Superintendent had implicitly determined that an English certificate was acceptable, such a determination was not binding and can be overruled by the State Board of Education. *Zachau v. Burlington County Vocational and Technical Schools,* 97 *N.J.A.R.* 2d (EDU) 4. Counsel for the Board has put before this judge a one-page document which he asserts authorizes the use of teachers with an English endorsement only to teach certain remedial and writing courses. The document is not a statute or a regulation and has no precedential value. Further, the document was never provided to counsel for petitioners during the discovery phase of this case, pursuant to *N.J.A.C.* 1:1-10.1 through -10.6. It was never authenticated pursuant to *N.J.A.C.* 1:1-15.6. Further, one-page from a multi-page document may literally and intellectually be out of context. Therefore, the Board's motion to dismiss must be denied.

DETERMINATION

Preliminarily, it is noted that there are three certificates that the State Board of Examiners is authorized to issue: the instructional certificate, the administrative certificate and the educational services certificate. *N.J.A.C.* 6:11-2.3. The same rule provides for issuance of endorsements for each recognized teaching, administrative and service postion.

The Commissioner has long held that the certification required for a position is determined by the duties performed, not the job title. *Teaneck Education Association v. Teaneck Board of Education*, 1983 *S.L.D.* 1039 (Sept. 30, 1983). The chief school administrator must

require a reassigned teaching staff member to exhibit an appropriate certificate and endorsement(s) before the teaching staff member assumes responsibility for the performance of regulated duties.

The Appellate Division of Superior Court has held that a teacher holding English and reading specialist endorsements is eligible to teach reading in a compensatory education program. *Schmidt v. Board of Education of Weehawken*, (N.J. App. Div. Feb. 1, 1984, A-4842-82T5) (unreported). But there is no discoverable case holding that says a person not holding an elementary or reading teacher endorsement may teach a compensatory program such as that offered by the respondent here. In *Old Bridge,* above, cited by both parties, the Board approved a scheme in which eighth grade pupils received instruction in courses entitled "social studies readings," "science readings" and the like taught by teachers with subject area, but not reading endorsements. The Board had argued that the pupil:

> are taught by teams consiting of four or five teachers. Some of whom are certified in the elementary category and others who are certified in particular subject areas. Each student receives instruction each day in math, science, language arts, social studies and reading. On a five person team, each teacher is assigned exclusively to one subject area and teaches five periods of that subject each particular day. On a four person team, each teacher is assigned to teach four periods of math, science, language arts or social studies and one period of reading each day.

Under these circumstances, the ALJ found and the Commissioner concurred that the courses were reading courses and that an endorsement authorizing a person to teach reading was required. Virtually the same circumstances obtain in today's case.

The mere allegation of the superintendent that a federal regulation authorizes Dvorak to teach remedial reading, without move, is unpersuasive. If such a regulation exists, the Commissioner of Education and the State Board of Examiners would be aware of its existence and the New Jersey Administrative Code would reflect it.

In consideration of the foregoing, I **FIND** and **CONCLUDE** that the assignment of Jane E. Dvorak to duties including remedial reading (J-1) is improper because many of the duties this assignment requires her to perform lie outside the scope of her certificate and endorsement. Beyond putting a teaching staff member in an uncomfortable situation, this arrangement ill-serves the pupils who need and are intended to benefit from remedial instruction.

I **CONCLUDE** that the Middlesex County Vocational and Technical Schools Board of Education must immediately relieve Jane E. Dvorak and those similarly situated of the remedial workshop assignments and must replace those teaching staff members with persons holding reading or elementary endorsements on their instructional certificates. 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 0 8 2001
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

3/12/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 13 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

EXHIBITS

Joint:

J-1 Excerpt, minutes of regular public Board of Education meeting, February 9, 2000, page 238

J-2 Sample teacher schedules, 1999-2000

J-3 Draft, Course of Study Outline, Basic Skills Improvement Program: Reading-Writing Workshop, undated, 50 pages

J-4 Course of Study Outline, 1994 ed., volume 46, English, 82 pages and Resource Guide, 57 pages

J-5 Course of Study Outline, 1999 ed., volume 46, English, 127 pages and appendix, 40 pages

WITNESSES

For petitioner:

Jane E. Dvorak

For respondent:

Joseph C. Colombo

OAL DKT. NO. EDU 122-00
AGENCY DKT. NO. 374-12/99

MIDDLESEX COUNTY VOCATIONAL EDUCATION ASSOCIATION, ON BEHALF OF ITSELF AND THE MEMBERS NAMED HEREIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MIDDLESEX COUNTY VOCATIONAL TECHNICAL SCHOOLS,	:	DECISION
RESPONDENT.	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. On March 21, 2001, respondent filed a Notice of Motion (Motion) seeking remand of this matter to the OAL for completion of the presentation of its case. In a Certification by respondent's attorney in support of the Motion, Mr. Vignuolo avers that at the time of the hearing, petitioner gave her testimony and completed presentation of her case; whereupon respondent made application to the Administrative Law Judge (ALJ) to dismiss the petitioner's claim for failure to state a claim upon which relief should be granted. Respondent further avers that the Superintendent of Schools was present at the hearing along with several other witnesses to be presented in the respondent's case. The ALJ requested the opportunity to ask several questions of the Superintendent who was placed under oath and provided a response to the ALJ's inquiry, with some clarification by additional questioning from counsel. Upon the conclusion of the limited testimony of the Superintendent of Schools, the ALJ reserved on the motion to dismiss the petition and respondent never presented its case in this matter. According

to Mr. Vignuolo, the Initial Decision, when issued on March 13, 2001, not only denied respondent's application for dismissal "but also entered an Order granting the relief requested by the Petitioner without consideration of the Respondent's case which was never presented." (Certification at 2)

On April 6, 2001, petitioner's attorney responded to respondent's Motion, indicating that she concurred with Mr. Vignuolo's Certification pertaining to the hearing in this matter. Additionally, she states:

> At the conclusion of the limited testimony following respondent's motion for dismissal, the Court reserved on that motion pending receipt of legal memoranda from both parties on that motion. Following submission of the legal memoranda, the parties anticipated a decision on the dismissal motion, and were surprised when that decision not only denied respondent's motion but resolved the case. Under these circumstances, petitioner has no objection to respondent's request that the matter be remanded to the Office of Administrative Law to permit respondent to complete the presentation of its case.

Upon consideration of the parties' submissions, the Commissioner agrees that respondent must be permitted an opportunity to complete the presentation of its case. Accordingly, the Initial Decision is rejected for the reasons stated herein and the matter remanded to the OAL for further proceedings.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4|20|01

Date of Mailing: 4|20|01

* 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.

131-01

GAIL CARSON AND THE NEPTUNE TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 20, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4250-00

AGENCY DKT. NO. 94-3/00

GAIL CARSON AND THE NEPTUNE TOWNSHIP EDUCATION ASSOCIATION,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,

Respondent.

David Rosenberg, Esq., for petitioners (Klausner & Hunter, attorneys)

James T. Hundley, Esq., for respondent (Hundley and Parry, attorneys)

Record Closed: March 2, 2001 Decided: March 9, 2001

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

This matter was transmitted to the Office of Administrative Law (OAL) on May 30, 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 indicating the terms thereof, which is attached and fully incorporated herein.

The stipulation of settlement entered into by the parties is hereby adopted

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 settlement 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.

3/09/01
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

3/13/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 14 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

es

HUNDLEY & PARRY, P.C.
35 Pilgrim Pathway
P.O. Box 488
Ocean Grove, NJ 07756
(732) 775-3100
Attorneys for Respondent

GAIL CARSON AND THE NEPTUNE TOWNSHIP	: BEFORE THE COMMISSIONER OF EDUCATION OF
Petitioner	: NEW JERSEY
vs.	: OAL Docket No. :EDUOR 04250-00S
THE BOARD OF EDUCATION OF THE THE TOWNSHIP OF NEPTUNE IN THE COUNTY OF MONMOUTH	: Agency Ref. No.: 94/3/00 :
Respondent.	: STIPULATION OF SETTLEMENT

WHEREAS, on or about March 13, 2000, Petitioners filed a Petition of Appeal before the Commissioner of Education alleging that on December 15, 1999 Petitioner Gail Carson, a teacher employed by Respondent Board, was assaulted by S.M., a third grade pupil enrolled in the District's Green Grove Elementary School; and

WHEREAS, the March 7, 2000 Petition of Appeal seeks that Respondent Board institute expulsion proceedings against pupil S.M. in accordance with the provisions of N.J.S.A. 18A:37-2.1; and

WHEREAS, on or about April 11, 1000, Respondent Board filed an Answer to Respondent's Petition of Appeal; and

WHEREAS, on May 26, 2000 the Commissioner transmitted the matter as a contested matter to the Office of Administrative Law; and

WHEREAS, juvenile proceedings were instituted against pupil S.M. in the Superior Court of New Jersey, Chancery Division, Family Part, alleging that pupil S.M. committed an assault upon Petitioner Gail Carson on December 15, 1999 in violation of the provisions of N.J.S.A. 2C:12-1; and

WHEREAS, Petitioners have advised Respondent that on or about June, 2000 pupil S.M. was found guilty of assault upon Petitioner Gail Carson on December 15, 1999 in said juvenile proceedings; and

WHEREAS, as a result of the resolution of the juvenile proceedings instituted against pupil S.M., the Petitioners and Respondent are desirous of resolving the issues in dispute in these proceedings;

NOW, THEREFORE, the Petitioners and Respondent Board agree as follows:

1. Petitioners will provide Respondent with written documentation from the Superior Court or the Monmouth County Prosecutor's Office verifying that pupil S.M. was found guilty in the Superior Court of New Jersey, Chancery Division, Family Part of committing an assault upon Petitioner Gail Carson on December 15, 1999 in violation of N.J.S.A. 2C:12-1.

2. Upon receipt from Petitioners of written documentation verifying that pupil S.M. was found guilty of assaulting Petitioner Gail Carson on December 15, 1999, Respondent Board will institute expulsion proceedings and conduct an expulsion hearing before the Board of Education in the Matter of Pupil S.M.

3. Petitioners hereby withdraw the Petition of Appeal in this matter and the matter is hereby withdrawn with prejudice.

KLAUSNER, HUNTER AND ROSENBERG
Attorneys for Petitioners

By: _____ Date: 2/26/01
DAVID E. ROSENBERG

HUNDLEY AND PARRY, P.C.
Attorneys for Respondent

By: _____ Date: 1-19-01
JAMES T. HUNDLEY

OAL DKT. NO. EDU 4250-00
AGENCY DKT. NO. 94-3/00

GAIL CARSON AND THE NEPTUNE TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, 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: 4|20|01

Date of Mailing: 4|20|01

132-01

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

April 20, 2001

State of New Jersey
Office of Administrative Law

INITIAL DECISION

SETTLEMENT
OAL DKT. NO. EDU 05310-00
Agency Docket No. 120-4/00

REGINA ROSSI,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD,

Respondent.

Sheldon S. Pincus, Esq., for petitioner
(Bucceri& Pincus, Esqs.)

Eric Bernstein, Esq., for respondent

Record Closed: March 21, 2001 Decided: March 28, 2001

BEFORE **MICHAEL L. RAVIN**, ALJ:

Petitioner Regina Rossi petitioned the Commissioner of Education, Bureau of Controversies and Disputes, to resolve a salary dispute that had arisen between petitioner and respondent Englewood Board of Education.

On June 5, 2000, the matter was transmitted to the Office of Administrative, 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 January 25, 2001 at the OAL. Prior to that hearing date, a conference was held and the parties agreed to settle the matter. 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 stipulation of settlement.

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.

March 28, 2001
DATE

MICHAEL L. RAVIN, ALJ

Receipt Acknowledged:

3/30/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

APR - 2 2001
DATE

OFFICE OF ADMINISTRATIVE LAW

jrp

BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(973) 773-5665
Counsel for Petitioner

REGINA ROSSI,	: BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF
Petitioner,	: ADMINISTRATIVE LAW
v.	: AGENCY REF. NO. 120-4/00 OAL DKT. NO. EDU 5310-00N
ENGLEWOOD BOARD OF EDUCATION,	:
Respondent.	: **STIPULATION OF SETTLEMENT**

This Stipulation of Settlement is made this 21ST day of November, 2001, by and between Regina Rossi (hereinafter "Rossi"), who resides at 69 Courtland Lane, Bedminster, New Jersey 07921, and the Englewood Board of Education, with its principal offices located at 12 Tenafly Road, Englewood, New Jersey 07631 (hereinafter the "Board").

WHEREAS, the Board and Rossi are parties to an administrative proceeding before the New Jersey Commissioner of Education/Office of Administrative Law entitled Regina Rossi v Board of Education of the City of Englewood, Agency Ref. No. 120-4/00, OAL Docket No. EDU 05310-00; and,

WHEREAS, in lieu of trial of the issues raised in that proceeding, the parties are desirous of entering into an

agreement stipulating the terms of a settlement of any and all claims raised in the Verified Petition;

NOW THEREFORE, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly noted below, it is hereby agreed:

1. Within thirty (30) calendar days of the approval of this Stipulation of Settlement by the Commissioner of Education, the Board will pay to Rossi the sum of Four Thousand Five Hundred Dollars ($4,500.00). In the event payment is not made within thirty (30) calendar days, the sum due and outstanding shall accrue interest pursuant to R.4:42-11(a)(ii).

2. The payment due to Rossi set forth in paragraph 1 shall be made in lump sum and without deductions. The Board shall issue Rossi an IRS Form 1099 for the payment. Rossi shall be responsible for all taxes, penalties and related monies thereto. Rossi shall indemnify the Board for any failure to carry out such responsibility.

3. The parties' entry into this settlement agreement shall not be construed as an admission of guilt or wrongdoing by either party.

4. The Board and Rossi agree to execute mutual general releases that shall accompany this Stipulation of Settlement and which will be on the terms specified within this

Stipulation of Settlement. The forms of the releases are attached hereto as Exhibits A and B. Nothing in this Stipulation of Settlement shall preclude either party from bringing an action to enforce performance of any term of this Stipulation of Settlement should there be a default in performance.

5. Rossi agrees to withdraw, with prejudice, the Verified Petition before the Commissioner of Education/Office of Administrative Law bearing Agency Ref. No. 120-4/00, O.A.L. Docket No. EDU 05310-00.

6. 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 enumerated herein.

7. This Stipulation of Settlement shall be subject to the laws of the State of New Jersey.

8. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Stipulation of Settlement and bind the Board to its terms.

9. All terms of this Stipulation of Settlement 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 and year aforesaid.

WITNESS:

FOR THE ENGLEWOOD BOARD OF EDUCATION

By: _____
, Board President

Dated: _____

By: Robert Brown
, Board Secretary

Dated: 2/23/01

FOR REGINA ROSSI

Regina Rossi

Regina Rossi

Dated: 3/21/01

Sheldon H. Pincus, Esq.

Dated: 3/21/01

RELEASE

This Release, dated , **2001**, is given

BY the Releasor, **ENGLEWOOD BOARD OF EDUCATION, ITS OFFICIALS, OFFICERS, AGENTS AND EMPLOYEES, ASSIGNS OR DESIGNEES**

referred to as "I",

TO REGINA ROSSI, 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 which 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 which has happened up to now. I specifically release the following claims:

> Any and all claims arising out of the employment relationship between the Englewood Board of Education and Regina Rossi, including the claims raised in the action entitled, Regina Rossi v. Board of Education of the City of Englewood, Agency Ref. No. 120-4/00, O.A.L. Docket No. 05310-00.
>
> This Release does not apply to any rights that Regina Rossi may have under the terms of the Stipulation of Settlement between Regina Rossi and the Englewood Board of Education.

2. Payment. I have been paid a total of $1.00 and other good and valuable consideration as set forth more specifically in the Stipulation of Settlement dated February __, 2001 in full payment for making this Release. I agree that I will not seek anything further including any other payment from you.

3. Who is Bound. I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities such as your heirs or the executor of your estate.

4. Signatures. I understand and agree to the terms of this Release. If this Release is made by a corporation, its proper corporate officers sign and its corporate seal is affixed.

Witnessed or Attested by:

_____ _____ (Seal)

_____ (Seal)

STATE OF NEW JERSEY :
COUNTY OF :

I CERTIFY that on , 2001, _____ personally came before me and stated under oath to my satisfaction that:

(a) this person was the subscribing witness to the signing of the attached instrument;
(b) this instrument was signed by _____ who is _____ of the Englewood Board of Education, the entity named in this instrument, and was fully authorized to and did execute this instrument on its behalf;

(c) the subscribing witness signed this proof under oath to attest to the truth of these facts.

_____

Signed and sworn to before me on
, 2001.

_____

EXHIBIT A

RELEASE

This Release, dated , 2001, is given

BY the Releasor, **REGINA ROSSI**

referred to as "I",

TO ENGLEWOOD BOARD OF EDUCATION, ITS OFFICIALS, OFFICERS, AGENTS AND EMPLOYEES, ASSIGNS OR DESIGNEES, 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 which I may have against you, the Board, its officials, officers, employees, assigns and/or designees. 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 which has happened up to now. I specifically release the following claims:

> Any and all claims arising out of the employment relationship between the Englewood Board of Education and Regina Rossi, including the claims raised in the action entitled, Regina Rossi v. Board of Education of the City of Englewood, Agency Ref. No. 120-4/00, O.A.L. Docket No. 05310-00.
>
> This Release does not apply to any rights that REGINA ROSSI may have under the terms of the Stipulation of Settlement between REGINA ROSSI and the Englewood Board of Education.

2. Payment. I have been paid a total of ~~$4,5000.00~~ 4,500.00 RB and other good and valuable consideration as set forth more specifically in the Stipulation of Settlement dated February __, 2001, in full payment for making this Release. I agree that I will not seek anything further including any other payment from you.

3. Who is Bound. I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities such as your heirs or the executor of your estate. Heirs, assigns, designees and/or family members of Regina Rossi shall not bring an action against the Board, its officials, officers, employees, assigns and or designees.

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:

_____ _____ (Seal)
Regina Rossi

STATE OF NEW JERSEY :

COUNTY OF PASSAIC :

I CERTIFY that on , 2001, **REGINA ROSSI** personally came before me and stated under oath to my satisfaction that she:

(a) was the maker of the attached instrument; and

(b) executed this instrument as her own act.

_____
Sheldon H. Pincus
An Attorney at Law of the State of New Jersey

EXHIBIT B

OAL DKT. NO. EDU 05310-00
AGENCY DKT. NO. 120-4/00

REGINA ROSSI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, 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|20|01

Date of Mailing: 4|20|01

134-01

K.F. on behalf of minor child, R.K.F.,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE MONMOUTH REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, DR. WILLIAM GEORGE, ROBERT C. NAGLE, PATRICK COLLUM, *ET. AL.*,	:	COMMISSIONER OF EDUCATION
	:	DECISION ON MOTION
RESPONDENTS.	:	

April 20, 2001

April 17, 1996; *Camden City Board of Education v. NJSIAA*, Docket No. A-2802-91T2 (decided by the New Jersey Superior Court February 18, 1992); *Burnside et al. v. NJSIAA*, 1984 *S.L.D.* 1695 (App. Div. 1984), *cert. denied* 101 *N.J.* 236 (1985). Thus, even granting that R.K.F. may suffer a greater hardship than the Board absent the relief requested, petitioner fails to meet her legal burden.

Accordingly, the recommended Order of the ALJ is affirmed for the reasons expressed therein. This matter shall continue at the OAL for proceedings as may be deemed necessary.

IT IS SO ORDERED.*

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 4|20|01

Date of Mailing: 4|20|01

* 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.* 6:2-1.1 *et seq.*

136-01E

H.M., on behalf of her minor child, R.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

April 26, 2001

137-01

SUSAN SETTLE,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSVILLE, SALEM COUNTY AND ROBERT PEDDLE, SUPERINTENDENT,

RESPONDENTS,

AND

PENNSVILLE EDUCATION ASSOCIATION,

INTERVENOR.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Board member challenged the authority of the Board to conduct a "grievance" proceeding against her. She also alleged Open Public Meetings Act (OPMA) violations.

The ALJ concluded that the Commissioner had the jurisdiction to determine under education law whether the Board could consider the grievance filed by the Pennsville Education Association (PEA), which asked the Board to remove or discipline petitioner for her involvement in a dispute of a student's grade; that to pursue allegations of ethical violations, the PEA would have to file a complaint pursuant to *N.J.S.A.* 18A:12-21 *et seq.*; that the Board had the right to file a revised grievance which requests only a reprimand or censure of petitioner based on violations of the Board's policies or procedures; and that the Board had the right to have the consideration of the grievance conducted in a closed session. The ALJ also concluded that the Commissioner had the right to consider allegations of OPMA violations and that the Board did not violate any OPMA provisions.

The Commissioner set aside the Initial Decision. In so doing, he was persuaded by a more fully developed record that petitioner's main prayers for relief were either not properly addressed in this forum or were not ripe for adjudication. The Commissioner concurred with the Pennsville Education Association that this dispute was not properly before him, since he has no jurisdiction to enforce or interpret collective negotiations agreements. Moreover, the Commissioner was prevented from reviewing petitioner's attendant OPMA claims. Petition was dismissed. The temporary Order of April 3, 2000 enjoining the Board from considering PEA's grievance was dissolved.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2345-00

AGENCY DKT. NO. 109-3/00

SUSAN SETTLE,

Petitioner,

v.

BOARD OF EDUCATION OF
THE TOWNSHIP OF PENNSVILLE,
SALEM COUNTY, AND ROBERT PEDDLE,
SUPERINTENDENT,

Respondents,

and

PENNSVILLE EDUCATION ASSOCIATION,

Intervenor.

Paul H. Scull, Jr., Esq., and **John Adams**, Esq., for the petitioner

Judith A. Karr, Esq., for the respondents (Karr & Salber, attorneys)

Keith Waldman, Esq., for the intervenor, Pennsville Education Association (Selikoff & Cohen, attorneys)

Record Closed: December 12, 2000 Decided: March 12, 2001

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

This matter concerns the petition filed by Susan Settle, the petitioner, requesting that the respondents, the Board of Education of the Township of Pennsville, Salem County (Board), and Robert Peddle, Superintendent, be barred from further consideration of a grievance filed by the Pennsville Educational Association (PEA), which involves the petitioner. The petitioner also asked for emergent relief seeking to enjoin the Board from continuing its consideration or rendering a decision as to the grievance prior to a determination in this matter.

The legal issues in the petition include whether the Board has jurisdiction to consider a grievance filed against an elected board member which raises primarily ethical violations; if the Board has such jurisdiction, whether its consideration of the grievance is to be conducted at an open or closed session of the Board; what type of disciplinary action, if any, the Board can take against an elected school board member pursuant to the grievance procedure; whether the Board violated any of the provisions of the Open Public Meetings Act, *N.J.S.A.* 10:4-6 *et seq.* (OPMA) and whether this issue can be decided in this forum; and whether the Board acted correctly in prohibiting the petitioner's court reporter from recording its initial consideration of the grievance on March 27, 2000.

The matter was transmitted to the Office of Administrative Law on March 30, 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. After hearing the oral arguments of the parties and considering the written submission by the petitioner as well as the exhibits admitted into evidence (P-1, P-2, P-4 and J-1), I granted the request for emergency relief on March 31, 2000. By decision on motion dated April 3, 2000, Assistant Commissioner of Education John M. Sherry concurred with my decision granting emergent relief.

Keith Waldman, Esq., filed a motion to intervene on behalf of the PEA. After considering the arguments of the parties, I granted PEA's motion to intervene by order dated May 2, 2000.

Thereafter, I had several telephone conferences with the parties who agreed to submit a stipulation of facts and motions for summary decision. The parties were unable to agree to a stipulation of facts; however, the PEA submitted a motion to dismiss the matter for lack of jurisdiction and ripeness, and the respondents joined in the motion to dismiss. The petitioner filed a motion for a summary decision. Specifically, the petitioner asked that a permanent injunction be issued against the Board's consideration of the grievance filed against her by the PEA, and in the alternative, argued that Judith A. Karr, Esq., attorney for the respondents, should no further represent them in this matter.

After receipt of briefs, the record closed on December 12, 2000. At my request, the time period for the submission of my initial decision was extended until March 12, 2001.

FACTUAL FINDINGS

Although there are some factual disputes, I **FIND** that the relevant facts are not in dispute. The petitioner is a school board member and was a school board member when she attended on or about February 25, 2000, a school meeting regarding a student's grade. Also present at the meeting were the student, the student's mother, the student's teacher and a school administrator. For the purpose of this initial decision, it is not relevant whether the petitioner was asked to attend by the student's parent or whether the teacher objected to her presence.

On or about February 28, 2000, the PEA filed a grievance with the Board which alleges that the petitioner had violated the negotiated agreement between the PEA and the Board (J-1), violated the Board's established procedures and violated the code of ethics. In its grievance, the PEA seeks the removal of the petitioner and in the alternative, that she should be admonished or censored or some other disciplinary sanctions be imposed on her (P-1).

It should be noted that in their brief dated August 30, 2000, the respondents stated that the Board does not have the right to remove the petitioner through the grievance procedure, and that such action would violate the education laws. The respondents argued that the Board could deny the grievance or if it granted the grievance, the Board could either reprimand or censure the petitioner.

On or about March 22, 2000, the petitioner received a letter advising her that the Board would discuss the grievance at its closed session during its meeting on March 27, 2000 (P-2). The petitioner's requests that the matter be considered during the public session were denied. On March 27, 2000, there was an initial consideration of the grievance in closed session and the petitioner's request to have her court reporter record the meeting was denied. The petitioner was given until March 29, 2000 to indicate whether she would make a formal presentation as to the grievance.

By letters dated March 29 and 30, 2000, the petitioner filed the petition in this matter with the Commissioner of Education (Commissioner) and also asked for emergent relief since the Board had scheduled the further consideration of the grievance for April 3, 2000 (P-4).

ARGUMENTS OF THE PARTIES

The first issue in this matter is whether the Board can consider a grievance filed against a board member, and whether the Commissioner has jurisdiction to make a determination as to the grievance.

The PEA and the respondents argued that the grievance was not filed against the petitioner but was directed to the Board and alleged that the petitioner, as the Board's agent, acted inappropriately. Although they are technically correct, the grievance was obviously directed against the petitioner and the relief sought was the discipline of the petitioner.

The PEA and respondents argued that the Board can hear the grievance, and cited the initial decision in *Frenchtown Ed. Ass'n. v. Bd. of Ed. of Frenchtown*, 1980 *S.L.D.* 198. In that case, the local board considered a union's complaint regarding a visit by a board member to a classroom and took no action. The union filed an appeal with the Commissioner, and the administrative law judge concluded that "any visit with interrogation of a teacher, examination and photocopying of a planbook should in the future only be made with approval of the Board and in keeping with established Board policy and with the right of the teacher to have a representative present during such visit pursuant to *N.J.S.A.* 18A:25-7." *supra* at p. 201. The

Commissioner adopted the ALJ's decision and directed that visitations by an individual board member to a teacher's classroom comport with board policy and *N.J.S.A.* 18A:25-7. *supra* at p. 203.

The petitioner argued that the decision in the *Frenchtown Ed. Ass'n.* case is not applicable since the facts in that case are substantially different than those in this case.

The PEA and the respondents argued that the Board did not authorize Ms. Settle to participate or attend the school meeting regarding the student and that the Board has a longstanding practice that the student and his or her parent(s) or legal guardian(s) are the only members of the public who are allowed to be present at a meeting concerning a student's grade. This practice is consistent with the regulation as to the confidentiality of student's records. *N.J.A.C.* 6:3-6.5. It is the position of the PEA and the respondents that the petitioner, as a friend of the student, was not allowed to attend the meeting, and as a Board member, she could only attend if she had been authorized to do so. They argued that it would be disruptive to the operation of the schools if individual board members were to inject themselves into the instructional setting without a mandate from the board.

Also, the PEA and the respondents argued that the petitioner's presence at the meeting created a serious conflict of interest; as a board member the petitioner should not attend a meeting regarding a student's grade since as a member of the Board she might have to render a decision if a grade appeal is filed with the Board pursuant to the student grievance procedure.

The PEA and the respondents argued that the Board has the authority to hear and decide grievances under the New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-5.3 and the New Jersey State Constitution, Art. I, ¶ 19, and that this authority includes grievances which concern a subject outside of the scope of negotiations. *Tp. of West Windsor v. Public Employment Relations Commission*, 78 *N.J.* 98, 108 (1978). Also, they argued that any appeal as to the scope of the grievance procedure should have been filed with the Public Employment Relations Commission (PERC) which has the primary jurisdiction to determine the scope of negotiability between the union and the local board. *See, N.J.S.A.* 34:13A-5.3; *Ridgefield Park Ed. Ass'n. v. Ridgefield Park Bd. of Ed.*, 78 *N.J.* 144, 155 (1978).

In support of their argument, the PEA and the respondents stated that several decisions of the Commissioner and the State Board of Education have recognized that the Commissioner's jurisdiction does not extend to matters involving contractual disputes. *Poole v. Bd. of Ed. of Passaic Cty. Reg'l. School Dist. No. 1*, 1978 *S.L.D.* 1039; *Vitacco v. Lincoln Park Bd. of Ed.*, EDU 7594-94, Initial Decision (June 1, 1998), adopted, Comm'r. (July 17, 1998) <http://lawlibrary.rutgers.edu/oal/search.html>

The PEA and respondents recognize that the Commissioner may ultimately have an interest in the outcome of the grievance, but argued that any such interest would arise only if the Board took action in violation of the education laws. The PEA and the respondents request that I determine that the Board has the right to consider the grievance and that the Commissioner dissolve the restraint and permit the grievance process to go forward.

The petitioner argued that the negotiated agreement between the Board and the PEA has no provision allowing for the filing of a grievance against a board member. Also, the petitioner argued that there is no statutory authority to allow the Board to consider a grievance against one of its members. The petitioner argued that the courts have recognized that a board is a creature of the State and may exercise only those powers granted to it by the Legislature, *N.J.S.A.* 18A:10-1 and 18A:11-1, and that where there is a reasonable doubt as to whether the Legislature has granted the board a power, that power should not be implied, and cited a number of cases, including, *Atlantic City Ed. Ass'n. v. Bd. of Ed. of the City of Atlantic City,* 299 *N.J. Super.* 649 (App. Div. 1997), certif. den., 152 *N.J.* 192 (1997); *Fairlawn Ed. Ass'n. v. Fairlawn Bd. of Ed.*, 161 *N.J. Super.* 67 (1978), aff'd., 79 *N.J.* 574 (1979). Also, the petitioner argued that it has been recognized that a board is a quasi-corporate entity and that board members, like the officers of a corporation, are immune from suit except for specific and enumerated circumstances. It is petitioner's position that *N.J.S.A.* 18A:11-2 fully sets forth the permissible scope of actions against the Board thereby excluding an action against a school board member for any action other then that which may be in contravention of *N.J.S.A.* 18A:12-24. The petitioner argued that she did not engage in any conduct prohibited by *N.J.S.A.* 18A:12-24.

The petitioner argued that any agreement between the Board and PEA which provided for greater jurisdiction and powers than those enumerated in *N.J.S.A.* 18A:11-1 *et seq.* would be *ultra vires*.

In reply, the PEA argued that even though the discipline of a board member is not expressly included in *N.J.S.A.* 18A:11-1, it is a power conferred by "necessary or fair implication," *Fair Lawn Ed. Ass'n.* case, and that case law has established that a local board has the right to censure or reprimand a board member for violating board policy. *Crystal v. Bd. of Ed. of Barnegat*, EDU 2398-99, Initial Decision (Nov. 30, 1999), adopted, Comm'r. (Jan. 18, 2000) <http://lawlibrary.rutgers.edu/oal/search.html>.

I agree with the arguments of the PEA and the respondents that the Board has the right to hear the grievance involving the petitioner. Also, I disagree with the argument of PEA and the respondents that the issue of the scope of the grievance lies solely with PERC and I **CONCLUDE** that the Commissioner can review the grievance to determine whether it is consistent with education law, *Frenchtown Ed. Ass'n.* case and *Crystal* case.

The petitioner argued that any allegation as to ethical violations should be subject to the School Ethics Act, *N.J.S.A.* 18A:12-21. *N.J.S.A.* 18A:12-23 specifically includes school board members as "school officials," and board members are subject to the code of ethics set forth in *N.J.S.A.* 18A:12. It is the petitioner's position that there are no violations pursuant to this act. I agree with petitioner's argument that if the PEA wants to pursue the alleged ethical violations and the removal of the petitioner it has to file a complaint under the School Ethics Act. *Feldman v. Bd. of Ed. of the Bergen Cty Sp. Services School Dist.*, 96 *N.J.A.R.* 2d (EDU) 807, adopted by Comm'r., 96 *N.J.A.R.* 2d (EDU) 811.

The second issue in this matter is whether the Board's consideration of the grievance against the petitioner during a closed session is in violation of the OPMA.

The PEA and the respondents argued that the Commissioner's jurisdiction as to OPMA claims is limited, and that the Commissioner has recognized that he will not exercise jurisdiction over claims arising under the OPMA when such a claim stands alone. *Rovello v. Boyle and*

Hopewell Valley Reg'l. Bd. of Ed., 93 *N.J.A.R.* 2d (EDU) 313. The PEA and the respondents argued that the petitioner is not entitled to a public hearing of the grievance since she does not have the right to have the student's grade discussed at the public session since grades are confidential pursuant to *N.J.A.C.* 6:3-6.5(c)(6); since the consideration of the grievance is a matter of contract administration that falls within an exception to the OPMA, *N.J.S.A.* 10:4-12(b)4; and since the grievance involves a personnel matter that falls within an exception to the OPMA, *N.J.S.A.* 10:4-12(b)8. The PEA and the respondents argued that any discussion of the grievance would require a discussion of the underlying student grade, the meeting concerning the student's grade and the administration of the union contract. Also, the PEA and the respondents argued that the teacher has not waived his right of privacy. In *Toplansky v. Bd. of Ed. of Bor. of Kenilworth*, 1989 *S.L.D.* 2708, the Commissioner ruled that it was inappropriate for a board to discuss a personnel matter in public session and that personnel matters fall within the personnel exception to the OPMA. They argued that the Board has the inherent right to maintain order at its meetings and to insure that confidential matters including pupil records, contract administration and personnel matters are not spread out on the public record, *N.J.S.A.* 18A:11-1(c) and (d).

The PEA and the respondents argued that this matter should be dismissed. In the alternative, they argued that the restraint which prohibits the Board from proceeding with the grievance should be dissolved, that this matter be stayed until after the Board's consideration of the PEA's grievance, and that the Board be prohibited from implementing any sanction until the petitioner has pursued this matter.

The petitioner argued that she has the right to a public hearing on the grievance and that the hearing can be held in such a way as not to divulge the name of the teacher or the name and grade of the student. She argued that she has a right to a public hearing even if the other parties involved do not agree. The petitioner argued that the personnel exception to the OPMA does not apply to elected officials, *Gannett Satellite Information Network Inc. d/b/a The Courier News v. Bd. of Ed. of Manville and Green*, 201 *N.J. Super.* 65 (Law. Div. 1984).

As to the OPMA issues, I agree with the arguments of the PEA and the respondents that the Board should discuss the grievance at a closed session after appropriate notice to the

petitioner. In order to assure the confidentiality of the discussion, the Board had the right to refuse petitioner's request to have a court reporter present. Also, I **FIND** that the petitioner has presented no proof to support her argument that the Board had given insufficient notice in violation of OPMA.

Lastly, the petitioner argued that if this matter is not dismissed, then Ms. Karr should be barred from continuing to represent the respondents. The petitioner stated that after she received the letter advising her of the hearing on the grievance she contacted Ms. Karr, the school board solicitor, and spent some time discussing the matter. The petitioner represents that it was only after the petitioner presented every intimate detail of the incident that Ms. Karr informed her that she would not be able to represent her. Ms. Karr told her that the law does not allow for removal of board members by the grievance procedure, and that the Board would probably censure her.

It is the petitioner's position that the conduct of Ms. Karr raises ethical questions, a conflict of interest, and may also violate the Rules of Professional Responsibility. The petitioner requests that the respondents be required to retain the services of another attorney to represent them in this matter.

In reply, Gary M. Salber, Esq., on behalf of the respondents, argued that the petitioner did not disclose any intimate details to Ms. Karr since there were no intimate matters involved and everything Ms. Karr was told by the petitioner is included in the petitioner's statement of facts. He argued that Ms. Karr has no conflict of interest nor were there any ethical violations or violations of the Rules of Professional Responsibility. Since I am issuing an initial decision, it is not necessary for me to make a ruling as to whether Ms. Karr should represent the respondents at a hearing in this matter.

There was also a discussion as to whether the petitioner is entitled to attorney's fees. Both the PEA and the respondents argued that the petitioner is not entitled to any attorney's fees. *Gibson v. Bd. of Ed. of the City of Newark*, 1986 *SLD* 3044. I concur.

CONCLUSIONS OF LAW

Having reviewed the arguments of the parties, I **CONCLUDE** that:

(1) The Commissioner has the jurisdiction to determine under education law whether the Board can consider the grievance filed by the PEA which asks the Board to remove or discipline the petitioner.

(2) If the PEA wishes to pursue its allegation of ethical violations and the request for the removal of the petitioner, it has to file a complaint pursuant to *N.J.S.A.* 18A:12-21 *et seq.*

(3) The Board has the right to file a revised grievance limited to alleged violations of the Board's procedures by the petitioner.

(4) If filed, the Board has the right to consider the revised grievance regarding the petitioner provided that the requested relief is limited to a reprimand or censure.

(5) The Board has the right to have the consideration of the grievance conducted in a closed session.

(6) The Commissioner has the right to consider allegations of violations of the OPMA as part of this case.

(7) The Board did not violate any of the provisions of the OPMA.

(8) Since the Board has the right to conduct the consideration in closed session, it had the right to deny the petitioner's request to have a court reporter present to record the consideration of the grievance.

(9) The request to remove Ms. Karr as attorney for the respondents is moot, and if the petitioner has any questions regarding Ms. Karr's conduct, she has the right to file a complaint with the District Ethics Committee.

(10) The petitioner is not entitled to attorney's fees.

Therefore, I **ORDER** that the motion filed by the PEA and the respondents to dismiss the matter for lack of jurisdiction and ripeness be denied. Also, I grant, the part, the petitioner's motion for summary decision. Specifically, I **ORDER** that there be a permanent restraint on the Board from considering the grievance regarding the petitioner in its present form. Also, I **ORDER** that the PEA has the right to submit a revised grievance which requests only a

reprimand or a censure of the petitioner based on violations of the Board's policies or procedures. If a revised grievance is filed, I **ORDER** that the Board has the right, after appropriate notice, to consider such a revised grievance at a closed session of the Board and to deny the petitioner's request to have a court reporter present.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 12, 2001
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

3/12/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 14 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cad

EXHIBITS ADMITTED INTO EVIDENCE:

Joint Exhibits:

J-1 Agreement between the Pennsville Education Association and the Pennsville Township Board of Education, June 1, 1997 through June 30, 2000

For the Petitioner:

P-1 Grievance filed by the Pennsville Education Association
P-2 Letter from Robert A. Peddle to Susan Settle, dated March 22, 2000
P-3 Marked for identification only
P-4 Letter from Judith Karr, Esq., to Paul Scull, Esq., dated March 28, 2000

WITNESSES:

For the Petitioner:

None

For the Respondent:

None

OAL DKT. NO. EDU 2345-00
AGENCY DKT. NO. 109-3/00

SUSAN SETTLE,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSVILLE, SALEM COUNTY AND ROBERT PEDDLE, SUPERINTENDENT,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENTS,	:	
AND	:	
PENNSVILLE EDUCATION ASSOCIATION,	:	
INTERVENOR.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The exceptions filed by Intervenor Pennsville Education Association (hereafter, "PEA") were submitted in accordance with *N.J.A.C.* 1:1-18.4.

In its exceptions, PEA maintains its position, as previously argued before the Administrative Law Judge (ALJ), that the Commissioner should dismiss the within petition since he is without jurisdiction to determine the fundamental issue herein, and the case is not, as to other issues, ripe for adjudication. Specifically, PEA contends that the issue of whether the Board may properly hear and adjudicate the grievance PEA brought before it is, "in its very essence, an argument concerning the statutory scope of negotiations and the Legislature has vested [the Public Employment Relations Commission] -- not the Commissioner -- with primary

jurisdiction to determine scope of negotiability. See *N.J.S.A.* 34:13A-5.3." (PEA's Exceptions at 4) PEA continues:

> Such a determination would be consistent with the body of caselaw of the Commissioner and the State Board of Education which has consistently recognized that the Commissioner's jurisdiction does not extend to contractual disputes. For example, the Commissioner and the State Board have recognized that the Commissioner does not have jurisdiction over every contractual action involving a school board. *E.g., Poole v. Bd. of Ed. of Passaic Cty. Reg'l. School District No. 1*, 1978 *S.L.D.* 1039 (St. Bd.) (Commissioner's jurisdiction does not extend to controversies arising under other laws, even though a school district may be a party to the controversy); *Vitacco v. Lincoln Park Board of Education*, CD 312-98 (7/17/98) (Commissioner dismissed case for lack of subject matter jurisdiction over purely contractual disputes). (*Id.* at 4)
>
> ***
>
> The Commissioner should dismiss the present case, allowing the grievance to proceed to Board determination in furtherance of the employees' right under [sic] to have the Board hear and adjust grievances under the New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-5.3 and the New Jersey State Constitution, Art I, ¶ 19. (*Id.* at 5)

Moreover, PEA asserts that to the extent petitioner challenges action which the Board might *later* take against her as a consequence of this grievance, and such action may implicate education law, petitioner's current appeal is premature. (*Id.*) Finally, PEA notes that, as of December 19, 2000, it has submitted an amended grievance to the Board which, significantly, seeks public reprimand and censure of petitioner as the sole form of relief, and the Commissioner should, therefore, "dissolve the permanent restraints in this matter as moot." (*Id.* at 5)

Upon careful review of the record, now supplemented pursuant to the plenary proceedings which followed the Order issued on April 3, 2000 temporarily enjoining the Board from taking further action in consideration of the within grievance, the Commissioner determines

to set aside the Initial Decision of the ALJ. In so doing, he is persuaded by a more fully developed record that petitioner's main prayers for relief are either not properly addressed in this forum or are not ripe for adjudication. Consequently, he cannot reach petitioner's attendant Open Public Meetings Act (OPMA) claims.

The PEA brought before the Board a Grievance Report, initially filed on February 28, 2000, seeking petitioner's removal and stating, in pertinent part:

> The Association contends that Mrs. Settle's actions were in violation of Articles III, IV, IX, and other Articles and policies relevant to the instant matter. We further contend that her attendance at this conference was in direct violation of the established, Board approved, "Student Grievance Procedure" found in the student handbook***. In addition we maintain that Mrs. Settle has once again overstepped her bounds as a Board Member and is in violation of the Code of Ethics ***; and Applicability of the Code of Ethics *** established for School Board members.***" (Petition of Appeal, Exhibit A at 1)

Although PEA recognized that, in most cases, it is an administrator, rather than a board member, who is the target of a grievance, PEA nonetheless reasoned that if an action can be brought against an administrator who is not a party to the collectively negotiated agreement for an alleged violation of the contract or Board's policies, then such an action should be viable against a Board member. (PEA Reply Brief, September 25, 2000 at 4) PEA viewed the filing of the grievance as its right under its collectively negotiated agreement (*id.*), which provides, in pertinent part, that:

> A grievance shall mean a complaint by a member of the negotiating unit that there has been to him a personal loss, injury, or inconvenience resulting from a violation, misinterpretation, or inequitable application of any of the provisions of this Agreement, Board policies, or administrative decisions affecting him. (Exhibit J-1, Agreement Between the Pennsville Education Association and the Pennsville Township Board of Education, July 1, 1997 – June 30, 2000 at 3)

Thus, with respect to petitioner's claims that the grievance is improperly directed at her, and that the Board is without the power to hear the grievance or discipline her pursuant thereto,[1] the Commissioner must concur with the PEA that this dispute is not properly before him, since he has no jurisdiction to enforce or interpret collective negotiations agreements. *Vitacco, supra*; *Solomons v. Fair Lawn Bd. of Education*, 1984 *S.L.D.* 384.[2]

Further, as to petitioner's demand that the Board be permanently enjoined from taking any disciplinary action against her because it is not authorized under *N.J.S.A.* 18A:11-1 to do so,[3] the Commissioner concurs with the PEA that petitioner's prayer for such relief is premature. Although petitioner's alleged violations were considered at the Board meeting held on March 27, 2000 as "a result of" the grievance filed against her by the PEA (Petition of Appeal at Exhibit B), the Board had not, on its own initiative, made any findings or taken any disciplinary action against petitioner which might be considered an exercise of its authority pursuant to *N.J.S.A.* 18A:11-1.[4] Neither, as the ALJ observes, had a complaint been filed against petitioner "pursuant to *N.J.S.A.* 18A:12-21 *et seq.*" (Initial Decision at 10)

---

[1] The Petition of Appeal and accompanying Motion for Emergent Relief, requested, in pertinent part, "A. That the Pennsville Education Association's alleged grievance filed on February 28, 2000 be dismissed due to lack of jurisdiction, as well as lack of standing. B. That the Pennsville Board of Education be restrained from conducting any disciplinary hearing as a result of an improperly filed grievance against an improper party in interest.*** (Petition of Appeal at 8)

[2] Contrast, *Frenchtown Education Association, supra*, where there is no indication that the local education association's complaint about a board member's classroom visit was in the form of a grievance filed pursuant to its collective agreement, notwithstanding that it "protested these actions" before the board. Rather, when the board discussed the member's conduct and, perceiving no wrong, took no action, the association filed a Petition of Appeal alleging that the board member's action in visiting and observing a constituent member's classroom "was violative of the Board's own policy and *N.J.S.A.* 18A:25-7.***" (*Frenchtown* at 198, 199)

[3] Here, the Petition of Appeal and Motion for Emergent relief specifically request "D. That the Pennsville Board of Education be hereby enjoined from taking any disciplinary action against *** Susan Settle, as they are not authorized under *N.J.S.A.* 18A:[11-1] to do so, and as petitioner has not violated any of the subsections of the *N.J.S.A.* 18A:12-24. E. That a declaratory judgment [be issued] that the Pennsville Board of Education is not statutorily empowered to exercise jurisdiction or to take such action.***" (Petition of Appeal at 8-9)

[4] Contrast, *Crystal,supra,* where the board, acting *sua sponte* upon a perceived violation, voted to censure Crystal for violating its policy prohibiting any board member from making a presentation regarding any board-related matter, or releasing information concerning the board's business, until that member has notified all other board members at least five days prior to the presentation or dissemination. *Crystal,slip. op.* at 4. Although petitioner alleged that the Board's decision to censure him was arbitrary and capricious, the ALJ therein concluded, and the

Therefore, there being no claim before him pursuant to *N.J.S.A.* 18A:6-9, the Commissioner finds that he cannot reach petitioner's allegations which arise under the OPMA, since the Commissioner's jurisdiction to address such violations "has been found to be ancillary – pendant to an equally or more significant related 'school law' issue."[5] *Rovello, supra,* 93 *N.J.A.R.* 2d (EDU) 313 (1993) at 316; *Cheung v. Freehold Twp. Bd. of Education*, 94 *N.J.A.R.* 2d (EDU) 576 (1994)

Accordingly, the Petition of Appeal is dismissed, and the temporary Order of April 3, 2000 enjoining the Board from considering PEA's grievance is dissolved.

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

Date of Decision: 4|26|01

Date of Mailing: 4|26|01

Commissioner affirmed, that petitioner violated a clearly articulated policy, and pursuant to *N.J.S.A.* 18A:11-1, the board was empowered to censure him for that act. *Crystal slip. op.* at 9.

[5]In this regard, petitioner seeks, "C. That the Pennsville School District be hereby enjoined from holding any hearings in closed sessions with respect to board member, Susan Settle. *** F. That the Pennsville Board of Education and it's [sic] President, Edward Jones and Superintendent, Dr. Robert A. Peddle is [sic] held to have violated the Open Public Meetings Act of 1975, *N.J.S.A.* 10:4-12. G. That Pennsville Board of Education be required to promulgate judicially and statutorily acceptable guidelines for the recording of their public meetings." (Petition of Appeal at 8, 9)

[6] 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.

139-01

#139-01

CHRISTOPHER WOHLRABE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning student filed an emergent petition seeking review of the NJSIAA's determination denying his application for waiver of the NJSIAA's eligibility standards. Petitioner sought a waiver of the NJSIAA's Academic Credit Rule, as he did not have the 13.75 passing grade credits required to participate in the spring baseball season on the Verona High School team because he failed his English course. Petitioner argued that his mother's illness, a circumstance beyond his control, caused his failure in English, and thus, that the Academic Credit Rule should have been waived by NJSIAA.

NJSIAA argued that its decision, absent a determination that it is arbitrary or capricious, must be affirmed, that it lacks the ability to change a student's grade and that petitioner failed to demonstrate that his failing grade was caused by circumstances beyond his control, which is a prerequisite to a determination by NJSIAA to waive its Academic Credit Rule.

The Commissioner affirmed the decision of the NJSIAA and dismissed the emergent petition, holding that the inability to participate in interscholastic sports does not constitute irreparable harm, and that petitioner did not demonstrate a likelihood of success on the merits because he could not demonstrate that his failing grade was a circumstance beyond his control.

May 4, 2001

AGENCY DKT. NO. 100-4/01

CHRISTOPHER WOHLRABE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

For Petitioner: Christopher Wohlrabe, *pro se*

For Respondent: Steven P. Goodell, Esq. (Herbert, Van Ness, Cayci & Goodell)

This matter has come before the Commissioner of Education by way of an Emergent Petition filed on April 16, 2001, seeking a reversal of the decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) precluding him from participating as a member of the Verona High School baseball team during the 2000-2001 school year, and further seeking a waiver of the NJSIAA's eligibility standards. Respondent's Answer was filed on April 18, 2001, together with a complete record of the proceedings before the NJSIAA Eligibility Appeals Committee (EAC). On April 19, 2001, petitioner filed a brief in support of his emergent petition. The NJSIAA filed its brief in opposition on April 25, 2001.

In accordance with *N.J.A.C.* 6A:3-1.6(b), a grant of emergent relief is considered an extraordinary remedy that can only be issued upon a finding that petitioner has met the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). The *Crowe* standard

requires petitioner to demonstrate the following: that he will be irreparably harmed if not permitted to participate in interscholastic baseball games; that the legal right underlying petitioner's claim is settled; that petitioner has a substantial likelihood of prevailing on the merits of the claim; and that, in balancing the interests of the parties, the greater harm will be to petitioner should the requested relief not be granted.

The relevant facts in this matter are not disputed. Petitioner, a senior at Verona High School in the Verona Township School District, has been a member of the high school baseball team for the previous three years. In the fall semester of 2000, petitioner failed his English course. Therefore, petitioner did not have the 13.75 passing grade credits for the fall semester required by the NJSIAA's academic credit rule set forth in Article V, Section 4.E(2) of the Bylaws and Regulations in order to be eligible for high school athletics in the spring semester. On March 28, 2001, the principal of Verona High School contacted the Associate Director of the NJSIAA to request that the NJSIAA review petitioner's eligibility status. Although applications for waivers of the eligibility rules are usually heard initially by the NJSIAA Eligibility Committee, petitioner did not file his appeal in time for the Eligibility Committee to hear his case. Consequently, petitioner's appeal was heard by the Eligibility Appeals Committee (EAC), which has jurisdiction to hear appeals directly, on April 4, 2001. (NJSIAA's Brief at 2-3) At the hearing, petitioner presented evidence and testimony in support of his contention that he had failed his English course due to extenuating circumstances arising from his mother's illness. (Petitioner's Brief at 1)

By a unanimous vote, the EAC denied petitioner's request for a waiver of the Academic Credit Rule. A letter memorializing the decision was issued April 9, 2001.

PETITIONER'S POSITION

Petitioner argues that he will be irreparably harmed if preliminary injunctive relief is not granted because the spring sports season is already underway. Petitioner further argues that a waiver of the Academic Credit Rule would cause EAC no hardship, but that he would suffer the loss of the opportunity to play in his senior year and his mother would lose her last opportunity to watch him play. (Petitioner's Brief at 2)

Petitioner contends that the EAC's ruling denying the requested waiver is unreasonable, arbitrary and capricious because the determination contradicts itself. Petitioner notes that the EAC stated, through its attorney, that the purpose of the hearing was to determine whether petitioner's failure to reach a passing grade in English was due to circumstances beyond his control. In an apparent effort to illustrate that he had demonstrated that his failure to reach a passing grade in English was due to circumstances beyond his control, petitioner cites his testimony, and that of his cousin to the effect that:

> At the time I was at home, I obviously have to be concerned about schoolwork too, but when I'm at home an I'm with her, I'm a little more worried about her...
> ***
> He more would just have the emotional I think strain of just, you know, seeing his mother sick and just kind of wanting to be there, you know, making sure that she's not -- she doesn't need anything, and just letting her know he was there and kind of like watching her. You want to get every moment you can in with her because you never know when the last moment's going to be. (*Id.* at 3)

Petitioner also asserts that "the EAC's own split (5-4) decision[1] [proves] that there were extenuating circumstances out of Petitioner's control, and therefore, the waiver should have been granted." (*Id.* at 4) Instead of granting the waiver, however, petitioner asserts that the EAC

[1] Petitioner's reference is to a motion to grant eligibility based on extenuating circumstances that was defeated, four votes in favor, five opposed. (Tr. at 16) Following additional discussion, a subsequent motion denying petitioner's request for a waiver was passed unanimously. (Tr. at 18)

acknowledged the extenuating circumstances of his mother's illness, but recommended that Verona High School consider addressing the grade with make-up work. (*Id.* at 5) Petitioner avers that this approach was unreasonable, arbitrary and capricious because: 1) the evidence establishes that extenuating circumstances have been present throughout petitioner's education, including his recent failure (*id.* at 4); and 2) the EAC's recommended remedy suggests an action that is out of petitioner's control. (*Id.* at 5) Moreover, submissions by petitioner's mother and her doctor, and the testimony offered at hearing, petitioner maintains, show that his mother's recurring bouts of metastatic breast cancer over the past 13 years have put emotional strain on him and his entire family. (*Id.* at 4) Petitioner, therefore, requests that the Commissioner stay the determination of the NJSIAA and grant petitioner a waiver of the eligibility requirements so that he can participate in the baseball season already in progress. (*Id.* at 6)

THE NJSIAA'S POSITION

In support of its decision denying petitioner's request for a waiver, the NJSIAA points to the academic credit rule set forth at Article V, Section 4.E of its Bylaws and Regulations, which states, in part:

> (2) To be eligible for athletic competition during the second semester (February 1 to June 30) of the 9th grade or higher, a pupil must have passed the equivalent of 12-½% of the credits (13.75) required by the State of New Jersey for graduation (110) at the close of the preceding semester (January 31). Full-year courses shall be equated as one-half of the total credits to be gained for the full year to determine credits passed during the immediately preceding semester. (NJSIAA's Brief at 2)

The NJSIAA submits that its policy is that it will not change a grade or credit where a school has refused to do so. As specified in its handbook:

> *The NJSIAA does not establish grading policies or standards for granting credits. The local school's Board of Education has the exclusive authority to address such matters within the parameters*

> *of the State Board of Education guidelines. Therefore, the NJSIAA will not waive, either the standards set by a member school or the minimum standards set forth in Article V. Section 4.E except as provided in Section 4.F(1).* [NJSIAA Handbook (2000-2001, p. 44; Bylaws, Article V, Section 4E.2.) Emphasis in original.] (*Ibid.*)

Moreover, the NJSIAA maintains that petitioner was afforded all elements of due process wherein he was permitted to appear with counsel, present evidence and cross examine witnesses at an EAC hearing composed of educators with experience in the application of the NJSIAA eligibility rules. (*Id.* at 3)

Citing *Palmer v. Marluzzi,* 689 *F.Supp.* 400, 406-409 (D.N.J. 1988), *aff'd Palmer by Palmer v. Marluzzi*, 868 *F.*2d 90 (3rd Cir. 1989); *Moreland v. Western Pa. Athletic League*, 572 *F.*2d 121, 124 (3rd Cir. 1978); *Camden City Bd. of Ed. v. NJSIAA*, unpublished decision of the New Jersey Superior Court, Appellate Division, February 18, 1992 (Dkt. No. A2802-91T2); *Burnside v. NJSIAA*, unpublished decision of the New Jersey Superior Court, Appellate Division, November 15, 1984 (Dkt. No. A-625-84T7), *cert. denied*, 101 *N.J.* 236 (1985); *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.*2d (EDU)182, 188; *Dean v. NJSIAA*, 94 *N.J.A.R.*2d (EDU) 437 (1994); and *R.D., by L.W.C. v. NJSIAA*, 91 *N.J.A.R.*2d (EDU) 130 (1991), NJSIAA submits that failure to grant injunctive relief to petitioner will not result in irreparable harm because consistent court rulings have determined that participation in extracurricular sports is a privilege, not a right. (*Id.* at 4-6)

The NJSIAA further points out that, pursuant to *N.J.A.C.* 6A:3-7.4, the Commissioner's review of NJSIAA decisions is appellate in nature. Thus, where due process has been granted and the decision of the NJSIAA is supported by sufficient credible evidence in the record, the Commissioner shall not substitute his or her judgment for that of the NJSIAA, even if the Commissioner might judge differently in a *de novo* review. (*Id.* at 6-7) The NJSIAA

contends that it provided petitioner due process when the EAC held a hearing wherein petitioner was permitted to present his arguments and witnesses, and notes that the proceedings and the vote were stenograpically recorded. (*Id.* at 7) The NJSIAA points out that, although Verona High School officials did not appeal to the Eligibility Committee, which meets at the beginning of each sports season, nor did they file their appeal to the EAC in a timely manner, the NJSIAA waived the 10-day filing requirement and scheduled a hearing for April 4, 2001. (*Ibid.*)

The NJSIAA posits that although the EAC sympathized with petitioner, it ultimately determined, after serious deliberation, that petitioner did not fail his English course as a result of circumstances beyond his control. (*Id.* at 8) Moreover, the NJSIAA argues, to the extent that the English teacher and the school believed that there were "extenuating circumstances" which affected petitioner's grade, the school should have taken remedial action after the grade had been awarded if it felt that the grade was awarded unfairly because "[i]t has never been within the Association's authority to remedy an inequitable grade." (*Ibid.*) *See R.D., supra,* and *J.M.G., on behalf of minor son, J.G. v. NJSIAA*, 0-3/98, Commissioner of Education Decision on Motion, April 24, 1998. (*Id.* at 8-9) The NJSIAA avers that its decision was made by educators who listened to all the evidence, discussed the matter and decided that the school could have reviewed the student's grade and, thus, the EAC's conclusion is entitled to due deference. (*Id.* at 10)

With respect to the relative hardship to the parties, the NJSIAA argues that granting relief to petitioner would be unfair to opposing teams whose athletes have met the eligibility standards, and that it would establish an unwise precedent of shifting responsibility for academic assessment from the school to the NJSIAA. In *R.D., supra*, the NJSIAA argues, the Commissioner addressed this issue and held that "the balance of equities and likelihood of

success enured on behalf of NJSIAA, which has a greater interest in preserving academic standards for all participating students than the interests suggested by R.D. in seeking a waiver of the six-day academic credit rule because it is uncontested that R.D. failed sociology in his junior year." (*Ibid.*) The NJSIAA, therefore, maintains, that the relative hardships in this case similarly weigh against the granting of relief to the petitioner and requests that the Commissioner deny petitioner's Motion for Emergent Relief and dismiss the Petition. (*Id.* at 11)

DETERMINATION

Having carefully reviewed the record of proceedings before the NJSIAA,[2] as well as the legal arguments presented by the parties, the Commissioner determines to deny petitioner emergent relief and dismiss the petition.

In accordance with prior case law, the inability to participate in interscholastic sports, alone, does not constitute irreparable injury. Thus, petitioner cannot demonstrate irreparable harm merely because he is precluded from playing baseball, nor can he establish that a settled legal right is underlying his claim, *Crowe, supra*, at 133, where petitioner possesses no legal right to participate in such extracurricular activities. *See Martin A. Domacasse v. Board of Education of the North Warren Regional School District, Warren County*, decided by the Commissioner April 4, 1996, affirmed State Board April 17, 1996; *Camden City Bd. of Ed. v. NJSIAA*, unpublished decision of the Appellate Division, February 18, 1992 (Dkt. No. A-2802-91T2); and *Burnside, supra.*

Petitioner has also failed to demonstrate a likelihood of success on the merits of his claim. In this regard, the Commissioner recognizes that the NJSIAA is a voluntary association. In cases involving the Association, the Commissioner's scope of review is appellate.

[2] The record includes a transcript of the hearing before the EAC.

See N.J.S.A. 18A:11-3, *N.J.A.C.* 6A:3-7.4 and *Board of Education of the City of Camden v. NJSIAA, supra.* As such, he may not overturn an action by NJSIAA in applying eligibility rules absent a finding that the Association applied the rules in a patently arbitrary, capricious and unreasonable manner. *B.C. v. Cumberland Reg. Sch. Dist.*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987). Further, the burden of proof that an action was so deficient rests with the person challenging the decision. *Kopera v. West Orange Bd. of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960). Thus, the Commissioner may not substitute his judgment for that of the NJSIAA, even if he might judge otherwise in a *de novo* review. *Dam Jin Koh and Hong Jun Kim v. NJSIAA*, 1987 *S.L.D.* 259.

In the instant matter, the Commissioner finds that petitioner was provided the due process to which he was entitled and that the NJSIAA made every effort to assure a full, fair and timely hearing. A committee of educators convened to consider petitioner's request for a waiver of the NJSIAA's Academic Credit Rule. The EAC held a hearing at which Principal Thomas Valente, petitioner, and petitioner's cousin, Ms. Linda Lutz, appeared to testify on petitioner's behalf, and supportive letters from petitioner's mother, his mother's physician and petitioner's English teacher were admitted into the record. Upon review, the EAC fairly determined:

> Mr. Wohlrabe is in his senior year at Verona High School. His academic transcripts indicate that he failed Spanish II in his sophomore year and U.S. History I in his junior year. During the first semester of his senior year, he failed English IV and therefore did not achieve the requisite 13.75 credits to participate in sports during the spring semester. This student's mother has been diagnosed recently as having a reoccurrence of metastatic breast cancer. Chris struggled academically and emotionally. He testified that it was difficult to concentrate because of his mother's illness. His English teacher, Maria Meyer wrote a memo stating that he received a failing grade because of "missed work because of extenuating circumstances."

> The Committee could not grant a waiver of the Academic Credit Rule because it was not established that this student's academic failures were related to the illness of his mother. However, the Committee urges the school to re-evaluate the mark given to this student in English during the first semester. Since the teacher herself stated that she believed that the school should allow for additional course work to be taken so as to allow for the modification of the mid-year mark for the English course. If this were to occur, then this student will be eligible. However, the NJSIAA does not have the authority to modify a student's grade. That is within the sole prerogative of the school. (NJSIAA's April 9, 2001 Letter memorializing the EAC's decision of April 4, 2001)

The Commissioner further notes that petitioner has failed to demonstrate that the NJSIAA's determination that his failing grade in English was a circumstance which was within his control was arbitrary and capricious. A review of petitioner's transcript reveals that he has struggled academically all four years that he has been in high school, failing one class in each of the past three years, and that, with the exception of the grade in his English class, his grades in his senior year overall have surpassed those in his previous high school years. (Petitioner's High School Transcript, Exhibit 12) Moreover, petitioner does not serve in the role of primary caregiver for his mother. Ms. Lutz testified that there are nine children in the house and everybody has played a role in the care of petitioner's mother. (Tr. at 9) Thus, the Commissioner is unable to conclude, based on the testimony and evidence provided, that petitioner's failure to achieve a passing grade in English was the result of the resurgence of his mother's illness during his senior year.

Given the lack of evidence to support petitioner's claim that his failure was not within his control, and having been accorded due process in this matter, the Commissioner finds that petitioner has not established that the determination by the NJSIAA was arbitrary, capricious and unreasonable, so as to prevail on the merits of his claim.

The Commissioner further notes his concurrence with the NJSIAA's view that it is not within the NJSIAA's authority to remedy an allegedly inequitable grade. The authority for setting grading policies and the standards for the awarding of grades rests squarely within the school's jurisdiction. *See R.D., supra,* and *J.M.G., supra.* The English teacher, Ms. Marie Meyer, provided a letter in support of petitioner, which states:

> I would like you to reconsider your decision regarding Christopher Wohlrabe. As his English teacher, I am, of course, concerned about Christopher's academic achievement. While he did have a failing grade for the semester, it was the result of missed work because of extenuating circumstances. He did pass the first marking period and midterm exam, and since then has continued to do passing work, making significant progress on an independent research paper. I believe that Christopher will continue to do well for the remainder of the year, and the opportunity to participate in baseball will further encourage him. (Exhibit 11)

The NJSIAA has no authority to change the grade Ms. Meyer gave petitioner. It is the District's prerogative to take remedial action if it believes that petitioner missed work for reasons that should permit him to complete additional course work so as to allow for adjustment of the semester grade.

Finally, the Commissioner determines that the equities in this matter lie with the NJSIAA, since the issuance of a stay of its decision, under less than "truly extraordinary circumstances" may result not only in a weakening of the NJSIAA's Academic Credit Rule, but may also jeopardize, through participation of an ultimately ineligible player, the high school baseball team's position in interscholastic competition.

Accordingly, the Commissioner finds that petitioner has failed to meet the legal standard necessary to warrant the extraordinary remedy of emergent relief and, therefore, dismisses the Emergent Petition.

IT IS SO ORDERED. [3]

COMMISSIONER OF EDUCATION

Date of Decision: MAY 04 2001

Date of Mailing: MAY 04 2001

[3] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the Superior Court pursuant to *N.J.S.A.* 18A:11-3.

140-01

#140-01

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION: **IN THE MATTER OF THE DISTRICT SUPPLEMENTAL AID APPLICATION,**	:	DECISION
RESPONDENT.	:	

May 4, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6095-00

AGENCY DKT. NO. 235-6/00

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Robert A. DeSanto, Esq., for petitioner (Gruccio, Pepper, Giovinazzi, DeSanto and Farnoly, attorneys)

Michael Walters, Deputy Attorney General, for respondent (John J. Farmer, Jr., Attorney General of New Jersey, attorney)

Record Closed: April 24, 2001 Decided: April 27, 2001

BEFORE **JOSEPH F. MARTONE,** ALJ:

This matter was transmitted to the Office of Administrative Law on July 26, 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 parties have agreed to a settlement and have prepared a Consent Order 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.

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 27, 2001
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

5-1-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 2 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

mph

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	)	OAL DOCKET NO. EDUOT 06095-00S
Petitioner,	)	Agency Ref. No. 235-6/00
v.	)	
NEW JERSEY DEPARTMENT OF EDUCATION,	)	**CONSENT ORDER OF SETTLEMENT**
Respondent.	)	

Petitioner, Board of Education of the City of Vineland ("Petitioner"), through its Attorney, Robert A. DeSanto, Esq., (Robert A. DeSanto, appearing) 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 (Michael C. Walters, Deputy Attorney General, appearing), hereby stipulate to the following terms of settlement:

1. On or about June 29, 2000, Petitioner filed a Petition of Appeal ("Petition") with the Commissioner of Education seeking review of the Department's determinations with respect to Petitioner's request for supplemental funding for the 2000-2001 school year under the Abbott v. Burke decisions and DOE regulations.

2. The Petition was subsequently transferred to the Office of Administrative Law as a contested case.

3. The parties thereupon entered into discussions to amicably resolve this matter in the public interest.

4. Based on those discussions, the Department agrees that the Petitioner has demonstrated a need for additional supplemental

funding in the amount of $2,835,000.00 for the programs, services and/or positions set forth in the Appendix. This additional supplemental funding is restricted to fund only the programs, services and/or positions set forth in the Appendix. In the event that any portion of the additional supplemental funding is not expended during the current fiscal year ending June 30, 2001, that portion of the additional supplemental funding must be used to fund the programs, services and/or positions set forth in the Appendix during the 2001-2002 school year.

5. The Department agrees to provide Petitioner with additional supplemental funding in the amount of $2,835,000. Petitioner may anticipate revenue in the amount of $2,835,000 and record an accounts receivable in the 2000/2001 budget year of that same amount. The Vineland Board of Education is hereby authorized to borrow from any of its designated banks or lending institutions, such amounts up to the amount of the account receivable in order to provide cash for the fiscal year 2000/2001 needed to pay for the programs, services and/or positions set forth in the Appendix. The receipt of this additional amount of funds will occur in one-lump sum during the 2001-2002 budget year subject to appropriation in the FY 2002 Appropriations Act.

6. The Petitioner agrees to dismissal with prejudice of Petitioner's 2000-2001 Supplemental Funding appeal (OAL Docket No. EDUOT 06095-00S; Agency Ref. No. 235-6/00) 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.

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

MICHAEL C. WALTERS, DAG

DATED: 4/12/01

ROBERT A. DE SANTO ESQ.
Attorney for Petitioner,
Board of Education of the
City of Vineland, New Jersey

ROBERT A. DE SANTO, ESQ.

DATED: 4-16-01

SO ORDERED THIS 27th DAY OF April 2001.

HONORABLE JOSEPH MARTONE, A.L.J.

APPENDIX

1.	Student Assistance Counselor	$ 18,785
2.	Four (4) Building Level Tech Coordinators	75,141
3.	Five (5) Security Guards	39,167
4.	Security Items for Landis	24,000
5.	Field Trips for School-to-Career	6,700
6.	Supplies for AVID	6,428
7.	Professional Development	80,000
8.	Technology	1,569,197
9.	Second Chance Program Coordinators and Clerical	51,582
10.	Second Chance Equipment and Supplies	220,000
11.	(4) Assistant Principals for Elementary Schools	94,200
12.	Terra Nova Testing and Scoring	105,000
13.	Literacy Materials	100,000
14.	GEPA Prep Materials	80,000
15.	LASER Science Materials and training	70,000
16.	Curriculum Computer Corp. for Math ESPA	60,000
17.	SUCCESS Textbooks and Materials	10,000
18.	Internet Filtering Software and Training	45,000

19. Bilingual Program - Textbooks/training/curriculum alignment		45,000
20. Bilingual Kindergarten Aide, 1st and 2nd Grade 3/7 teachers		90,000
21. LASER Science Teacher Training		16,500
22. Otis Lennon School Ability Test Screening for Gifted Program		8,300
23. World Language Curriculum Development Stipends		10,000
24. Visual, Practical, Performing Arts Curriculum Development	$	10,000
Total:	$	2,835,000

OAL DKT. NO. EDU 6095-00
AGENCY DKT. NO. 235-6/00

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION: **IN THE MATTER OF THE DISTRICT SUPPLEMENTAL AID APPLICATION,**	:	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: MAY 04 2001

Date of Mailing: MAY 04 2001

141-01

#141-01

CATHERINE AUSTIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

April 26, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10966-97
AGENCY DKT. NO. 424-10/97

CATHERINE AUSTIN,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,
Respondent.

Claudine M. Liss, Esq., for petitioner

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

Record Closed: March 9, 2001 Decided: March 9, 2001

BEFORE **KEN R. SPRINGER**, ALJ:

This matter was transmitted to the Office of Administrative Law December 24, 1997 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 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.

March 9, 2001
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

3/12/01
DATE

Debbi Bartmanites
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 16 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
MAR 9 1 06 PM '01

SILLS CUMMIS RADIN TISCHMAN
EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(973) 643-7000
Attorneys for State Operated
School District of the City of Newark

COMMISSIONER OF EDUCATION
OAL Docket No. EDUOR 10966-97
Agency Ref. No. 424-10/97

CATHERINE AUSTIN,

Petitioner,

-vs-

STATE-OPERATED SCHOOL DISTRICT FOR THE CITY OF NEWARK,

Respondent.

STIPULATION OF SETTLEMENT, WAIVER AND RELEASE

The State-Operated School District of the City of Newark ("Newark" or "District") and Catherine Austin ("Petitioner" or "Austin") agree to the following terms in full resolution of this matter:

WHEREAS, Austin disputes the basis for the increment withholding for the 1997-1998 school year, and

WHEREAS, Austin retired was approved for disability retirement effective November 1, 1999; and

WHEREAS, the parties further agree that it is in the public interest to enter into this agreement in resolution of said charges in order to avoid the uncertainty and expense of litigation.

NOW, THEREFORE, the parties agree as follows:

1. The District agrees to restore Austin's 1997-1998 increment and to reflect Ms. Austin as having retired in good standing effective November 1, 1999.

2. Upon approval of this Agreement, Austin will withdraw her petition of the 1997-1998 increment withholding and the above-captioned matter, with prejudice.

3. This agreement is subject to the approval of the State District Superintendent.

The parties enter this agreement voluntarily and without coercion, after consultation with their respective counsel.

CATHERINE AUSTIN

Dated: 2/14/01

State-Operated School District of the City of Newark

By: 3/1/2001

Dated:

OAL DKT. NO. EDU 10966-97
AGENCY DKT. NO. 428-11/97

CATHERINE AUSTIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Stipulation of Settlement, Waiver and 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.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: APR 26 2001

Date of Mailing: MAY 04 2001

142-01

#142-01

IN THE MATTER OF THE TENURE	:	
HEARING OF HARRY INDAR,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF JERSEY CITY,	:	
HUDSON COUNTY	:	
	:	

May 7, 2001

AGENCY DKT. NO. 85–4/01

IN THE MATTER OF THE TENURE	:	
HEARING OF HARRY INDAR,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF JERSEY CITY,	:	
HUDSON COUNTY	:	
	:	

For Petitioner: Ken Iwama, Esq. (Assistant General Counsel, Jersey City School District)

This matter having been opened before the Commissioner of Education on April 5, 2001 through the certification of tenure charges by the State-Operated School District of the City of Jersey City against respondent, a tenured teacher, for chronic and/or excessive absenteeism, unbecoming conduct, insubordination and other just cause; and

The respondent, having been served, via regular and certified mail, with a copy of the charges, the Board's resolution, the Statement of Evidence and the Certificate of Determination on February 14, 2001; and

The Commissioner, having directed respondent, via both certified and regular mail on April 5, 2001, to file an Answer to the tenure charges certified against him; and

Whereas, such communications 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 from the date such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,"* and that failure to answer within the prescribed period will, absent granting of an extension for good cause shown, result in the charges being deemed admitted; and

Whereas, the April 5, 2001 communication sent to respondent via certified mail was returned to the Commissioner on April 23, 2001, marked "Unclaimed"; and

Whereas, no reply has been received from respondent in response to the Board's charges, each count of the charges against respondent is deemed to be admitted; and

Whereas, the Commissioner's review of the tenure charges and the statement of evidence in support of those charges indicates that respondent in the past two and one-half years has been absent for more than one and one-half school years, not having reported for duty this current school year, thus making him absent during this school year for approximately 100 days as of February 13, 2001; and

Whereas, respondent was absent during the 1999-2000 school year an approximate total of 164 days and during the 1998-1999 school year approximately 28 days; and

Whereas, respondent's salary and adjustment increments were withheld for the 2000-2001 school year for excessive absenteeism and unsatisfactory performance during the preceding school year; and

Deeming such tenure charges to be admitted, and noting that respondent has not replied to the specific allegations contained therein, either to the Commissioner or the state district superintendent, the Commissioner finds that respondent's actions constitute chronic and excessive absenteeism, warranting dismissal from his tenured position as teacher; now, therefore

IT IS SO ORDERED this 7th day of May that summary decision shall be granted to petitioner, and Harry Indar shall be dismissed as of the date of this order from his tenured position as teacher in the employ of the State-Operated School District of the City of Jersey City.*

Accordingly, this 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: MAY 07 2001

Date of Mailing: MAY 07 2001

* 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 date of mailing to the parties.

#143-01

DEBORAH E. CIAMBRONE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
GERALD WITTY AND THE BOARD OF EDUCATION OF THE BOROUGH OF BLOOMINGDALE, PASSAIC COUNTY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning teaching staff member alleged that respondent Board Member Witty invaded her privacy and abused his authority by accessing her personnel records, and that the respondent Board arbitrarily and capriciously refused to sanction Witty. Respondents denied the allegations and raised as affirmative defenses that the petition was untimely and that the relief requested was outside the scope of the Commissioner's jurisdiction.

The ALJ concluded that the petition was timely filed, but dismissed it because the Commissioner lacks jurisdiction over the subject matter of the petition, holding that the Commissioner has jurisdiction over boards of education and board members only when applying specific school laws.

The Assistant Commissioner, to whom this case was delegated for decision, generally affirmed the ALJ's determination that the Commissioner lacked jurisdiction over the issues raised, and the relief sought, in the petition. However, the Assistant Commissioner clarified that he did have jurisdiction over this matter to the extent that petitioner raised issues of a board member's authority and sought a declaration that the Board must ensure that access to personnel records by board members is restricted to conform with past decisions of the Commissioner. The Assistant Commissioner reminded respondent Board and all boards of education of their obligation to restrict access to personnel files by board members in conformance with applicable decisions of the Commissioner.

May 7, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9202-00
AGENCY DKT. NO. 279-8/00

DEBORAH E. CIAMBRONE,

Petitioner,

v.

GERALD WITTY AND THE BOARD OF EDUCATION OF THE BOROUGH OF BLOOMINGDALE, PASSAIC COUNTY,

Respondent.

Gregory T. Syrek, Esq., appearing for petitioner
(Bucceri & Pincus, attorneys)

Vito A. Gagliardi, Jr., Esq., appearing for respondent
(Porzio, Bromberg & Newman, attorneys)

Record Closed: January 18, 2001 Decided: March 21, 2001

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner teaching staff member charged member of respondent Board of Education abused his authority by accessing staff member's personnel records and charged Board's failure to sanction Board member as arbitrary and capricious. The

respondent denied the allegations but affirmatively defended that the petition was untimely and failed to state a claim upon which relief could be granted and the relief was beyond the jurisdiction of the Commissioner of Education. The Department of Education asked for briefs on the jurisdictional issues. On October 6, 2000, the Bureau of Controversies and Disputes of the Department of Education transmitted the matter to the Office of Administrative Law (OAL) for further proceeding without prejudice to the jurisdictional arguments of petitioner or the Board.

On January 3, 2001, the respondents moved to dismiss the petition for failure to state a claim, untimeliness, and lack of jurisdiction. On January 9, 2001, petitioner filed a brief and opposition to the motion. On January 18, 2001, respondents filed a reply brief.

FACTS

For purposes of this motion to dismiss, the facts pled by petitioner in the verified petition will be taken as the operative **FACTS**.

1) Petitioner has been employed by respondent Bloomingdale Board of Education (Board) as a teaching staff member since 1970.

2) Respondent Gerald Witty (Witty) is an individual member of the Board.

3) The Board maintains a personnel file regarding the employment service and performance of the petitioner.

4) On or about May 8, 2000, the petitioner learned that Witty had reviewed her personnel file to determine if certain information had been placed in it at the request of a parent.

5) Upon information and belief, the petitioner alleges that Witty conveyed information regarding his review of her personnel file to the parent.

6) At the time Witty reviewed petitioner's personnel file, there were not employment actions pending that would permit Witty's access to a confidential personnel file.

7) By letter dated June 30, 2000, a representative of the petitioner wrote to the Board requesting an investigation of Witty's access to the petitioner's personnel file.

8) By letter dated July 10, 2000, Board counsel responded by stating "The administration has looked into this matter and is unable to ascertain the veracity of [the] allegations" but that "Board members and administrative staff have been re-instructed as to the confidentiality due to personnel records."

ISSUES

The issues to be decided in this motion is whether the petition is untimely, whether the Commissioner have jurisdiction over claims against individual Board members and whether the petition comes within the jurisdiction of the Commissioner of Education.

LEGAL DISCUSSION AND CONCLUSION

Timeliness of the Petition

To initiate a contested action before the Department of Education concerning a controversy or dispute arising under the school laws, a petitioner must file a petition of appeal and serve it in accordance with *N.J.A.C.* 6A:3-1.1 to 1.5. The petitioner must file the petition no later than "the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the District Board of Education, individual party, or agency, which is the subject of the requested contested case hearing." N.J.A.C. 6A:3-1.3(d).

In this case it is undisputed that the petitioner filed her petition on July 25, 2000. Moreover, petitioner learned of Witty's unauthorized access to her personnel file on or about May 8, 2000. The Board responded to petitioner's request to investigate the matter by letter dated July 10, 2000. All of these dates are within 90 days of the July 25, 2000 filing date. Respondent's argument that Witty's access to personnel file could have taken place years prior is merely speculation and contrary to the requirement of the motion to dismiss to take the pleadings as truth. The Board's July 10, 2000 letter concerning its response to the request for an investigation is sufficient alone for a timely filing under *N.J.A.C.* 6A:3-1.3(d). As the facts pled show that the petition concerns matters that took place within 90 days of filing of the petition, I **CONCLUDE** that the petition is timely.

The Commissioner of Education has jurisdiction to hear and determine all disputes arising under the school laws. *N.J.S.A.* 18A:6-9. Petitioner seeks a finding by the Commissioner that Witty, an individual school Board member, violated her reasonable expectation of privacy by looking in her personnel file. Petitioner conceded that no specific school law governs teachers' personnel files but argued that she has a reasonable expectation of privacy of that file, which might be a constitutional right or a common law right. The search of a teacher's desk by a school Board member has been held to constitute a Fourth Amendment violation giving rise to a federal civil rights law suit under §1983. *Gillard v. Schmidt*, 579 F. 2d 825, 827 (3d Cir. 1978). Thus, petitioner argues that under the Commissioner's general supervisory powers, *N.J.S.A.* 18A:4-23, the Commissioner has the jurisdiction to hear this dispute.

Board members are either elected or appointed to their local or regional board and serve without compensation. *N.J.S.A.* 18A:12-4. Board of Educations are separate body politics established by the legislature. See *N.J.S.A.* 18A:12-1 to –20. Neither the Commissioner nor the State Board of Education has an all-encompassing power to discipline or remove Board members. In general removal for statutory causes under *N.J.S.A.* 18A:12-3 are done in Superior Court. *Waldor v. Untermann*, 10 *N.J. Super.* 188 (App. Div. 1950). The School Ethics Act, *N.J.S.A.* 18A:12-21 to –34, provides both standards to guide School Board members' conduct as well as a

disciplinary mechanism pertaining to the acts enumerated in *N.J.S.A.* 18A:12-24. Nowhere in that Act is there a provision for making a complaint for an alleged violation of a constitutional or a common law right. I **CONCLUDE** that the school laws do not make the Commissioner a general supervisor of the individual members of a School Board unless applying a specific school law. Thus, I **CONCLUDE** that respondent Witty must be dismissed for lack of jurisdiction as the complaint of violation of privacy does not arise under the school laws. Any relief for any civil tort or constitutional right violation must be sought in the appropriate forum.

The petitioner also seeks a finding that the Board acted arbitrary and capriciously in its response to the teacher's request for an investigation of the alleged invasion of privacy. Once again petitioner asks the Commissioner to act under the general supervision powers rather than invoking a specific law giving the Commissioner the power to discipline a Board member or oversee how the Boards discipline their members. The petitioner does not cite and I am unable to locate any authority for the proposition that the Commissioner or the State Board of Education can order a School Board to investigate a civil tort or constitutional violation by a School Board member. While the power of the Commissioner is broad, it is not unlimited. Such oversight of every action of the local board, as oppose to just oversight of the school laws, is not contemplated by the power given to the Commissioner. Based on the foregoing, I **CONCLUDE** that the petition against the School Board must be dismissed for lack of jurisdiction.

ORDER

Based on the foregoing, I **ORDER** that the petition action against Witty and the Board 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 21, 2001
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

3/23/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 27 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

jb

OAL DKT. NO. EDU. 9202-00
AGENCY DKT. NO. 279-8/00

DEBORAH E. CIAMBRONE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
GERALD WITTY AND THE BOARD OF EDUCATION OF THE BOROUGH OF BLOOMINGDALE, PASSAIC COUNTY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and respondents' reply thereto were timely filed pursuant to the requirements of *N.J.A.C.* 1:1-18.4.

Petitioner advances three exceptions to the Administrative Law Judge's (ALJ) dismissal of this matter for lack of Commissioner of Education jurisdiction over the issues raised. Petitioner first charges that, in reaching such a conclusion with respect to board member access to personnel files, the ALJ employed "a flawed, rigid and mechanistic application of N.J.S.A. 18A:6-9," and compounded this error by failing to consider, apply, or even acknowledge the specific decisions of the Commissioner that form the basis of petitioner's claims. (Petitioner's Exceptions at 1, 2) Citing *Horner v. Kingsway Regional High School District Bd. of Ed.*, 1990 *S.L.D.* 752 and *Witchel v. Cannici et al.*, 1966 *S.L.D.* 159, petitioner advances that the Commissioner has made it abundantly clear that board member access to personnel files is strictly circumscribed to those instances where "the employee is being recommended for or subjected to an employment action requiring a Board vote or when access is

necessary for the performance of essential duties." (*Id.* at 2) These standards, petitioner urges, are viewed "as 'flowing from basic rights and responsibilities of board members***.' *Horner, supra* at 767" (*Id.* at 2) Consequently, she observes that acceptance of the ALJ's determination in this regard leaves us with the anomaly that the Commissioner of Education is without the authority to enforce the very personnel file access standards which he created. That there may be no education statute or regulation which specifically sets forth these standards is of no import, petitioner submits, as they were established through case law, which is equally enforceable and applicable to all school districts. Furthermore, petitioner avers, the jurisdiction of the Commissioner has never been restricted solely to violations of education law and regulation but, rather, "attaches when issues involve the expertise of the agency or other matters involving the operation and supervision of local school district[s]." (*Ibid.*)

Petitioner cites *Hinfey v. Matawan Regional Bd. of Ed.*, 77 *N.J.* 514, (1978); *Desilets v. Clearview Regional Bd. of Ed.*, 137 *N.J.* 585 (1994); and *Red Bank Bd. of Ed. v. Warrington et al.*, 138 *N.J. Super.* 564 (App. Div. 1976) for the proposition that the authority of the Commissioner, pursuant to *N.J.S.A.* 18A:6-9, has been given "great breadth" by the New Jersey courts and has been found to encompass issues of educational policy and pedagogical goals, issues not necessarily linked to a particular statute or regulation but which involved the review of local school district actions. (*Id.* at 2-3) Petitioner, therefore, maintains that, in light of the courts' broad interpretation of the Commissioner's jurisdiction pursuant to *N.J.S.A.* 18A:6-9, along with the fact that the Commissioner has delineated those specific instances where board members may access personnel records -- rulings which arose by virtue of his particular expertise in the oversight of local boards of education -- these restrictions have

become part of the "broadly-defined school laws," and controversies associated with them are properly adjudicated pursuant to *N.J.S.A.* 18A:6-9. (*Ibid.*)

In response to this exception, respondents submit that petitioner's arguments are no more than a defective attempt to camouflage her common law privacy issue here as a school law controversy. Respondents advance that *N.J.S.A.* 18A:6-9 delineates the jurisdictional authority of the Commissioner: "[t]he Commissioner shall have jurisdiction to hear and determine . . . all controversies and disputes arising under the school laws." (Respondents' Reply Exceptions at 2) While conceding that the New Jersey courts have broadly interpreted the authority of the Commissioner, respondents argue that it is also evident that these courts have, at the same time, made it clear that such authority is not unlimited, stating:

> The Commissioner of Education only has jurisdiction over disputes "primarily" and "directly" *arising under the school laws. Board of Educ. of Hamilton v. Fraleigh*, 93 N.J.A.R. 2d (EDU) 538. In general, "school law" disputes are limited to those arising under Title 18A. *Fair Lawn Bd. of Educ. v. Mayor of Fair Lawn*, 143 N.J. Super. 259, 266 (Law Div. 1976), *aff'd*, 153 N.J. Super. 480 (App. Div. 1977). As explicitly stated by the Supreme Court of New Jersey, "[w]here the controversy does not arise under the school laws, it is outside the Commissioner's jurisdiction even though it may pertain to school personnel." *Board of Educ. of E. Brunswick v. Township Council of E. Brunswick*, 48 N.J. 94, 102 (1966). Further, where the subject matter of the dispute does not call for any particular administrative expertise, the Commissioner of Education also cannot invoke jurisdiction. *Board of Educ. of Hamilton v. Fraleigh*, 93 N.J.A.R.2d (EDU) 538. (emphasis in text) (Respondents' Reply Exceptions at 2-3)

Here, respondents argue, the controversy "does not 'primarily' and 'directly' *arise* under the school laws," rather it is a constitutional issue, *i.e.*, petitioner's reasonable expectation of privacy in her personnel file. (emphasis in text) (*Id.* at 3) At best, respondents advance, petitioner's claim is only tangentially related to school law in that the underlying conduct at issue is alleged

to have involved a Board member. Although she may have a cause of action under the Fourth Amendment or in common law tort, petitioner cannot credibly claim that her underlying dispute arises under Title 18A or requires the particular expertise of the Commissioner of Education to adjudicate. *(Ibid).* Respondents further profess that petitioner's citation to decisions of the Commissioner and her attempt to position this matter under the Commissioner's general supervisory power over boards of education in New Jersey is misguided. "[T]he operative question is not whether the Commissioner has supervisory powers over the board, but rather, whether Petitioner's allegations of invasion of privacy 'primarily' and 'directly' arise under the school laws." (*Id.* at 4) They charge that petitioner has failed to cite any precedent which would compel that the Commissioner examine such a claim and, therefore, urge that the ALJ's recommended disposition be affirmed.

Petitioner's second exception objects to the dismissal of her claim against Witty as a result of the ALJ's determination that the Commissioner lacked jurisdiction over individual board members absent the involvement of a particular school law. Such a conclusion is defective, petitioner submits, as it again evidences an unduly narrow view of the school laws and is contrary to a number of decisions of the Commissioner rendered over time. Initially in this regard, petitioner posits that, as a Board member, Witty's position and authority derive from *N.J.S.A.* 18A:12-1 *et seq.* and, therefore, his actions, particularly if contrary to or independent of the Board, could constitute a dispute arising under the school laws. (Petitioner's Exceptions at 4) Petitioner further cites a number of Commissioner decisions dealing with issues such as allegations of a conflict of interest in appointing an individual as an employee, conflict of interest based upon financial interest, appointment of a board member in violation of law, violations of the Open Public Meetings Act, and failure to renew a contract of employment, which she claims

have involved board members in their individual capacity. (*Ibid.*) Finally, petitioner argues that, in his capacity as a Board member, "Witty took an oath 'to faithfully discharge the duties of [his] office[.]' N.J.S.A. 18A:12-2.1(1)." Willfully violating the established standards for accessing personnel records, she charges, is a violation of that oath and should, therefore, be heard by the Commissioner pursuant to *N.J.S.A.* 18A:6-9. (*Id.* at 5)

In rejoinder, respondents again argue that petitioner cites no authority in support of her contention that this matter arises under education law, thereby compelling adjudication by the Commissioner of Education. "[T]he Commissioner cannot assert jurisdiction over Witty in his individual capacity to resolve a privacy claim." (Respondents' Reply Exceptions at 5) At issue here, respondents maintain, is not a controversy encompassed within *N.J.S.A.* 18A:6-9 but, rather, merely a teacher's personal disagreement with an individual member of the Board, an issue which is not amenable to resolution before the Commissioner. (*Ibid.*) Respondents assert that the ALJ rightly concluded "that 'the school laws do not make the Commissioner a general supervisor of the individual members of a School Board unless applying a specific school law.'" (*Id.* at 7)

Petitioner's third exception disputes the ALJ's finding that the Commissioner does not have jurisdiction over her claims against the Board. She submits that, for the reasons previously argued herein, her primary claim concerning Board Member Witty's improper behavior with respect to personnel records is justiciable before the Commissioner. Similarly, her claim against the Board that it failed to adequately investigate Witty's behavior and take any action in response to his misconduct is equally cognizable before the Commissioner. (Petitioner's Exceptions at 5) Petitioner advances that, as this matter was decided pursuant to respondents' Motion to Dismiss, all factual allegations in her Petition of Appeal were deemed

admitted for purposes of this motion. Therefore, it must be assumed that Witty did review petitioner's personnel file, with the only outstanding issue being whether he had a right to do so. (*Ibid.*) Additionally, again for purposes of the Motion to Dismiss, it must be accepted that the Board was apprised of the behavior of its member and failed to take action against him. (*Ibid.*) Petitioner tenders that pursuant to *N.J.S.A.* 18A:4-23 and *N.J.S.A.* 18A:7F-5, the Commissioner has the responsibility to oversee the activities of school boards and their members. She claims that the actions of both Witty and the Board constitute an abuse of their power which requires that the Commissioner of Education exercise his supervisory authority to insure that such abuse does not reoccur. As such, petitioner contends, this is a controversy and dispute arising under the school laws which establishes jurisdiction pursuant to *N.J.S.A.* 18A:6-9. (*Id.* at 6) Petitioner further observes that "[c]ases such as *Gillard v. Schmidt*, 579 F.2d 825, 829 [3rd Cir. 1978], have established that New Jersey school employees have a legitimate expectation of privacy as to searches of the workplace by board members.*** It is the violation of this confidentiality that is to be examined by the Commissioner." (*Id.* at 7)

In reply, respondents aver that, although petitioner is charging that the Commissioner's general supervisory power pursuant to *N.J.S.A.* 18A:4-23 converts this matter to a school law issue and grants him jurisdiction over both respondents, the legal authority cited by petitioner in support of her contention wholly belies her argument that this case arises under school laws. Rather, respondents argue, the contention confirms respondents' contention that this dispute is, in reality, "a constitutional claim or common law tort for the invasion of a privacy right." (Respondents' Reply Exceptions at 8) Specifically, respondents emphasize petitioner's citation to *Gillard, supra,* "for the proposition that 'New Jersey school employees have a legitimate expectation of privacy as to searches of the workplace by board members.'" (*Ibid.*)

Of import here, respondents posit, is that *Gillard* was a civil case brought in Federal court pursuant to 42 *U.S.C.* §1983 and the Fourth Amendment to the United States Constitution "premised upon an unreasonable search that violated Gillard's reasonable expectations of privacy," not a controversy or dispute pursuant to *N.J.S.A.* 18A:6-9. (*Id.* at 9) For this and all of the previously discussed reasons, respondents urge that the Commissioner affirm the Initial Decision of the ALJ.

Upon careful and independent review of the record in this matter and thorough consideration of the parties' exception arguments, the Assistant Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34, determines to affirm the conclusion of the ALJ, as clarified below.

Initially, with respect to what petitioner categorizes as her "primary" claim and prayer for relief, *i.e.*, a finding or declaration that Board Member Witty violated petitioner's reasonable expectation of privacy with regard to her personnel record, the Assistant Commissioner concurs with the ALJ, and with the arguments advanced by respondents, that such issue is not properly before the Commissioner and must be dismissed. Similarly, to the extent that petitioner is seeking a directive from the Commissioner that the Board must sanction or take action against one of its members, the Assistant Commissioner likewise agrees with the ALJ that, even assuming that the alleged conduct occurred as charged, a directive of the type sought by petitioner is outside the jurisdictional purview of the Commissioner and, therefore, this request must be dismissed.

However, to the extent that petitioner's claim arises under standards embodied in prior rulings of the Commissioner concerning the scope of an individual board member's authority, in his or her official capacity, to access personnel files, and to the extent that petitioner

seeks as relief a directive that the Board herein ensure that access by individual Board members is restricted in accordance with those standards, the Assistant Commissioner agrees with petitioner that this matter is appropriately before the Commissioner. The Commissioner has previously determined that board member access to personnel files "should be strictly limited to those instances where the employee is being recommended for or subjected to an employment action requiring a vote of the Board or where access to personnel information is necessary for the performance of essential Board members duties." *Horner, supra,* at 766-67. Thus, it is clearly a board's responsibility to ensure that access by board members, in their individual capacity, is confined within established parameters, and the Assistant Commissioner so reminds the Board herein.

Accordingly, the Initial Decision of the OAL is affirmed as clarified above and the within Petition of Appeal is dismissed. This Board, and all boards, are reminded of their responsibility to take such actions as may be necessary to ensure compliance with the Commissioner's established parameters regarding the extent of board member access to district personnel files.

IT IS SO ORDERED.*

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: MAY 07 2001

Date of Mailing: MAY 08 2001

* This decision, as the Assistant 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.

146-01

#146-01

BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY,	
PETITIONER,	
V.	COMMISSIONER OF EDUCATION
M.E., parent of minor children, C.E. AND J.E.,	DECISION
RESPONDENT.	

May 7, 2001

AGENCY DKT. NO. 28-2/01

BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY, PETITIONER,	
V.	COMMISSIONER OF EDUCATION
M.E., parent of minor children, C.E. AND J.E., RESPONDENT.	DECISION

For Petitioner: Ellen Marie Walsh, Esq. (Fogarty & Hara)

This matter, having been brought before the Commissioner of Education by the Board of Education of the Borough of North Arlington (Board) by way of a Petition of Appeal filed on February 7, 2001, requesting that respondent be ordered to pay the Board tuition in the amount of $5,148.00; and

Whereas, respondent parent, M.E., having been served with the petition by the Board by regular mail on February 5, 2001; and

Whereas, the Commissioner having sent respondent notice on February 7, 2001, directing that an Answer to the petition be submitted pursuant to *N.J.A.C.* 6A:3-1.5; and

Whereas, the Commissioner having notified respondent by regular and certified mail on March 1, 2001, that if an Answer was not submitted, each count of the petition would be deemed admitted and the matter would 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, the March 1, 2001 communication sent to respondent via certified mail was returned to the Commissioner marked "Unclaimed," notices having been sent to respondent by the Post Office on March 3, March 8 and March 18, 2001; and

Whereas, the March 1, 2001 communication sent to respondent via regular mail was not returned and, therefore, there is no indication that respondent did not receive such communication; and

Whereas, neither the respondent, nor any attorney on her behalf, has filed an Answer to the charges against her; thus, each count of the charges against respondent having been deemed to be admitted; and

Whereas, the Commissioner's review of the petition indicates that; (1) respondent's sons, C.E. and J.E., attended the Board's Washington Elementary School commencing with the beginning of the school year in September 2000; (2) following the start of school in September, the principal of the Washington School began to suspect that C.E. and J.E. were not residing at 190 Prospect Avenue, North Arlington, as respondent claimed, but with respondent's mother in Morris Plains; (3) the Board's investigation confirmed that respondent and her children were not domiciled in North Arlington during the months of September, October and November 2000 and that respondent had submitted a false document, allegedly from her landlord James Fletcher, verifying that she and her children lived at 190 Prospect Avenue, but found that Mr. Fletcher was not the registered owner of that property; and (4) the Board determined that respondent and her children established domicile in North Arlington on or about December 1, 2000, by virtue of their move into a property located at 124 Biltmore Avenue, North Arlington, but that they were not domiciled in the District prior to that date; and

Deeming such charges to be admitted in the absence of an Answer being submitted by respondent, the Commissioner finds that respondent's sons were ineligible, pursuant to the provisions of *N.J.S.A.* 18A:38-1, to attend school free of charge in the North Arlington School District for the period of time of September through November 2000 as set forth by the Board herein; now, therefore,

IT IS ORDERED on this 7th day of May 2001, that summary decision shall be granted to the Board of Education of the Borough of North Arlington and that respondent shall pay tuition in the amount of $5,148.00, as requested by the Board, for the period of time in which her sons, C.E. and J.E., were ineligible for a free education in the North Arlington School District.

With respect to the Board's request for an award of counsel's fees, I find that, in the absence of express statutory authority to award counsel fees, I may not direct that the Board be compensated for legal fees in this matter. *See B.B., on behalf of her son, L.C. v. Board of Education of the Union County Regional High School District No.1 and Donald Merachnik, Superintendent of Schools, Union County,* 1987 *S.L.D.* 323*; Balsley v. North Hunterdon Bd. Of Educ,.* 117 *N.J.* 434 (1990)*; and State, Dept. of Environ. Protect. v. Ventron Corp.,* 94 *N.J.* 473 (1983).*

COMMISSIONER OF EDUCATION

Date of Decision: MAY 07 2001

Date of Mailing: MAY 09 2001

* 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.

147-01

#147-01 R

IN THE MATTER OF THE TENURE	:	
HEARING OF CHARLES KASKA,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
TRENTON, MERCER COUNTY.	:	DECISION ON REMAND
	:	

May 9, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 08823-00S (EDU 08172-99S REMANDED)

AGENCY DKT. NO. 264-8/99

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

Petitioner,

v.

CHARLES KASKA,

Respondent.

Thomas W. Sumners, Esq., for petitioner (Sumners, George & Dortch, attorneys)

Michael J. Herbert, Esq., for respondent (Herbert, Van Ness, Cayci & Goodell, attorneys)

Record Closed: April 4, 2001 Decided: April 6, 2001

BEFORE **JEFF S. MASIN**, ACTING CHIEF ALJ:

This matter arises from the filing of tenure charges with the Commissioner of Education on August 31, 1999, by The Trenton Board of Education ("petitioner") against Charles Kaska ("respondent") alleging unbecoming conduct, excessive absenteeism, insurobdination and other just cause. The allegations are contained in a Statement of Tenure Charges filed with the Commissioner of Education dated August 10, 1999. The matter was transmitted to the Office of

Administrative Law on September 20, 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 agreed to settle the matter and prepared a Stipulation of Settlement, which was incorporated into an Initial Decision dated August 9, 2000. On September 25, 2000, the Commissioner issued a decision rejecting the settlement and remanded the matter to the OAL in order to allow the parties to amend the settlement to incorporate reference to the Commissioner's duty, pursuant to *N.J.A.C.* 6:11-3.6, to refer the matter to the State Board of Examiners for consideration of possible action against respondent's certificate. This statement has been incorporated into an amended settlement agreement attached hereto.

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 in this administrative forum and is consistent with the law.

This matter is referred to the Commissioner with approval of the terms of the settlement and with the understanding that although the parties have expressed their recommendation to the administrative law judge and the Commissioner that the matter not be referred to the Board of Examiners, the undersigned administrative law judge takes no position with respect to that recommendation and the settlement is not contingent upon the determination of the Commissioner regarding referral of the matter to the Board of Examiners.

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 6, 2001
DATE

JEFF S. MASIN, ACTING CHIEF ALJ

Receipt Acknowledged:

4/9/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 10 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

mjm
Attachment

SUMNERS GEORGE & DORTCH
A Professional Corporation
849 West State Street
Trenton, New Jersey 08618
(609) 393-6604
Attorneys for Petitioner, Board of Education of the City of Trenton, Mercer County

IN THE MATTER OF THE TENURE HEARING OF DR. CHARLES KASKA, BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY.	BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY AGENCY DOCKET NO. 264-8/99 OAL DOCKET NO.EDUTH 8172-99S **Remanded to** OAL DOCKET NO. EDUTH 8823-00S ***AMENDED*** ***SETTLEMENT AGREEMENT***

This Settlement Agreement is made between the Petitioner, Board of Education of the City of Trenton, Mercer County ("Board"), and the Respondent, Charles Kaska ("Respondent").

WHEREAS, the Board filed tenure charges with the Commissioner of Education, Agency Docket No. 264-8/99, OAL Docket No. EDUTH 8172-99S; and

WHEREAS, the tenure charges allege conduct unbecoming by the Respondent during the 1998-99 school year as follows:

1. Excessive absenteeism, totaling 53 days;

2. Failure to attend scheduled Child Study Team Roundtable Meetings covering the time period December 1998 to June 1999;

3. Failure to prepare psychological evaluations; and

4. Psychological examination reports were prepared by another member of his Child Study Team who is a certified School Psychologist.

WHEREAS, the Respondent has denied all of the allegations against him and has physician letters excusing him from work and attending Child Study Team Roundtab[1] Meetings;

WHEREAS, the parties recognize that there are strengths and weaknesses with respect to their respective positions; and

WHEREAS, the parties have agreed to an expeditious resolution of this matter intended to save both parties the cost and uncertainty of continued litigation;

NOW, THEREFORE, in consideration of the foregoing, the parties agree to resolve the within matter based upon the following terms:

1. Petitioner agrees to dismiss the tenure charges against the Respondent.

2. Respondent shall not be reimbursed any salary withheld from him during his 120 days suspension without pay following certification of these tenure charges.

3. Respondent agrees not to be returned to the payroll following the expiration of the 120 days suspension without pay following the certification of these tenure charges.

4. Respondent agrees to submit a letter of retirement effective September 1, 2000.

5. Respondent will be entitled to any benefits afforded to retirees under the collective bargaining agreement between the Board and the Trenton Education Association including, but not limited to, health insurance benefits and payment of 55 sick days (one-third of his accumulated personal business and sick days), unless expressly waived by Respondent in this agreement.

6. The parties agree and covenant that neither they, nor any person, organization, or other entity on their behalf will file any charge, claim, and/or lawsuit against the other based upon any facts set forth in the tenure charges or any facts arising from the tenure charges.

7. Petitioner and Respondent expressly acknowledge that they have agreed to each and every term of this agreement, that each of the terms and conditions of this agreement have been fully explained and that the execution of this agreement is being made voluntarily, knowingly, and with the advice of counsel.

8. All the terms of this agreement are deemed material.

9. The parties understand that this agreement is contingent upon the approval of Administrative Law Judge Jeff S. Masin and the Commissioner of Education, and if such approval is denied, the terms and contents of this agreement shall not be admissible in any legal administrative proceeding of any nature, and will be without prejudice to their positions in such proceedings, and that in such event, the parties may again attempt to settle this matter in a manner which is satisfactory to the Commissioner of Education.

10. Respondent understands that the Commissioner of Education has the duty, pursuant to ***N.J.A.C.*** 6:11-3.6, to refer tenure decisions to the State Board of Examiners for its consideration of possible revocation of his certificate.

11. The parties request that the tenure hearing be held in abeyance in order to obtain the approval of this settlement agreement by Administrative Law Judge Masin and the Commissioner of Education.

12. The petitioner represents that the tenure charges that are being dismissed by the within settlement do not involve any charges of child abuse, sexual harassment, any crimin[illegible] acts, including theft; or any conduct that would constitute moral turpitude. Accordingly, the petitioner recommends to Administrative Law Judge Masin and the Commissioner of Education that this matter not be referred to the Board of Examiners for any further proceedings, consistent with ***N.J.A.C.*** 6:11-3.6.

IN WITNESS WHEREOF, the parties have caused this agreement to be duly executed on this 29th day of March, 2001.

Abdul-Malik R. Ali, President
Trenton Board of Education

Thomas W. Sumners, Jr., Esq.
Attorney for Trenton Board of Education

Charles Kaska, Ph.D.
Respondent

Michael J. Herbert, Esq.
Attorney for Respondent

OAL DKT. NOS. EDU 08823-00 AND EDU 08172-99 (ON REMAND)
AGENCY DKT. NO. 264-8/99

IN THE MATTER OF THE TENURE	:	
HEARING OF CHARLES KASKA,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
TRENTON, MERCER COUNTY.	:	DECISION ON REMAND
	:	

The record, Amended Settlement Agreement, 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, which was amended consistent with the decision of September 25, 2000, 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 transmitted to the State Board of Examiners for action as it deems appropriate.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: MAY 09 2001

Date of Mailing: MAY 09 2001

* The Commissioner duly notes on page 4 of the Amended Settlement Agreement petitioner's "recommendation" that the matter not be referred to the State Board of Examiners, a recommendation which he rejects. As held by the State Board of Education in its recent decisions in *In re Lenore M. Allen*, decided November 1, 2000, and *In re Zena Mitchell*, decided March 7, 2001, the Commissioner has a *duty* to refer tenure determinations to the State Board of Examiners. This is true even in the absence of any allegation of moral turpitude or criminal wrong doing, or other wrongful behavior such as set forth in term 12 of the settlement herein. See *In re Jerry Barshatky*, decided by the State Board of Education, May 1, 1996.

149-01

149-01M

PATRICIA C. FLEMING,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF HADDON, CAMDEN COUNTY,	:	JOINT ORDER OF CONSOLIDATION AND DETERMINATION OF PREDOMINANT INTEREST
RESPONDENT.	:	
	:	
PATRICIA C. FLEMING,	:	
COMPLAINANT,	:	
V.	:	
HADDON TOWNSHIP BOARD OF EDUCATION,	:	
RESPONDENT.	:	

May 10, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER CONSOLIDATING CASES AND DETERMINING PREDOMINANT INTEREST

PATRICIA C. FLEMING,	OAL DKT. NO. EDU 6841-00
Petitioner,	AGENCY DKT. NO. 217-6/00
v.	
BOARD OF EDUCATION OF HADDON TOWNSHIP, CAMDEN COUNTY,	
Respondent,	
and	
PATRICIA C. FLEMING,	
Complainant,	
v.	
HADDON TOWNSHIP BOARD EDUCATION,	OAL DKT. NO. CRT 737-01
Respondent.	AGENCY DKT. NO. ED11WE-46105-E

Michael C. Damm, Esq., for petitioner/Complainant (Selikoff & Cohen, attorneys)

Kim C. Belin, Esq., for respondent (Capehart & Scatchard, attorneys)

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter involves the motion of petitioner/complainant to consolidate the above-captioned cases and to determine predominant interest pursuant to *N.J.A.C.* 1:1-17.5.

Respondent's motion and supporting papers were filed on February 8, 2001. A letter memorandum in opposition to the motion was filed on behalf of respondent on February 27, 2001. A reply brief in further support of the motion was filed on March 8, 2001.

In the case before the Commissioner of Education, petitioner asserts that the Board of Education of Haddon Township violated her tenure and seniority rights by refusing to reinstate her to a full-time position upon her request. Petitioner, a tenured teacher, had been granted a leave of absence without pay for medical reasons. When petitioner returned to teaching, respondent had accommodated her request to return to work on a reduced schedule of three days per week. On March 28, 2000, petitioner advised respondent in writing as follows:

> I would like to submit in writing my request to work five days a week as art teacher for Jennings, Stoy and Strawbridge Schools for the year 2000 and 2001. My health has been renewed and I am now ready to resume the position I held before my illness.

Respondent superintendent replied by letter dated March 29, 2000, as follows:

> This correspondence is in response to your letter, hand delivered to me yesterday by Mrs. Surplus, requesting the opportunity to return to work five days per week as an art teacher for the district.
>
> There is no opening for another full-time elementary art teacher in the district. The elementary art schedule calls for 2.1 art teachers. This allows for full art instruction while meeting HTEA contractual obligations with respect to prep time. The current personnel configuration of Beth Nice (1.0), Ellen Hargrove (.5) and yourself (.6) meets the district's obligation.
>
> In reviewing your years of teaching experience in Haddon Township, I am aware that in August 1998, Mr. McGovern recommended that the Board of Education approve your request to return to work three days a week (.6).
>
> Trish, I am very pleased that your health has been renewed. In the event that another full-time art position becomes available, you will be given every consideration.

Petitioner claims that her tenure and seniority rights entitle her to reclaim her full-time position, commencing with school year 2000-2001.

In the matter pending before the Division on Civil Rights, complainant alleges that respondent's proffered reason for failing to return her to full-time status is pretextual and that respondent discriminated against her because of her age (54 years old) and perceived handicapped (intestinal disorder/depression) by assigning her previous duties to a non-handicapped, younger co-worker, Ellen Hargrove.

Although it is not entirely clear from respondent's papers in opposition to the motion or from the comments of counsel during a telephone conference call on March 15, 2001, to discuss consolidation and predominant interest, it appears that respondent is asserting that some sort of restructuring of the art department was necessitated for educational reasons. At page 14 of its letter memorandum, respondent states, "In fact, *N.J.S.A.* 18A:28-9 states that not even tenure rights can limit the right of a board of education to reduce its staff for reasons of economy, reduction in the number of pupils, change in administrative or supervisory organization of the district, or other good cause. There is no exception for employees who may be out on a leave of absence." If it is respondent's position that petitioner is no longer entitled to a full-time position because of a reduction in force (RIF) pursuant to *N.J.S.A.* 18A:28-9, then the facts necessary for determining whether respondent acted in good faith in reducing petitioner's full-time position to a part-time position, *i.e.*, were the actions for sound educational reasons as opposed to arbitrary or unlawful reasons, will be the same core set of facts for both the Department of Education case and the Division on Civil Rights case.

N.J.A.C. 1:1-17.3, sets forth the standards for consolidation:

(a) In ruling upon a motion to consolidate, the judge shall consider:

1. The identity of parties in each of the matters;

2. The nature of all the questions of fact and law respectively involved;

3. To the extent that common questions of fact and law are involved, the saving in time, expense, duplication and inconsistency which will be realized from hearing the matters together and whether such issues can be thoroughly, competently, and fully tried and adjudicated together with and as a constituent part of all other issues in the two cases;

4. To the extent that dissimilar questions of fact or law are present, the danger of confusion, delay or undue prejudice to any party;

5. The advisability generally of disposing of all aspects of the controversy in a single proceeding; and

6. Other matters appropriate to a prompt and fair resolution of the issues, including whether a case still pending in an agency is contested or is ripe to be declared contested.

Applying that regulation in the present matters, I note that both cases involve the same two parties and arise under the same core set of facts. No purpose would be served in having two separate hearings. This would be an obvious waste of judicial economy. It would be duplicative, expensive and cause the potential for inconsistent results. The basis for respondent's opposition to consolidation is unclear. Accordingly, it is hereby **ORDERED** that these matters are **CONSOLIDATED** for disposition.

N.J.A.C. 1:1-17.5(a) requires that when contested cases originally filed with two or more State agencies are consolidated, a determination concerning which agency, if any, has the predominant interest in the conduct and outcome of the matter must be made. The rule provides for consideration of the following five factors:

1. Whether more than one agency asserting jurisdiction over a common issue has jurisdiction over the issue, and if more than one agency has jurisdiction, whether the jurisdiction is mandatory for one of the agencies;

2. Whether the common issue before the two agencies is, for either agency, the sole, major or dominant issue in dispute and whether its determination would either serve to moot the remaining questions or to affect substantially their resolution;

3. Whether the allegations involve issues and interests which extend beyond the immediate parties and are of particular concern to one or the other agency;

4. Whether claims, if ultimately vindicated, would require specialized or particularized remedial relief available in one agency but not the other;

5. Whether the common issue is clearly severable from the balance of the controversy and thus will permit non-duplicative factual and legal determinations by each agency.

Although the provisions of *N.J.A.C.* 1:1-17.5 quoted hereinabove set forth rather clearly the five factors to be weighed in arriving at a determination of which agency has the predominant interest, the regulation offers no guidance for understanding exactly what the designation of "predominant interest" means in terms of practical application. Assistance in defining "predominant interest," therefore, must be sought elsewhere.

The origin of the concept, if not the precise terminology, is the well-known case of *Hackensack v. Winner*, 82 *N.J.* 1 (1980). In that case the Supreme Court was presented with an appeal from conflicting decisions by two State administrative agencies arising from their separate handling of a single controversy over which each had apparent jurisdiction. The case originated with a dispute between the City of Hackensack and several of its Civil Service employees, firefighters, who claimed that they had been improperly denied promotions to the rank of lieutenant in the fire department. The employees' complaints related to their merit and fitness for promotion and thus were governed largely by the civil service laws and the Civil Service Commission under *N.J.S.A.* 11:1-1 *et seq.* The firefighters also asserted, however, that their promotions had been withheld because of their union activity, and in this respect, the claims were governed by the Public Employer-Employee Relations Act, *N.J.S.A* 34:13A-1 *et seq.* and subject to the jurisdiction of the Public Employment Relations Commission. Separate actions were brought before each agency by the firefighters with respect to their employment claims. The two agencies, independently, proceeded to adjudicate the matters in dispute and ultimately reached

different findings of fact, arrived at dissimilar legal conclusions and imposed inconsistent remedies.

In describing what would have been the proper approach for resolving the jurisdictional and procedural problems which had been created by the circumstances, Justice Handler discussed the Court's then recent decision in *Hinfey v. Matawan Reg. Bd. of Ed.*, 77 *N.J.* 514 (1978):

> The Court in *Hinfey* faced a jurisdictional dispute between the Division on Civil Rights and the Commissioner of Education regarding claims of sex discrimination in educational curricula in various public schools. 77 *N.J.* at 421. The Court concluded that, under the circumstances presented, it was proper for the Commissioner of Education to decide the controversy and that the Division on Civil Rights should transfer that aspect of the case to the Commissioner for adjudication. The path followed by the Court in resolving the jurisdictional dilemma engendered first an examination of the statutory authority of both agencies with respect to the disputed matters and a determination of whether both agencies had jurisdiction over the claims. Second, upon a determination that each of the two agencies had jurisdiction, the Court sought to ascertain whether that jurisdiction was paramount or primary in one of the two agencies in the sense that one of the agencies would be statutorily required to entertain the case prior to a hearing by the other agency. This inquiry called for a determination of whether either agency would be required or compelled by virtue of its statutory jurisdiction to proceed in the matter before it regardless of the jurisdictional claim of its sibling agency or the status of the same case before that other agency. If it were found that one or both agencies had discretionary jurisdiction, *i.e.*, that there was no statutory mandate for one agency to proceed first to adjudicate the controversy, at least in view of the pendency of the same dispute before the other agency, the final task for the Court was to explore the standards for the exercise of that administrative discretion. The Court, in addressing how agencies were to be guided in the situations where each were found to have parallel but discretionary jurisdiction over the same controversy, emphasized that the exercise of agency discretion should be governed by "[p]rinciples of administrative comity." 77 *N.J.* at 532. A similar approach is called for in this case. The inquiry here therefore should start with an examination of the nature of the jurisdiction of the two administrative agencies. *Id.* at 14-15.

Justice Handler then analyzed the jurisdiction of the Civil Service Commission to resolve the claims of the firefighters, including the unfair labor practice claim, and the jurisdiction of the Public Employment Relations Commission to resolve the claims of the firefighters that they had been denied promotion because of union activities and determined that each administrative body had parallel or concurrent jurisdiction over the controversy. *Id.* at 21.

Justice Handler next addressed the question of whether the concurrent or parallel jurisdiction residing in each agency to handle the mixed controversy was mandatory or discretionary. He rejected PERC's claim that its jurisdiction was mandatory and preemptive and determined that the claims directly projected primarily civil service grievances and were not limited to allegations of employer misconduct solely, primarily or predominantly involving unfair practices under the Public Employer-Employee Relations Act. He also determined that the unfair practice allegations were not severable from the issues before the Civil Service Commission and that the complaints had not called for a form or relief fundamentally different from that generally contemplated by the Civil Service Commission. Furthermore, he decided that the complaints did not project issues of fundamental importance which transcended the interest of the immediate participants. He concluded, therefore, that PERC had the statutory *power* to abstain initially from proceeding in the matter and to defer provisionally to the exercise of the jurisdiction over the controversy by the Civil Service Commission.

In answering the final question, whether PERC *should* have exercised its power to abstain, or, in other words, as the case stood, whether the deference which PERC should have given to the final decision of the Civil Service Commission should have applied to the *complete* determination of the Civil Service Commission, *i.e.,* not only to factual findings and legal conclusions but also to the administrative relief afforded, Justice Handler discussed such doctrines as *res judicata*, collateral/estoppel, the single-controversy rule, and administrative comity:

> [T]he 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. *Id.* at 32-33.

He determined that PERC in exercising its discretion whether to proceed or not should have been governed by these considerations in determining first whether the common issue before both agencies, the unfair practice, was either the sole or major issue in dispute or a dominating issue in the sense that its determination would have served either to moot the remaining questions in dispute or to have affected substantially the resolution. Further, he decided that PERC should have considered whether the allegations involved important issues and interests which extended beyond the immediate parties and whether the common issue was clearly severable from the balance of the controversy and would thus have permitted non-duplicative factual and legal determinations. A related inquiry, he determined, was whether the claims if ultimately vindicated would obviously have required specialized or particularized remedial relief not generally available in the other agency. In deciding that if PERC had made the requisite determinations the correct conclusion would have been to have stayed its hand, Justice Handler concluded:

> The controversy here presented multiple and mixed issues involving the statutory concerns of both agencies. Nevertheless, the basic dispute involved primarily civil service law. The firefighters here claimed to be entitled to promotion under civil service by virtue of merit and fitness, demonstrated in part by their performance on the promotional examinations conducted under civil service. *Cf. Pringle v. N.J. Civil Service Dep't.*, 45 *N.J.* 329 (1965). The anti-union bias charge was not the sole, major, or dominating issue. The factual circumstances relating to this issue, moreover, were the same as those raised in the civil service proceedings and the facts pertaining to these charges were inseparable. Additionally, it was not shown or suggested at the outset of the case that any important interests other than those of the immediate parties were implicated. Nor, in terms of the broad remedial powers of the Civil Service Commission, did it appear that redress as sought by the claimants would have been inadequate. Finally, there was a substantial likelihood that the entire controversy could have been heard fairly and fully by the Civil Service Commission in a single proceeding with sufficient expertise and competence to account for all genuine concerns including those occasioned by the unfair labor practice charge. In short, we conclude that it would have been the proper and politic course at the outset of these proceedings for PERC to have stayed

> its own hearings until after the Civil Service Commission had reached a determination in the matter. *Id.* at 34-35.

It is clear that the majority determination in *Hackensack v. Winner* assumes and presumes that only one agency should rule upon the charges in a situation similar to the one presented. See the concurring opinion of Justice Pashman, pp. 40-41, wherein he disagrees with the majority's reliance upon *Hinfey* to determine which of the two agencies should have abstained from exercising any jurisdiction. Justice Pashman would have each agency involved exercise concurrent jurisdiction and adjudicate the particular aspects of employer conduct which fall within its field of expertise. See also Justice Schreiber's opinion concurring in part and dissenting in part wherein he specifically states, ". . the majority would have one agency hear the case to the exclusion of the other depending on the major or dominant issue in dispute."

From a review of Justice Handler's analysis, it is apparent that the five factors for consideration listed in the administrative rules come directly from the *Hackensack v. Winner* decision and that the determination to be made following a consideration of those factors is whether one of the agencies should exercise its jurisdiction to the exclusion of the other because the case is predominantly one type of case as opposed to the other. Because the firefighters' controversy was primarily a Civil Service dispute and the PERC issue could not be extracted and independently determined without the possibility of a conflicting decision, the Court determined that the Civil Service Commission should have had the predominant interest and that it would have been proper "for PERC to have stayed its own hearings until the Civil Service Commission had reached a determination in the matter."

From an application of each of the individual factors for consideration to the facts in the present matter, it appears that the Division on Civil Rights has discretion to refrain from exercising its jurisdiction and that the Commissioner of Education has the predominant interest in the conduct and outcome of the matter. The common issue before both agencies is whether petitioner Fleming should have been reassigned to a full-time position within respondent's district upon her request or following the alleged reorganization. Whether respondent is specifically alleging that petitioner's position was reduced to a part-time position as the result of a legitimate reduction in force, under *Carpenito v. Board of Educ.*, 322 *N.J. Super.* 522 (App.

Div. 1999), seniority rights are triggered whenever a tenured teacher suffers a loss of tangible employment benefits, such as a loss of salary or reduction in work hours. This issue is predominantly an education issue to be determined under the school laws. The power to effectuate a reduction in force and the reasons for reduction are established at *N.J.S.A.* 18A:28-9:

> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils *or of change in the administrative or supervisory organization of the district* or for other good cause upon compliance with the provisions of this article. (emphasis added)

Furthermore, *N.J.S.A.* 18A:28-10 provides:

> Dismissal resulting from any such reduction shall not be made by reason of residence, *age*, sex, marriage, race, religion or political affiliation but shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board. (emphasis added)

Although *N.J.S.A.* 18A:28-10 does not specifically identify handicap or perceived handicap as a proscribed reason for preferring one tenured staff member over another in a RIF, the omission is likely the result of the fact that the provisions of this statute have not been amended since 1968; the prohibition against discriminating on the basis of a handicap was not added to the Civil Rights Law until 1972 (L.1972 C.114§2). Respondent misreads the holding of *Hinfey*, *supra*, claiming that the Court therein determined "that the Commissioner and the Division on Civil Rights only have concurrent jurisdiction to entertain complaints charging acts of sex discrimination in public school course of study and curricula." On the contrary, the *Hinfey* Court noted:

> It is also unquestioned that the Commissioner of Education has not only the power to decide controversies under the school law which entail invidious discrimination practices, but indeed he may be regarded as having an affirmative duty to do so. In *Booker v. Plainfield Bd. of Ed., supra*, finding that the Commissioner had too

> narrow a view of his own powers in the area of school racial desegregation, the Court held that the Commissioner had independent supervening authority to fashion an optimum plan for desegregation consistent with constitutional and statutory strictures. In *Jenkins v. Morris Twp. School Dist. and Bd. of Ed., supra*, this Court again found the Commissioner's view of his powers too cramped and repeated the principle that his authority to rectify discrimination was independent. . . ." *Id.* at 525-526.

See also *N.J.A.C.* 6:4-1.6 and 1.7, requiring all public school districts to comply with all laws related to equal employment, including the LAD and mandating that each district forward to the Commissioner for his approval a program or plan for compliance. Accordingly, I **CONCLUDE** that the Commissioner has concurrent jurisdiction with the Division on Civil Rights over the issues of alleged discriminatory treatment. DCR, on the other hand, has no jurisdiction over the tenure, seniority and RIF issues.

I further **CONCLUDE** that petitioner Fleming's claims project primarily tenure and seniority issues and are not limited to allegations of employer misconduct solely, primarily or predominantly involving unlawful age discrimination or handicapped/perceived handicap discrimination under the Civil Rights Act.

Nor, is the age/handicapped discrimination issue so dominant as to color the entire case such that a determination of it would moot any of the education law issues. The discrimination charge does not appear to raise any issue of wide public significance affecting interests beyond those of the immediate parties, nor is the discrimination charge severable from the other issues so as to permit separate non-duplicative, factual and legal determination by each agency.

Any issue of possible age/handicapped discrimination in effectuating the reorganization of the district and the resultant reduction in force and determination of seniority rights which resulted therefrom is so inextricably intertwined with educational issues that the Commissioner must determine the discrimination issue in the context of and concurrently with his determination of the following issues:

1. Do petitioner's tenure rights entitle her to a full-time teaching position? If so, when?

2. Did petitioner relinquish her tenure rights to a full-time teaching position? (See prehearing order entered in EDU 6841-00 on December 4, 2000)

Based upon the assertions in respondent's motion papers, the following issue is hereby added:

3. Did respondent act in good faith in reorganizing the art department?

The facts with respect to petitioner's part-time/full-time employment status are the same facts which must be considered either under the school law or under the civil rights law. If petitioner had any *right* to reassignment to a full-time position after the RIF, that right arises under the education statutes and the Commissioner's seniority regulations. No separate determination concerning wrongful consideration of petitioner's age or handicapped status could be made in a vacuum. The common issue can be fairly, competently and fully tried and adjudicated together with and as a constituent part of all other issues in the case before one agency – the Commissioner of Education.

Finally, the issue of age/handicapped discrimination does not call for a form of relief *fundamentally* different from the relief available through the Commissioner of Education. If the Commissioner decides that age/handicapped discrimination was not a factor in the decisions of the Board concerning the alleged reorganization and petitioner's entitlement to full-time employment as a teaching staff member, and that the Board's determinations were otherwise educationally correct, the Division on Civil Rights must accord binding effect to that determination. If the Commissioner decides that age/handicapped discrimination was a substantial motivating factor in respondent's treatment of petitioner in the reduction in force and its aftermath, the Commissioner can afford all relief necessary, with the exceptions of monetary interest on any back pay award, monetary damages for emotional distress and counsel fees (*N.J.S.A.* 10:5-17.1). The Court in *Balsley v. North Hunterdon Bd. of Educ*, 117 *N.J.* 434, 444-447 (1990), explained the proper procedure in cases such as this:

> Both *Hinfey* and *Winner* expressly recognized that in a context invoking administrative comity, the agency that deferred action under the predominant-interest standard necessarily retained jurisdiction over any issues not fully adjudicated in a manner consistent with its own non-delegable responsibilities. Hence, in an appropriate case, a complainant should not be deprived of any determination or relief that would be available before such an agency simply because the predominant-interest agency heard and determined her substantive claim. It does not follow, however, that the predominant-interest agency can provide that remedy. A complainant armed with a successful determination and supported by an adequate record following a proceeding before the predominant-interest agency can proceed to the agency that deferred action for a determination of whether an unresolved claim or additional relief should be addressed under the laws defining its own jurisdictional responsibilities.
>
> . . .
>
> In sum, the Division on Civil Rights and the Commissioner of Education have concurrent jurisdiction in discrimination cases concerning education. Because the discrimination occurs in a public education context, the Commissioner has the predominant interest in the subject matter. However, even though complainant properly filed her petition with the Commissioner of Education, the amendment of her petition to assert a claim for relief in the form of counsel fees under the LAD presented issues cognizable only before the Division on Civil Rights. The specialized remedy of counsel fees is not one within the statutory authority of the Commissioner but is available only in the Division on Civil Rights. Hence, under our decisional law and the general standards of the current rules of the Office of Administrative Law, the Commissioner of Education should not determine that claim for relief. Rather, the complainant should have filed that claim in the Division on Civil Rights or, the Commissioner having granted the application, applied to sever and transfer that claim to the Division for disposition as the Director deems appropriate in accordance with the statutory policies and regulatory standards of the LAD.

Therefore, under the principles of *Hackensack v. Winner*, the Division on Civil Rights should defer the exercise of its jurisdiction until after the Commissioner of Education has reached a final decision in the matter. If the Commissioner of Education's final decision warrants such additional relief as is incidental to the fundamental remedies and such as is

available only from the Division on Civil Rights, then the matter will be forwarded to the Director of the Division on Civil Rights for issuance of an Order directing respondent to compensate petitioner accordingly.

For all the foregoing reasons, it is **ORDERED** that the Commissioner of Education has the predominant interest in the conduct and outcome of this matter and that he shall render the final decision on all issues within the scope of his predominant interest as indicated in the opinion hereinabove. If necessary, the Director of the Division on Civil Rights will thereafter have a 45-day period within which to issue an Order concerning any additional remedial relief.

This order may be adopted, modified or rejected by the **DEPARTMENT OF EDUCATION** and **THE DIVISION ON CIVIL RIGHTS** who by law are authorized to make a final decision in this matter. The **DEPARTMENT OF EDUCATION** and the **DIVISION ON CIVIL RIGHTS** are encouraged to consult and coordinate with each other before issuing a final order. If the **DEPARTMENT OF EDUCATION** and 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 **DEPARTMENT OF EDUCATION** and the **DIVISION ON CIVIL RIGHTS.**

March 26, 2001
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

cc

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
AND
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NOS. EDU 6841-00 AND
CRT 737-01
AGENCY DOCKET NOS. 217-6/00 AND
ED11WE-46105-E

PATRICIA C. FLEMING, Petitioner, v. BOARD OF EDUCATION OF HADDON TOWNSHIP, CAMDEN COUNTY, Respondent.	ADMINISTRATIVE ACTION JOINT ORDER OF CONSOLIDATION AND DETERMINATION OF PREDOMINANT INTEREST
PATRICIA C. FLEMING, Complainant, v. HADDON TOWNSHIP BOARD OF EDUCATION, Respondent.	

This matter arose on June 16, 2000, when the petitioner, Patricia Fleming (Fleming), filed a verified petition with the New Jersey Department of Education alleging that the Board of Education of Haddon Township, New Jersey (Respondent), had denied her a full-time teaching position for the 2000-01 school year in violation of her tenure rights under N.J.S.A. 18A:28-5, and in violation of related statutes governing school law.

On July 28, 2000, Fleming filed a verified complaint with the New Jersey Division on Civil Rights (Division), alleging that Respondent unlawfully denied her a full-time teaching position for the 2000-01 school year because of her age (54) and disability (intestinal disorder/depression) in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49.

On February 8, 2001, Fleming filed moving papers with the Office of Administrative Law (OAL) for consolidation and determination of predominant interest. Respondent opposed the motion. On February 28, 2001, the Director of the Division on Civil Rights transmitted this matter to the OAL at Fleming's request pursuant to N.J.S.A. 10:5-13. On March 26, 2001, the Honorable M. Kathleen Duncan, Administrative Law Judge (ALJ), issued an order consolidating the cases and determining that the Department of Education had predominant interest in the matter (the ALJ's Order).

Having considered the record and having made an independent evaluation thereof, the **Commissioner of the New Jersey Department of Education (Commissioner) and the Director of the New Jersey Division on Civil Rights (Director)** find good cause to adopt, with the following modifications, the portion of the ALJ's Order consolidating the above captioned matters and determining that the Department of Education has predominant interest in the initial adjudication of this matter.

However, the consideration of whether Fleming was subjected to unlawful employment discrimination in violation of the LAD is a matter that, in this instance, should be determined by the Director following the Commissioner's determination of educational, tenure and seniority issues governed by school law. For these reasons, the Commissioner and the Director are constrained to reject the portion of the ALJ's determination that would require the Commissioner to decide whether Respondent violated the LAD, including whether Respondent failed to consider or provide reasonable accommodation as required by the LAD.

Accordingly, the Commissioner and the Director reject the portion of the ALJ's Order that directs the Commissioner of Education to decide whether the LAD was violated, requires the Director of the Division on Civil Rights to give binding effect to the Commissioner's legal determinations with respect to Fleming's LAD claims (ALJ's Order pp. 11-12), and limits the Director's review to a determination of whether additional relief is warranted following the Commissioner's determination (ALJ's Order pp. 13-14).

ORDER

The New Jersey Department of Education and the New Jersey Division on Civil Rights ORDER that the above captioned matters be consolidated for hearing; and it is

FURTHER ORDERED that the New Jersey Department of Education shall exercise predominant interest in this matter and shall adjudicate the substantive claims governed by school law, including the following issues set forth in the ALJ's order: whether Fleming's tenure rights entitle her to a full-time teaching position and, if so, when such entitlement becomes effective; whether Fleming relinquished her tenure rights to a full-time teaching position; and whether Respondent acted in good faith in reorganizing its art department; and it is

FURTHER ORDERED that the ALJ's Order is modified to include the following additional issues that the ALJ conducting the hearing shall address: whether Fleming's age

or disability was a motivating factor in Respondent's decision to deny her a full-time teaching position or to reorganize the art department at a time or in a manner that hindered Fleming's employment in a full-time position; whether Respondent failed to fully consider or provide reasonable accommodation with respect to Fleming's disabilities before making its decisions regarding her employment, including whether Respondent failed to accommodate her by not preserving a full-time teaching position for her during her disability period or by refusing to return her to a full-time teaching position when she no longer needed the accommodation of part-time work. See N.J.A.C. 13:13-2.7 (unlawful employment practice against person with a disability is not made lawful because it is authorized or mandated by collective bargaining agreement or other contracts of labor organization); and it is

FURTHER ORDERED that, after the Commissioner of Education renders a decision in this matter, the case will be transmitted to the Director of the Division on Civil Rights to determine whether Respondent violated the LAD and, if so, whether Fleming has received full, appropriate relief under the LAD, and to enable the Director to assess a statutory penalty, if appropriate, as provided by the LAD.

DECISION RENDERED BY THE
COMMISSIONER OF EDUCATION
ON May 10, 2001

Jeffrey N. Osowski
Assistant Commissioner of Education
N.J. Department of Education
Delegated pursuant to N.J.S.A. 18A:4-34

DECISION RENDERED BY THE
DIRECTOR OF THE DIVISION ON
CIVIL RIGHTS ON May 10, 2001

O. Lisa Dabreu
Director
N.J. Division on Civil Rights

150-01

#150-01

A.J., on behalf of minor child, J.J., AND A.J.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY, EDWIN DUROY, STATE DISTRICT SUPERINTENDENT, AND DAVID HESPE, COMMISSIONER, NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENTS.	:	

May 11, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NOS. EDU 5201-00
AGENCY DKT. NO. 106-3/00

A.J. ON BEHALF OF MINOR CHILD J.J. AND A.M.
Petitioner,
v.
STATE OPERATED DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY AND NEW JERSEY DEPARTMENT OF EDUCATION, DAVID HESPE, COMMISSIONER
Respondent.

Elizabeth Athos, Esq., for petitioner
(Education Law Center)

Jack Gillman, Esq., for respondent
(Hanly and Ryglicki, attorneys)

Record Closed: March 21, 2001 Decided: March 23, 2001

BEFORE **IRENE JONES**, ALJ:

On Mary 26, 2000 this matter was transmitted to the Office of Administrative Law (OAL) for hearing pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13. The petitioner alleged that the District has failed to provide him with a thorough and efficient education; failed to provide alternative education guidelines; and violated his due process rights. On August 29, 2000, the petitioner advised that the matter had

settled. Prior to receipt of the settlement, the matter was inadvertently returned to the agency as a withdrawal. Subsequently, the Department of Education returned the file to the OAL because the Initial Decision Settlement did not have the appropriate stipulation of settlement. On March 21, 2001, the petitioner filed a signed copy of the stipulation of settlement which is attached hereto.

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

1. The parties have voluntarily agreed to the settlement as evidence 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.

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

3/23/01
DATE

IRENE JONES, ALJ

Receipt Acknowledged:

3-27-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 30 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

sej

Elizabeth Athos, Esq.
EDUCATION LAW CENTER
155 Washington Street, Suite 205
Newark, New Jersey 07102
(973)624-1815; FAX (973) 624-7339
Attorney For Petitioner

A.J., on behalf of minor child, J.J., and A.J.,

Petitioners,

v.

STATE-OPERATED SCHOOL DISTRICT, CITY OF PATERSON, EDWIN DUROY, STATE DISTRICT SUPERINTENDENT, and DAVID HESPE, COMMISSIONER, NEW JERSEY DEPARTMENT OF EDUCATION,

Respondents.

BEFORE THE COMMISSIONER OF EDUCATION

STATE OF NEW JERSEY

Agency Dkt. No. 106-3/00

OAL Dkt. No. EDUOS 05201-00N

STIPULATION OF SETTLEMENT AND DISMISSAL

Petitioners having withdrawn their claims against Commissioner David Hespe and having amicably resolved their claims against the remaining respondents, it is stipulated and agreed that PETITIONERS' claims against STATE-OPERATED DISTRICT, CITY OF PATERSON, and EDWIN DUROY, STATE DISTRICT SUPERINTENDENT ("Paterson respondents"), are hereby settled between these parties according to the following terms:

1. Paterson respondents will continue to provide compensatory education to J.J. for ~~the first~~ two marking periods of the 2000-2001 school year in the

JR Ea

3a

form of 1:1 home instruction, two days per week, two hours per day.

2. Paterson respondents will pay $2000.00 in damages to petitioners, plus $4575.00 in legal fees to petitioners' attorneys, in full compensation for petitioners' claims in this matter.

3. Petitioners hereby dismiss with prejudice all claims raised in this matter against the STATE-OPERATED DISTRICT, CITY OF PATERSON, and EDWIN DUROY, STATE DISTRICT SUPERINTENDENT.

Dated: August 30, 2000

Anita Jones, on behalf of herself and her minor child, J.J.

Edwin DuRoy, on behalf of himself and the Paterson State-Operated School District

EDUCATION LAW CENTER
By: Elizabeth Athos, Esq.
Attorney for Petitioners

Jack Gillman, Esq.
Attorney for Paterson Respondents

Education Law Center

155 Washington Street, Suite 205
Newark, New Jersey 07102
(973)624-1815 Fax (973)624-7339
educlawctr@aol.com http://www.edlawcenter.org

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
MAR 22 12 55 PM '00

March 21, 2000

Hon. Irene Jones, ALJ
Office of Administrative Law
185 Washington St.
Newark, NJ 07102

Re: A.J. et al. v. State Operated District City of Paterson et al.
OAL Dkt. No. EDUOS 05201-00N
Agency Ref. No. 106-3/00

Dear Judge Jones:

In response to Your Honor's request, I have enclosed an additional copy of the Stipulation of Settlement and Dismissal in the above-referenced matter.

Thank you for your attention to this matter.

Respectfully,

Elizabeth Athos

Elizabeth Athos, Esq.

via fax and regular mail
Encls.

cc: Jack Gillman, Esq.
Attorney for Paterson State-Operated School District and State District Superintendent

OAL DKT. NO. EDU 5201-00
AGENCY DKT. NO. 106-3/00

A.J., on behalf of minor child, J.J., AND A.J.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY, EDWIN DUROY, STATE DISTRICT SUPERINTENDENT, AND DAVID HESPE, COMMISSIONER, NEW JERSEY DEPARTMENT OF EDUCATION, [1]	:	DECISION
RESPONDENTS.	:	

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

Upon review, the Commissioner approves the settlement terms and adopts the settlement agreement as the final decision in this matter.[2] The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: MAY 11 2001

Date of Mailing: MAY 14 2001

[1]The case caption in this matter has been changed to correct errors in the caption in the Initial Decision.
[2] The Commissioner notes that petitioners withdrew their claims against David Hespe, Commissioner, Department of Education, on August 29, 2000.

151-01

#151-01

L.D.M., on behalf of minor child, T.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner sought to compel the respondent Board to provide a free public education to her brother T.D., who, she argued, resides with her because of a family hardship. The Board contested the petition because petitioner had not demonstrated that her brother was legally entitled to a free public education in West Orange.

The ALJ concluded that petitioner failed to demonstrate that her parents could not support her brother because of a family or economic hardship, and that petitioner's brother was not entitled to a free public education in West Orange prior to the date petitioner obtained an order of custody of T.D. The ALJ ordered payment of tuition by petitioner in the amount of $10,159.47 for the period of T.D.'s attendance at school in West Orange prior to the date of the custody order.

The Commissioner reversed the decision of the ALJ, holding that, pursuant to the terms of the Custody Order obtained by petitioner, she obtained custody of her brother retroactive to January 27, 2000. As such, the Commissioner determined that T.D. was entitled to a free public education in the West Orange School District as of that date and that petitioner owed no tuition to respondent.

May 11, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3590-00
Agency Dkt. No. 60-2/00

L.D.M. ON BEHALF OF MINOR CHILD, T.D.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,
Respondent.

L.D.M., *pro se*

Stephen J. Christiano, Esq., for respondent

Record Closed: March 15, 2001 Decided: March 22, 2001

BEFORE **EDITH KLINGER**, ALJ:

On February 17, 2000, petitioner, L.D.M., filed a petition before the Commissioner of Education to compel the respondent, Board of Education of the Township of West Orange (District), to provide her brother, T.D., with a free public education in the Township schools pursuant to *N.J.S.A.* 18A:38-1b.

On March 14, 2000, the District filed its answer to the petition and on April 14, 2000, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

A hearing was scheduled on January 16, 2001 at 9:00 a.m. at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey. At the scheduled time, the parties appeared and discussed the resolution of this matter.

At the time, it became evident that the material facts in this matter are undisputed. According to the Affidavit of Parent (Affidavit), prepared by A.M.D., the mother of both T.D. and L.D.M., on February 7, 2000, T.D. lived with his parents in Florida and attended school there. His parents were supporting him. A.M.D. stated that she and her husband were in the process of moving from Florida to West Orange to establish residence and they were concerned that the upheaval in the family would affect her son's performance in school during this period. For this reason, T.D. went to live with his sister in West Orange for the purpose of attending high school there.

A.M.D. makes no specific mention of the condition of her father-in-law, A.D., in the Affidavit, however medical reports relating to the condition of A.D. may have been attached to the Affidavit. (See the response to question 5.) These reports date from June 1999, nine months prior to the Affidavit, and show A.D. to be suffering from some degree of dementia but otherwise healthy. He was hospitalized with a urinary tract infection and dehydration on June 17, 1999. It was recommended that he be released from the hospital to a nursing care facility for a period of two weeks, but T.D.'s parents elected to care for him in their home. He went to live with them in July 1999 and neither A.M.D. nor L.D.M. provided the District with further documentation as to his subsequent condition.

In her Petition in this matter, L.D.M. gives her grandfather's condition, not her parents' prospective move, as the cause of the family hardship requiring her brother to

live with her and attend school in West Orange. Nothing in the records submitted to the District show A.M. to be terminally ill as she stated in her Petition.

On January 16, 2001, the scheduled date of hearing, the District agreed that, if L.D.M. and her husband went to court and obtained an order giving them the legal custody of T.D., no tuition would be charged for his school attendance from the date of the order. In exchange for this agreement, the District allowed T.D. to continue to attend school in West Orange until the order of custody was obtained.

The District, however, did not relinquish its claim for the tuition owed for T.D.'s school attendance from February 23, 2000 through February 7, 2001 when the custody order was signed by the Nancy Sivilli, J.S.C., in the Superior Court of New Jersey, Chancery Division, Family Part, Essex Vicinage.

According to an affidavit from respondent, T.D. had 78 days of ineligible attendance during the 1999-2000 school year, at the rate of $55.53 per day, and 99 days of ineligible attendance during the 2000-2001 school year at the rate of $58.87 per day. These rates are based upon the annual per pupil cost to the West Orange School District for a high school student for the respective years. (See Respondent's Affidavit.) The total tuition sought by the District is $10,159.47.

On January 16, 2001, by agreement with the parties, the hearing was continued until January 26, 2001. A telephone conference was scheduled at 2:00 p.m. on that date with the parties to determine the status of the proposed settlement. The petitioner was not available at the agreed time and did not respond to a subsequent letter from the undersigned. All attempts by the forum to contact her were unsuccessful. Respondent was also unable to contact her.

As a result, the undersigned, by letter dated January 29, 2001, directed the District to submit an affidavit setting forth the tuition owed by L.D.M. for T.D.'s attendance. Petitioner also received a copy of this affidavit. Neither she, nor anyone

on her behalf, has made contact with the Office of Administrative Law up to and including the date of this initial decision.

N.J.S.A. 18A38-1(b)(1) provides that a child, living in the home of another person who is domiciled in the school district, must, among other things, be kept and supported gratis by that person for a period longer than the school term. The sworn statement of the resident to these conditions must be accompanied by the sworn statement of the child's parent or guardian that he or she is not capable of supporting the child due to a family or economic hardship. If the district denies the claim of entitlement to a free public education, the burden is on the resident to prove entitlement by a preponderance of the credible evidence.

In the present case, I **CONCLUDE** that L.D.M. has failed to carry her burden of proving that T.D. came to live with her and attend school in West Orange because his parents were unable to support him due to family or economic hardship so that he could no longer continue to live with them and attend school in Florida.

If the resident fails to carry the burden of proof, *N.J.S.A.* 18A:38-1(b)(2) provides that the district can remove the child from school and assess the resident tuition for the student prorated to the period of ineligible attendance in district schools. In this case the District has agreed to allow T.D. to continue attending West Orange high school but seeks to be paid the tuition for the period during which he was ineligible to attend without cost.

Based upon the above, I **CONCLUDE** that L.D.M. has failed to prove that T.D. was entitled to a free public education in the Township of West Orange from February 23, 2000 through February 7, 2001. Accordingly, I **CONCLUDE** that L.D.M. and her husband, as residents of West Orange, are liable to the District for tuition in the amount of $10,159.47 for T.D.'s school attendance during this period of ineligibility.

ORDER

It is, therefore, **ORDERED** that L.D.M. and her husband pay respondent tuition in the amount of $10,159.47, pursuant to *N.J.S.A.* 18A:38-1(b), for T.D.'s ineligible attendance in the District 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 unless 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, 2001
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

3-27-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 30 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTR ATIVE LAW

APPENDIX

Exhibits:

Affidavit of Parent with attachments

Respondent's Affidavit with attachments

OAL DKT. NO. EDU 3590-00
AGENCY DKT. NO. 60-2/00

L.D.M., on behalf of minor child, T.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX 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 independent review of the record of this matter, the Commissioner determines to reverse the Initial Decision of the Administrative Law Judge (ALJ) for the reasons set forth herein. The record clearly demonstrates that on February 7, 2001, L.D.M was granted legal custody of T.D., *retroactive to January 27, 2000.*[1] Consequently, the ALJ's analysis of this matter under the affidavit student provision, N.J.S.A. 18A:38-1b(1), is inapplicable. Based on these facts, the Commissioner finds and determines that T.D was entitled, during the entire period in dispute herein, to attend school in the West Orange School District free of charge pursuant to the requirements of *N.J.S.A.* 18A:38-1(a). As was determined by the Commissioner and affirmed by the State Board of Education in *L.A. v. Board of Education of the Town of West*

[1] The Commissioner observes that the Custody Order of February 7, 2001 was obtained as a result of a tentative agreement reached between the parties wherein the District agreed that if petitioner obtained legal custody of T.D., respondent would accept a payment of $2,000 for back tuition charges. (Respondent's Affidavit at 2) While it is clear that respondent did not expect a *retroactive* custody order as a result of the settlement discussion, once such an order is entered, there is no longer any basis on which the Board may argue, or the Commissioner may find, that tuition monies are due.

Orange, 97 *N.J.A.R.*2d (EDU) 266 (1996), *aff'd* by the State Board of Education, 97 *N.J.A.R.*2d (EDU) 554 (1997); and *V.H. v. Board of Education of the Township of Quinton*, 97 *N.J.A.R.*2d (EDU) 124 (1996), *aff'd* by the State Board of Education, 97 *N.J.A.R.*2d 554 (1997), as of the date that a resident of a district takes *legal control* of a child, entitlement to attend school free of charge is no longer to be examined pursuant to *N.J.S.A.* 18A:38-1(b), the "affidavit student" provision.

Consequently, in the instant matter, once L.D.M. assumed legal custody of T.D., the only appropriate inquiry for respondent was whether L.D.M. and T.D. were domiciled in the District pursuant to *N.J.S.A.* 18A:38-1(a). Inasmuch as respondent does not dispute that L.D.M. is domiciled in West Orange, and the domicile of the child follows that of the parent or guardian having *legal custody* over him or her, *Mansfield Twp. Board of Education v. State Board of Education*, 101 *N.J.L.* 474, 479-480 (Sup. Ct. 1925), it is hereby found and determined that T.D. was entitled to a free public education pursuant to *N.J.S.A.* 18A:38-1(a), as of the effective date that L.D.M. acquired legal custody of T.D. *See also Y.L., on behalf of M.A. v. Board of Education of South Orange-Maplewood*, Number 658-97, decided by the Commissioner of Education December 24, 1997. In so finding, the Commissioner notes that there is no claim of fraud on the part of petitioner. *See Y.L.; V.H., supra;* and *L.A., supra.* Further, as was held in *L.A.*, and affirmed by the State Board, the motives of the party obtaining a custody order are not determinative. A custody order must be accepted on its face. *See L.A.* at 269. *See also Y.L., supra.*

Accordingly, having determined that T.D. was eligible, pursuant to *N.J.S.A.* 18A:38-1(a), to attend school in the West Orange School District during the 1999-2000 and 2000-2001 school years, the recommendation of the ALJ ordering tuition payment by petitioner is herein reversed. Further, it is determined that T.D.'s eligibility for a free education

in the West Orange School District will continue until such time as L.D.M. no longer retains custody of T.D. or there is a change of domicile affecting entitlement to a free education in the West Orange School District.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: MAY 11 2001

Date of Mailing: MAY 14 2001

[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.

#152-01

IN THE MATTER OF THE TENURE	:	
HEARING OF DULCE LUCIANO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF ELIZABETH, UNION COUNTY.	:	
	:	

May 14, 2001

AGENCY DKT. NO. 47-2/01

IN THE MATTER OF THE TENURE	:	
HEARING OF DULCE LUCIANO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF ELIZABETH, UNION COUNTY.	:	
	:	

For the Board, Mary E. Hennessy, Esq. (Murray, Murray and Corrigan)

This matter having been opened before the Commissioner of Education on February 27, 2001 through certification of tenure charges of excessive absenteeism and conduct unbecoming against a tenured secretary by the Board of Education of Elizabeth; and

The Board having attempted to serve the certification of tenure charges before the Commissioner on respondent at 561 Grier Avenue, Elizabeth, New Jersey, via certified mail on February 26, 2001, and such certified mail having being returned to the Board on March 16, 2001 as "Unclaimed" following three attempted deliveries by the post office; and

The Board having confirmed respondent's address in its personnel records, again attempted to serve the certification of tenure charges before the Commissioner on respondent at the same address via First Class mail and Airborne Express on March 19, 2001; and,

The Board having obtained a different address for respondent from the New Jersey Education Association representative, and having attempted to serve the certification of tenure charges before the Commissioner on respondent at 300 Spencer Street, Elizabeth, New Jersey via regular and certified mail on March 21, 2001, with such mail being returned by the post office on March 29, 2001; and,

The Board having personally served respondent with a complete copy of the Tenure Charges, Resolution and Certificate of Determination via a process server on April 2, 2001 at 300 Spencer Street, Elizabeth, New Jersey; and

The Commissioner having directed respondent, via both certified and regular mail on February 27, 2001 to the address at 561 Grier Avenue, Elizabeth, New Jersey to file an Answer to the tenure charges against her, and such certified mail having being returned to the Commissioner on March 1, 2001 as "Unclaimed" following three attempted deliveries by the post office; and

The Commissioner having again directed respondent, via both certified and regular mail on April 23, 2001 to the address at 300 Spencer Street, Elizabeth, New Jersey to file an Answer to the tenure charges against her, and there being no indication that respondent did not receive the Commissioner's April 23, 2001 communication; and

Such communication 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

In that no reply has been received from respondent in response to the Board's charges, each count of the charges against respondent is deemed admitted; and

The Commissioner's review of the tenure charges certified against respondent by the Board and the statement of evidence in support of those charges indicating that respondent

had been absent more than 206 days in the past five years, having been absent 71 days during the 2000-2001 school year, and that respondent was chronically fifteen to twenty minutes tardy, accumulating 110 instances of tardiness from July 1998 to July 2000; and

Deeming such charges to be admitted, and noting that respondent has chosen not to deny the specific allegations contained therein, the Commissioner finds that respondent's actions constitute chronic and excessive absenteeism, warranting dismissal from her tenured position as a secretary; now, therefore

IT IS ORDERED this 14th day of May 2001 that summary decision shall be granted to the Board, and that respondent Dulce Luciano shall be dismissed from her tenured position as a secretary in the Board's employ as of the date of this order.[1]

COMMISSIONER OF EDUCATION

[1] 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.

153-01

#153-01

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
(IN THE MATTER OF THE DISTRICT EARLY CHILDHOOD PLAN APPLICATION)	:	
RESPONDENT.	:	
	:	

May 14, 2001

OAL DKT. NO. EDU 06104-00S
AGENCY DKT. NO. 265-7/00

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, **(IN THE MATTER OF THE DISTRICT EARLY CHILDHOOD PLAN 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: MAY 14 2001

Date of Mailing: MAY 14 2001

#154-01

DR. H. BENJAMIN WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE ATLANTIC CITY PUBLIC SCHOOLS, ET AL., ATLANTIC COUNTY,	:	DECISION
RESPONDENTS.	:	
	:	

May 16, 2001

OAL DKT. NO. EDU 6460-98
AGENCY DKT. NO. 351-7/98

DR. H. BENJAMIN WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE ATLANTIC CITY PUBLIC SCHOOLS, ET AL., ATLANTIC COUNTY,	:	DECISION
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 Acting 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: MAY 16 2001

Date of Mailing: MAY 16 2001

155-01

#155-01

KATHLEEN E. SAUVIE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY	:	DECISION
RESPONDENT.	:	

May 16, 2001

OAL DKT. NO. EDU 1082-99
AGENCY DKT. NO. 492-11/98

KATHLEEN E. SAUVIE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, 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 Acting 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: MAY 16 2001

Date of Mailing: MAY 16 2001

156-01

#156-01

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

May 17, 2001

OAL DKT NO EDU 3801-99
AGENCY DKT. NO. 399-9/98

GERALD BATTLE,	:	
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 Acting 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: MAY 17 2001

Date of Mailing: MAY 17 2001

#157-01

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

May 17, 2001

OAL DKT. NO. EDU 3797-99
AGENCY DKT. NO. 399-9/98

CALLIE HAYES,	:	
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 Acting 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: MAY 17 2001

Date of Mailing: MAY 17 2001

158-01

#158-01

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

May 17, 2001

OAL DKT. NO. EDU 3824-99
AGENCY DKT. NO. 399-9/98

CHERYL BASIL,	:	
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 Acting 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: MAY 17 2001

Date of Mailing: MAY 17 2001

159-01

BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, **(IN THE MATTER OF THE DISTRICT SUPPLEMENTAL FUNDING AND EARLY CHILDHOOD PLAN APPLICATIONS),**	:	DECISION
RESPONDENT.	:	

May 18,2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5799-99
AGENCY DKT. NO. 79-4/99

BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION,
Respondent

Donald W. Morrow, Esq., for petitioner

Arlene Goldfus Lutz, DAG., for respondent
(John J. Farmer, Attorney General of New Jersey, attorney)

Record Closed: March 9, 2001 Decided: March 14, 2001

BEFORE **IRENE JONES**, ALJ:

This matter was transmitted to the Office of Administrative Law on June 14, 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 paties settled the matter before a hearing was scheduled and submitted a signed stipulation of settlement to this office on March 9, 2001. A copy of the stipulation of settlement is attached hereto.

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

1. The parties have voluntarily agreed to the settlement as evidence 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.

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

3/19/01
DATE

IRENE JONES, ALJ

Receipt Acknowledged:

4/3/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR - 5 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sej

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
MAR 9 8 44 AM 01

BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY,	OAL DOCKET NOS. EDU 05799-99N; EDUOT 09618-99N; EDUOT 07914-00N
Petitioner,	Agency Ref. Nos.79-4/99; 237-8/99; 258-7/00
v.	
NEW JERSEY DEPARTMENT OF EDUCATION,	**CONSENT ORDER OF SETTLEMENT**
Respondent.	

Petitioner, Board of Education of the Town of Phillipsburg School District ("Petitioner"), through its Attorney, Donald W. Morrow, Esq., (Donald W. Morrow, appearing) and Respondent, New Jersey Department of Education ("DOE"), through its attorney, the Honorable John J. Farmer, Jr., Attorney General of the State of New Jersey (Michael C. Walters, Deputy Attorney General, appearing), hereby stipulate to the following terms of settlement:

1. On or about July 14, 2000, Petitioner filed a Petition of Appeal ("Petition") with the Commissioner of Education seeking review of the Department's determinations with respect to Petitioner's requests for supplemental funding for the 2000-2001 school year and Petitioner's One-Year Early Childhood Operational Plan for the 2000-2001 school year under the Abbott v. Burke decisions and DOE regulations.

2. On or about August 6, 1999, Petitioner filed a Petition of Appeal ("Petition") with the Commissioner of Education seeking review of the Department's determinations with respect to Petitioner's requests for supplemental funding for the 1999-2000 school year under the Abbott v. Burke decisions and DOE regulations.

3. On or about April 20, 1999, Petitioner filed a Petition of Appeal ("Petition") with the Commissioner of Education seeking review

of the Department's determinations with respect to Petitioner's One-Year Early Childhood Operational Plan for the 1999-2000 school year.

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

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

6. Based on those discussions, the DOE agreed that the Petitioner has demonstrated a need for additional supplemental funding in the amount of $1,327,553 for DOE-approved programs and/or services. Petitioner may anticipate revenue in the amount of $1,327,553 and record an accounts receivable in the 2000-2001 budget year of that same amount. The receipt of this additional amount of funds will occur in the 2001-2002 budget year subject to appropriation in the FY 2002 Appropriations Act.

7. The Petitioner agrees to dismiss with prejudice the Petitions (OAL Docket Nos. EDU 05799-99N; EDU 09618-99N; EDU 07914-00N) pending before the Office of Administrative Law and the Commissioner of Education.

8. 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

MICHAEL C. WALTERS, DAG

DATED: 2/23/01

DONALD W. MORROW, ESQ.
Attorney for Petitioner,
Board of Education of the
Town of Phillipsburg, New Jersey

DONALD W. MORROW, ESQ.

DATED: 3-2-01

SO ORDERED THIS 12th DAY OF March 2001.

HONORABLE DIANA C. SUKOVICH, A.L.J.

HONORABLE IRENE JONES, A.L.J.

OAL DKT. NOS. EDU 05799-99; EDUOT 09618-99N; and EDUOT 07914-00N
AGENCY DKT. NOS. 79-4/99; 237-8/99; and 258-7/00

BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, **(IN THE MATTER OF THE DISTRICT SUPPLEMENTAL FUNDING AND EARLY CHILDHOOD PLAN APPLICATIONS),**	:	DECISION
RESPONDENT.	:	

The record of these matters and Consent Order of Settlement transmitted by the Office of Administrative Law have been reviewed. Because this agency is a party to these cases, the settlement, pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), is deemed to be the final decision in these matters.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5|18|01

Date of Mailing: 5|18|01

160-01

KINNELON EDUCATION ASSOCIATION, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF KINNELON, MORRIS COUNTY, : DECISION

RESPONDENT. :

SYNOPSIS

Petitioner, the representative of the teaching staff members employed by the respondent Board, challenged the Board's policies with regard to development of Professional Improvement Plans (PIP) as being contrary to applicable regulations. Specifically, petitioner argued that the Board predetermined topics and goals for PIPs, thus circumscribing staff members' participation and precluding development of individual PIPs. The Board denied that its policies were contrary to regulation, noting that staff members are permitted to add objectives to their PIP.

The ALJ determined that teachers had not been restricted to predetermined professional growth objectives and that inclusion of district-wide goals in addition to choices made by teachers in collaboration with their supervisor did not circumscribe the role of the teacher. The ALJ also determined that the format utilized by the Board for development of PIPs is contrary to regulation insofar as it does not delineate district responsibilities.

The Commissioner affirmed the decision of the ALJ with clarification. While agreeing that infusion of district-wide or school-wide goals into action and activity plans choices developed by teachers in collaboration with their supervisors does not circumscribe the role of the teacher, the Commissioner nevertheless underscored that such goals may not substitute for, nor act to foreclose, the individual aspect of such plans. Additionally, the Commissioner clarified that the Board's failure to specifically include district responsibilities in PIPs does not necessarily invalidate the current PIP format. Rather, the Commissioner determined that such responsibilities must be explicitly stated within the PIP document, rather than being considered implicit in the nature of particular goals or objectives.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9575-99

AGENCY DKT. NO. 245-8/99

KINNELON EDUCATION ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF KINNELON, MORRIS COUNTY,

Respondent.

Nancy I. Oxfeld, Esq., appearing for Petitioner
(Oxfeld & Cohen, attorneys)

Robert J. Merryman, Jr., Esq., appearing for Respondent
(Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: February 13, 2001 Decided: March 30, 2001

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

This is a request by Petitioner, Kinnelon Education Association (KEA), on behalf of the teaching staff members employed by Respondent, Kinnelon Board of Education (BOE), to hear and resolve a controversy arising between the two. Petitioner contends

that the policy of Respondent regarding teacher's professional improvement plans is violative of the regulations found at *N.J.A.C.* 6:3-4.3.

On August 31, 1999, the Department 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.

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) Petitioner is the certified collective negotiations representative of all certified teaching staff members employed by Respondent.

2) Each teaching staff member is required to have an annual written performance report which must include an individual professional improvement plan (PIP).

3) Pearl R. Miller School (Miller) is a middle school within the Kinnelon District.

4) During the 1999-2000 school year, each teacher at Miller was instructed to include a specific growth objective, "to implement activities which enhance student achievement" in his/her PIP. The activities through which this growth objective was to be achieved was to develop and implement tiered assignments appropriate for subject and grade. The inclusion of this professional growth objective through this specific activity was required for any teacher for whom it was appropriate to the curriculum.

5) At Miller teachers are expected to bring ideas on what they would like to include in the PIP for the following year to the annual evaluation. These ideas provide the starting point for the PIPs which are developed through dialogue between the teacher and the supervisor, who may make suggestions as to what might be included.

6) The inclusion of the tiered assignment requirement is an outgrowth of a strategic plan prepared by a task force which determined to move Miller from a junior high school model to a middle school model.

7) The teachers at Miller were also permitted to develop growth objectives and activities on an individual, independent basis.

8) The teachers at Miller were required to document the completed activities through a professional portfolio.

9) The Special Education teachers were required to have a departmental goal of reviewing, revising and writing IEP goals and objectives to comply with the new guidelines.

10) The school psychologist, nursing staff and social worker were excluded from that requirement.

11) The Special Education staff was required to formulate at least three personal goals for the 1999-2000 school year and list the timeframes and indicators of success for each objective.

12) Suggested areas on which to focus goals were provided by the Director.

13) The Kiel School is an elementary school within the Kinnelon Public School District.

14) Teachers at Kiel were instructed to include two personal goals and one goal which would impact the school family in their PIPs. In addition, they were instructed that the one common goal would be to document the PIP through the development of a portfolio for each grade which would be an indicator of success. In addition, staff at Kiel were provided with 28 different ideas for professional growth objectives from which they might choose or they were encourage to consult with the principal about any new ideas they might have. None of the 28 suggestions which were provided to the staff were mandated. There was no restriction placed on which or how many indicators of success might be employed.

15) The lists of goals provided to the Kiel staff are not limiting on the choices which may be made by individual teachers. These are suggestion of choices which could be made. Moreover, there is no limit on the number of goals each teacher may set forth him/herself.

16) The Stonybrook School is also an elementary school within the Kinnelon Public School District.

17) Staff at Stonybrook was provided with ideas for the format of an action research project and ideas for school-wide goals to be employed in their 1999-2000 PIPs. In addition to providing staff with the grid on which to develop the PIP, Stonybrook staff was provided with three choices from which to choose to develop the PIP for the 1999-2000 school year. None of the choices were mandated nor were any of the ideas for school oriented or grade level oriented goals mandated. Moreover, the school oriented or grade level goals are developed by faculty and changed each year.

18) At Stonybrook there was no need for a school-wide goal in the 1999-2000 school year nor was there one in the 2000-2001 school year. However, if

there was a need for one as seen by the staff, such a school-wide goal would have been included.

19) A district-wide format is employed by the Kinnelon Public School District for the recordation of the PIP. The format is clear on Ex. J-1 through J-4 and includes a column in which a professional growth objective is listed. The second column lists the activities to be employed in achieving that objective; the third, narrow, column specifies the timeframe; the fourth column shows the indicators of success. The form is signed by the staff member and by the evaluator after a meeting between the two.

DISCUSSION AND CONCLUSION

The issue to be resolved in this matter is whether Respondent's policies with regard to the development of the PIP are violative of the requirements of the regulation. An individual PIP is defined as a written statement of actions developed by the supervisor and the teaching staff member to correct deficiencies or to continue professional growth, time limits for their implementation, and the responsibility of the individual teaching staff member and the District for implementing the plan. *N.J.A.C.* 6:3-4.3(h)3. Specifically, in this case, the question to be resolved is whether the inclusion of mandated professional growth objectives in the 1999-2000 PIPs, without limitation on the number or nature of additional growth objectives, is violative of the regulations. The regulation requires that there be an annual written performance review which shall include a review of performance areas of strength and areas needing improvement as well as a PIP developed by the supervisor and teaching staff member. *N.J.A.C.* 6:3-4.3(f)1,2,3.

Petitioner asserts that the predetermination of topics and goals for PIPs at the schools and in the special education department violates the law because they unduly circumscribe the role of the teaching staff member and the development of an individual PIP and relies on the decision in *Education Association of Passaic v. Bd. of Educ. of the City of Passaic, OAL Dkt. No. EDU* 1081-98 and *EDU* 1517-98. This reliance is

misplaced. In the cited case, teachers were required to choose a professional plan topic from a list of seven items. Teachers were asked to answer three questions in regard to PIPs, but there is no statement of the school district's responsibilities in regard to the implementation of the PIP. Other exhibits contain the language that teachers must choose growth objectives from a list of eight items. The conclusion drawn by the administrative law judge in this matter is that the Respondent's practices limited the teacher to a choice from a list of items selected by the principal. The practice did not provide an opportunity to address deficiencies on an individual basis. *Passaic*, p. 6.

In the case before me, although school-wide and grade-wide objectives were provided at Kiel and Miller Schools and to the Special Education staff, the unrebutted testimony was clear that the teachers were not prohibited from developing additional professional growth objectives. Review of the documentation admitted as joint exhibits demonstrates a wide range of growth objectives and individuality, not only in the growth objectives, but also the activities to be employed and the indicators of success in Kiel, Stonybrook and the Special Education department. The indicator of success at Miller was uniform, *i.e.,* the completion of a portfolio; it is clear, however, that the objectives and the activities were specific to the individual teacher. Moreover, although the indicator of success was uniform, the completion of a portfolio by an individual documenting his/her own achievements is, by definition, an individual activity. Furthermore, it was clear, again from the unrebutted testimony of the supervisors, that there was collaboration on an individual basis in the development of these plans.

Accordingly, I **FIND**, based on the determination that teachers were not restricted to choices from a predetermined list and were not restricted to a specific number of choices, that the situation in this case at bar is vastly different from the one addressed in the *Passaic* case. I also **FIND** that in the case of the Kinnelon Public School District the practices of Respondent with respect to the inclusion of school-wide or grade-wide goals in addition to other choices which are made in collaboration between the teacher and the supervisor does not unduly circumscribe the role of the teacher.

Petitioner also contends that Respondent's practices are not in compliance with the requirement that the PIP include a statement of the responsibilities of the school district for implementing the plan, since the format for recording the PIP employed by Respondent does not provide for a statement of the responsibilities of the school district. Respondent maintains that the responsibilities of the school district are readily discernible by one reviewing each of the PIPs because there are certain approvals and accommodations which must be made by the supervisors in question in order for the activities contemplated to proceed. There is testimony that "it has always been assumed that a supervisor's signature is an indication of her role of responsibility in implementing the PIP."

The recognition by the supervisor of her responsibilities is simply not enough. The failure to specify in writing what those responsibilities are leads to misinterpretation and misunderstanding. Moreover, the regulation provides that the PIP is "a written statement of actions which sets forth the responsibilities of the individual staff member and the District for implementing the plan. *N.J.A.C.* 6:3-4.3(h)3. Clearly, the responsibilities should be set forth in writing. I **FIND**, therefore, that the format used by the Kinnelon Public School District with respect to the development of PIPs is in violation of the requirements of the regulation insofar as it does not specifically provide for a delineation of the District's responsibilities.

Petitioner also request that the principals of Stonybrook, Miller, Kiel and Director of Special Education work individually with each staff member to determine a PIP designed to correct individual deficiencies and continue professional growth. The unrebutted testimony for each of the supervisors was that each does meet with each individual staff member under her supervision to collaborate on the development of a PIP, notwithstanding the fact that there are included school-wide goals.

I also **FIND,** based on unrebutted testimony that such meetings do take place, as well as the unrebutted testimony that there have been no specific complaints made to the supervisors about the way in which the PIPs are developed, that the PIPs at Kiel, Stonybrook and Miller schools and the special education department are based upon

individual teaching staff member's performance areas of strength and areas needing improvement.

Accordingly, I **CONCLUDE** that this petition should be dismissed in part, specifically as it requests a determination that the use of predetermined goals and topics were PIPs at Stonybrook, Miller and Kiel are violative of the law, that it requests that the principals be directed to work individually with each staff member to determine a PIP, that the supervisors be directed to cease using the PIP as a means of achieving school or department-wide goals and that PIPs be based on the individual member's of performance areas of strength and areas needing improvement be dismissed. I further **CONCLUDE**, however, that the District should be directed to include within the PIP a specific delineation of the responsibilities of the District for implementing an individual's professional improvement plan.

ORDER

I hereby **ORDER** that Respondent amend the existing format to include a specific delineation of the District's responsibilities in implementing each PIP; I further **ORDER** that all other claims 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.

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 30, 2001
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

4/3/01
DATE

Debbie Antunites/jb
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR - 5 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Witnesses:

Ethel Minchello

Valerie Mosca, Psy.D.

Pat Hart

Bette A. Esposito

Lois McGuire

Exhibits:

P-1 Memo – Dr. Mosca to Special Education Staff, April 14, 1999

P-2 Memo – Pat Hart to Kiel Staff, May 13, 1999

P-3 Memo – Bette Esposito to Stonybrook Staff, May 24, 1999

R-1 Form re Annual Evaluation

R-2 Memo – Commissioner Hespe to Chief School Administrators, April 25, 2000

J-1 PIP Pearl R. Miller School, Grade 6-8, 1999-2000

J-2 PIP Stonybrook School, Grade 3-5, 1999-2000

J-3 PIP Kiel School, Kindergarten, 1999-2000

J-4 PIP Stonybrook School, Grade 3, 1999-2000

OAL DKT. NO. EDU 9575-99
AGENCY DKT. NO. 245-8/99

KINNELON EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF KINNELON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions and reply arguments were filed by petitioner and the Board in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner contends that the ALJ erred in finding that the Professional Improvement Plans (PIPs) of the staff members in this matter were developed by supervisors and teaching staff members based on the individual staff member's areas of strengths and areas needing improvement, simply because staff members could add objectives to those that were pre-chosen on a school and/or department-wide basis and those submitted on lists from their administrators. (Petitioner's Exceptions at 13) In this connection, petitioner asserts, "[n]othing in the regulations provides for a PIP, defined as arising from the individual staff member's need 'to correct deficiencies or to continue professional growth', as the appropriate place to include school-wide or grade-wide objectives." (*Ibid.*) Petitioner continues, "*Passaic* [supra] does not stand for the proposition that PIPs that are not based on the individual staff members [sic]

strengths and areas needing improvement are acceptable if the staff member can add individualized PIPs. (*Id.* at 14)

In support of its position, petitioner underscores that a review of the PIPs from the Pearl R. Miller School (Exhibit J-1), the Stoneybrook School (Exhibit J-4) and the Special Education Department (J-2) shows that the teaching staff members uniformly followed the form dictated by the principal. (*Id.* at 15) Additionally, in the Kiel School (Exhibit J-3), notwithstanding the principal's claim that everyone had the right to choose his/her own objectives, the teachers' PIPs followed the same format and contained the same items identified by the principal. (*Ibid.*) Petitioner thus concludes:

> A PIP is not a documents [sic] in which an administrator includes anything the administrator would like the staff member to do, whether district-wide, school-wide or department or grade-wise [sic], or individually based; it is a document solely for individual goals based on areas of strength and areas in which improvement is needed. (*Id.* at 17)

In reply, the Board notes that no one from the Kinnelon Education Association testified in this matter; not a single member alleged that his/her ability to participate in the preparation of PIPs was inhibited. By contrast, the three principals of the elementary schools in question provided unrebutted testimony that each of the supervisors met individually with staff members and collaborated on the development of the PIPs. (Board's Reply at 1) The Board further observes that petitioner's entire argument rests on the assumption that, because a specific goal was included in a PIP, the teacher was forced to include that goal in his/her plan. However, the evidence in this matter, the Board avers, is to the contrary. (*Id.* at 2) No teacher testified that a goal was placed in his/her PIP without consent; indeed, each of the supervisors involved in the preparation of the PIPs testified that no teacher was forced to include any particular objective. (*Ibid.*) Additionally, the Board argues that, although many of the indicators of success were

uniform, the objectives and activities contained in the PIPs were specific to the individual teacher's subject level and grade assignment. (*Ibid.*) Thus, the Board concludes:

> In the absence of any testimony that that an individual teaching staff member was forced to take on additional activities or responsibilities the Administrative Law Judge properly concluded that the inclusion of such school-wide activities and responsibilities in a Professional Improvement Plan was the result of a collaborative effort between the teaching staff member and his/her supervisor. (*Id.* at 3)

As to the Board's exceptions to the Initial Decision, the Board objects to the ALJ's finding that the format of its PIPs is inconsistent with applicable regulations because it does not "specifically delineate the responsibilities of the School District for the implementation of the PIPs." (Board's Exceptions at 1) This finding, the Board contends, not only conflicts with the unrefuted evidence in this matter, but with the Commissioner's own directive (issued in April 2000 to all Chief School Administrators) with respect to developing PIPs to comply with continuing professional development requirements. (*Ibid.*) The Board asserts that the ALJ's decision in this regard would compel a revision to its PIP form, which was developed as a collaborative effort by a committee of parents, teaching staff members and school administrators, and has been implemented, without objection, for six years. (*Id.* at 2) The Board continues:

> Each of these witnesses testified that the current forms used in Kinnelon do provide the responsibilities of the School District for implementing the Professional Improvement Plans. Witnesses testified that all teaching staff members are required to obtain approval for all workshops, courses and training. Where noted in the PIP, the Principal or Supervisor would be responsible for reviewing and approving the courses or training program recommended or selected by the teaching staff member. Many of the professional improvement plans require that the PIP be documented through a portfolio. The principals testified that they are actively involved in the development and review of the portfolios prepared by the teachers.

> Further, the principals testified that they are involved in reviewing new curriculums and/or units of study initiated by teachers and included as part of their PIP goals or activities. It is also noteworthy that there was no testimony that even one teaching staff member ever questioned who was responsible for implementing the goals and objectives set forth in a PIP. In fact, each of the school district officials who testified stated that it was clearly understood between the teacher and the Principal or Supervisor what the responsibilities are of the teaching staff member and the principal or supervisor.*** (*Id.* at 2-3)

In response to the Board's exceptions, petitioner counters that "[n]othing argued by the Respondent contradicts the fact that the regulations require that each PIP must specifically include the responsibility of the District for implementing the PIP, and the fact that such an area is nowhere included in the District's form." (Petitioner's Reply at 1) According to petitioner, the Commissioner has confirmed this requirement in *Passaic Education Association*, decided by the Commissioner April 26, 1999, Decision No. 126-99, which decision constitutes an administrative ruling, unlike the memorandum from the Commissioner of Education cited by the Board. (*Id.* at 2) Thus, since the PIP forms used in the Pearl R. Miller School, the Special Education Department, the Kiel School and the Stoneybrook School do not contain an area in which the District's responsibility is set forth, petitioner maintains that the District has failed to conform to the requirements of *N.J.A.C.* 6:3-4.1 through *N.J.A.C.* 6:3-4.3 and to the requirements of *Passaic*.

Upon careful and independent review of the record in this matter, which did not include a transcript of the hearing conducted at the OAL, the Commissioner determines to affirm the Initial Decision, with clarification, as set forth below.

Initially, the Commissioner concurs with the ALJ's finding that "the inclusion of school-wide or grade-wide goals in addition to other choices which are made in collaboration between the teacher and the supervisor does not unduly circumscribe the role of the teacher" in

developing his/her PIP. (Initial Decision at 6) Based on the Board's unrefuted testimony, petitioner has not proven that teachers in the Pearl R. Miller School, the Special Education Department, the Kiel School and the Stoneybrook School are improperly restricted in the development of their individual PIP by predetermined topics and goals for their professional improvement. In this connection, the Commissioner stresses that recognition of school or district-wide goals in the development of a PIP is certainly not prohibited; indeed, such recognition may well shape perceptions of deficiency, or desirable professional development, with regard to individual staff members. However, while school or district-wide goals and objectives may be infused into a PIP through their relationship to individually developed action and activity plans, they may not be substituted for these, nor serve to foreclose other aspects of need and development. *See N.J.A.C.* 6:3-4.3(h)3.

With respect to the ALJ's finding that the format used by the Board is in violation of the pertinent regulations for developing professional improvement plans because "it does not specifically provide for a delineation of the District's responsibilities" (Initial Decision at 7), the Commissioner clarifies that this finding need not necessarily be read to invalidate the PIP format currently used by the Board, but, rather, to direct that such district responsibilities for implementing the PIP be *explicitly stated within the document* (*see N.J.A.C.* 6:3-4.3(h)3), rather than implicit in the nature of the particular goal or objective, or "assumed" by virtue of the supervisor's signature on the PIP. (*Ibid.*) As directed by *Passaic*, "[a]ll professional improvement plans shall contain the responsibilities of the school district for the implementation thereof." *Passaic, supra,* Slip Opinion at 8.[1]

[1] For example, utilizing the Board's current form, the "activities" section might include both individual and district responsibilities relative to each goal.

Accordingly, the Initial Decision is affirmed, as clarified above, for the reasons expressed therein.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5|18|01

Date of Mailing: 5|18|01

[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.

161-01R

BOARD OF EDUCATION OF THE BOROUGH OF BRADLEY BEACH, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

May 22,2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6809-00
(ON REMAND EDU 4975-99)

BOARD OF EDUCATION OF THE BOROUGH OF BRADLEY BEACH, MONMOUTH COUNTY,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,
Respondent.

Christopher B. Parton, Esq., on behalf of petitioner (Kenney, Gross, Kovats and Campbell, attorneys)

Jack S. Senechal, Deputy Attorney General, on behalf of respondent (John J. Farmer, Jr., Attorney General of New Jersey, attorney

Record Closed: April 16 2001 Decided: April 16 2001

BEFORE **SOLOMON A. METZGER,** ALJ:

This matter arises out of a remand. The parties have now reached a settlement, which is annexed. Having reviewed the terms of the settlement and it appearing that it was entered into voluntarily and fully disposes of all issues in controversy, I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** 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.

4/16/01
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

4-18-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 19 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/caa

OAL DKT. NOS. EDU 6809-00 and 4975-99 (ON REMAND)
AGENCY DKT. NO. 114-5/99

BOARD OF EDUCATION OF THE BOROUGH OF BRADLEY BEACH, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION ON REMAND
RESPONDENT.	:	

The record, Initial Decision and Consent Order/Settlement Agreement returned by the Office of Administrative Law have been reviewed in this matter on remand. 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: 5|22|01

Date of Mailing: 5|22|01

162-01

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION 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

May 23, 2001

OAL DKT. NO. EDU 9462-00
AGENCY DKT. NO. 331-9/00

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION 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

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: 5|23|01

Date of Mailing: 5|23|01

163-01

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

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,
(IN THE MATTER OF THE DISTRICT'S SUPPLEMENTAL AID APPLICATION),

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

May 23, 2001

OAL DKT. NO. EDU 7611-00
AGENCY DKT. NO. 280-8/00

BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY, PETITIONER, V. NEW JERSEY STATE DEPARTMENT OF EDUCATION, **(IN THE MATTER OF THE DISTRICT'S SUPPLEMENTAL AID APPLICATION)** RESPONDENT.	COMMISSIONER OF EDUCATION DECISION

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: 5|23|01

Date of Mailing: 5|23|01

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

BOARD OF EDUCATION OF THE CITY OF PASSAIC,	OAL DOCKET NO. EDUOT 07611-00N
	APR 16 3 07 PM '01
Petitioner,	Agency Ref. No. 280-8/00
v.	
NEW JERSEY DEPARTMENT OF EDUCATION,	**CONSENT ORDER OF SETTLEMENT**
Respondent.	

Petitioner, Board of Education of the City of Passaic ("Petitioner"), through its Attorney, Richard E. Shapiro, Esq., LLC, (Richard Shapiro, appearing), and Respondent, New Jersey Department of Education ("DOE"), through its attorney, the Honorable John J. Farmer, Jr., Attorney General of the State of New Jersey (Michael C. Walters, Deputy Attorney General, appearing), hereby stipulate to the following terms of settlement:

1. On or about August 4, 2000, Petitioner filed a Verified Petition of Appeal ("Verified Petition") with the Commissioner of Education seeking review of the DOE's determination which denied funding and approval for the following positions at the Passaic High School during the 2000-2001 school year; (1) full time clerical position - Office of Prevention and Intervention and (2) Computer Lab Aide for the Science/Math Lab.

2. The Verified Petition was subsequently transferred to the Office of Administrative Law as a contested case.

3. The parties thereupon entered into discussions to amicably resolve this matter in the public interest.

4. Based on those discussions, the DOE agreed that Petitioner has demonstrated a need for a full-time clerical position in the Office of Prevention and Intervention and a Computer Lab Aide for the Science/Math Lab for the 2000-2001 and 2001-2002 school years.

5. Petitioner agrees that supplemental funding, at this time, is unnecessary for implementation of the above-listed positions during the 2000-2001 school year.

6. Petitioner agrees to demonstrate to the DOE that there is a continued need for the above-listed support positions at the Passaic High School and that the above-listed support positions have facilitated the ability of professional staff in the Office of Prevention and Intervention and the Science/Math Lab, respectively, to enable students to achieve the Core Curriculum Content Standards. Petitioner shall make said demonstration using student information obtained during the 2000-2001 and 2001-2002 school years at the Passaic High School. Said demonstration is due to the DOE on December 1, 2001 as part of the Passaic High School's 2002-2003 school year Whole School Reform plan and school based budget.

7. The Petitioner agrees to dismissal with prejudice of the Verified Petition For Appeal (OAL Docket No. EDUOT 07611-00N; Agency Ref. No. 280-8/00) pending before the Office of Administrative Law and the Commissioner of Education.

8. 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(A), if Petitioner is unable to implement the above-listed positions due to fiscal constraints.

9. 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

MICHAEL C. WALTERS, DAG

DATED: 4/11/01

RICHARD E. SHAPIRO, ESQ., LLC
Attorney for Petitioner,
Board of Education of the
City of Passaic, New Jersey

RICHARD E. SHAPIRO, ESQ.

DATED: 4/13/01

SO ORDERED THIS _____ DAY OF _____ 2000.

_____
HONORABLE STEPHEN G. WEISS, A.L.J.

164-01

IN THE MATTER OF THE TENURE :
HEARING OF JOHN H. YOUNG, :
SCHOOL DISTRICT OF THE CITY OF :
ORANGE TOWNSHIP, ESSEX COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning school district filed tenure charges of inefficiency against respondent, an assistant principal in its employ, alleging, *inter alia*, that respondent failed to perform certain administrative duties, follow proper procedures and perform other duties. Respondent denied all charges.

After three days of hearing at the Office of Administrative Law (OAL), the parties reached a settlement, which was memorialized in an agreement attached to the ALJ's decision approving the settlement.

Upon review, the Commissioner rejected the settlement and remanded the case to the OAL, concluding that the settlement failed to include an explanation of the circumstances justifying the settlement, or demonstrate why the agreement is in the public interest as required by rule.

May 24, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT

OAL DKT. No. EDU 7214-00
AGENCY DKT. NO. 198-6/00

IN THE MATTER OF THE TENURE HEARING OF JOHN H. YOUNG, CITY OF ORANGE TOWNSHIP SCHOOL DISTRICT, ESSEX COUNTY,

---

Joseph R. Morano, Esq., for petitioner (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Charles I. Auffant Esq., for respondent

Record Closed: April 12, 2001 Decided: April 17, 2001

BEFORE **STEPHEN G. WEISS,** ALJ:

This tenure case was transmitted to the Office of Administrative Law (OAL) by the Department of Education on August 3, 2000 following the filing of certified tenure charges by the Board of Education of the School District of Orange versus John H. Young, a tenured assistant principal. The charges against Young included, *inter alia*, allegations of failure promptly to perform certain administrative duties, to follow proper procedures and to perform other delegated duties. Following the filing of an Answer denying the charges the matter, as noted above, was transmitted to the OAL. The hearing commenced in November 2000 and following three days of hearing the case was adjourned in order to permit the parties seriously to pursue ongoing settlement discussions. New hearing dates in January 2001 were then adjourned as a result of those discussions.

Counsel and their respective clients have advised that the parties have reached agreement with respect to an amicable resolution of the matter. To that end a Settlement Agreement Release has been submitted to me and which contains the signatures of the Superintendent of Schools, Board Secretary, the respondent and his attorney. The agreement essentially provides that Young will resume his duties as an Assistant Principal at the Orange Middle School rather than at Orange High School at a salary equal to that which he would have received as a high school Assistant Principal. In addition, Young is to receive compensation for the one hundred and twenty (120) days between June and October 2000 wherein his salary had been withheld. The parties have also agreed to drop any and all claims each has or may have against the other, including the within certified tenure charges.

Based upon my review and consideration of the matters at issue in this case, and having heard partial testimony with respect to the charges, I believe that the settlement is a fair and appropriate one and should be approved.

I have reviewed the Stipulation of Settlement and Dismissal which is attached hereto and **FIND** as follows:

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

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

Therefore, I **ORDER** that the parties comply with the terms of the settlement 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.

April 17, 2001
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

4/20/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 23 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

\mvh

C; JRM

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
APR 12 4 01 PM '01

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLP
Ten James Street
Florham Park, New Jersey 07932
TEL. (973) 301-0001; FAX (973) 301-0203
Attorneys for City of Orange Township Board of Education

IN THE MATTER OF THE TENURE HEARING OF JOHN H. YOUNG, CITY OF ORANGE TOWNSHIP SCHOOL DISTRICT, ESSEX COUNTY.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY DKT. NO. 198-6/00 OAL DKT. NO. EDU 7214-00 **SETTLEMENT AGREEMENT AND RELEASE**

This Settlement Agreement is made by and between John H. Young who resides at 1608 Montgomery Street, Rahway, New Jersey and the City of Orange Township Board of Education (hereinafter "the Board"), with offices located at 451 Lincoln Avenue, Orange, New Jersey. In consideration of the mutual promises and undertakings contained in this Agreement, and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned state:

WHEREAS, John H. Young is a tenured employee of the Board, having been employed as an assistant principal by the Board since on or about September 1, 1994; and

WHEREAS, the Board certified tenure charges against John H. Young to the Commissioner of Education captioned: *In the Matter of the Tenure Hearing of John H. Young, City of Orange Township School District, Agency Dkt. No. 198-6/00*; and

WHEREAS, the parties have worked cooperatively in an effort to reach an amicable resolution of their differences; and

WHEREAS, this amicable resolution of the pending tenure matter shall not be construed as an admission of wrongdoing by either party;

IT IS on this 10th day of April 2001, agreed that:

1. John H. Young will resume his duties as assistant principal in the Orange Public Schools, but at the Orange Middle School, rather than the High School, with such placement

to be effective upon execution of this settlement agreement. For tenure purposes, Mr. Young's employment at the Middle School shall be treated as a voluntary transfer.

2. John H. Young's salary will not be reduced as a result of his reassignment by the District to an assistant principal position at the Orange Middle School. Mr. Young shall continue to be paid and receive the same benefits and emoluments as an Assistant Principal - High School.

3. John H. Young shall receive the amount of $29,518.22, which represents compensation for 120 calendar days of employment commencing on or about June 14, 2000 and ending on or about October 14, 2000, subject to the usual payroll deductions unless otherwise directed by the Court. Payment of this amount shall be released to Charles Auffant, Esq., attorney for John H. Young, within seven business days of approval of the settlement by the Commissioner of Education. By signing this agreement, Mr. Young authorizes the board to make payment to Mr. Auffant.

4. Mr. Young shall receive his full salary increment for the 2001-2002 school year.

5. John H. Young and the Board hereby release, abandon, surrender, and waive any and all other claims to damages, salary, benefits, back pay, recoupment of monies or any other civil/administrative claim or cause of action, whether known or unknown, against one another, as well as against the Board's agents, employees, servants and Board members individually and collectively.

6. The Board agrees to withdraw the certified tenure charges against John H. Young captioned: *In the Matter of the Tenure Hearing of John H. Young, City of Orange Township School District, Agency Dkt. No. 198-6/00* with prejudice upon execution of the Settlement Agreement and Release by the parties.

7. Should the Commissioner refuse to approve the within settlement, then this Agreement shall be null and void and the subject charges shall continue in full force and effect.

8. John H. Young acknowledges that he has consulted with an attorney of his own choosing prior to signing this Agreement, and that he signs this Agreement and Release as his

own voluntary act and deed, and that he fully understands the duties and obligations enumerated herein.

9. 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.

10. This Agreement is subject to approval by the Board, by an appropriate resolution. In the event that this Agreement is not ratified by the Board, it shall be null and void.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

WITNESS:

Charles Auffant, Esq.

John H. Young

Dated:_____

WITNESS:

Ronald Lee,
Board Secretary/Business Administrator

Dr. Columbus Salley, Superintendent

Dated: 4/10/21

OAL DKT. NO. EDU 7214-00
AGENCY DKT. NO. 198-6/00

IN THE MATTER OF THE TENURE HEARING OF JOHN H. YOUNG, SCHOOL DISTRICT OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter, Initial Decision of the Office of Administrative Law(OAL) and the Settlement Agreement and Release 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.

Here, the proposed settlement fails to include an explanation of the circumstances justifying the settlement or to demonstrate why the agreement is in the public's interest. It is

well-established that, having once taken up the burden of tenure charges, the District may not lay it down without setting forth in 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 Smith, School District of the City of Orange, Essex County*, Commissioner Decision No. 90-82, decision on remand, 1983 *S.L.D.* 420, *aff'd with modification* by the State Board of Education November 2, 1983, 1983 *S.L.D.* 489, *aff'd* N.J. Superior Court, Appellate Division, January 30, 1986.

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*.

Accordingly, the proposed settlement is rejected for the reasons expressed herein. The Commissioner hereby remands this matter to the OAL for further revision of the documents and expansion of the record, 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 a hearing on the merits.[1]

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5|24|01

Date of Mailing: 5|24|01

[1] Additionally, should the parties agree to a revised agreement on remand of this matter, the record should include an indication that the revised terms have been approved by the Board of Education. *N.J.A.C.* 6A:3-5.6(b).

[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.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

165-01

J.M., on behalf of minor child, S.C.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning mother, J.M., challenged the Board's residency determination that her son, S.C., was not domiciled in West Orange Township because he spent equal time with his grandmother, J.P., in Boonton.

The ALJ concluded that S.C. may have had two residences, but by operation of law, his domicile was in West Orange, which was the domicile of his mother who had legal custody. The matter did not implicate *N.J.S.A.* 18A:38-1b(1), the "affidavit student" provision. Thus, the ALJ concluded that S.C. was domiciled in the Township of West Orange during the time he attended the West Orange School District and he was entitled to a free education as provided by *N.J.S.A.* 18A:38-1.

The Commissioner concurred with the ALJ that S.C. was entitled to attend school in the District pursuant to N.J.S.A. 18A:38-1a; neither S.C.'s overnight visits to his grandmother's home in Boonton, nor, under the instant circumstances, his physical relocation to Parsippany, which was not addressed by the ALJ, impaired that right, as long as his mother was a domiciliary of West Orange. The Commissioner, however, remanded the matter to the OAL solely for additional fact-finding as is necessary to determine the date on which J.M. was no longer domiciled in West Orange but had moved to Parsippany and the amount of tuition, if any, which might be due West Orange as a result.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1061-00
AGENCY DKT. NO. 347-1199

J.M ON BEHALF OF MINOR CHILD S.C.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,
Respondent.

J.M., *pro se*

Stephen J. Christiano, Esq., for respondent

Record Closed: January 15, 2001 Decided: April 6, 2001

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appealed the determination of respondent West Orange School District (District) to remove her son S.C. from the public schools because he was not domiciled in the Township of West Orange.

On January 5, 2000, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. A hearing was held on January 8, 2001. The parties submitted post hearing briefs and the record closed on January 20, 2001. An order of extension was granted for filing the Initial Decision to April 20, 2001. *N.J.S.A.* 52:14B-10(c); *N.J.A.C.* 1:1-18.8.

FACTS

Based on the evidence I **FIND**:

1. In 1993, J.M., age 15, gave birth to S.C. They resided in West Orange with J.P., the mother of J.M.
2. In 1995, J.M., her son and J.P. moved to Bloomfield, New Jersey.
3. In 1997, J.M. returned to West Orange and resided with relatives. S.C. lived with his mother three to four days per week and stayed with his grandmother, who had moved to Boonton, New Jersey, during the remainder of the week.
4. In September 1998, S.C. was enrolled in the Boonton public schools.
5. On September 15, 1998, Boonton Township Board of Education contacted J.M. about her residency. The letter states in part:

> It has come to our attention that you may not live in this district and you should enroll [S] in the school district where you reside...[The] Board of Education policy requires the parents or guardians to reside in the township...
>
> If you would like for us to consider [S] as a tuition student, the Board policy concerning tuition students in enclosed....
>
> [P-2]

6. After discussions with the Boonton school district, S.C. was transferred to the West Orange school district where he completed kindergarten.
7. In September 1999, S.C. repeated kindergarten.

8. On November 22, 1999, West Orange Board of Education contacted J.M. about her son's residency. The letter states in part:

> Based on our findings that your [S] does not domicile in West Orange, you must remove him from the West Orange Public Schools by November 24, 1999.
>
> If you wish to appeal this decision and can present proof that you and your children are domicile in the township, please contact my office...
>
> [P-3].

ISSUE

The issue is whether S.C. domiciled in the Township of West Orange with his mother or in Boonton with his grandmother?

Position of the Parties

J.M. asserts that S.C. lived in West Orange, New Jersey, with her mother who was actively involved in his upbringing. Although S.C. spent time with J.P., he spent equal time with her in West Orange. In a letter to the school district dated November 24, 1999 and at the hearing J.M. testified about the family circumstances as follows:

> Due to the fact that I was 15 when my son [S] was born we have to live with my mother and she had a great deal of responsibility for my son as well as most of the financial responsibility, but I retain legal custody.
>
> Up until 1½ years ago we all lived together but when my mother moved to Boonton Township she kept my son while I went out on my own to attempt to set up an apartment for my son and myself. This turned out to be finically impossible, but I could no longer go back with my mother who now only had two bedrooms, so I moved in with my father in West Orange. Since my son predominately resided with my mother in Boonton Township, we enrolled him there for school. After finding out our situation Boonton township stated either my mother needed to take legal custody or [S] needed to go to school in the town which I, his legal guardian, lived; so at that time we moved him to West Orange because we found the circumstances of my mother taking custody to be extremely distasteful in that she would have to go to court and attempt to prove me an unfit mother, which was not the case....

> Now, West Orange has put him out of school effective today...His schedule is as follows: West Orange- Friday, Saturday, Sunday and Wednesday nights. Boonton Township- Monday, Tuesday and Thursday nights.
>
> [R-4]

J.M. and J.P. each testified that since J.M. worked varied hours in Woodbridge, New Jersey, and J.P. worked in West Orange she could easily transport S. to school from Boonton and West Orange. J.M. maintained that she is S.C.'s legal guardian and is actively involved in his upbringing.

The District argues that S.C. domiciled in Boonton with his grandmother J.P. Thus, he was not entitled to a free education in the West Orange public schools. The District relies on the conduct of the J.P. and J.M. For example, S.C. lived with J.P. three out of five school nights. Moreover, respondent noted a letter dated January 9, 2001, in which J.P. conceded, "she takes care of all the arrangements concerning [S.C.'s] welfare." See Respondent's Post Hearing Letter dated January 17, 200.

In her letter J.P. further states:

> Dear Mr. Christiano:
>
> [You alluded to several times...that I take care of all the arrangements concerning S's welfare, not [J.M.], since she is now a 23 year old adult. The reason for this is that [J] suffers all the same learning disabilities as her son; the ADHA (more specifically ADD). Retention deficit, also a strong propensity to not be able to follow through with what she has begun. She has proven herself incapable of getting for [S], all the attention and help he needs. This is why I do it all, but with her input and approval.
>
> [Letter to Stephen Christiano, Esq.]

LEGAL DISCUSSION AND CONCLUSIONS

The district implicitly asserts that under *N.J.S.A.* 18A:38-1(b)(1) S.C. is domiciled with J.P. *N.J.S.A.* 18A:38-1(b)(1) states reads, in pertinent part:

> 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 in the District and is supporting the child *gratis* and will assume all personal obligation 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 a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parents 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 economical hardship and that the child is not residing with the resident of the District solely for the purposes of receiving a free public education in the District. The statement shall be accompanied by documentation to support the validity of the sworn statement, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child.

Thus, the purpose of the domicile requirement is to prevent pupils from living with a person who is not the parent or guardian in order to obtain the benefit of a free education in a district other than that of their parent's domicile. Here, J.M is not seeking to satisfy the requirements of *N.J.S.A.* 18A:38-1(b)(1).

Generally, 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. *Mercandante v. City of Paterson*, 111 *N.J.Super.* 35, 39 (Ch. 1970), *aff'd,* 58 *N.J.* 112 (1971); *see also Matter of Unanue,* 255 *N.J.Super.* 362, 374 (1991) (citing *Kurilla v. Roth,* 132 *N.J.L.* 213, 215 (Sup. Ct. 1944)) (explaining that "[i]n 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"). An individual may acquire a domicile by birth or place of origin, through the choice of a person legally capable of choosing his or her domicile, by operation of law in the case of a person who lacks capacity to acquire a new domicile by choice. *In re estate of Gillmore*, 101 *N.J.Super.* at 87.

The domicile of a minor child follows that of his parents. *See V.R. on behalf of A.R. v. Bd. of Ed. of Hamburg*, 2 *N.J.A.R.* 283, 286. Because S.C. is a minor child who lacked the capacity to choose his own domicile, his domicile is by operation of law. Thus, while the S. resides for part of the week with his grandmother, who is also actively helping to raise the child, he is domiciled with his mother.

The domicile of a child for school purposes is generally that of the natural father. *Board. of Educ. Little Egg Harbor v. Bds. of Educ., etc.*, 145 *N.J.Super.* 1, 12 (App. Div. 1975) (Morgan, J.A.D., dissenting), *rev'd per curium, 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)). The evidence reveals that J.M., single parent, was domiciled in West Orange and that S.C. resided with his mother in West Orange for at least half of each week. Moreover, J.M. has legal custody of her son and exercises control over his life. Although S.C. receives support and maintenance from his grandmother, the arrangement does not alter J.M.'s legal custody of her child, nor does it demonstrate that J.M. has relinquished actual control over raising her son. S.C. may have had two residences, but by operation of law, his domicile was in West Orange, which was the domicile of his mother.

Based on the whole of the evidence, I **CONCLUDE** that S.C. was domiciled in the Township of West Orange during the time he attended the West Orange School District. Thus, I **CONCLUDE** that S.C. was entitled to a free education as provided by *N.J.S.A.* 18A:38-1.

ORDER

I **ORDER** that the petition filed by J.M. to permit S.C. to attend school in the West Orange School District is **GRANTED.** Further, I **ORDER** that the District's claim for payment of tuition is hereby **DISMISSED WITH PREJUDICE.**

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (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, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 6, 2001
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

4-12-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 17 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 1061-00
AGENCY DKT. NO. 347-11/99

J.M., on behalf of minor child, S.C.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions were submitted in accordance with *N.J.A.C.* 1:1-18.4.

In its exceptions, the Board notes that the Initial Decision fails to indicate that, beginning in December of 1999, S.C. became a full-time resident of Parsippany, but he nevertheless continued to attend school in its District until June 2000. Yet, the Board points out that the record contains a writing from J.P., S.C.'s grandmother, which suggests that J.M., S.C.'s mother, did not move to Parsippany with him in December of 1999. J.P. wrote:

> [J.M.] DIDN'T move into Parsippany in December [1999] with myself, my husband, and her son, because her room was still under construction. She didn't move in until the end of May (I've attached a copy of the receipt for the rental truck we used to move her, which I realize is not proof of anything, just a point of reference). *** (emphasis in text) (Letter from J.P., January 9, 2001, cited in part in the Board's Exceptions at 2)

Additionally, the Board maintains that, prior to S.C.'s move to Parsippany, he slept in Boonton, at J.P.'s home, three out of five school nights. The Board argues:

> Where the child spends the majority of the school week is where the child should attend school. The fact that the Boonton Board of Education ("BBOE") misstates the law on school residency to petitioner (P-2) is not a reason for the West Orange taxpayers to shoulder the school costs of S.C. It appears that the BBOE never made an inquiry as to the potential existence of a hardship on the part of petitioner. *** (Board's Exceptions at 2-3)

Thus, the Board reasons that petitioner should be assessed tuition for the 1998-99 school year (*id.* at 3), or, at the very least, for the period of S.C.'s ineligible attendance from December 1999 to June 2000. (*Id.* at 2)

Upon careful and independent review of the record in this matter, the Commissioner concurs that petitioner has demonstrated that S.C. was entitled to attend school in the Board's District, free of charge, pursuant to *N.J.S.A.* 18A:38-1a, for the period of time that she, J.M., was domiciled in West Orange. In so finding, the Commissioner notes that although the Initial Decision fails to account for S.C.'s move to Parsippany in December of 1999, *his* move, under these circumstances, has no effect on the outcome of this matter.

Initially, as the ALJ observed, this matter does not implicate *N.J.S.A.* 18A:38-1b(1), the "affidavit student" provision; if S.C. was attending school in the district where his parent was domiciled, he was entitled to a free education in that district. *N.J.S.A.* 18A:38-1a. Thus, the *only* inquiry to be made by the respondent Board, both *before and after* S.C.'s move to Parsippany, was whether S.C.'s mother was a domiciliary of West Orange. Interestingly, the Board *does not dispute* that J.M. was, in fact, domiciled in West Orange for the predominant period of S.C.'s attendance in the District. Furthermore, the Commissioner recognizes that:

> Persons legally incapable of choosing domicile acquire domicile by operation of law. [*In re Estate of*] *Gillmore*, 101 *N.J. Super.* [77 App. Div. 1968] at 87. Under the common law, the domicile of a child was said to follow that of the father "until the child is emancipated and chooses a residence of its own." *Mansfield Twp. v. State Bd. of Educ.*, 101 *N.J.L.* 474, 478 (Sup. Ct. 1925). *** In

> more modern language, a child's domicile is equated with the domicile of the parent or guardian "having legal control of the child." *Mansfield Twp.*, at 479. *Clifton Board of Education v.Sauro*, 96 *N.J.A.R.*2d (EDU) 497 (1996) at 500.

Consequently, what the Boonton Board of Education apparently recognized, but the respondent Board still does not, is that, based on the aforementioned principle, S.C., as a minor child, could not choose his own domicile, and his domicile, therefore, *followed* that of his mother, who has legal custody of him.[1] As long as J.M. was domiciled in West Orange, her child was entitled to attend school in the District free of charge. *N.J.S.A.* 18A:38-1a. This is so, notwithstanding that S.C. may have, at one time, slept "60% of the school week in Boonton" with his grandmother, as the Board alleges, or even perhaps 100% of the school week in Parsippany, since there is *nothing* in the record before the Commissioner to indicate that petitioner and her mother were attempting to defraud the West Orange Board. Indeed, one can only conclude from this record that both were merely attempting to secure an education for S.C., in whichever district he was entitled to it, under challenging financial and familial circumstances. Notably, the Board cites to *no* legal authority for its convenient and simplistic declaration that "[w]here the child spends the majority of the school week is where the child should attend school." (Board's Exceptions at 2)[2]

---

[1] Exhibit P-2, a letter to petitioner from Superintendent/Principal of the Boonton Township School District David Gidich states, *inter alia*, "It has come to our attention that you may not live in this district and you should enroll [S.] in the school district where you reside." (Letter from David Gidich, September 15, 1998) Petitioner confirms that her mother was told by Mr. Gidich that "New Jersey statute stated that a child must attend school in the town of domicile of his parent or legal guardian." (Exhibit P-1)

[2] In this connection, the Commissioner finds particularly disturbing the following attestation from petitioner:

> My mother spent many hours on the phone and some in person, with Josefa Lopez of the West Orange Bd. of Education Central Office in an attempt to rectify the situation and make clear to her that we were not in West Orange illegally as she had decided was the case, but that we had come there ONLY because Boonton Township had told us that this was where we belonged.
>
> Mrs. Lopez disagreed with what Boonton Township said about a child attending the district that his parent or legal guardian resides in and said it should be the town that the child resides in. My mother attempted to explain to her that [S.] actually lived equal amounts of time in both towns, AND that his mother resided full-time in West Orange. At that point the truant [officer] was brought in, in an attempt to disprove that [S.] spent equal time in West Orange. When that wasn't

Therefore, on these facts, the Commissioner finds that S.C.'s physical relocation to Parsippany for the portions of time he resided with his grandmother was of no legal consequence where his mother remained a domiciliary of West Orange. However, at the point petitioner moved from West Orange to Parsippany, S.C. was, most likely, no longer entitled to attend school in the District free of charge. While the parties appear to acknowledge that J.M., in fact, moved to Parsippany at some point, the record before the Commissioner does not permit a determination as to the precise date when J.M. was no longer domiciled in West Orange.

Accordingly, the Commissioner adopts the Initial Decision of the ALJ for the reasons expressed therein and amplified above, and remands this matter to the OAL *solely* for additional fact-finding as is necessary to determine the date on which J.M. was no longer domiciled in West Orange and the amount of tuition, if any, which may be due the Board as a result.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 5|24|01

Date of Mailing: 5|24|01

---

disproved, we were told that he didn't belong in West Orange, because he spent more SLEEPING time in West Orange and more awake time in Boonton Township and that besides that, it wasn't healthy for him to be transported that distance daily to and from school! (emphasis in text) (Exhibit P-1)

[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.

165-01

EDU # 1061-00
C # 165-01
SB # 19-01

J.M. ON BEHALF OF MINOR CHILD, S.C., :

PETITIONER-RESPONDENT, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY, :

RESPONDENT-APPELLANT. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, May 24, 2001

For the Respondent-Appellant, Stephen J. Christiano, Esq.

For the Petitioner-Respondent, J.M., pro se

J.M. (hereinafter "petitioner") challenged a determination by the Board of Education of the Township of West Orange (hereinafter "Board") that her son was not entitled to a free public education in the district. In a decision issued on May 24, 2001, the Commissioner of Education concluded that J.M.'s son was entitled to attend school in West Orange pursuant to N.J.S.A. 18A:38-1a. The Commissioner, however, remanded the matter to the Office of Administrative Law for additional proceedings to determine when the petitioner ceased to be domiciled in West Orange and the amount of tuition, if any, that might be due to the Board as a result.

On June 27, 2001, the Board filed a notice of appeal to the State Board.[1] By letter dated July 2, 2001, the Director of the State Board Appeals Office acknowledged receipt of that notice and advised the counsel for the Board that:

> ...N.J.S.A. 18A:6-28 requires that an appeal to the State Board of Education must be taken within 30 days after the Commissioner has filed his decision. See N.J.A.C. 6A:4-1.3(a). Pursuant to N.J.A.C. 6A:4-1.4(a), "[a] decision of the Commissioner...shall be deemed filed three days after the date of mailing to the parties." In this instance, the date of mailing of the Commissioner's decision was May 24, 2001, so that your notice of appeal was required to be filed by June 26, 2001. See N.J.A.C. 6A:4-1.6.
>
> Since your notice was not filed by that date, N.J.A.C. 6A:4-1.5(a), this matter is being referred to the Legal Committee for consideration of the effect of your failure to file a timely appeal. If you wish to file an affidavit setting forth the circumstances of your late filing, you must do so by July 13, 2001.

On July 9, 2001, the counsel for the Board submitted an affidavit in support of the filing date of the appeal. In his certification, counsel acknowledged his responsibility for the late filing and indicated that he had "thought (incorrectly) that the date of filing (May 27), as it fell on a Sunday, would become effective on May 29, the day after Memorial Day. I was thus computing the 30-day appeals period from May 29."

Pursuant to N.J.S.A. 18A:6-28, appeals to the State Board must be taken "within 30 days after the decision appealed from is filed." The State Board may not grant extensions to enlarge the time specified for appeal. N.J.A.C. 6A:4-1.5(a). In contrast to the period for filing petitions to the Commissioner of Education, see N.J.A.C. 6A:3-1.3(d); N.J.A.C. 6A:3-1.16, the time limit within which an appeal must be taken to

---

[1] The notice of appeal was dated June 27, 2001 and included a certification from the counsel for the Board indicating that it was also mailed on that date. Hence, pursuant to N.J.A.C. 6A:4-1.6(b), it was considered filed on June 27.

the State Board is statutory, and, given the jurisdictional nature of the statutory time limit, the State Board lacks the authority to extend it. Mount Pleasant-Blythedale Union Free School District v. New Jersey Department of Education, Docket #A-2180-89T1 (App. Div. 1990), slip op. at 5. The Appellate Division has "consistently concluded" that appeals must be timely filed and that "neither an agency nor our court on appeal may expand a mandatory statutory time limitation." In the Matter of the Special Election of the Northern Burlington County Regional School District, Docket #A-1743-95T5 (App. Div. 1996), slip op. at 3, citing Scrudato v. Mascot Sav. & Loan Ass'n, 50 N.J. Super. 264 (App. Div. 1958).

As the Court explained in Scrudato, supra, at 269: "Where a statute sets up precise time limits within which an aggrieved party may seek recourse to administrative adjudication, those limits have been held mandatory and not subject to relaxation. The agency is without power to waive them and proceed to hearing and determination notwithstanding noncompliance." The Court in Scrudato found that the fact that an application to the Commissioner of Banking and Insurance was filed only two days after the statutory deadline for such filing did not mitigate the invalidity of such action. The Court stressed that "[e]ven a minor deviation from the statutory limit in a particular case is fatal....This is not a mere technicality, but fundamental to the proper and necessary restraint of the exercise of judicial and administrative discretion. The remedy for results that either tribunal may deem unjust or unwise lies not in disregard of the statutory limitation, but in corrective legislation." Id. at 271.

In Schaible Oil Co. v. New Jersey Dept. of Envtl. Protection, 246 N.J. Super. 29 (App. Div. 1991), certif. denied, 126 N.J. 387 (1991), the Court stressed that "[f]irmly

embedded in our law is the principle that '[e]nlargement of statutory time for appeal to a state administrative agency lies solely within the power of the Legislature...and not with the agency or the courts.' Hess Oil & Chem. Corp. v. Doremus Sport Club, 80 N.J.Super. 393, 396, 193 A.2d 868 (App. Div. 1963), certif. denied, 41 N.J. 308, 196 A.2d 530 (1964) (citations omitted)...."

In Yorke v. Board of Education of the Township of Piscataway, decided by the State Board of Education, July 6, 1988, aff'd, Docket #A-5912-87T1 (App. Div. 1989), the Court upheld the dismissal of an appeal by the State Board where it found that the notice of appeal had been filed one day late by the appellant's counsel, who alleged that he had misread or misunderstood the applicable regulations. The Court added that even if the statute could be construed to permit enlargement of the time for filing an appeal, the appellant therein had failed to establish good cause. See also In the Matter of the Grant of the Charter School Application of the International Charter School of Trenton, etc., Docket #A-004932-97T1 (App. Div. 1998) (the Court, upon reconsideration, upheld the State Board's dismissal of an appeal filed one day late).

In the instant case, the Commissioner's decision was rendered on May 24, 2001 and mailed on that date. Accordingly, pursuant to N.J.A.C. 6A:4-1.4(a), the decision appealed from was deemed filed on May 27, 2001, three days after it was mailed. Therefore, as mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6A:4-1.3(a), the Board was required to file its notice of appeal with the State Board on or before June 26, 2001. As previously indicated, the Board's notice of appeal was not filed until June 27.

Even if N.J.S.A. 18A:6-28 can be construed to provide us with the authority to enlarge the time limit for filing an appeal, we find no substantive basis to warrant doing

so in this particular instance. Our regulations are clear that a decision of the Commissioner "shall be deemed filed three days after the date of mailing to the parties," N.J.A.C. 6A:4-1.4(a), and that an appeal must be filed "within 30 days of the filing date of the decision from which appeal is taken," N.J.A.C. 6A:4-1.3(a). See also N.J.S.A. 18A:6-28 ("An appeal to the state board shall be taken in the manner prescribed by rules of the board, within 30 days after the decision appealed from is filed....") Since the Commissioner's decision was mailed on May 24, 2001, it was deemed filed on May 27, and the notice of appeal was required to be filed 30 days thereafter, by June 26.

Accordingly, we dismiss the appeal in this matter for failure to file notice thereof within the statutory time limit as computed under the applicable regulations.

August 1, 2001

Date of mailing AUG 03 2001

166-01

BERIL V. STEWART-RANCE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE ESSEX COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning nontenured teacher challenged the Board's nonrenewal of her contract for the 1999-2000 academic year. Petitioner contended that the Board discriminated against her on the basis of race or national origin. An administrative hearing commenced, the proceeding was interrupted due to an aborted settlement, and petitioner sought to start over again in a different forum. The Board moved to dismiss the petition for lack of prosecution when petitioner failed to continue with the presentation of evidence at the administrative hearing scheduled for April 9, 2001 and asked to withdraw her petition.

The ALJ concurred with the Board that the case must continue in the administrative forum since the Board had invested time and money in the administrative hearing, and the Superior Court already dismissed her parallel complaint "with prejudice," leaving petitioner no place else to go. Moreover, given the time that has already passed, the Board should not be subjected to further delay of its opportunity to demonstrate that the allegations against it were groundless. Citing *Aldrich*, the ALJ noted that withdrawal of the pending OAL action should not automatically be permitted in cases where the parties are in the middle of a hearing. The ALJ ordered the petition dismissed with prejudice.

The Commissioner adopted findings and determination in the Initial Decision as his own. The Commissioner additionally noted that petitioner failed to meet the standards for the grant of a stay of proceedings at OAL pending appeal to the Appellate Division. Petition was dismissed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11044-99
AGENCY DKT. NO. 238-8/99

BERIL V. STEWART-RANCE,
Petitioner,
v.
BOARD OF EDUCATION OF THE ESSEX COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT,
Respondent.

Eldridge Hawkins, Esq., for petitioner

Nicholas Celso III, Esq., and **Marc H. Zitomer,** Esq., for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: April 9, 2001 Decided: April 10, 2001

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is a suit by a non-tenured teacher who challenges the non-renewal of her teaching contract for the 1999-2000 academic year. Basically, the issue is whether respondent Board of Education of the Essex County Vocational-Technical School District ("Board") discriminated against petitioner on the basis of race or national origin when it declined to renew her teaching contract after her third year of teaching. When petitioner Beril Stewart-Rance failed to continue with the presentation of evidence at the

hearing scheduled for April 9, 2001, the Board moved to dismiss the petition for lack of prosecution. For the reasons set forth herein, the Board's motion should be granted.

Procedural History

The procedural history of this matter is unusually convoluted. On August 9, 1999, petitioner filed her verified petition with the Commissioner of Education ("Commissioner") alleging, among other things, that the Board breached her "statutory and constitutional rights by obviously discriminating against her because of her Jamaican national origin." Respondent Board filed its answer on August 27, 1999. Subsequently, on September 29, 1999, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

Prior to hearing, the parties engaged in extensive discovery, including the taking of depositions. At the first day of hearing on October 2, 2000, the OAL denied the Board's motion for summary decision, ruling that there exist disputed factual issues, which require development of a full evidentiary record. Thereafter, the case proceeded to hearing on October 2 and 3, 2000. During those two days of hearing, Ms. Rance completed most of her direct testimony. Further, petitioner's counsel stated on the record that it would take "a half hour or less" to complete the direct examination of Ms. Rance and that his remaining four witnesses would be "very, very quick if they're called."

On October 4, 2000, the next day scheduled for hearing, counsel for both parties advised the OAL that they had reached an amicable settlement. In open court, the terms and conditions of the proposed settlement were placed on the record. Ms. Rance testified that she fully understood the agreement, that she knowingly and voluntarily accepted it, and that she had adequate opportunity to consult with her attorney before entering into the agreement. One condition for finalization of the settlement was that it had to be approved by the Board. Consequently, the item was placed on the agenda of the Board meeting scheduled for October 10, 2000. Instead of approving the settlement on that date, the Board requested further detail regarding the matter and

deferred any formal action until its meeting on October 23, 2000. Before the Board could act, however, Ms. Rance repudiated the agreement and withdrew her offer. On or about October 18, 2000, she notified her attorney, opposing counsel and the administrative law judge of her decision to reject the settlement offer and proceed to hearing. As a result, the OAL restored the case to its active calendar and set the matter down for six more days of hearing to commence on April 9, 2001.

Meanwhile, Ms. Rance dismissed her attorney and retained the services of her current attorney. By substitution of attorney filed on December 1, 2000, the new attorney entered his appearance as the attorney of record.

Shortly thereafter, on December 26, 2000, petitioner's new attorney filed an action, entitled *Stewart-Rance v. Essex County Vocational Schools, et al.,* Dkt. No. L-63-01, in the Superior Court of New Jersey, Law Division, Essex County. Although the Superior Court action was brought under the authority of the New Jersey Law Against Discrimination, ("LAD") *N.J.S.A.* 10:5-1 to –42, most of the allegations were identical or similar to the allegations raised in the pending administrative proceedings. In addition to seeking compensatory and punitive damages under LAD, Ms. Rance demanded her constitutional right to trial by jury. The Board responded by filing a motion to dismiss the Superior Court complaint due to the doctrines of exclusivity and election of remedies. Ms. Rance countered by filing a cross-motion seeking to transfer the administrative cause of action and consolidate it with the newly-filed court action.

Superior Court Judge Irwin Kimmelman heard oral argument on March 15, 2001 and issued an oral opinion on the record. He dismissed the complaint brought in the Superior Court "with prejudice" and likewise denied petitioner's motion to transfer the administrative proceeding to the Superior Court.

On March 21, 2001, Ms. Rance applied to the OAL for a stay of the administrative proceeding pending appeal of Judge Kimmelman's order to the Appellate Division. Ten days later, the Board filed its opposing papers. After conducting oral

argument by telephone on April 5, 2001, the OAL denied Ms. Rance's application for a stay.

Thereafter, the administrative matter proceeded to hearing before the Office of Administrative Law on April 9, 2001. Initially, petitioner's counsel filed a handwritten motion to bifurcate her LAD claim from her claim arising under the school laws or, in the alternative, to allow her to withdraw the pending administrative action. Holding that the factual issues were inextricably intertwined and that the two state agencies had concurrent jurisdiction, the OAL declined to bifurcate the two issues. In addition, the OAL disallowed petitioner's request to withdraw her petition in the midst of the ongoing administrative proceeding. Since petitioner failed to resume the stand or to offer any other proof on behalf of her allegations, the OAL granted the Board's motion to dismiss the administrative appeal for lack of prosecution.

Conclusions of Law

Based on the foregoing history and the applicable law, petitioner's request to withdraw her petition should be denied.

Recently, in *Aldrich v. Manpower Temporary Servs.*, 277 *N.J. Super.* 491 (App. Div. 1994), the Appellate Division reviewed the circumstances under which a litigant may withdraw a pending administrative complaint in order to bring a similar complaint before the Superior Court. In *Aldrich*, the plaintiff had filed a LAD complaint with a state agency, which she later sought to withdraw "before the commencement of any administrative hearings before an Administrative Law Judge." 227 *N.J.* at 502. Focusing on the "pendency" of the proceeding, the Appellate Division explained that "it is not until a final determination is rendered by one forum that the choice becomes preclusive." *Aldrich*, at 505. Where, as in *Aldrich,* the litigant withdrew her administrative complaint "before OAL hearings were even scheduled, much less commenced," the Court saw no good reason for preventing the plaintiff from changing forums. *Aldrich*, at 506. Likewise, when an administrative matter has proceeded to

final disposition, the Court recognized that the losing party should be prevented from seeking to relitigate the matter anew in a different forum. *Aldrich,* at 505.

The court left open, however, the question of what should occur where "the administrative action is withdrawn in the middle of an OAL hearing which is proceeding unfavorably for a complainant." *Aldrich*, at 505-506. Commenting on such situation, the Court noted:

> Indeed, *N.J.A.C.* 1:1-19.2 provides that if the ALJ "deems it advisable to state the circumstances of the withdrawal on the record, the judge may enter an initial decision memorializing the withdrawal and returning the matter to the transmitting agency for appropriate disposition." We assume that this could encompass a recommendation by an ALJ that the withdrawal not be permitted where "estoppel principles" might arise. *Compare, R.* 4:37-1.

Our own case presents such middle ground, where the administrative hearing has already commenced, the proceeding was interrupted due to an aborted settlement, and petitioner now seeks to start all over again in a different forum. In such posture, the Board rightly complains that it has been put to the time and expense of gathering discovery, preparing for hearing and participating in two days of actual hearing. Petitioner has presented no persuasive reason why this investment of time and money should be lost. More importantly, the Superior Court has already determined to dismiss her parallel complaint "with prejudice," so that petitioner literally has no place else to go. An administrative agency should accord respect and due deference to such judicial determination that the case must continue in the administrative branch rather than be transferred to the judicial branch.

Given the time that has already passed, the Board should not be subjected to further delay of its opportunity to demonstrate that the allegations against it are groundless. As the Board aptly points out, memories will fade and witnesses may become unavailable if this hearing should be further put off until disposition of an appeal to the Appellate Division.

Petitioner had ample time to prepare for the hearing which commenced last October and has had an additional six months since then to get ready for hearing. Either she should go forward with whatever evidence she has of the Board's alleged wrongdoing or her charges must be dismissed for failure to prosecute.

Order

It is **ORDERED** that the petition 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.

April 10, 2001
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

4-12-01
DATE

Deborah V. Gwartney /ch
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 17 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

OAL DKT. NO. EDU 11044-99
AGENCY DKT. NO. 238-8/99

BERIL V. STEWART-RANCE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE ESSEX COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT,	:	DECISION
RESPONDENT.	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed pursuant to the requirements of *N.J.A.C.* 1:1-18.4.

Petitioner's exceptions rely upon the original papers submitted to the OAL in favor of her Motion to Stay the OAL matter pending the appeal of the New Jersey Superior Court Judge's decision denying her transfer of the matter to that jurisdiction, or, in the alternative, to voluntarily dismiss the OAL matter. The exceptions reiterate her arguments that *N.J.S.A.* 10:5-13, 27 allow Law Against Discrimination (LAD) claims to be heard only before the Division of Civil Rights (DCR) or New Jersey Superior Court, in whichever jurisdiction the matter is pending.[1] (Petitioner's Exceptions at 2) Petitioner also avers that the *Aldrich* case[2] upon which the Administrative Law Judge (ALJ) relied was a DCR case which, in her judgment,

[1] The Commissioner notes for the record that the court held in *Hinfey v. Matawan Regional Board of Education.*, 77 *N.J.* 514 (1978) that the Commissioner of Education may determine claims alleging discriminatory conduct in violation of LAD.

[2] *Aldrich v. Manpower Temporary Servs.*, 277 *N.J. Super.* 500 (App. Div. 1994).

supports her request for a stay or voluntary dismissal. She further argues that the ALJ and the Superior Court Judge erred in their determinations. (Petitioner's Exceptions at 1) Moreover, it is petitioner's position that there is no prejudice to defendents if her request is granted because the facts are the same in both proceedings, while she, on the other hand, would be prejudiced if her request is denied. Furthermore, she does not want *res judicata* to preclude her Superior Court action. Petitioner argues that:

> With regard to [the ALJ's] suggestion that Petitioners' [sic] election of remedies preclude her Superior Court action, same flies in the force [sic] of NJSA 10:5-13, 27. *Scouler v. Camden*, 332 *NJ Super* 69 (App.Div 2000) and *Fuchilla v. Layman*, 109 *NJ* 319 (1988). (*Id.* at 2)

The Board's reply exceptions urge that the ALJ's recommended decision be adopted, averring that petitioner's exceptions merely reiterate arguments which have been previously considered by the ALJ and properly dismissed, and that she is essentially seeking a second bite of the apple through forum shopping. (Board's Reply Exceptions at 2, 5)

More specifically, the Board argues that both the ALJ and the Superior Court Judge correctly relied on *Aldrich, supra,* for the proposition that withdrawal of the pending OAL action should not automatically be permitted in cases where the parties are in the middle of a hearing. The Board contends, *inter alia,* that the court in *Aldrich* recognized that in such cases "estoppel principles" might arise. (Board's Reply Exceptions at 5) Further, the Board avows that the ALJ correctly recognized that the instant matter presents such a circumstance when he states at page five of the Initial Decision that "[o]ur own case presents such middle ground, where the administrative hearing has already commenced, the proceeding was interrupted due to an aborted settlement, and petitioner now seeks to start all over again in a different forum."

Additionally, the Board urges that the ALJ properly determined that staying this

matter, which has been litigated since 1999, pending an appeal of her Superior Court matter would be highly prejudicial to the Board. (Board's Reply Exceptions at 5) As to this, the Board argues that not only has it expended a significant amount of time and resources defending the action but, as correctly recognized by the ALJ at pages five and six of the Initial Decision, a delay in this matter would impose a hardship on the Board.

Finally, the Board contends that the doctrine of election of remedies barred the Superior Court action in the instant matter and petitioner's blanket and unsupported contention that the Commissioner of Education cannot hear LAD claims is simply wrong. (Board's Reply Exceptions at 6)

Upon review of the record, the Commissioner agrees with and adopts the recommended decision of the ALJ because, contrary to the arguments advanced by petitioner, he finds that the ALJ was correct in his legal conclusions relative to *Aldrich, supra.* A review of the record, which includes the transcript of the proceeding held on March 15, 2001 in Essex County Superior Court regarding petitioner's motion to transfer the matter to said court, established that the judge, in dismissing transfer motion, rejected petitioner's legal arguments with respect to the *Aldrich*, *Scouler* and *Fuchilla* cases. In rejecting petitioner's arguments, Superior Court Judge Kimmelman states, "The Court sees the matter otherwise. The plaintiff is barred from proceeding in the Superior Court because the plaintiff has chosen an administrative remedy *which has not been but is about to be concluded.*" (emphasis supplied) (Tr. 3/15/01 at 19) Unlike the factual circumstances in the *Aldrich* matter, where the court held that the plaintiff was allowed to withdrew her matter from the DCR before any OAL hearings had even been scheduled, the facts in the instant matter indicate that the OAL hearing was not only nearly

completed, but a settlement agreement was reached, to which petitioner agreed on the record during the third day of hearing and later repudiated; whereupon, she then sought to start litigation over again in another forum. Consequently, under the circumstances presented herein, the Commissioner agrees with the ALJ's conclusion that principles of estoppel support denial of petitioner's request for a stay of the OAL hearing or voluntary dismissal of the petition. In so holding, the Commissioner fully concurs with the ALJ that:

> Given the time that has already passed, the Board should not be subjected to further delay of its opportunity to demonstrate that the allegations against it are groundless. As the Board aptly points out, memories will fade and witnesses may become unavailable if this hearing should be further put off until disposition of an appeal to the Appellate Division.
>
> Petitioner had ample time to prepare for the hearing which commenced last October and has had an additional six months since then to get ready for hearing.*** (Initial Decision at 5-6)

Moreover, upon review of the record, the Commissioner is in complete agreement with the arguments set forth by respondent in its brief in opposition to a stay that the grant of a stay is an extraordinary remedy. In order for a stay to be granted in this matter, petitioner must meet the standards for the grant of such relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982); namely, a demonstration that petitioner will experience irreparable harm if the remedy is not granted; the legal right underlying her claim is settled; she has a likelihood of prevailing on the merits; and, in balancing the interests and weighing the equities, she would experience greater harm or hardship than the Board. Under the facts of this matter, petitioner fails to meet her burden.

Accordingly, for the reasons expressed in the Initial Decision and expanded upon herein, the Petition of Appeal is dismissed with prejudice.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 5|25|01

Date of Mailing: 5|25|01

[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.

168-01

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION: **IN THE MATTER OF THE DISTRICT SUPPLEMENTAL AID APPLICATION,**	:	DECISION
RESPONDENT.	:	
	:	

May 30,2001

OAL DKT. NO. EDU 06053
AGENCY DKT. NO. 245-7/00

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION:	:	DECISION
IN THE MATTER OF THE DISTRICT SUPPLEMENTAL 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.

Maria Kuncetello

ACTING ASSISTANT COMMISSIONER

Date of Decision: 5|30|01

Date of Mailing: 5|30|01

169-01

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

May 31, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11160-96

AGENCY DKT. NO. 390-9/96

GARY MULHEARN,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

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

Charlotte Kitler, Esq., for Respondent

Record Closed: April 10, 2001 Decided: April 11, 2001

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on October 23, 1996, 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 October 7, 1997 at the OAL, 185 Washington Street, Newark, New Jersey. By letter dated September 29, 1997, counsel for Petitioner, with consent of Respondent, requested that this case be placed inactive pending resolution of the worker's compensation case. On April 3, 2001, a telephone conference was 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 11, 2001
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

4-18-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 19 2001
DATE

ACTING DIRECTOR AND [redacted]

OFFICE OF ADMINISTRATIVE LAW

jb

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

APR 10 8 31 AM '01

FEINTUCH, PORWICH & FEINTUCH
26 Journal Square
Jersey City, New Jersey 07306
(201) 656-8600
Attorneys for Petitioner

GARY MULHEARN, Petitioner	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
vs.	Agency Ref No. 390-9/96 OAL DKT NO. EDUOR-11160-96N
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, COUNTY OF HUDSON, Respondent	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 Gary Mulhearn vs. Jersey City Board of Education, C.P. No. 96-046562, and for good cause being shown,

IT IS on this 11th day of April, 2001,

STIPULATED AND AGREED that Respondent shall restore all Petitioner's sick days deducted from Petitioner's sick leave bank from June 6, 1996 through June 20, 1996.

WE HEREBY CONSENT TO THE FORM AND ENTRY OF THE ABOVE STIPULATION.

FEINTUCH, PORWICH & FEINTUCH
Attorneys for Petitioner

By: _____
ALAN S. PORWICH
DATED: April 4, 2001

_____
CHARLOTTE KITLER, ESQ.
Attorney for Respondent
DATED: April 5, 2001

_____
MARIA MANCINI LaFIANDRA, A.L.J.

OAL DKT. NO. EDU 11160-96
AGENCY DKT. NO. 390-9/96

GARY MULHEARN,	:	
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 the parties' compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5|31|01

Date of Mailing: 5|31|01

#170-01

IN THE MATTER OF THE TENURE	:	
HEARING OF GERALD M. MABLI,	:	
SCHOOL DISTRICT OF THE BOROUGH	:	COMMISSIONER OF EDUCATION
OF DEMAREST, BERGEN COUNTY.	:	DECISION
	:	

SYNOPSIS

Petitioning Board filed tenure charges against respondent teacher for conduct unbecoming, alleging destruction of software, violation of policies and procedures, insubordination and disregard of the educational needs of students. Respondent denied the charges.

At the OAL, the parties reached a settlement wherein respondent would be permitted to continue as an employee of the district, on paid leave status, until he reached 25 years of service in the TPAF, at which time he will retire. The parties also agreed that the matter would be referred to the New Jersey State Board of Examiners for action against respondent's certificate as it deems appropriate.

The Commissioner rejected the settlement and remanded the case to the OAL. The Commissioner noted that the proposed agreement does not indicate that the parties considered the potential impact referral of this matter to the State Board of Examiners might have on their agreement should the State Board of Examiners act on respondent's certification during the term of employment contemplated by the agreement. Absent an expression by the parties of their understanding and acceptance of this eventuality, the Commissioner could not approve the settlement.

June 1, 2001

State of New Jersey
Office of Administrative Law

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7998-00
Agency Docket No. 311-9/100

IN THE MATTER OF THE TENURE HEARING OF GERALD MABLI v. BOARD OF EDUCATION OF THE BOROUGH OF DEMAREST, BERGEN COUNTY

Matthew J. Giacobbe, Esq, for petitioner
(DeCotiis, Fitzpatrick, Gluck, Hayden & Cole, LLP)

Harold N. Springstead, Esq., for respondent
(Springstead & Maurice, attorneys)

Record Closed: April 27, 2001 Decided: April 27, 2001

BEFORE **MICHAEL L. RAVIN,** ALJ:

STATEMENT OF THE FACTS

This matter involves tenure charges of conduct unbecoming certified by the Demarest Board of Education ("Board') against Gerard Mabli ("Mr. Mabli") under the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 to-18.1.

Gerard Mabli is a tenured teacher designated as a Technology Coordinator employed by the Board. On or about September 8, 2000, tenure charges were filed with the New Jersey Commissioner of Education ("Commissioner") in connection with actions Mr. Mabli took on or about June 21 or June 22, 1999. The four separate charges alleged that Mr. Mabli, while employed by the Board as a Technology Coordinator, committed acts of conduct unbecoming, namely: (1) the destruction, misuse, and unauthorized removal of computer software operating systems; (2) violation of policies and procedures; (3) insubordination; and (4) disregard of the educational needs of students. On September 15, 2000, respondent filed an answer. On September 21, 2000, the Commissioner referred this matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

The matter was heard by me on January 9, 10, 11 and 12, 2001. The parties were then offered the opportunity to submit posthearing submissions and replies.

Prior to the due date for the parties posthearing submissions, I was advised that the parties had agreed to the attached Stipulation of Settlement, subject to approval by the Commissioner.

In accordance with the decision of the State Board of Education in *In Re Cardonick,* 1990 S.L.D. (1983), the record of any proposed settlement must include:

> . . . the nature of the charges, circumstances justifying the settlement, consent or authorization by the Board of Education and the teacher to the proposed agreement, the Administrative Law Judge's finding that the teacher entered into the agreement with a full understanding of his rights, and [a finding] that the agreement is consistent with the public interest.

Having reviewed the Stipulation of Settlement, I **FIND** that it explicitly includes the nature of the charges and the consent or authorization of the Board and Mr. Mabli. I **FIND** that Mr. Mabli entered into the settlement with full understanding of his rights. I further **FIND** that Mr. Mabli understands the

Commissioner's duty pursuant to *N.J.A.C.* 6:11-3.7(b)(1)(i) to refer tenure determinations to the State Board of Examiners for possible revocation of his certificate. I **FIND** that Mr. Mabli is satisfied with his attorney's representation and had adequate time to discuss the contents of the Stipulation of Settlement.

Finally, I **FIND** the settlement is consistent with public policy. The parties acknowledge the public interest in saving considerable costs in attorney's fees through amicably settling this matter. The Board is expressly aware of the public's interest in the proper pursuit and handling of tenure charges, but recognizes that even if the charges were proven true, Mr. Mabli might not be dismissed, given mitigating factors which arguably exist in the record. For his part, Mr. Mabli, while never conceding the validity of the tenure charges, does not want to risk that the charges may be sustained and that he may be dismissed.

I **FIND** the settlement fully disposes of all issues in controversy.

ORDER

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.

April 27, 2001
DATE

Michael L. Ravin
MICHAEL L. RAVIN, ALJ

Receipt Acknowledged:

5-2-01
DATE

Deborah A. Contarino /CR
DEPARTMENT OF EDUCATION

MAY - 3 2001
DATE

Mailed to Parties:
ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jrp

DeCotiis, FitzPatrick, Gluck, Hayden & Cole, LLP
500 Frank W. Burr Boulevard
Teaneck, New Jersey 07666
Telephone (201) 928-1100
Facsimile (201) 928-0588
Attorneys for Demarest Board of Education

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
APR 27 11 37 AM '01

IN THE MATTER OF THE TENURE CHARGES AGAINST GERARD M. MABLI, TEACHING STAFF, MEMBER OF THE DEMAREST BOARD OF EDUCATION DISTRICT, BERGEN COUNTY

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL Docket No. EDU 7998-00
Agency Ref. No. 311-9/08

STIPULATION OF SETTLEMENT AND SETTLEMENT AGREEMENT

The parties to this matter, the Petitioner, Demarest Board of Education ("Board") and Respondent, Gerard M. Mabli ("Mabli"), having reached an agreement to resolve the matter amicably, hereby request 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 and all terms of this agreement are contingent upon approval by the Administrative Law Judge and Commissioner of Education, and that if any of the terms of this agreement 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 completion of the record including the rendering of a decision by the Administrative Law Judge in relation to tenure charges filed in this matter, but that nothing in this paragraph or agreement shall, in any event, preclude the parties from agreeing to a new, revised or modified settlement agreement,

provided that such agreement shall be subject to the approval of the Administrative Law Judge and of the Commissioner of Education.

2. Rationale for Settlement: On or about September 6, 2000 some four separate tenure charges were filed by the Board against the respondent for his actions occurring on June 22, 1999. The four separate charges alleged that Mabli, while employed as a Technology Coordinator with the Board, committed acts of conduct unbecoming, namely, (1) the destruction, misuse, and unauthorized removal of computer software operating systems; (2) violation of policies and procedures; (3) insubordination; and (4) disregard of the educational needs of students. Mabli denied the charges and the matter proceeded to a hearing on January 9, 10, 11 and 12, 2001. Transcripts have been received and a briefing schedule was ordered by Administrative Law Judge Ravin. Both the Board and Mabli believe that it is in the best interest of all parties and the public to amicably resolve this matter pursuant to the specific terms set forth below.

The Board is aware of the public's interest in the proper pursuit and handling of tenure charges which in the present case are considered serious and warranted. However, the Board understands that the charges, even if proven true may not result in a dismissal of Mabli in light of his having taught in the District for over 21 years without incident and with positive evaluations.

Mabli does not concede nor has he conceded the validity of the tenure charges. Nevertheless, he understands that the tenure charges may be sustained and he does not want to take the risk.

Furthermore, the parties both acknowledge the public interest in saving considerable costs in attorneys fees through amicably settling this matter.

3. 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.

4. Mabli agrees to withdraw his challenge to the increment withholding, which is pending in arbitration and to rescind his Notice of Tort Claim filed against the Board and the Superintendent of Schools. The parties recognize that Mabli has claims and certain rights, including status as a tenured teacher arising from his employment by the Board. In exchange for the foregoing promises made by the Board, Mabli hereby releases the Board, its members, officers, agents, servants, employees, attorneys, representatives, and insurers (collectively referred to as "the Board") from all claims and liabilities which it or they may be subject to arising from Mabli's employment with the Board, except for any claims Mabli may assert for benefits under the State Workers Compensation laws, or any other rights Mabli may have pursuant to this agreement. Further, Mabli and anyone who succeeds to his rights, such as heirs or executors of his estate, or his assigns, waive any and all claims against the Board including, but not limited to claims for attorneys' fees, compensatory damages, emotional distress, punitive damages and costs allegedly incurred, as well as all claims arising under contract, Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Civil Rights Act of 1866, the Age Discrimination and Employment Act of 1967, the Employee Retirement Income Security Act of 1974, the Americans with Disabilities Act, Executive Orders 11246 and 11141, the New Jersey Law Against Discrimination, the New Jersey

Conscientious Employee Protection Act, and all other claims arising under federal law, state law or the common law. Mabli will not make any claim to or receive additional monies or benefits which may be provided to the teachers in the Demarest 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 personal days. Mabli further represents that he has been given twenty-one days from the date of the receipt of this document to accept or reject this Agreement, and further that he has up to seven (7) days after signing this document to withdraw his agreement to this settlement. Nothing in this Agreement or the General Release given by Mabli shall preclude either party from bringing an action to enforce performance of any of the terms of this agreement, should there be a default of performance.

5. The parties agree that the Board shall pay Mabli his full salary, medical benefits and pension contributions, if any, for the 2000-2001 school year which salary is currently $73,605.00 per year, less the 120 days Mabli was suspended without pay during the 2000-2001 school year. The Board shall place Mabli on a terminal leave of absence for the 2001-2002 and 2002-2003 school years at half-pay ($36,802.50 per school year) with medical benefits and pension contributions, if any. The Board agrees to consider the 120-day suspension without pay as an unpaid leave of absence so as to permit Mabli to attempt to purchase back the time from the Teachers Pension & Annuity Fund ("TPAF"). If the TPAF does not permit the purchase back of his time, then commencing July 1, 2003, Mabli will be granted an unpaid leave of absence until on or about December 31, 2003, so as to permit Mabli to achieve 25 years of credited service with the TPAF. It is Mabli's sole responsibility to arrange for and purchase his pension credit for this unpaid leave of absence. During this

unpaid leave of absence, the Board will continue Mabli's medical benefits with the expense thereof to be paid solely by Mabli. Mabli further agrees that he will pay the Board a lump sum payment by no later than June 15, 2003 to cover all such expenses for medical benefits for the entire period of this unpaid leave of absence. The Board will notify Mabli on or before June 1, 2003 of the exact amount of that lump sum payment. Should Mabli fail to make that lump sum payment to the Board on or before June 15, 2003, the Board will cease making all payments for Mabli's medical benefits as of June 30, 2003.

6. Along with this agreement, Mabli shall submit an irrevocable letter of resignation effective June 30, 2003 and shall not seek further employment with the Demarest Board of Education, which is annexed hereto as Exhibit A. If, however, the TPAF does not permit Mabli to purchase his pension credits for the 120-day suspension, then Mabli's resignation shall be deemed effective on or about December 31, 2003 so as to permit Mabli to achieve 25 years of credited service with the TPAF. Mabli further agrees that he will not enter Board property except for a legally required purpose.

7. The Board agrees that any reference for employment requested by and provided on behalf of Mabli will be a neutral recommendation stating the number of years worked with no mention of increment withholding or tenure charges. Mabli will not seek references from any administrator currently employed by the Board, with the exception of any administrator employed by the Board prior to the filing of the tenure charges. Any references received from current administrators employed by the Board will not be on Board or other Demarest Schools letterhead.

8. If Mabli obtains employment during the term of this agreement with another public entity that makes contributions to the TPAF on Mabli's behalf, any payments by the Board due to Mabli pursuant to this agreement shall immediately terminate as of the effective date of Mabli's employment with the other public entity.

9. This Stipulation of Settlement incorporates the complete financial obligation of the Board with respect to Mabli's employment relationship and separation of employment from the Board.

10. 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 originals.

11. By settling this matter, respondent acknowledges that he is waiving his right to a decision from the Office of Administrative Law and Commissioner of Education, in which he could obtain an adjudication of the merits of the tenure charges and of the penalty, if any, if the charges were sustained. Mabli 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.

12. Mabli is aware, and it has been explained to him, that the Commissioner of Education has a duty to refer tenure determinations to the State Board of Examiners for possible revocation of his certificate.

THE UNDERSIGNED STATE THAT THEY HAVE CAREFULLY READ THE FOREGOING SETTLEMENT AGREEMENT, KNOW THE CONTENTS THEREOF, HAVE HAD THE OPPORTUNITY TO DISCUSS THOSE CONTENTS WITH COUNSEL OR OTHER PERSONAL ADVISOR OF THEIR CHOOSING, FREELY AND VOLUNTARILY CONSENT TO ALL TERMS AND CONDITIONS THEREOF AND SIGN SAME AS THEIR OWN FREE ACT.

Gerard Mabli

GERARD M. MABLI

DATE: 4/20/01

Harold Springstead

HAROLD N. SPRINGSTEAD, ESQ.
ATTORNEY FOR GERARD M. MABLI

DATE: 4/20/01

Frank G Chilson

FRANK G. CHILSON
SECRETARY AND BUSINESS ADMINISTRATOR
OF THE DEMAREST BOARD OF EDUCATION

DATE: 4/25/01

Matthew J Giacobbe

MATTHEW J. GIACOBBE, ESQ.
ATTORNEY FOR DEMAREST BOARD OF EDUCATION

DATE: 4/26/01

Frank G. Chilson
Business Administrator
Demarest Board of Education
568 Pierpont Road
Demarest, New Jersey 07627

Re: Irrevocable Resignation of Employment

Dear Mr. Chilson:

Please be advised that I hereby tender my resignation from the teaching staff and any other employment with the Demarest Board of Education, effective June 30, 2003, in accordance with the Stipulation of Settlement and Settlement Agreement. If TPAF does not permit me to purchase back the 120 unpaid leave days from September 6, 2000 to January 15, 2001, my irrevocable resignation shall be effective December 31, 2003 to allow me to earn twenty-five (25) years of service. Furthermore, If I obtain employment with another public entity which contributes to the TPAF on my behalf, this resignation will become effective on the date my employment with the other public entity commences. I understand that this letter of resignation is irrevocable under any circumstances. I have discussed the contents of this letter with my attorney and sign this letter of resignation upon my own free will and accord.

Very truly yours,

Gerard Mabli

Gerard M. Mabli

Date: 4/20/01

"Exhibit A"

OAL DKT. NO. EDU 7998-00
AGENCY DKT. NO. 311-9/00

IN THE MATTER OF THE TENURE	:	
HEARING OF GERALD M. MABLI,	:	
SCHOOL DISTRICT OF THE BOROUGH	:	COMMISSIONER OF EDUCATION
OF DEMAREST, BERGEN COUNTY.	:	DECISION
	:	

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

Upon such review, the Commissioner cannot approve the settlement as currently configured. Specifically, the terms of this agreement clearly contemplate that it is the parties' intent that respondent be continued as an employee of the District, albeit on leave status, until, at the outside, December 31, 2003, at which time respondent would achieve 25 years of credited service with the TPAF. Although the agreement further recognizes and accepts that, should the Commissioner determine to approve the proposed settlement, he, nonetheless, has a duty to refer this matter to the State Board of Examiners for action, as that body deems appropriate, with respect to revocation of respondent's certificate, it is unclear that the parties have considered what the status of their agreement here would be in the event the State Board of Examiners determined to move forward with revocation during the period covered by the agreement. Absent an indication that this eventuality has been contemplated, understood and accepted by the

parties, the Commissioner cannot approve this otherwise satisfactory settlement agreement due to its facial potential for frustration of its terms.

Accordingly, the proposed settlement is rejected, and the Commissioner remands this matter to the OAL for revision of the document consistent with the concerns herein expressed. Should the parties be unwilling or unable to reach accord on a modified settlement agreement, this matter shall proceed to conclusion on the merits.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: JUN 01 2001

Date of Mailing: JUN 01 2001

#171-01

171-01

IN THE MATTER OF THE : COMMISSIONER OF EDUCATION

ABBOTT GLOBAL ISSUES. : DECISION

SYNOPSIS

Petitioning boards of education and parents alleged that the New Jersey Department of Education (DOE) had failed to comply with the mandate of the New Jersey Supreme Court in implementing the Court's decisions regarding programs and funding to be provided in "Abbott" school districts. In particular, they alleged violation of the Court's 1998 (*Abbott V*) and 2000 (*Abbott VI*) rulings on preschool programs.

The ALJ distilled petitioners' numerous specific allegations into a handful of fundamental issues and addressed them by summarizing the parties' positions, reviewing the record without fact-finding, and offering comments, suggestions and recommended orders based on that review. These included adoption of a uniform regulatory standard for calculating the projected population of eligible preschool students; review of time frames for applications, DOE decisions, and appeals; DOE adoption of a planned curriculum *Framework* document, or an interim version, by June 15, 2001; negotiation with Head Start in order to bring deficient programs up to Abbott standards; assurance that discussions with Head Start and other community providers, and consideration of additional program and funding requests, are based on assessments of needs and not pre-determined levels of funding; and timely addressing of facilities needs through the program established by the Legislature for this purpose (EFCFA).

The Commissioner affirmed, modified and reversed various aspects of the Initial Decision. The Commissioner affirmed the ALJ's conclusions that preschool is a significant legal right in the present context but has not been declared a Constitutional entitlement, that the Department had not violated the Court's mandates by excluding students based on parental status, and that facilities issues must be addressed through the mechanism established by the Legislature for this purpose (EFCFA and its implementing rules). He affirmed that, to the extent DOE assessment of district preschool curriculum plans and district enrollment/recruitment plans may not be occurring in sufficient depth, DOE must revise its practices and procedures. The Commissioner concurred that DOE should develop rules for a uniform regulatory method of determining the projected number of eligible preschool students. The Commissioner also affirmed that, to the extent that DOE determinations on preschool program and funding applications may ever have been based on predetermined fiscal considerations rather than on assessment of student needs, that practice is not to occur and DOE must provide guidance to districts on information needed for adequate review. Finally, the Commissioner agreed that the various time frames operative in Abbott applications, determinations and appeals appeared problematic and directed that the Department examine these time frames and report its conclusions and recommendations so that he may effectuate changes in preparation for the 2002-2003 school year. Where the Department was directed to revise practices and procedures or develop guidelines, rules or recommendations, the Commissioner ordered that this be done by August 31, 2001.

The Commissioner modified the ALJ's directive with respect to needs assessments, concurring that these are essential and that the manner in which such assessments are to be undertaken must be determined by DOE, but clarifying that the State may allocate responsibility as appropriate and that the Court did not place responsibility for Abbott mandates exclusively on the DOE. The Commissioner rejected the ALJ's conclusion on the necessity of the preschool *Framework* document and reversed the order directing its promulgation by June 15, 2001, finding instead that quality, Court-compliant preschool programs can be implemented based upon standards set forth in the definitive *Expectations* document already promulgated; however, because the *Framework* will be a valuable supplemental tool for districts, the Commissioner directed that it be promulgated as scheduled by August 2002, with no delays or extensions. Finally, the Commissioner reversed the order of the ALJ with regard to Head Start, stressing that identifying and contracting with community providers is a district responsibility; that while districts must use community providers where practical, there is no requirement to use any particular provider; and that the State is not required to provide funds to bring Head Start, or any other willing community provider, up to Abbott standards regardless of cost or the availability of alternative means of serving students.

June 1, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION[1]

IN RE: ABBOTT GLOBAL ISSUES

OAL DKT. NO. EDU 3246-01

BOARD OF EDUCATION
OF THE CITY OF PERTH AMBOY,
MIDDLESEX COUNTY,
v.
NEW JERSEY STATE
DEPARTMENT OF EDUCATION.

OAL DKT. NO. EDU 04029-99S
AGENCY DKT. NO. 48-3/99

BOARD OF EDUCATION
OF THE BOROUGH OF KEANSBURG,
MONMOUTH COUNTY,
v.
NEW JERSEY STATE
DEPARTMENT OF EDUCATION.

OAL DKT. NO. EDU 04030-99S
AGENCY DKT. NO. 44-3/99

BOARD OF EDUCATION
OF THE CITY OF TRENTON,
MERCER COUNTY,
v.
NEW JERSEY STATE
DEPARTMENT OF EDUCATION.

OAL DKT. NO. EDU 04113-99S
AGENCY DKT. NO. 42-3/99

---

[1] Although the consolidation of the issues addressed in this decision was not originally accompanied by a severance of the consolidated cases and issues therein from the underlying individual district-related contested cases, including those brought by the Education Law Center (ELC), as this decision is issued, it appears that given the passage of time and the fact that a number of the underlying contested cases have been resolved in one or another fashion, it makes the most sense to issue this as an initial decision, limited to the issues addressed herein. This will assure that the Commissioner will review these overarching issues promptly and allow the eventual determination of the remaining contested cases in whatever may be the appropriate manner for each, without the continued pendency of those matters delaying review. It is not clear at this time that there will be any ultimate initial decisions in those cases, since they relate to a past, or an almost completed, school year. While in at least two cases reimbursement is sought for funds already expended, I deem it best to sever this decision from its underlying base. Therefore, the contested case has been renamed and a new docket number assigned. Counsel should use this new name and docket number in any future communications regarding the global issues, on review and on appeal. They should use the docket numbers of the underlying contested cases in regards to any district-specific matters. The listing of individual case names and dockets in the title of this decision reflects those matters still shown as open.

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION.

OAL DKT. NO. EDU 04436-99S
AGENCY DKT. NO. 109-5/99

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION.

OAL DKT. NO. EDU 05356-99N
AGENCY DKT. NO. 61-3/99

BOARD OF EDUCATION OF THE CITY OF IRVINGTON,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION.

OAL DKT. NO. EDU 05358-99N
AGENCY DKT. NO. 53-3/99

BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION.

OAL DKT. NO. EDU 05799-99N
AGENCY DKT. NO. 79-4/99

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION.

OAL DKT. NO. EDU 05804-99N
AGENCY DKT. NO. 47-3/99

MARTA HOYOS, ET AL.,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION (WEST NEW YORK).

OAL DKT. NO. EDU 05873-99N
AGENCY DKT. NO. 110-5/99

ANTHONY DORESA, ET AL., v. **NEW JERSEY STATE DEPARTMENT OF EDUCATION, STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY.**	OAL DKT. NO. EDU 07157-99N AGENCY DKT. NO. 98-5/99
VIVIAN DEWITT, ET AL., v. **NEW JERSEY STATE DEPARTMENT OF EDUCATION, STATE-OPERATED SCHOOL DISTRICT OF NEWARK.**	OAL DKT. NO. EDU 07158-99N AGENCY DKT. NO. 100-5/99
ANGELICA ARANDA, ET AL., v. **NEW JERSEY STATE DEPARTMENT OF EDUCATION, STATE-OPERATED SCHOOL DISTRICT OF PATERSON, PASSAIC COUNTY.**	OAL DKT. NO. EDU 07456-99N AGENCY DKT. NO. 99-5/99
BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, v. **NEW JERSEY STATE DEPARTMENT OF EDUCATION.**	OAL DKT. NO. EDU 07914-00N AGENCY DKT. NO. 258-7/00
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY, v. **NEW JERSEY STATE DEPARTMENT OF EDUCATION.**	OAL DKT. NO. EDU 09462-00N AGENCY DKT. NO. 331-9/00

David G. Sciarra, Esq., for petitioners Hoyos, Doresa, Aranda and DeWitt (Education Law Center, attorneys)

Francis X. Journick, Esq., for petitioner Board of Education of Perth Amboy (Wilentz, Goldman & Spitzer, attorneys)

Richard E. Shapiro, Esq., for participants Boards of Education of Passaic and Elizabeth

Michelle L. Miller and **Michael C. Walters,** Deputy Attorneys General, for respondent (John J. Farmer, Jr., Attorney General of New Jersey, attorney)

Record Closed: March 15, 2001 Decided: April 20, 2001

BEFORE **JEFF S. MASIN**, ACTING CHIEF ALJ:

Petitioners, who are students and parents in the Abbott school districts of Paterson, Jersey City, Newark (each a State-operated district) and West New York ("the four districts"), represented by the Education Law Center ("ELC"), counsel to the class of Abbott students and parents, and who are also Boards of Education from several Abbott districts, seek a determination that the respondent State Department of Education ("DOE" or "Department" or "agency") has failed to meet its obligation to provide high-quality, well-planned preschool education for three- and four-year-old children in those districts. The sources for this obligation are the Supreme Court decisions issued in *Abbott v. Burke*, 153 *N.J.* 480 (1998) ("*Abbott V*"), and *Abbott v. Burke*, 163 *N.J.* 95 (2000) ("*Abbott VI*"). ELC counsel has identified several issues that have, for purposes of this case, been labeled as "global issues." These issues address matters that the ELC contends involve general systemic deficiencies in the manner and process by which the DOE has responded to its obligations.

ELC counsel first identified a series of such "global" issues when this matter first came before the Office of Administrative Law ("OAL") in the fall of 1999. At that time counsel filed briefs addressing these matters with then Chief Administrative Law Judge Barbara Harned, who consolidated the then pending Abbott appeals for the purpose of resolving the global issues.[2] However, the parties and Judge Harned, aware that the Supreme Court was soon to issue a decision in a pending proceeding known now as *Abbott VI*, agreed to withhold determination of the issues pending the Court's decision, which was issued on March 7, 2000. In that decision, the Court urged the districts and the Department to attempt to resolve their differences in light of the opinion, and, at the same time, directed that, to the extent necessary, remaining issues be

[2] The individualized aspects of the several cases remained with the assigned administrative law judges and, as explained, some of these have since been withdrawn, settled, or, at the request of counsel, left in repose pending the determination of the global issues.

determined by hearings at the OAL. These hearings were to be expedited. *Abbott VI, supra*, 163 *N.J.* at 118. Subsequent to the Court's decision, districts that had cases pending challenging the Department's response to their 1999-2000 plans and funding requests, as well as districts that were dissatisfied with the Department's response to their submission of early childhood plans for the 2000-2001 school year and filed new challenges in supplement of their previous 1999-2000 appeals, have been involved in extensive negotiations seeking to resolve their individual programmatic and budget concerns. Some of the districts with 1999-2000 appeals pending did not file new appeals, and in some cases the 1999-2000 appeals have been withdrawn. While the individual districts attempted to resolve their appeals, requests were made to counsel for the several districts and the ELC concerning their intentions regarding the previously identified global issues. ELC counsel responded on August 23, 2000, filing a letter supplementing the previous 1999-2000 submissions, contending that the DOE was neither fulfilling its constitutionally mandated obligations to the students of the four districts nor acting to assure that the districts did so. The letter identified fifteen "global" concerns.[3] After receipt of this letter, the Abbott districts that were parties to the 1999-2000 cases and/or had filed 2000-2001 appeals were invited to join in determining these issues.[4] Some, including districts that had already settled or withdrawn their individual appeals, have chosen to act as participants.[5] The ELC and the Elizabeth, Trenton, Perth Amboy, Passaic, Vineland, Camden and New Brunswick boards of education have filed briefs, certifications, supporting documentation and letters adopting the arguments of the ELC, and the Department of Education has responded with its own brief, exhibits and certifications. After these briefs were received and following review of the record, this judge determined that oral arguments might sharpen the positions of the parties and oral argument was held on March 15, 2001. At argument, all counsel agreed that the matter could be decided on the documentary record, without the need for any live testimony. The record closed following the presentation of these arguments on March 15, 2001.

[3] Chief Judge Harned left the OAL in May 2000. I assumed the role of acting director on March 20, 2000, and assumed responsibility for the resolution of the pending "global" issues.

[4] Several motions regarding the standard of review, discovery and a motion to dismiss based upon the alleged untimely filing of the global issues were filed and determined after the filing of the August 23 letter.

[5] Interlocutory Order dated October 13, 2000.

The "Global" Issues

As noted, the ELC had originally identified a set of global issues in 1999. Following the *Abbott VI* decision it revised and refined that list in an August 23, 2000, letter. The issues address the ELC's conclusions as to what it contends are failures on the part of the DOE to meet the Court's mandates:

(1) The failure to provide timely and concrete guidance to enable and assure that districts plan and implement preschool for all children under the *Abbott VI* quality standards;

(2) The failure to require the development and implementation of plans to provide high-quality preschool for all eligible three- and four-year-old children in the Abbott districts, based on need;

(3) The failure to require the development and implementation of concerted and aggressive outreach and recruitment efforts to improve and maximize enrollments;

(4) The failure to include Head Start children and programs in the districts' preschool plans and budgets;

(5) The failure to require assessment of children's needs and the development and implementation of program plans and budgets based on those needs;

(6) The failure to require assessment of all school- and community-based programs and the development and implementation of improvement plans to enable each program to meet *Abbott VI* quality standards, including class size limits and teacher certification;

(7) The failure to require the development and implementation of uniform, age-appropriate content and curriculum for all programs;

(8) The failure to require the development and implementation of plans for transportation, social, health and other services, based on need;

(9) The failure to require the development and implementation of plans for safe and educationally adequate preschool facilities, including temporary and permanent facilities to address increased enrollments and the needs of unhoused children as a result of class size reduction;

(10) The failure to require the development and implementation of plans to provide preschool to children with disabilities, with limited English proficiency and other special needs;

(11) The failure to require the development and implementation of plans for district-wide assessments, supervision, technical assistance, coordination, training, evaluation and accountability measures to assure uniform, high-quality preschool education in all programs, whether community- or school-based, based upon an assessment of district-wide need;

(12) The failure to require the development and implementation of needs-driven district budgets and supplemental funding requests;

(13) The imposition of pre-determined, per-pupil funding amounts for preschool in community-based providers, based upon available state funding;

(14) The approval of district-revised plans for 2000-2001 that fail to comply with the *Abbott VI* preschool directives; and

(15) The arbitrary rejection of various components of district plans that required supplemental funding for implementation.

The ELC seeks an initial decision that finds that the DOE's 2000-2001 implementation of preschool programs in the Abbott districts violates *Abbott V and VI*, federal and state special education laws and state bilingual education law, and, as relief, directs the Commissioner to require and assist the Jersey City, Newark, Paterson and West New York districts, and other Abbott districts, to

Conduct a comprehensive assessment of the particular academic, social and health needs of preschool-age children;

Conduct an assessment of all school and community providers of preschool to determine their needs and develop site-specific improvement plans and budgets therefore to assure maximum enrollment of three- and four-year-old children without regard to parental status;

Assure inclusion of all children enrolled in federally funded Head Start and services for children with disabilities;

Assure timely transition to classes of fifteen students where necessary;

Assure sufficient and ongoing professional development;

Assure teacher certification for non-certified teachers with needed supports and accessible higher education and phase-in of comparability between district and provider salaries, benefits and schedules for similarly credentialed and experienced teachers;

Assure high-quality curriculum at each site;

Assure all necessary transportation, health and social services;

Assure needed facility improvements and, as necessary, expansion and/or new construction;

Assure adequate programs and staff for oversight, training assistance, etc., and adequate provider-specific and district plans, budgets, facilities and state funding.

The ELC agrees that any relief must be prospective.

The Perth Amboy Board of Education has joined in the ELC's request for a determination of the global issues, while at the same time offering that its experience is an example of the deficiencies in the DOE's response to its Abbott obligations. Perth Amboy seeks to obtain some $2.6 million in funds it claims to have expended to begin implementation of its early childhood

program, asserting that it had made a strong case regarding the need for such expenditures after a detailed study of its particular needs.[6] As the issues in regards to its specific expenditures in years prior are not readily determinable in the context of this determination of more sweeping global concerns, Perth Amboy's particularized claims will be determined in a separate decision.[7]

The Elizabeth and Passaic boards of education have also filed briefs. Passaic had filed an appeal regarding its 1999-2000 early childhood plan. That appeal has since been withdrawn. It also filed an appeal regarding its 2000-2001 supplemental funding requests. The parties thereto have represented that that case is close to settlement. The Elizabeth Board of Education appealed regarding its 2000-2001 plan and again the parties thereto have advised the assigned judge that the case is settled. Expressing strong objections to the DOE's conduct despite their having "resolved" their appeals, both districts have presented their views regarding the global issues as participants.[8]

The Court's Holdings in *Abbott V* and *VI*

In *Abbott V, supra*, 153 *N.J.* at 508, the Court ordered that the Commissioner of Education "exercise his power under *N.J.S.A.* 18A:7F-6(b) and -16 to require all Abbott districts to provide half-day pre-school for three- and four-year olds." Further, the Court stated, "The Court authorizes the Commissioner to require the Abbott schools to implement these programs as expeditiously as possible." The Court added:

> [T]he Commissioner must ensure that such programs are adequately funded and assist the schools in meeting the need for transportation and other services, support, and resources related to such programs. The Commissioner may authorize cooperation with or the use of existing early childhood and day-care programs in the community. If any Abbott schools are able to obtain the space, supplies, teaching faculty, staff, and means of transportation

[6] See Seplocha Certification and attachments thereto which are appended to Perth Amboy's brief.

[7] The Vineland Board of Education also seeks reimbursement. It did not file a brief or appear at the argument of these issues, but its position is preserved for separate determination.

[8] See certifications of Superintendent Thomas G. Dunn, Jr., and Dr. Robert N. Holster, respectively the superintendents of the Elizabeth and Passaic school districts.

> that are necessary to implement these programs for the 1998-1999 school year, they should be supplied with the necessary funding to enable them to do so. The Commissioner shall ensure that all other Abbott schools shall have the resources and additional funds that are necessary to implement pre-school education by the commencement of the 1999-2000 school year.

In *Abbott VI*, in response to the ELC's petition in support of litigants' rights, the Supreme Court reviewed the actions of the DOE in regards to the Court's *Abbott V* mandate pertaining to early childhood education. The Court considered the petitioners' allegation that the "State has gravely defaulted on its commitment" to implement "well-planned, high quality preschool education for all Abbott children." 163 *N.J.* at 104. The Court, while concluding that the Commissioner had not "backed away from his efforts to reform education in the Abbott districts," and rejecting allegations that the Commissioner had acted in bad faith, 163 *N.J.* at 100, nevertheless

1. Held that "[s]ubstantive educational guidance for all Abbott district preschool programs is an essential component of DOE's commitment to the Abbott districts and must be adopted by April 17, 2000, so that the districts will be able to prepare for the 2000-2001 school year," 163 *N.J.* at 107;

2. Ordered clarification of the Department's regulations regarding teacher certification ("unquestionably an important component of any preschool education program," 163 *N.J.* at 108), and a shortening of the time frame allowed for the attaining by teachers of required certification so as to eliminate "as quickly as possible" any disparity between district-run and DHS-licensed preschool programs, 163 *N.J.* at 111;

3. Reaffirmed its previous requirement that one certified teacher be provided for every fifteen preschool children, 163 *N.J.* at 114;

4. Considered the DOE's exclusion from district enrollment projections of children attending Head Start, an existing federally-funded program, and stated that "based on the

assumption that Head Start will continue to serve district children in the next school year," and based on its conclusion that "State preschool standards are, however, more demanding than Head Start program standards," 163 *N.J.* at 116, held that only where the district could demonstrate that children attended Head Start programs that met DOE standards could the children be excluded from such district's projection of the preschool population it had to serve and required that preschool programs commensurate with the *Abbott V* standards be provided for "*all* Abbott district children—no child may be excluded from a preschool program that is part of a district plan because of parental status," 163 *N.J.* at 117;

5. Reviewed its previous directions to the Commissioner in *Abbott V* regarding facilities and supplemental program funding, such as space, supplies, teaching faculty, staff, and means of transportation necessary to implement Abbott preschool programs. It quoted its prior opinion, where it had stated that "even though it is not feasible at this time to ascertain or mandate a specific funding level, adequate funding remains critical to the achievement of a thorough and efficient education," *Abbott V, supra*, 153 *N.J.* at 517-18, and "the Commissioner shall ensure that all other Abbott schools shall have the resources and additional funds that are necessary to implement pre-school education by the commencement of the 1999-2000 school year" 153 *N.J.* at 508, and explained that in doing so "the Commissioner may, before seeking new appropriations, first determine whether funds within an existing school budget are sufficient to meet a school's request for a demonstrably needed supplemental program," 153 *N.J.* at 518. It emphasized that "[o]nly after a review of individual applications from the districts can it be determined whether 'adequate funding . . . critical to the achievement of a thorough and efficient education' has been provided." *Abbott VI, supra*, 163 *N.J.* at 118.

6. Noted the concern expressed by *amicus curiae* Newark Emergency Committee to Save Childcare that "[a]n aggressive recruitment campaign is critical," and emphasized "the need for assessment and evaluation of the preschool programs in the SNDs" and directed that "existing enrollments can now be reviewed and that low enrollments will

trigger a determination whether parents in the community are aware of the district's preschool programs" and, to the extent that they are not, "the district must make concerted outreach efforts to improve enrollments." In doing so, the Commissioner "must make funding available for [concerted outreach efforts to improve enrollments] through the DOE's supplemental program procedures." 163 *N.J.* at 119.

Summary of Legal Positions

Petitioner's Arguments

As expressed in its brief and at oral argument, the fundamental thrust of the ELC's series of "global issues" is that the DOE, in its response to the Supreme Court's orders and directions in *Abbott V* and *VI*, has failed to adequately direct, guide, monitor, assess and fund significant elements of the mandated preschool programs for three- and four-year-olds in the affected districts. It maintains that these failures serve to deprive its clients of their constitutionally mandated right to a thorough and efficient education. In its view, despite the regulations the DOE has adopted, the guidelines and expectations it has issued, the meetings, clinics, and seminars it has held, and the funds it has made available to the districts, both before and most particularly since the issuance of *Abbott VI*, it has still not provided the districts with legally and educationally adequate means of ensuring that they both can and are in fact delivering the constitutionally mandated well-planned, high-quality preschool education the Court intended. The lack of such adequate measures has also prevented or substantially limited the ability of the districts to properly provide transportation, special education and education for students with limited English proficiency and has affected the districts' ability to provide necessary facilities. More specifically, the ELC contends that in January 2000, prior to *Abbott VI*, the four districts whose students it represents filed defective plans for providing preschool, and that the DOE, after receiving that decision, failed to require that the districts, as well as other Abbott districts, revise their applications commensurate with the decision in order to eliminate the deficiencies and bring their proposals up to the level needed to ensure that such well-planned, high-quality programs would be provided. It points to what it deems as low and inadequate levels of enrollment in

preschool programs as proof that the districts failed to aggressively market their programs and seek out those portions of the preschool population that are not adequately aware of the programs. It contends that the DOE failed to assure that districts did what was necessary to upgrade those Head Start programs that did not provide a program meeting Abbott standards, so that those children attending such programs would be receiving the mandated level of preschool education. It failed to provide substantive guidance to districts that would have directed them to assure that no child seeking preschool is excluded due to parental status. The ELC also argues that the DOE insisted upon limited, pre-set amounts of funding per pupil and failed to assess the needs of specific programs and the populations served thereby to assure that each program received adequate funding and provided programs targeted to the specific needs of the students and the program, and that, to the extent that the DOE is required to ensure that districts complied with the Court's mandate, it failed to provide the necessary level of oversight, in part by not insisting that the applications filed by districts adequately assess the needs and provide specific information and detail as to how the inadequacies of programs would be remedied. The DOE also failed to instruct districts, and insist on specific, detailed plans, regarding the districts' intentions for assuring the upgrading of teacher certification in line with the mandated level of qualification required for teachers. In addition, the ELC contends that the Department has issued regulations that, while perhaps adequately repeating the mandates of the Court, nevertheless fail to provide districts with the necessary guidance and direction as to how to provide the needed programs and how to present their applications in a manner that serves the DOE's need to monitor and assess the districts' plans and performance.

The DOE Response

In response to the ELC's allegations, the DOE, which maintains that the provision of preschool is not constitutionally required, nevertheless generally contends that it has properly responded to the mandates of *Abbott V* and *VI*. It has issued appropriately directed regulations, provided districts with a detailed written statement of the academic and programmatic expectations for the preschool programs that they are required to deliver and has approved properly supported requests for transportation funding and other services such as special

education and bilingual education. It claims that it is working with districts on facility needs in accordance with the recently enacted Educational Facilities Construction and Financing Act ("EFCFA"), *P.L.* 2000, *c.* 72, codified as *N.J.S.A.* 18A:7G-1 *et seq.* It is moving forward to ensure that full-day, full-year preschool is implemented as early as possible. As for the specific allegations raised by the ELC, the Department suggests that the ELC complaints regarding the supposed failure to provide substantive standards amount, in light of the adoption of the *Expectations* document on April 17, 2000, to a demand that the Department impose a uniform, age-appropriate curriculum upon the districts, an action that the DOE denies it is required to undertake in order to satisfy the Court's requirements. To the extent that the petitioners complain about any asserted lack of guidance, assistance and/or standards regarding curriculum and other issues, the Department contends that it has provided all these in appropriate form and detail, while not imposing any ironclad, straitjacketed approach. It denies that it has imposed any hard fiscal cap on districts, acknowledging that, to the extent required in order to fulfill the Court's mandate, it must provide needed funding to the districts, while nevertheless insisting that it has the obligation to assure that where funding is requested, it is authorized to assure that the need exists. It argues that the rising enrollment rates in the districts demonstrate that the programs in place therein have successfully strengthened community recruitment and outreach efforts, resulting in increases in enrollment. It defends its position regarding enrollment projections, and points out that the Court in *Abbott VI* noted that its concern was less with "enrollment numbers for planning purposes" than with the need in given situations for "community outreach." 163 *N.J.* at 119. As for Head Start, the DOE contends that as Head Start is a federal program, neither it nor the districts can dictate to that program what it must do. Nevertheless, the Department has tried to work out funding and other needed arrangements with Head Start programs so that they could be upgraded to the state standards where the particular program did not meet those standards. Where this effort has been unsuccessful (and the DOE concedes that it has), the district is affirmatively required to assure that each child in the deficient Head Start program can be accommodated within the district's plan for providing preschool. However, to the extent that the ELC contends that the DOE has failed in its obligations because deficient Head Start programs themselves have not been brought up to standard, the Department denies that there is any mandatory requirement to provide preschool through the Head Start

medium. As for issues regarding district assessments of programs and students, it denies that such assessments are required before the preparation and submission of plans and revisions thereof. Finally, to the extent that districts are complaining about specific funding issues, these disputes must be resolved in the context of any pending case between the district and the DOE.

The DOE Response to *Abbott VI*

Regulations

Before considering the record and the arguments presented by the parties, it may be useful to review the regulations adopted by the DOE following the issuance of *Abbott VI*. These represent the most formal legal response to the Court's *Abbott V* and *VI* mandates. These regulations became effective on July 3, 2000, after the end of the 1999-2000 school year and, effectively, after the budget process for the 2000-2001 school year was complete. The regulations identify their purpose as ensuring that quality early childhood education programs are established in New Jersey. *N.J.A.C.* 6A:24-3.1. They require that the local board offer a half-day program to all three- and four-year-old children and implement a plan to provide a full-day, full-year program by the 2001-2002 school year. *N.J.A.C.* 6A:24-3.3(a). They codify the Court's mandate that the board "shall provide one teacher and one aide for every 15 children" and that "[c]lass size shall not exceed 15 children." *N.J.A.C.* 6A:24-3.3(a)(3). They require that the board provide programs meeting the Department's expectations, expressed in its then recently adopted "*Early Childhood Education Program Expectations: Standards of Quality*" ("*Expectations*") that are linked to the Core Curriculum Content Standards ("CCCS") and integrated with the WSR model(s) or the whole school reform alternative program design(s) utilized in the district. *N.J.A.C.* 6A:24-3.3(a)(4). They mandate that new teachers employed shall be required by September 1, 2001, to hold the new teacher of Preschool through Grade 3 endorsements and that master teachers be provided at a recommended ratio of one to every 20 classrooms. *N.J.A.C.* 6A:24-3.3(a)(5) and (6). The regulations further provide that the board "shall develop, in consultation with the Department, community outreach and recruitment strategies to maximize participation," and that the board, to the extent that enrollments "do not

exceed 50 percent of the projected preschool population in the district, . . . shall develop a corrective action plan to increase enrollments which shall be approved by the Commissioner and then implemented by the district." *N.J.A.C.* 6A:24-3.3(a)(8).

In addition to these requirements, *N.J.A.C.* 6A:24-3.3(b) provides that the "board shall cooperate with or utilize a DHS-licensed child care provider whenever practical to implement required . . . programs and shall not duplicate programs or services otherwise available in the community." The regulation provides that when such arrangements are made for DHS-approved providers to conduct programs, the contract for such services shall be in a Department-approved form containing clear expectations, necessary supports and accountability measures. The DHS-approved provider must agree to comply with the class size and teacher-student ratio requirements established in *N.J.A.C.* 6A:24-3.3(a)(3) and must provide programs meeting the *Expectations* and linked to the CCCS and integrated as required in *N.J.A.C.* 6A:24-3.3(a)(4). Teacher certification for existing teachers who do not hold the required academic credentials must be brought up to required levels and the P-3 endorsement obtained by September 2004, and other certification requirements for newly hired teachers must be achieved by September 2001. *N.J.A.C.* 6A:24-3.3(b)(3), (4). The Board must operate its early childhood program consistent with its early childhood plan approved by the DOE and "shall provide any necessary information to the Department to ensure that the program implementation is consistent with that plan." *N.J.A.C.* 6A:24-3.4(a). Finally, the regulations provide that "[n]o additional early childhood education programs or services shall be approved unless a particularized need is demonstrated pursuant to *N.J.A.C.* 6A:24-5." *N.J.A.C.* 6A:24-3.4(b).

The Preschool Program Contract

In addition to the regulations the DOE also issued the *Abbott Preschool Educational Program Contract* ("*Contract*"), a document incorporating and elaborating upon the requirements for the provision by outside providers of Abbott preschool education programs. This document addresses, among other items, the components of such programs, the staff qualifications required, the terms of the agreement and the termination procedures, the

compensation rates, the need for district/provider coordination and cooperation, the record-keeping requirements, confidentiality issues and the monitoring of program performance. The *Contract* attempts to respond to the Court's observations in *Abbott V* and *VI* regarding the wisdom of and need for cooperation with existing community-based providers and the terms and conditions necessary to accomplish this cooperation while assuring that the districts have all necessary control and authority to ensure that the community-based programs function in accordance with Abbott standards. *Abbott VI, supra*, 163 *N.J.* at 114-16.

Arguments Concerning Specific Issues

Standards and Guidance

The ELC's first contention is that the DOE has failed to provide timely and concrete guidance to both enable and assure that districts plan and implement *Abbott VI* quality-preschool-for-all-children standards. In *Abbott VI*, the Supreme Court directed that uniform standards be established emphasizing articulation with the whole school reform programs and the Core Curriculum Content Standards. It emphasized then that staff assistance, which the DOE now offers and has been provided post-*Abbott VI* in many workshops, seminars, and meetings, is not a substitute for "substantive standards" issued by the Commissioner. The Court did not believe that the DOE would be able to evaluate preschool programs and prevent a two-tiered system from forming, with one tier consisting of those programs offering well-planned, high-quality early childhood education and the other tier consisting of those programs offering nothing more than daycare, unless such substantive standards were promulgated. *Abbott VI, supra*, 163 *N.J.* at 106-07. Indeed, in his concurrence, Justice Stein termed the need for "prompt adoption . . . of clear substantive standards" "incontestable." 163 *N.J.* at 123. The Court noted that at the time of the decision the DOE had a set of "draft standards" on its website and ordered that "substantive educational guidance," termed an "essential component of DOE's commitment," must be adopted by April 17, 2000. 163 *N.J.* at 107.

The Court's concerns regarding the need for substantive standards can only be understood in light of its previous comments regarding standards and the adoption of the Core Curriculum Content Standards by the Legislature. In *Abbott v. Burke*, 149 *N.J.* 145, 161-62 (1997) ("*Abbott IV*"), the Court noted that the development of the actual curriculum was left up to the local boards of education and that the Core Curriculum Content Standards were "not a curriculum; rather, they define the results expected without prescribing specific strategies or educational methodologies to ensure that students actually meet those expectations." However, the Court added that "the Legislature has now taken a major step to spell out and explain the meaning of a constitutional education. The content and performance standards . . . represent the first real effort on the part of the legislative and executive branches to define and to implement the educational opportunity required by the Constitution. It is an effort that strongly warrants judicial deference." 149 *N.J.* at 167-68. The Court found the standards to be "facially adequate as a reasonable legislative definition of a constitutional through and efficient education." 149 *N.J.* at 168.

As noted above, the Department did adopt its "*Early Childhood Education Program Expectations: Standards of Quality*" ("*Expectations*") by the April 17 deadline. In its later adopted regulation, *N.J.A.C.* 6A:24-3.3(a), the DOE provides that programs must meet the *Expectations*, which are linked to the Core Curriculum Standards and integrated with the WSR model or the whole school reform alternatives.

The ELC argues that the *Expectations* are not the "substantive educational standards" that the Court required the DOE to produce. In a certification entered in evidence by the petitioners, Dr. William Steven Barnett, director of the Center for Early Education at Rutgers ("CEER"), and a full member of the graduate faculty of Rutgers, New Brunswick, in public policy and education, who has previously testified as an expert in earlier *Abbott* proceedings, offered his review of the *Expectations*. He opined that they (1) are not substantive educational guidance or program standards to guide districts and community-based providers to implement preschool in accordance with the Abbott quality standards and to do so in a uniform fashion; (2) are exhortations to the reader to implement "developmentally appropriate practices" without explaining how "this can and should be done"; (3) primarily focus on the classroom activities and

neglect program standards, program and child assessment, planning, budgeting, supervision, professional development, social and health services and services and strategies for children with disabilities and those with limited English proficiency; and (4) fail to provide "clear, measurable standards of high-quality classroom practice to which the teaching staff can be held accountable."

In response to Dr. Barnett's position, the DOE offers the certification of Kimberly Friddell, coordinator of the Division of Early Childhood Education for the DOE, who is responsible for review and assessment of Abbott school districts' Early Childhood Education Operational Plans. She offers that the *Expectations* are "substantive educational guidance to Abbott districts to assist in the development of the district's instructional program." In addition, the Department notes that it is now in the early stages of preparing an "Early Childhood Education Curriculum Framework," although it is noted from the record that the team charged with writing this document was only being selected sometime after February 8, 2001. According to an announcement seeking persons interested in being considered for the drafting process, this document is intended to present "broad overarching concepts and ideas for the development of curriculum" to support the successful achievement of the *Expectations*. "The introduction of the entire framework document will address issues of the effective instruction, interdisciplinary methodology and other related issues" and "will offer teachers multiple strategies to meet the preschool standards and related progress indicators, and also develop guidelines for instructional strategies and assessment methods to assist educators in the development of supportive, effective learning environments."

The *Expectations* document states that it is "not to be seen as a curriculum guide or to limit the district's implementation of developmentally appropriate curricula that will meet the individual needs of children in their communities." In addition, the *Expectations* "are not meant to be used in isolation, but as one of the many resources that are essential to building a developmentally appropriate early childhood program."

Enrollment/Recruitment/Head Start/Parental Status

The ELC raises several interrelated issues concerning the efforts of the districts and Department to assure that all Abbott-district children have the opportunity to attend early childhood programs. It argues that the DOE has failed to ensure (1) that the districts are providing high-quality, well-planned early childhood programs for *all* Abbott-district students; (2) that the districts are engaging in aggressive recruitment of eligible students; (3) that the districts include children in Head Start programs as a part of their programs; and (4) that no children are denied programs due to their parental status. In the ELC's view, a review of the number and percentage of students actually enrolled in preschool in the Abbott districts constitutes clear proof that the Supreme Court's goal of affording constitutionally appropriate preschool education to all Abbott-district preschoolers has been defeated by district and DOE inaction. To the extent that recruitment of hard-to-reach groups has not occurred and children in Head Start have not been included, these failures have played a role in limiting enrollment.

As the Court affirmed in *Abbott VI*, preschool programs are mandated for all Abbott-district children. In discussing what it characterized as "some misunderstanding about the DOE requirement that the districts plan for seventy-five percent of their anticipated preschool enrollment (based on the number of children in kindergarten the previous year) instead of 100 percent or full enrollment," 163 *N.J.* at 118-19, the Court recognized that the Commissioner, while allowing districts to develop their enrollment projections based on "reliable indicators," had, more importantly, "stated unequivocally that every child who seeks to enroll in preschool will be accommodated," 163 *N.J.* at 119. The Court determined that the issue of concern was not so much enrollment numbers for planning purposes, but instead, "whether there is a need for community outreach to inform parents about the availability of preschool for three- and four-year old children in the Abbott districts." 163 *N.J.* at 119. The Court announced its expectation that "low enrollments" revealed by "assessment and evaluation of preschool programs in the SNDs" "will trigger a determination whether parents in the community are aware of the districts' preschool programs," and, to the extent that parents are not aware, "the district must make

concerted outreach efforts to improve enrollments"; to the extent necessary, the "Commissioner must make funding available for this purpose through the DOE's supplemental program procedures." 163 *N.J.* at 119.

The Court also recognized that, where a student attends a Head Start program that provides a preschool education at or above the standards required for class size, teacher-student ratio, quality standards, etc., in Abbott-district preschools, the district did not have to duplicate what was already a constitutionally appropriate program and did not have to separately provide that child with a preschool program. The district could therefore exclude such children from its projections as to the number of children it had to serve, and plan accordingly in terms of faculty, facilities, etc.

The regulations adopted by the DOE effective July 1, 2000, clearly provide that early childhood preschool "shall" be offered to all three- and four-year-olds. In *Abbott V*, the Court emphasized that the Commissioner "may authorize cooperation with or the use of existing early childhood and day-care programs in the community." 153 *N.J.* at 508. The regulations incorporate this requirement at *N.J.A.C.* 6A:24-3.3(b), expressing in mandatory terms that districts "shall cooperate with or utilize a DHS-licensed child care provider whenever practical" and shall contract with such a provider "when that provider is able and willing to comply" with requirements imposed upon Abbott preschool programs. The district is not to duplicate programs or services that are otherwise available.

The petitioners contend that the DOE provided the districts with no guidance on revising their January 2000 plans to address the need for assessment of enrollment issues or the need for outreach and has not determined whether enrollments in any districts are too low, therefore triggering the need for concerted and aggressive recruitment activities. There have been no assessments regarding hard-to-reach persons, communities, or ethnic or cultural groups, and no district or state assessments of whether the parents in the districts are aware of their children's entitlement to preschool. No direction has been provided regarding either the creation of plans for recruitment or the budgeting of such recruitment programs, or for the planning of such

campaigns. Only "isolated" expenditures have been approved for such recruitment activities and no additional funding has been provided to assist districts in this task. The proposals offered by the districts in January 2000 proposed to serve only 60% of the projected population of eligible students: indeed, the Newark plan only called for 40% to be served. According to Dr. Barnett's supplemental certification, as of December 2000, figures supplied by the districts to the DOE show that only 47% of the eligible students in the thirty Abbott districts are being provided with early childhood programs, with the figure in Newark standing at 42%, Paterson at 37%, Jersey City at 43% and West New York at 56%.[9] Other district total preschool enrollments range from a high of 84% in Harrison to a low of 22% in Plainfield.[10] When compared to the total number of eligible children these extremely low numbers demonstrate the failure of the DOE and the districts to do enough to ensure that all Abbott-district preschool children are served.[11] The ELC accuses the DOE of continuing to deny its obligation to serve all eligible children.

In support of their position on these issues, the petitioners offer the certification of Joan Ponessa, research director for the ELC's Abbott Schools Initiative, who asserts that a review of the one-year operational plans filed for Abbott districts for 2000-2001 shows no guidelines, standards or procedures for comprehensive, planned approaches to aggressive outreach and recruitment. Only some of the plans are even minimally responsive to these concerns. The Paterson, Newark and Jersey City plans provide for some expenditures, but do not describe any definite plans, and the West New York plan provides for minimal expenditures and for the

[9] These figures reflect Dr. Barnett's data. According to his supplemental certification, this data was collected by the CEER from each of the thirty Abbott districts and also was consistent with the data supplied by the DOE, which had received preschool enrollment forms by December 15, 2000, from each Abbott district. According to his calculations, as of December 2000, out of a projected total of 49,064 eligible for preschool, only 22,926 are actually enrolled. In the State-operated districts of Newark, Jersey City and Paterson, the figures are: Newark, 2,908 out of 7,002; Jersey City, 2,598 out of 6,014; and Paterson, 1,795 out of 4,906. Joan Ponessa's certification on behalf of petitioners, drawn from information apparently received earlier than Barnett's, reflects slightly lower percentages of enrollment, with Newark at 39%, Jersey City at 39%, Paterson at 32% and West New York at 48%. Thus Barnett's data appears to reflect some increase, albeit limited, in enrollment in the first half of the 2000-2001 school year.

[10] Other examples drawn from Dr. Barnett's data include high figures such as City of Orange, 69%; Irvington, 78%; New Brunswick, 77%; Pleasantville, 68%; and Trenton, 64%. Examples of low percentages include Elizabeth, 25%; Paterson, 37%; Newark, 42%; Jersey City, 43%; and Asbury Park, 45%.

[11] Joan Ponessa's certification states that she calculated the "universe" of eligible three- and four-year-olds for each district by doubling the 1998-99 first-grade enrollments, a calculation that does not include those first-graders enrolled in private schools. Dr. Barnett used the same formula. Kimberly Friddell certifies that the DOE determined the universe of eligible students by averaging the enrollment of kindergarten and first grade and then multiplying by two. She asserts that this is a "most reasonable estimate," as kindergarten is voluntary and first grade mandatory and preschool is voluntary.

provision of literature to be distributed at several identified forums, but also does not describe a concrete strategy. Ms. Ponessa observes that after the Court issued *Abbott VI*, the DOE did not offer the districts any guidance as to how to comply with its mandate regarding assessment and, where indicated, recruitment. While Abbott-district superintendents wrote a letter to the Department seeking clarification and assistance regarding outreach, no guidelines were issued even after that request. Paterson did list some additional outreach activities on its revised application, but neither Newark, Jersey City nor West New York offered any revision in this area. The DOE's responses approving these plans did not require that any of these districts make any further revisions. Ponessa's comments regarding the lack of any post-*Abbott VI* guidelines or standards for the development and implementation of plans for aggressive outreach are echoed in the certification offered by Thomas G. Dunn, Jr., superintendent of the Elizabeth School District. Dr. Barnett reports in his certification that a CEER door-to-door survey conducted in Newark in spring 2000 found that "most parents" were unaware of the availability of an early childhood program from the district.

As for Head Start, the petitioners claim that those Head Start programs that did not meet Abbott standards were not offered sufficient funding to allow them to achieve the necessary standards. The failure of the DOE to provide such funding violates the Court's mandate. Ms. Ponessa's analysis of the four districts' applications both pre- and post-*Abbott VI* indicates that in January 2000, Paterson identified 492 three- and four-year-olds in federally funded Head Start and had no plan or budget to serve these children in a way that would assure that they received an Abbott-compliant education in their Head Start programs. Newark had included funding to serve 345, but had no plan to serve them in accordance with Abbott standards. In addition, it identified 1430 additional three- and four-year-olds in federally funded Head Start programs, but requested no funding to serve these children in Abbott-compliant programs. Jersey City offered no plan for children in Head Start, despite identifying 875 children as participating in federally funded Head Start. West New York also did not submit a plan that indicated that it intended to assure Head

Start children an Abbott-quality program. Following *Abbott VI*, none of the districts provided any significant revision regarding Head Start.[12]

In support of these contentions, the petitioners offer the certifications of Cecile Dickey, executive director of the Concerned Parents for Head Start in Paterson ("Concerned Citizens"), Trish Morris-Yamba, executive director of the Newark Day Center and a member of the Executive Committee of the Newark Emergency Committee to Save Child Care, Audrey West, executive director of the Newark Preschool Council, and Lorraine Johnson, director of the North Hudson Community Action Head Start Agency. Each of these individuals details the circumstances of her particular organization and addresses concerns regarding allegedly inadequate funding offers, lack of assessment of needs, including for transportation, professional development and certification, disparity of salaries and benefits between their staffs and those of the local districts and the need for comparability in order to secure and retain qualified staff.

Ms. Dickey reports that her organization has operated since 1965 and currently serves 663 disadvantaged three- and four-year-olds, spending an average of $6,500 per student to provide a full-day or six-hour program for 560 children for 185 days a year and an extended day or ten-hour day for 103 children for 245 days a year. During the 1999-2000 school year, the Paterson School District approached the organization about providing Abbott preschool to non-Head Start children and also providing preschool under Abbott standards to some of the federally-funded Head Start children in Paterson. The district offered to pay $3,500 per child, but no contract was ever finalized and Ms. Dickey believes that the DOE rejected the district's offer. No explanation was ever provided as to how that $3,500 figure was determined, and she contends that it was not based upon any assessment of the educational needs of the children in her program or of the centers themselves. No approach was made to her organization for the 2000-2001 school year. A recent approach by the DHS, again offering to pay $3,500 per child to supplement federal funding for Head Start, with the Concerned Citizens to agree to extend its six-hour day/185-day program to ten hours per day/245 days, was "never seriously pursued" by Concerned Citizens, as they knew that they "could not possibly operate on so little funding." As of the present time,

[12] Dr. Holster's certification also complains that the DOE did not require Passaic to include Head Start children or

class size in the Concerned Citizens program is 18-20 students per class and teachers are non-certified. Ms. Dickey advises that in order to meet Abbott requirements, the group would need funding based upon an assessment of the children's educational needs, as well as the needs of the program, including staff, facilities and the like. The staff issue is most significant, as the certified teachers previously employed have, with one exception, left for higher salaries offered by the district. In order to be able to provide Abbott-quality preschool for ten hours a day/245 days a year, the Concerned Citizens estimate that they would need approximately $5,000 per child, in addition to the federal funding they receive.

Ms. Morris-Yamba certifies that the Emergency Committee consists of approximately fifty early childhood centers ("centers") in Newark. The Newark plan submitted in January 2000 included all of these centers. In 1999-2000 the centers did not receive sufficient funding to provide preschool education consistent with Abbott standards. Class size, teacher certification and curriculum requirements were all difficulties. Following *Abbott VI*, the situation has not changed. Discussions held in the winter of 2000 regarding a contract for Abbott programs for the 2000-2001 school year resulted in an offer for blended DOE/DHS funding for full-day/full-year preschool. The amount offered was $9,000 per child, which Morris-Yamba states was, in the estimation of the Emergency Committee, "wholly inadequate to provide a high-quality ten-hour, twelve-month" Abbott program. The district advised the committee that the $9,000 was a "pre-set" figure established by the State and that the district had no authority to exceed that amount. Morris-Yamba is unaware of how the figure was determined, and is not aware of any formal needs assessment of either preschool children in Newark or those in the collaborating centers. Indeed, the Committee calculated the necessary funding per child for full-day, full-year, high-quality Abbott education at $13,000. While no contract was entered into following these negotiations, in late August an agreement was reached with the district for funding at $4,750 per child for six hours a day/180 days for the 2000-2001 school year. This would be supplemented by the $4,500 per child received from the DHS for daycare services for an additional four hours per day and an additional 65 days a year, and by an additional $600 received per child for family service workers, in accordance with a separate contract with the DHS. Although the Committee

---

approve funding for Head Start children in the district's preschool plan.

believed this amount of funding to be insufficient, it nevertheless "felt compelled to enter into this contract to avoid disruption of services to Newark's children and families." The lack of sufficient funding under the Abbott contract has greatly limited the centers' ability to provide the curriculum, staff, support, and facilities needed to provide a proper Abbott-standard program.

Ms. West, whose organization is described as the largest federally funded Head Start agency in New Jersey, serves 2582 three- and four-year-old children. She details that her program standards are below Abbott level, yet they have been unable to contract with the Newark School District. In addition, the Department of Human Services has rejected their proposed budget, offering to pay $5,050 or $5,800 per child, depending upon whether the teacher in the classroom is certified or not, for a ten-hour/245-day program. Ms. West is unaware that any assessment of educational needs or of the program itself was conducted to form the basis of these per-child funding offers. She asserts that the funding offered was based instead upon a pre-determined, per-pupil amount of either $9,250 or $10,000, again depending upon certification of the teacher. The DHS funding, although accepted for 345 children, was inadequate to permit the program to provide Abbott-compliant preschool for these children, as the requirements for class size, teacher certification and developmentally appropriate curriculum could not be met. No DOE or DHS funding has been provided to permit the organization to deal with these deficiencies. No contract is in place to allow for the provision of Abbott preschool for the remaining children in the Head Start program.

Ms. Johnson certifies that her program, which serves Union City and West New York, serves 349 children, 120 of whom are from West New York. Federal Head Start funding provides $6,996 per student for six hours per day/160 days per year. In 1999-2000 the West New York Board of Education contracted for services for 81 children not funded by federal funds, at $11,766 per pupil or $6,695 per pupil, the difference depending upon the location at which the services were provided, being either in the Head Start centers or in district-owned facilities. These contracts did not concern the federally funded children. In May 2000 the district first advised that it was discontinuing the contracts, but later, in June 2000, the District offered $4,500 per child for 30 children in a six-hour/180-day program to be held in two vacant classrooms. The

amount offered was clearly insufficient, but the agency accepted the contract due to the overwhelming demand for the program. As with the other witnesses, Ms. Johnson knows of no assessments having been prepared on which to base the $4,500-per-pupil funding. No funding was provided for curriculum development, salary comparability, bilingual education or facilities.

The record also reveals that, apparently in anticipation of a statewide accord with Head Start, the Department denied district-requested funding for federally funded Head Start, as it did, for example, in its June 20, 2000, letter responding to Vineland's preschool plan. On September 22, 2000, the Commissioners of Health and Education jointly announced that the agencies had "made a commitment to Head Start directors to assist them in participating in the Abbott Early Childhood Education Program" and that an agreement had been reached allowing such participation, effective immediately. The letter announcing the agreement reports that the State would "contract with Head Start programs to fund the difference between federal Head Start funding and the average district-sponsored preschool funding," with the Head Start programs agreeing to meet DOE regulatory standards based upon the *Abbott* decisions. However, despite this announcement, counsel for the DOE concedes that in the end the contract negotiations were not successfully concluded.

The DOE points out that the *Abbott VI* decision clearly requires that, to the extent a district intends to serve children through a Head Start program, it must do so only in Head Start programs that meet Abbott quality standards. In such instances funding and other supports must be provided to allow those programs to reach such standards. However, the DOE does not read the decision as compelling districts to upgrade deficient Head Start programs. Instead, a district has a choice. It may work with the Head Start program to achieve the necessary upgrade to Abbott standards, or, alternatively, if the Head Start program is unwilling or unable to upgrade, even if offered district assistance, the district may fulfill its absolute obligation to provide a preschool program for these children by choosing to do so in some other community-based or in-district program.

In her certification on behalf of the DOE, Ms. Friddell advises that recruitment and outreach was a topic for discussion at the Program Development Institute held on March 8, 2000, just after the issuance of *Abbott VI*, and opportunities were provided to discuss successful strategies. Among those mentioned were the use of grocery bags and liners for trays at fast food establishments. The topic was again discussed at meetings in late April and early May. A memorandum issued on May 12 "reinforced" the need for recruitment of students with disabilities. Special efforts to recruit in the Hispanic community were made through contacts with the Hispanic Directors Association of New Jersey. Individual district applications filed with the DOE included provisions for recruitment and outreach activities. Jersey City listed nine activities to be paid for with Early Childhood Program Act Funds. West New York advised that it would use cable TV and posters in religious facilities, shopping areas and restaurants to get out the message. Paterson proposed to advertise in newspapers, place posters and issue fliers, and raise awareness at its Parents Awareness Day. Newark described its proposed actions as an "aggressive registration campaign . . . designed using varied media resources" and listed several items.

Ms. Friddell's amended certification, filed on February 16, 2001, asserts that, based upon projected enrollment data submitted to the DOE in the 2000-2001 early childhood plans and the October 13, 2000, ASSA data, every Abbott district except for Elizabeth is serving at least 50% of its projection.[13]

At oral argument counsel for the DOE observed that while the figures gathered in December 2000 are, of course, a confirmation that there is a long way to go to reach levels commensurate with the realization of full enrollment of the projected student population, they do demonstrate progress over earlier figures.

[13] Interestingly, Ms. Friddell's amended certification was filed after Dr. Barnett's supplemental certification in which he discussed the data collected by the DOE as of December 15 and the CEER data, and concluded that at least twelve Abbott districts were not serving at least 50% of their projected universe of three- and four-year-olds. Perhaps the difference between the Friddell and Barnett calculations is the result of the difference in calculating the projected universe.

The ELC also argues that the DOE has failed to assure that no child is denied an early childhood education due to parental status. In *Abbott VI*, the Court noted that allegations had been made that children whose parents had dropped out of a required Temporary Aid for Needy Families ("TANF") program could not attend Head Start. In light of this claim, the Court emphasized that "no child may be excluded from a preschool program that is part of a district plan because of parental status." 163 *N.J.* at 117. The ELC contends that despite this determination, the DOE has not required that districts do anything to assure that such parental-status-based exclusions not occur and has neither provided nor required such guidance or training as to this holding. In response the DOE notes that it has no reason to believe that such exclusions are occurring following the Court's ruling, and points out that the situation described was a limited one. It believes that no additional regulations, safeguards or instructions are necessary.

The Need for Assessments and Issues Regarding Funding and Facilities

In *Abbott V* the Supreme Court ordered that those Abbott schools able to obtain space, supplies, teaching faculty, staff, etc., necessary for the implementation of these programs for the 1998-99 school year "should be supplied with the necessary funding to enable them to do so" and that, in addition, the "Commissioner shall ensure that all other Abbott schools shall have the resources and additional funds that are necessary to implement pre-school education by the commencement of the 1999-2000 school year." 153 *N.J.* at 508. In *Abbott VI* the Court addressed concerns regarding the alleged lack of compliance by the DOE with the *Abbott V* mandate regarding the funding of supplemental programs and preschool facilities improvements. 163 *N.J.* at 117. It criticized the DOE for not providing the districts with sufficient guidance early on in the process in 1998-99 following *Abbott V* so that they could properly comply with the Department's process for considering facility and supplemental funding requests, pointing out that in some cases districts had made such requests as a part of their operational plans. The Department had then advised those districts that they had to make such requests separately. In response to the allegations regarding this alleged failure to comply with the *Abbott V* mandates, the Department assured the Court that requests for both supplemental and temporary facilities

funding were being approved and funded under its chosen procedures. The Court indicated that the choice of procedures was "no doubt within the agency's prerogatives." 163 *N.J.* at 117. The Court further opined that disputes over the specific needs of districts were the sort of fact-sensitive matters demanding the creation of a record that were properly determined at the OAL and, ultimately, by the Commissioner. However, in response to what it called the DOE's "form letter responses" to district funding applications, the Court did express a caution that "reasonable requests to fund supplemental programs must be handled fairly and quickly." 163 *N.J.* at 118. The Court's continued insistence upon the need for assuring adequate funding must be understood in light of its determination in *Abbott IV* that the provision of "arbitrary" amounts of funding, unsupported by studies as to the adequacy of such amounts, was unconstitutional. 145 *N.J.* at 180-86.

The petitioners once again complain that the DOE has failed to fulfill the Court's mandate. In large part, the petitioners complain about what they see as the Department's failure to assess the needs of students and districts and to insist upon districts doing the same regarding their programs and students, as well as the community providers with whom they propose to work. As one example of the arbitrary action of the Department undertaken without the benefit of apparent study, analysis and assessment, the petitioners claim that rather than doing as the Court instructed, the DOE has instead insisted upon imposing a pre-established cost per student of $4,500, a figure used in such dealings as the DOE's contract negotiations over Head Start. It points to the form issued for the "Abbott Preschool Educational Program Contract,"[14] in which the "Compensation" section contains the $4,500 figure as the amount the district "shall pay the Provider . . . per child based on an average daily attendance of no less than 80%." In the Newark Plan submitted in January 2000, the Board proposed to serve 90 eligible three-year-olds, at a cost of $4,500 per student per school year in cooperation with providers, the tuition covering educational services, materials and supplies.

In addition, petitioners claim that the DOE has failed to insist that districts detail their plans for achieving certification of teachers within the time frames established or to provide

[14] Miller Cert., Exhibit D.

funds for such purposes. It has also insisted upon limiting funding to districts to pre-determined ECPA levels, without assurance that such funding will be adequate for districts to provide well-planned, high-quality preschool education.

The petitioners also complain that the DOE has failed to provide safe and adequate preschool facilities. In part, they urge that the Department has failed to require the districts to assess their temporary and permanent facility needs in light of the restriction to fifteen students per classroom and the goal of increased enrollment. Elizabeth especially argues that it has encountered serious difficulties in its planning process due to the failure of the State to provide funding, and assurances of funding, for what the district believes to be its facility requirements. It contends that the DOE's failure to at least commit to the funding of the facilities prevented it from realistic planning for the 2000-2001 school year and forthcoming school years and, in particular, has deleteriously impacted on its ability to realistically recruit its preschool population since it could not itself be assured, or assure parents, that facilities would actually be in place for the children. Passaic also complains vigorously that the DOE has not acted so as to assure that funding for all necessary preschool facilities will be in place so as to provide adequate facilities for its programs.

In part, the DOE response to complaints regarding alleged systemic failures regarding funding is that in those cases involving district-specific complaints that adequate funding was not provided, those complaints are more properly addressed in individual appeals related solely to the circumstances of the individual district and its children. As previously noted, a number of these cases have been filed in the OAL in both the 1999-2000 and 2000-2001 school years and most have been resolved between the DOE and the individual district without the need for a full hearing. In addition, the DOE disputes the contention that either *Abbott V* or *VI* requires districts to conduct needs assessments of students and preschools prior to designing or revising early childhood plans. To an extent the DOE also argues that disputes regarding special education funding are properly addressed in OAL proceedings brought to deal with the rights and responsibilities attendant to the special legislation pertaining to special education, such as the

Individuals with Disabilities Education Act ("IDEA"), 20 *U.S.C.A.* § 1400 *et seq.*, and *N.J.S.A.* 18A:46-1 *et seq.*

Addressing the facilities funding issue, the DOE believes that as of this time the appropriate procedure for districts to seek such funding is through the process established by the Legislature in the Educational Facilities Construction and Financing Act ("EFCFA"), *N.J.S.A.* 18A:7G-1 *et seq.*, enacted on July 18, 2000. It contends that this legislation "fully funds the new construction and renovations" of Abbott-district schools and thereby responds to the mandate of the *Abbott V* Court. The EFCFA (1) establishes an orderly process for approval of long-range facilities plans, (2) establishes criteria for determining whether rehabilitation or renovations are warranted, and (3) allows districts to seek additional space beyond that provided by the facilities efficiency standards upon a demonstration of particularized need. *N.J.S.A.* 18A:7G-3, 4, 5(g)(1), 7(b). Educational Facilities Regulations promulgated by the Commissioner at *N.J.A.C.* 6:23A-1.1 *et seq.*, effective on January 26, 2001, implement the EFCFA provisions. The DOE argues that at this time, all requests for temporary or permanent facilities must be made and reviewed under the standards and procedures of the EFCFA and its implementing regulations. If a district is unsatisfied with the results of the review of its EFCFA application, it can appeal that determination. To the extent that there is currently any dispute by a district over facilities funding, the matter is not properly before the OAL at this time. In the interim, to the extent that districts require temporary facilities to fulfill their Abbott commitments until permanent facilities can be constructed or renovated, the New Jersey Economic Development Authority ("EDA") is in the process of procuring temporary modular classroom units to ensure that all students eligible can be served in full-day, full-year preschool by September 2001.[15] Regarding Elizabeth's facilities complaints, the Department contends that the district failed to advise it of the specific facilities to be used by the district and this failure delayed the issuance of the decision on Elizabeth's plan and application.

Finally, the DOE argues that where a district exhausted its available ECPA funding in support of approved early childhood programs, additional funding was approved where need was

[15] *See* Sztuk certification.

demonstrated. To the extent that additional funding is demonstrably necessary above and beyond the supplemental funds already provided by the Legislature for the 2000-2001 school year, the Commissioner will seek those funds. The Department recognizes that the Commissioner must ensure that Abbott schools have the resources and additional funds necessary to implement preschool education in the 2000-2001 school year. Thus, it denies that it has imposed either an estimated amount per pupil for the costs of early childhood education or that it has capped funding by districts at the existing level of ECPA funds.

The petitioners respond that the DOE's insistence as to the required use of EFCFA procedures amounts to nothing more than a bureaucratic detour from the DOE's fulfillment of its responsibility to assure funding of necessary temporary and permanent facilities. Elizabeth urges that the Department's position *vis-à-vis* its facility requests is unreasonable, as logic compels that the DOE's decision on whether to allow the district to implement a full-day, year-round program for all eligible preschool children had to be received before the facilities for implementing the program could reasonably be identified and secured. The nature and structure of the program to be provided would be a vital factor in establishing the sites for the implementation of the approved program.

DISCUSSION

The long history of *Abbott* litigation demonstrates that the issues involved in the effective delivery of a thorough and efficient education to students in the designated Abbott districts are, for many reasons, not easily brought to conclusion. Indeed, in his concurring opinion in *Abbott VI*, Justice Stein reflected that "[t]he effectuation of the *Abbott V* requirements involves both a large scale and long-term cooperative effort between the DOE, the Abbott districts and the Abbott schools, much more in the nature of a marathon than a sprint." 163 *N.J.* at 128. He recognized that in this effort, so complex and vast in scope, "missteps are virtually certain to occur." 163 *N.J.* at 132. While he clearly foresaw that such a project could not be successfully completed in "a sprint," the fact that it might be a long-term, "marathon" undertaking did not, however, mean that the near-term efforts did not have to be undertaken with urgency, for "the

clock is ticking, and for each school year in which implementation is delayed or flawed, thousands of urban children will lose the full benefit promised by the Abbott initiatives." 163 *N.J.* at 132-33. Foreseeing that "vigorous leadership on the part of the Commissioner and sustained support and encouragement from the DOE will be critical if the reforms are to succeed," 163 *N.J.* at 128, he asserted that "[t]he time for "bold, corrective and decisive action by the DOE is now," 163 *N.J.* at 133.

The petitioners, who initially contended in 1999 that the DOE had failed to comply with the mandates issued by the Supreme Court in *Abbott V*, continue to insist that the DOE continued to fail to comply with those mandates in the post-*Abbott VI* stage. In their arguments and evidence, they rely in significant part upon the conduct of the districts and the Department in regard to the plans and applications for funding presented by the districts, first in January 2000 for the 2000-2001 school year and, later, in regards to the post-*Abbott VI* district responses, or the lack thereof, regarding revisions to those plans and applications. They judge the affirmative responses and developing actions of the Department to be manifestly deficient and symbolic of an abject failure to deliver on the Commissioner's past promises and, perhaps more importantly, to effectively respond to the commands of the Court. To the extent that these failures have occurred, they constitute violations of the children's constitutional rights.

To a significant extent, the ELC's global issues focus upon what it perceives as the failure of the DOE to require that districts produce for its review appropriate and necessary information so that the Department can fully understand the circumstances, conditions and needs of the districts, their students, their schools and to the extent involved, the community-based providers whom the district proposes to use to assist it in providing preschool to its students. It asserts that only when armed with such information and knowledge, along with the information it must itself gather in order to assess the information given to it by districts, can the Department properly fulfill the overarching role the Court so definitively assigned it. These complaints, while ultimately grounded in specific allegations of inadequate funding that are properly resolved in individual district-specific hearings, are, on the "global" level, largely complaints about process, complaints that the process used by the districts and the Department to carry out their mandated

tasks are flawed, so much so that they lead to inadequate or non-existent planning, review, assessment and delivery of necessary funding, facilities and programs to the Abbott children. They are, fundamentally, issues that address the aftermath of the broad pronouncements of the Supreme Court, which while mandating the ultimate roles and responsibilities of the Department and its district surrogates in delivering high-quality preschool to Abbott-district children, did not address the details of exactly how the districts and the DOE were to carry out their mandates. Thus, the Department is criticized for failing to properly arrange for and insist upon the details seen as essential to the process, such as allegedly failing to require, among other things, (1) the development of plans for provision of preschool to all eligible children in the districts, (2) plans regarding how to outreach and recruit, (3) assessments of children's needs and plans to meet those needs, (4) improvement plans for the school- and community-based programs, and (5) plans to deal with facilities, teacher qualification, transportation, class size, etc. The Department is then criticized because, to the extent it has not insisted upon receiving this information, it cannot act, and even where it has received the information, it has not acted, to assure that the districts receive the necessary funding to carry out the Court's mandates. Further, it is criticized for its own actions, or for its inaction, concerning promulgation of standards, imposition of alleged per-student spending caps and approval of deficient plans, and for arbitrary rejection of requests.

The remedy sought for the DOE's alleged violations of its responsibilities is a finding that the DOE's implementation of preschool in Abbott districts has violated the Court's *Abbott* mandates and an order directing the Department to require districts to conduct comprehensive assessments of their preschool children and of all school and community providers so as to assure the adequacy of planning for and performance of a list of mandated Abbott-related direct educational and supplemental items and to assist them in these undertakings.[16] Thus, in this "global" decision, the remedy sought is essentially one requiring the Department and districts to

[16] Maximum enrollment, inclusion of all children in federally-funded Head Start, services for children with disabilities and limited English proficiency, transition to 15 students per classroom, professional development, teacher certification for non-certified teachers, uniform high quality through phase-in of comparability between district and provider salaries, benefits and schedules, high-quality curriculum at each site, needed health, transportation and social services, expanded facilities as needed (new or renovated), oversight, coordination, training and assessment, adequate provider-specific and district plans, budgets, facilities and State funding.

change their process, or, to the extent that process may already exist, but be unknowable to those outside the Department, to assure that it is made accessible and understandable to all concerned.

Judging the legal sufficiency of any steps taken in an ongoing process that is intended to reach a goal that admittedly cannot be achieved in a definably short time is difficult. Similarly, where some possible action has not occurred, the determination as to whether that lack of action at any given time in the long-term process constitutes a legally actionable violation can be difficult to determine. In this case, that determination is exacerbated by the passage of time in a setting where there exists a yearly cycle of events regarding budgets, plans, applications and an ever-changing population of individuals to be educated, who, for the most part, move on to a new school level each September. The application process for the 2000-2001 school year, which is the subject of much of the detailed evidential analysis presented by the petitioners in their briefs is, now, in March/April 2001, considerably dated, at least as to the districts' plans and applications for the approaching 2001-2002 school term. Thus, to a large degree, while the evidential details of what occurred last year are important as examples of what purportedly was wrong (or right) with the efforts of districts and, more pointedly here, the Department, it is the overarching systemic concerns raised by the petitioners that are most amenable to current treatment. In part, this is due to the fact that some of the DOE responses to the Court's mandates were not in effect at the time the January 2000 applications were issued, nor were they in effect, or even in existence, in the weeks and months immediately post-*Abbott VI*. As the case is judged today, regulations are in effect, the *Expectations* document is published, and a series of post-*Abbott VI* training and guidance events have occurred. Whether any of these have sufficiently performed the tasks for which they are meant and whether, even if valuable, such matters have allowed the Department to sufficiently respond to the Court's mandates so as to defeat the claims of the petitioners, is a primary aspect of the decisions herein. The ELC agrees that any relief that might be found appropriate in regards to its systemic complaints must be prospective in nature.[17] To the extent that the evidence presented establishes that the DOE has not done what the Court

[17] This is in contrast to Perth Amboy's claim regarding facility expenditures it contends the DOE has already approved but has failed to actually fund.

mandated it to do, the remedy for such non-compliance necessarily must be directive, that is, the DOE must be ordered to comply, and in that vein, possibly be given somewhat more detailed directives as to how to assure that it does so. In addition, the necessary level of evidence surrounding the actual individual and particularized needs of the four districts about which the ELC stands here are not before this judge. The decision here is therefore addressed to systemic concerns and is perceived as far more applicable to the next and future rounds of plans and applications, as any identified failings in the DOE's systemic response to the task set out for it by the Supreme Court must be immediately rectified so that the 2001-2002 school year can proceed in a more ordered and less contentious manner, and so that, in future years, the interested parties, agencies and groups can all address the issues in a more coordinated and cooperative manner. As a result, some of the comments and conclusions reached are perhaps more suggestive than they are adjudicative.

The Constitutional Basis for
Preschool in the Abbott Districts

It is first appropriate to touch upon the question of whether the preschool education rights of three- and four-year-olds found by the Court in its *Abbott* decisions are constitutional in nature. The New Jersey Constitution, art. VIII, § 4, ¶ 1, provides that the "Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." In *Abbott V* the Supreme Court seemed unwilling to go so far as to unhesitantly declare that there was a constitutional right to preschool for all three- and four-year olds. Instead the Court, taking into account what it found to be the "significant and substantial positive impact on academic achievement in both early and later school years," 153 *N.J.* at 506, and given the deep concern as to the lag in achievement for youngsters in Abbott districts, stated that "because the absence of such early educational intervention deleteriously undermines educational performance once the child enters public school, the provision of pre-school education also has strong constitutional underpinning" 153 *N.J.* at 507. Thus, the Court, while seemingly on the verge of declaring preschool a right for these children, did not go quite so far. It found that it could resolve the

issues before it without reaching constitutional issues. Perhaps the Court was concerned about the potential statewide impact of a finding that the Constitution, despite the clear delineation of the age range for which a thorough and efficient education must be available, nevertheless required that children younger than five be provided with a preschool educational program. Whatever the reason, I **CONCLUDE** that the Court has as yet not clearly declared preschool education for three- and four-year-old children, even those in the Abbott districts, to be a constitutional right. Instead, as the Court said, the provision of preschool education is so fundamentally tied to the chance for success in that thorough and efficient education that the Constitution does guarantee that it deserves a level of protection very close to, if not quite at the level of, constitutionally protected rights. In light of the Court's apparent caution, I decline to conclude in this case that preschool is a constitutional right guaranteed by the through-and-efficient clause. Nevertheless, given the recognized close relationship between a quality preschool experience and later academic achievement, a failure to provide an adequately funded and high-quality preschool educational program in the Abbott districts, while perhaps not amounting to a violation of Constitutional rights, is, without doubt, a very serious violation of legal rights.

Substantive Educational Standards

The ELC's request for relief seeks an order directing that the Commissioner require and assist the four district boards in assuring that they provide "high quality curriculum adopted and taught at every preschool site."[18] In regards to the Court's clear mandate that substantive educational standards and guidance be provided to districts, the ELC acknowledges that it is not advocating the most extreme form of state direction on standards and curricula, that is, a statewide mandated curriculum, nor is it advocating that all room for educational flexibility and judgment within districts be eliminated by state-mandated means and methods. In *Abbott VI* the Court acknowledged the "draft standards" then "under review by educators around the state," 163

[18] The petitioners do not advocate any particular standards, only that the Department act to promulgate "substantive" standards.

N.J. at 107, and ordered their prompt adoption, a mandate that the DOE fulfilled timely. If the adoption of those "standards" is enough to satisfy the Court, then the DOE has not violated the Court's mandate. Yet, to the extent that the *Expectations* are not a detailed how-to for achieving the goals and expectations set out both broadly and in particular therein, they may fall short of the expectations of the Court as to the level and degree of direction and guidance the Court deemed necessary. It is clearly the intention of the DOE to go further, as the Framework document promises to be a more specific set of guidelines as to strategies, methods and means for assuring that the *Expectations* become reality. If the adoption of the draft standards ordered by the Court does indeed fall short of complete satisfaction of the Court's mandate for substantive educational guidance because the "standards" are not "substantive" enough to assure that districts have the necessary direction and guidance to see to it that the education they offer to preschoolers is well planned and high-quality, then the Department must move forward quickly and decisively to put into place the Framework in as much detail as possible, as soon as possible. It is troubling that that effort seems to have been only in its formative stage in February 2001. While I **CONCLUDE** that the Department is not in violation of the Court's mandate at this time, that determination is conditioned upon the awareness that to truly meet the Court's mandate in full the Department must assure that the Framework is adopted and in place before the start of the 2000-2001 school year. If it was not the intention of the Department that this document be issued in final form by June 15, 2001, then the Department should either issue an interim Framework or otherwise issue interim suggestions and strategies meant to guide districts in how to best achieve the expectations for a well-planned, high-quality early childhood education.

In addition to issuing the Framework and any other guidelines regarding the nature of an appropriate curriculum and how it is to be achieved, the DOE must also insist that districts provide it with their plans as to how they will achieve successful implementation of the curriculum in district-operated and community-based providers. The Court placed the burden upon the DOE to assure that districts provided effective early childhood education to their students. It cannot do so if it does not have knowledge of the plans by which districts intend to achieve this goal. The level of information and detail that the Department requires to adequately assure itself of both the intention and the ability of the districts to achieve the implementation of

the appropriate curriculum must be left to the expertise of the agency. Nevertheless, here, as in many areas of this case, the DOE must become the active insurer of the achievement of *Abbott's* goals. Passivity in this endeavor is simply not warranted.

Enrollment & Recruitment

Preschool education in the Abbott districts is required to be available to *all* students whose parents want them to attend. It is the absolute responsibility of each district to make the necessary arrangements to accommodate each and every eligible child, whether in a district-run program or an approved community-based program. There are, of course, reasons why the percentage of eligible children who actually enroll in the programs a district makes available may be less than 100%, even when the district has all the facilities and associated necessities to enable all students in the district to attend. Presumably some parents will choose not to send their children, or will make some other arrangements for a preschool program not associated with the district's plan. However, there can be no doubt that the mandate is that each district must provide an appropriate program for 100% of the children eligible.

In *Abbott VI*, the Court, while not actually holding, as the ELC asserts, that the DOE "had improperly capped the districts' January 2000 projections at 75% of 'anticipated preschool enrollment,'" nevertheless spoke to the true concern, that is, the need for community outreach. That is the real concern because, to the extent that a district is required to provide preschool for all children and the DOE and districts together must provide all necessary funding for such programs, provision of all these items will do little to increase enrollment if parents either do not know about or do not understand the programs available. The Court has advised that the projections are only important to the extent that they reveal the existence of a need for outreach. It stressed that the determination of the existence of "low" enrollments was "expect[ed]" to be the trigger for determinations that could identify the reasons for such "low" numbers. The Court did not define "low." In response to that direction, the DOE adopted *N.J.A.C.* 6A:24-3.3(a)(8). That regulation does two things. First, it codifies the requirement that districts, in consultation with the DOE, must develop "community outreach and recruitment strategies to maximize

participation." This mandatory requirement necessarily incorporates a need for the districts to assess their enrollment situations, consider what groups may not be participating to a reasonably expected level and adopt a plan as to how to reach these groups. In addition, this first requirement, coupled with the Department's overall responsibility to the children of Abbott districts, inevitably mandates that the Department share in this task for each district, and to do so, it must determine the information it needs to evaluate whether the districts' plans and strategies are sufficient to ensure, to the greatest extent possible, that all reasonable steps are being taken to "maximize participation." The Department must therefore direct and guide districts as to what strategies it believes are likely to have positive effects on participation levels and what information it must have to assist with and assess district performance. Secondly, the regulation addresses the issue of what level of participation is to be defined as "low," responding to the Court's concerns by establishing the level at which a district must go beyond its initial responsibility to plan and engage in recruitment and outreach to a further responsibility to reassess its efforts and present for the Commissioner's specific approval a corrective action plan to increase enrollments by requiring corrective measures where the enrollments do not exceed 50% of the "projected preschool population in the district." As to this second aspect of the regulation, it is certainly possible to quibble with the Department as to the definition of "low." If the goal is to serve all of the eligible children then perhaps a district that is serving "only" 50% or some percentage above that rate is indeed serving an unacceptably "low" percentage of its universe. However, to the extent that the DOE has established by regulation a level that serves to define "low" for the purpose of establishing the threshold at which the Court's expectation of a determination of "awareness" must be triggered, the regulation is presumptively appropriate and, importantly, not open to review in this forum.

To the extent that subsequent to the issuance of *Abbott VI*, the DOE has taken regulatory action and thereby directed districts to engage in the very outreach and recruitment activities the Court emphasized as the real issue in regard to enrollment concerns, the Department has taken an important step that aims at assuring that the Court's directions and concerns are actually addressed. In its review of 2001-2002 plans and applications, it must be assumed that the Department will be assuring that the plans contain recruitment and outreach plans and that these

are adequately funded and reasonably geared to success. To the extent that those proposals do not contain plans and information as to the funding allotted and/or sought, the Department must reject the plans and insist on compliance. As for the contentions in this case regarding whether there are at this time districts, other than Elizabeth, in which the enrollment is low and the districts are not serving at least 50% of the "projected preschool population," the question is whether the Department, faced with evidence of such "low" enrollments, has taken appropriate steps to require that the districts determine the awareness of parents about the district's preschool programs and, as appropriate, adopt plans to promote awareness and, as necessary, encourage enrollment. The Department apparently relies upon the assertions made in Ms. Friddell's certifications, in which she asserts that the ASSA data reveals that each district other than Elizabeth is serving at least 50% of its "projection." She presents no consolidated report or documentation for this conclusion. However, if her conclusion is correct, then the regulatory threshold of service to at least 50% of the "projected preschool population" has been achieved and there is no present basis for invoking the regulatory requirement that any district, other than Elizabeth, develop the corrective action plan mandated for those districts with less than 50% enrollment.

The record does, however, reveal that there is some discrepancy between the parties regarding the appropriate manner of determining the projected number of three- and four-year-olds in a district. Using his own methodology and basing his calculations upon the data collected by the CEER and the district enrollment information gathered by December 15 and presented in detail in the record, Dr. Barnett determined total eligibility at twice the first-grade enrollment. If Barnett's calculations are accepted, the rate of overall enrollment (three- and four-year-olds) in some of the Abbott districts is far in excess of that in others, ranging from Harrison's 78% down to Plainfield's 22%. He concluded that consolidated enrollment rates in twelve districts were below 50%, triggering the "corrective action" requirement.[19]

[19] Asbury Park (45%); Bridgeton (42%); Camden (48%); East Orange (33%); Elizabeth (25%); Hoboken (48%); Jersey City (43%); Neptune (42%); Newark (42%); Paterson (37%); Pemberton (45%); Plainfield (22%).

The DOE's regulations do not provide regulatory guidance to districts as to how to determine the number of students they might be expected to serve, that is, the "projected preschool population." The regulations also make no distinctions based upon the percentages of enrollment of three-year-olds and of four-year-olds. Upon examination of the record herein, this distinction may be a significant factor in evaluating the performance of districts. Examination of the Barnett numbers shows that in districts with low (below 50%) three-year-old enrollment, the enrollment of four-year-olds is at least sometimes above 50%, even substantially so. In Bridgeton, the three-year-old rate is 25%, for four-year-olds the rate is 59%, an average of 42%. In Pemberton the rates are 29% and 60%; in West New York, 47% and 65%; in Newark, 34% and 49%; in Passaic, 41% and 59%. Not every district has this clear-cut distinction between the two age groups, or even if the difference is significant, it may not include a rate for either group close to 50%. In East Orange the rates are 26% and 41%; Elizabeth, 13% and 37%; Paterson, 32% and 41%. As counsel for the DOE posited at oral argument, these numbers may reflect that higher enrollments are likely for the older, as opposed to the younger, group of preschoolers, although the record is free of any substantive evidential support for that assertion. Indeed, there is no evidence in the record regarding any factors that might explain why any particular district might have low enrollment even if it were able to service all of its eligible students. If a district currently has a low or middling percentage of enrollment, the reasons might logically be a lack of parental awareness, awareness but indifference, lack of facilities to service students with a concomitant lack of interest by people convinced that they cannot obtain service, etc. Also affecting the numbers might be cultural or philosophical resistance to enrollment of young children, lack of understanding of the importance of early childhood education, distrust of the educational system, transportation difficulties, and child care issues. The point is that, at this stage in the "marathon," if one accepts the Barnett statistics there are a significant number of Abbott districts that still have enrollment percentages that, for one or both age groups, fall under the regulatory threshold. The DOE's own regulation mirrors the Court's expectation that low enrollments would "trigger a determination whether parents in the community are aware of the district's preschool programs." *Abbott VI, supra*, 163 *N.J.* at 119. Dr. Barnett's supplemental certification refers to a CEER survey in Newark that would appear to raise concerns about the knowledge of that district's parents as to its programs. There is no other evidence in the record

that the DOE has demanded of any districts the production of plans in accordance with *N.J.A.C.* 6A:24-3.3(a)(8).

The record before me does not include any evidence that would allow for a decision as to whether the Friddell representation of enrollment figures or the Barnett figures are more reliable indicators of the percentage of possible students in a district who are being served. Indeed, to the extent that their calculations differ in part due to differences in the formula used to determine the preschool population, there is no regulation controlling this calculation and it may be that both methods are reasonable. It is clear that where the Department has reasonable evidence that the enrollment in a district is below 50%, it must enforce its regulation strictly, demanding that districts with low enrollment, as defined by the regulation, take immediate and vigorous steps to determine the reasons for limited enrollments and identify the same to the DOE, so that the plans to increase such enrollments, the development of which the DOE must equally insist upon, can be expeditiously reviewed, critiqued and, as appropriate, revised and/or approved, with the necessary funding provided to ensure that the plan has a reasonable likelihood of success. In addition, although the Court in *Abbott VI* appeared to accept the Commissioner's method of letting districts rely upon "reliable indicators" to determine their projected population, it may be appropriate for the Department to consider refinements in the regulation, including a definition of the method to be used for calculation of the projected preschool population so as to allow for statistical uniformity and, additionally, in regards to the determination of "low" enrollments as relating to triggering of the need for corrective plans, to take into account the very likely difference in enrollment rates for three-year-olds as opposed to four-year-olds, if indeed it appears that there are significant reasons to anticipate that even with appropriate outreach and recruitment these numbers will reflect significant differences which may skew the overall enrollment figures and, perhaps, not allow the overall figure to truly reflect a district's performance in achieving an acceptable enrollment percentage that demonstrates a district's success at attracting those who actually will take advantage of the educational opportunity guaranteed by *Abbott.*

At oral argument, the deputy attorneys general did not vigorously dispute the Barnett figures, and pointed out that even if these were used it appears that overall enrollment has risen from about 39% to 47%, and argued that this level of progress is not to be dismissed as insignificant. Obviously, any gain in overall enrollment and the percentage of children served is a gain to be applauded. However, as counsel for the petitioners note, with only small yearly increments of progress it could take a considerable amount of time to reach the goal of full enrollment. To the extent that any action by districts can expedite the process, the districts must undertake that action, and, importantly, the DOE must insist that they do so.

In view of the controversy over the appropriate manner for determining the "projected preschool population" I am convinced that if future efforts to ensure appropriate recruitment and outreach are to be successful, a uniform standard should be established. What the proper means of calculation is I cannot tell. The Department should consider adopting a rule, after proper public input. To the extent that the record herein does reveal significant evidence that calls into question the claim that all districts, save Elizabeth, exceed 50% enrollment of the "projected preschool population," the DOE, in its current and ongoing review and assessment of district activity, should carefully evaluate the data, including the breakdown between three- and four-year-old enrollment, and, to the extent it determines that any districts have less than 50% enrollment, the DOE must advise those districts to immediately assess in detail the local situation as it pertains to the enrollment deficits and to prepare and present its detailed findings and corrective action plan for agency review and approval. Where necessary, the agency must then assist in adequately funding such plans.

Head Start

The record regarding Head Start and community-based programs reveals that in Newark and Paterson and West New York, existing Head Start and other community-based organizations appear quite willing to form a part of the districts' plan to provide early childhood education for all eligible children. In the case of Head Start, the DOE acknowledges the failure to reach a final statewide accord with Head Start, but has not offered any explanation why it could not do so. If

the reason was that the non-Abbott-compliant Head Start programs were seeking exorbitant and unnecessary amounts of per-pupil assistance to supplement federal funds and the Department became convinced that these programs were attempting to gouge the districts and the State, then certifications and other documentary evidence in support of these contentions should have been produced. It is true that, as asserted in the Department's brief, to the extent that a Head Start agency cannot maintain Abbott standards at the offered contract rate, the Department need not enter into a contract with that agency. However, that presumes that the rate offered to the Head Start agency was a fair and appropriate rate based upon a reasonable assessment of the *actual needs of the program and of the students* it would serve. More broadly, the several allegations that the Department imposed a $4,500 per-pupil rate should have evoked more than a simple denial in the Department's brief that the DOE did not use an estimated amount per child. (See further discussion regarding this subject in the Funding section below.) At oral argument, co-counsel for the DOE noted that, while aware that negotiations had occurred with the Head Start programs, they could not say what actually happened. Of course, except to the extent that they might have been actual participants in the negotiations (they were not), the statements of counsel would not be evidential, but at least might have offered some insight into what happened and why no accord was reached. The Attorney General in fact conceded at oral argument that the record is barren of any evidence as to how the DOE determined the actual needs of the Head Start programs involved, including those of their students. Even more, regarding the contracts with community-based programs addressed in the West, Johnson, Morris-Yamba and Dickey certifications, how the districts decided upon the actual assistance needed for such pupils and programs on a particularized basis is not revealed. More specifically, the record does not reveal that the Department insisted that the local districts make such particularized determinations or present them to the Department for its assessment.

What is troubling here is that the thrust of the Supreme Court rulings and the clear wording of the regulations is that the districts should work with and wherever possible make use of existing community-based programs to deliver preschool services rather than duplicate such programs. If a community-based or Head Start program cannot reasonably provide Abbott-compliant preschool services or is unwilling to do so, then the district must provide its own

program for the children attending the deficient program, or otherwise assure that there are other qualified community-based programs to deliver the program. However, if reasonable provision of funding and other supports will allow an already existing program to achieve Abbott quality, then the spirit of the regulations and Court rulings certainly requires that such reasonable measures be accomplished. If, in the districts here at issue, the DOE has, in its estimation, offered what was reasonable to accommodate the determined needs of the community-based and/or Head Start programs, it should have detailed its efforts and the circumstances that led to the failure to contract. It has not done so. There is therefore no way to determine whether the DOE acted properly. The Supreme Court has previously noted that funding levels determined without study as to the adequacy of such amounts are unconstitutional. *Abbott IV, supra*, 149 *N.J.* at 181-84.

Ultimately, as the DOE correctly argues, in districts where the children will not be served in adequate Head Start programs, the children must be served by the district in some other program and cannot be left adrift. However, I **CONCLUDE** that the Department violates both judicial intent and the regulatory spirit if it refuses to provide appropriate required levels of adequate funding, funding based on particularized need, to deficient but willing Head Start programs and thereby requires districts to duplicate the Head Start programs to the extent that they will have to provide not only the additional aspects of the deficient program, but also those aspects that fall short of Abbott requirements, but are nevertheless a proper part of a preschool program. As the record stands, I **CONCLUDE** that it is not possible to find that the DOE has acted in a reasonable and compliant manner. As the districts and Department confront the new school year and beyond the DOE must work with the districts and Head Start programs on both the local and statewide levels to cooperate so as to allow the districts to make maximum use of Head Start as an integral part of the districts' delivery of Abbott-quality education for preschoolers. In that effort, and especially to the extent that the Department is itself a participant in arranging any statewide agreement, the DOE must carefully assess the real needs of districts, students and specific providers, requiring districts to cooperate fully in the effort. It must document its actions and assessments, and, to the extent that the efforts are unsuccessful, must clearly explain to the districts involved and to the public the reasons why the Head Start program

will not be a part of the process, just as it announced so publicly that it would be. If the issue is financial, then there must be a clear, documented review and assessment of the reasons why no agreement was possible, including an evaluation of the needs identified, the resources offered and the reasons, to the extent known, why the offers were not deemed acceptable and sufficient. Without these elements, it will be difficult to determine whether the agency has acted in accordance with the regulations and the Court's intentions.

Parental Status

As for the ELC's concerns regarding an alleged failure of the DOE to assure that districts are not denying preschool to children because of their parental status, the Court addressed this issue only in regard to concerns about the denial of services to children whose parents were excluded from Head Start due to their having dropped out of the TANF program. No other incidence of parental-status-based exclusion was addressed. The Court has spoken plainly on this: children cannot be excluded from a district's preschool programs simply because their parents have withdrawn from TANF and the children are consequently barred from Head Start. These children are fully entitled to a preschool education and the district must provide for them. The DOE did not adopt a regulation incorporating this bar on parental-status exclusion, instead adopting a regulation, *N.J.A.C.* 6A:24-3.3, that more broadly requires that the district "shall offer" an early childhood program to "all three- and four-year-old children." There is in this record no contention that any district is now excluding children based on parental status. In light of the Court's clear ruling, the all-encompassing nature of the quoted regulatory mandate and the lack of any evidence of a continuing problem, I **CONCLUDE** that no violation of the Court's mandates has been established.

The Role of Assessment

The crux of the ELC's complaints (and, in some degree, that also of the several participating districts) regarding the adequacy of both direct and supplemental funding revolves around the concern that the districts have not properly examined and assessed the conditions,

circumstances, strengths and weaknesses relating to their delivery of an appropriate Abbott-quality preschool program for their children and thereby properly determined their needs, including those of the local community-based centers, and that the Department has failed to insist upon such district activity so that it can properly oversee the planning and implementation process and do all that is necessary to assure its success. The evaluation and assessment process is a procedure ultimately utilized as a means to produce plans for achieving the goals of *Abbott* and also to assist in assuring compliance with those mandates. In the petitioners' view, the failure to insist upon districts formulating plans and submitting them for assessment has led to inadequate funding being supplied to the districts in a number of Abbott-related areas.

The DOE argues in its brief that the petitioners attempt to foist a responsibility on the districts to assess the students and preschools prior to designing plans or revising them, a responsibility the agency contends is nowhere established in the *Abbott* cases. Such a reading of the *Abbott* decisions, especially after *Abbott VI*, is completely unwarranted. To the extent that the Court plainly requires that the DOE assure that the districts are adequately funded, that they are capable of delivering the level of educational program mandated and that they have the necessary tools to do so, the Department must understand the nature and quality of the programs and the conditions and circumstances of the districts and the students. The local districts must be even more cognizant of these matters in designing their plans for submission and assessment by the Department. While the "assessment and evaluation" phrase appears in the *Abbott VI* decision in the section relating to community outreach, 163 *N.J.* at 119, the whole tenor of the decision, including its emphasis on the "responsibility of the districts and the DOE to monitor operating preschools on a regular basis," to "ensure that they are delivering quality programs," 163 *N.J.* at 116, and the overall responsibility for the DOE as the insurer of performance dictate that the districts, and the DOE, engage in assessments of students, preschools and programs on an ongoing basis, so as to enable them to properly plan, assess and revise plans and programs. The essential nature of this function cannot be denied. The details of how such assessments are effectively carried out are clearly more flexible and need to be adaptable to the specific circumstances. However, it is apparent that the bold and vigorous effort to provide high-quality preschool programs to children of the Abbott districts cannot succeed without real understanding

of the circumstances affecting the children, the community-based providers and the districts themselves.

While the petitioner asserts in broad terms that the DOE has failed to assure adequate funding, facilities, and supplemental funding for the Abbott districts in general and the ELC and participant districts in particular, in regard to disputes concerning the actual funding for specific district and preschool programs, the Department properly contends that the individual disputes between a district and the Department, or, for that matter, those disputes in which the representatives of the parents and students in a district challenge the adequacy of funding sought by and/or provided by the DOE, should be resolved separately from the global issues. In that regard, even as to the four districts directly involved in the ELC challenges, the detailed disputes as to the adequacy of the funding and programs in those districts cannot be decided on this record and must be separately addressed to the extent the petitioners seek any further resolution thereof. It *may be* that even in the absence of the plans and assessments that the petitioners see as missing, the district and the DOE have provided adequate funding to the districts and the districts are in a position to deliver an appropriate Abbott preschool program. However, the determination of the detailed issues in dispute concerning this question must be dealt with in separate proceedings. As for this "global" challenge, the question here is not whether any individual district received an adequate or an inadequate amount of funding, but instead whether there are systemic factors that exist that undermine the ability of the districts to obtain the funding they need or that limit the ability of the Department to assess that need. In this consideration, it is important to recall the Court's adjuration that determination as to "adequate funding remains critical to the achievement of a thorough and efficient education," *Abbott V*, *supra*, 153 *N.J.* at 517-18, *quoted in Abbott VI, supra*, 163 *N.J.* at 118. In addition, the Court's expectations as to the need for "assessment and evaluation" cannot be overlooked.

The ELC's specific complaints about inadequate funding include the aforementioned allegedly predetermined $4,500 per-child rate for community providers. However, the allegation that that rate was fixed without any evidence that it reflected a reasonable assessment of need, much less of the particularized need of specific districts, programs and children, also relates to a

broader degree to the DOE's treatment of the districts' proposed budgets for the 2000-2001 school year. As the Department agrees that it must ensure full funding for all reasonable program needs through ECPA and, to the extent that ECPA funds are insufficient to meet adequate funding requirements, must ensure that supplemental funding is made available, there is no dispute about the fundamental funding responsibility. The Department properly insists that it must assure that funds requested are spent "effectively and efficiently." *Abbott IV, supra*, 149 *N.J.* at 195. The record contains a number of examples of the DOE advising districts that they would receive additional funds to implement the districts' plans, funds directly targeted to the early childhood program.[20] To the extent that these examples demonstrate that the Department has not acted to limit the expenditures of districts to the ECPA funds originally allocated to the districts, I **FIND** that they show that the DOE understands the obligation it has to provide adequate funding. Thus, the global issue is whether the record supports concerns that the DOE, despite such recognition, is nevertheless not acting to assure that the monies sought by districts are adequate for the task. The need for individual assessment of the adequacy of funds is emphasized by the Court in *Abbott VI*, where it recognized that "[o]nly after a review of individual applications from the districts can it be determined whether 'adequate funding . . . critical to the achievement of a thorough and efficient education' has been provided." 163 *N.J.* at 118. It is only when the Department truly understands and appreciates the level of funding adequate to the given situation that it can act on its understanding of its obligation to assure that those funds are available. Whether that understanding of the need is garnered solely from the information provided by a district, or from the district-provided information supplemented by the DOE's own information, the DOE must ultimately have sufficient knowledge of a district's situation that it is confident that the district can and will carry out its responsibility as the State's agent for providing education to the students of the district.

Examination of the record shows that, for example, the Paterson School District filed a plan in January 2000 in which it proposed to spend $3,500 for each three-year-old (half-day service) and $5,000 for each four-year-old (full-day service), with the program to be provided in

[20] *See* letters included as Exhibit H to the Certification of Michelle Miller. These include notice of the issuance of additional funding to Pleasantville ($28,372); Vineland ($645,993); Gloucester ($50,198); and Keansburg ($300,000).

DHS-licensed centers pursuant to a subcontract agreement. It revised its plan on February 17 (pre-*Abbott VI*) and then again on April 18 (post-*Abbott VI*). Using a copy of the January plan, Paterson changed the rate of funding per four-year-old in the full-day program, striking out the original figure of $5,000 and writing in $4,500 for the same approximately 1,200 students. It continued to plan on spending $7,800 per child for students sent to the Passaic County Educational Services District. No explanation is provided as to the reason for the change in funding for the four-year-olds to be served in the DHS centers. No information is provided to allow anyone to understand whether the reduction in expenditure per student is based upon an assessment that the lower figure is adequate to provide a well-planned, high-quality education. Indeed, the original application did not provide any background information for the sufficiency assessment regarding the originally proposed $5,000 per four-year-old. If the reduction to $4,500 is a change to a predetermined set rate (here is that $4,500 number again), there is no evidence in the record as to the manner in which that rate was determined and how it relates to the provision of an appropriate Abbott preschool education. Additionally, while there are presumably legitimate reasons why the cost per student is higher for those served in the Passaic County Educational Services District, the rate for these students remains the same in the revised plan, while the DHS-center rate has been reduced. How, one wonders, does the reduction in one program relate to the stable rate in the other, and what impact, if any, does the reduction have on the program provided? To the extent that the applications do not explain the whys and wherefores, one is left to guess. The Department's approval of the revised plan, by letter dated April 24, 2000, references revisions "discussed on April 18 [the date of the second revision to the plan]," including the provision of "half of the full-day costs ($4,500) for children in community programs," and approves the same. There is no reference in the letter to the reason for the reduction, no evidence in the record of the nature of the discussions of April 18, and no suggestion as to how, why or from whom the suggestion for the revision arose. It must be assumed that the Department believed that the plan, including its per-student cost, was adequate to provide an Abbott-compliant education. However, since the reduction was to $4,500, the reduction seems suspiciously to have been based on some pre-set DOE rate calculation. Again, if this is true, a proposition that the DOE denies, no evidence explaining or justifying the adequacy of that rate has been presented. If this is not true, how was the $4,500 rate determined? In the

face of a record lacking in explanation and documents that are likewise empty, the appearance of the very arbitrariness that troubled the Court in *Abbott IV* is evident.

Consideration of the Jersey City plans raises similar questions. Originally, the January plan called for three-year-olds to receive a half-day program in approved agencies at a cost per pupil of $3,400. When the plan was revised, sometime after its original submission, three-year-olds were to receive a full-day program with a per-pupil cost of $8,400. There is no explanation of the sufficiency of the per-pupil cost at either rate. Apparently the cost for full-day was more than twice that for half-day, but one is left to guess whether the original $3,400 cost was actually sufficient for an appropriate half-day. (It may be that the $8,400 figure reflects the inclusion of matching DHS funds. If this is so, the rate per pupil is apparently $4,200, an $800 dollar per-pupil increase over the previous figure. How the two figures relate and to what extent one or the other constitutes sufficient funding for an appropriate education is not revealed.) The DOE approved the revised plan by letter dated June 13, 2000. The letter makes no reference to the change in per-pupil costs. It states that the "plan meets all . . . required components." This blanket statement may imply that the DOE was satisfied that the plan would provide the well-planned, high-quality preschool education contemplated by the Court, but the approval letter, much like the plan produced by the district, does not explain how that conclusion is justified. It is interesting to note that Newark's plan originally called for funding for a full-day program in approved centers for three-year-olds at $4,500 per child, with matching funds from the DHS to be blended with that amount. As revised, on September 19, 2000, the Newark plan sets the rate for the same program at $4,750, again to be matched by DHS funds. Again, there is no explanation of the sufficiency of either figure, or any reason given for the change in rate. To the extent that the rates varied from those originally sought in Jersey City, or those sought in the amendment, there are no doubt reasons for the differences between the two districts, but on the face of the proposals and approvals, there is no way to understand the differences and the justifications as to why the amount needed per pupil varies. Of course, it is exactly this difference in the needs and circumstances of individual programs and of individual districts and students that argues for careful assessment by districts and the DOE, and against anything smacking of arbitrary treatment.

It is of course possible that the per-pupil costs listed in these plans are adequate for the provision of preschool programs that are fully compliant with Abbott standards and would provide each eligible child with a well-planned, high-quality education. The fact that no one elaborated on the subject may simply reflect that all involved were convinced that the costs were sufficient and did not believe it necessary to say so in writing. However, to the extent that the DOE has the responsibility to assure that the local districts are providing well-planned, high-quality education, one must wonder on what basis, if any, the DOE made that assessment regarding these plans. Additionally, one must wonder if the districts themselves made that assessment. It is also true that there is no evidence that the districts made a program-by-program, center-by-center assessment of the specific needs of those providers in order to determine whether a single fee amount throughout the district was sufficient to allow each provider to deliver the appropriate education. Perhaps these assessments were performed. However, if they were, they are not documented and there is no evidential record that the DOE reviewed these assessments or even saw them.

In the end, regarding issues relating to the need for specific levels of funding, supplemental services and the funding therefore, facilities, and the like, the DOE must carefully guide the districts as to the information it must have in order to fairly assess their needs and requests. It must insist that districts both assess and regularly monitor their own and community-provider programs. It must do so regarding teacher certification and the progression of staff towards mandated certification, and regarding the need for transportation and health services, overall special education staffing and funding (as opposed to pupil-specific needs properly determined under IDEA provisions, including due process hearings), and bilingual education. While the DOE might prefer to allow districts to deal with the planning and implementation of Abbott programs on their own, and while the districts do have the front-line responsibility for properly planning, assessing, monitoring and, where needed, revising the manner in which they deliver services, the DOE has an inescapable, constitutionally significant responsibility that requires that it not merely sit back and receive what the districts give it, that it not merely offer limited guidance and assistance to the districts, but that, as Justice Stein said, it boldly and even

aggressively act as the strong and active insurer of the planning and implementation of Abbott preschool education.

I **CONCLUDE** that the districts are required to conduct reasonable evaluations, reviews and assessments of themselves, their preschool children and their providers' circumstances and to use these as aids in formulating plans for the implementation of Abbott preschool. These must be made available to the DOE so that it too can, as it must, conduct reasonable reviews and assessments of the districts' actions.[21] In addition, and of paramount significance, I **CONCLUDE** that the DOE must issue clear guidelines and standards to districts concerning the information that it requires to understand, evaluate and ultimately decide upon the adequacy of their plans, requested funding and plan implementation.

The permanent-facility needs of the several Abbott districts must be addressed through the path determined by the Legislature. The EFCFA is the Legislature's response to the challenge of assuring that the Abbott districts have these permanent facilities, while at the same time it represents a political decision by the elected representatives of the people as to how to achieve that mandate and at the same time recognize the interests of other districts and their students. To the degree that the EFCFA process controls the decisions regarding permanent facilities, all necessary measures must be taken to assure expeditious decision making, both in regard to initial determinations and reviews thereof. Of course, all such decisions must be made with full recognition of and obedience to the Supreme Court's requirement for the full funding of facilities necessary for the provision of Abbott preschool, as well as all other aspects of the broader *Abbott* mandates. To the extent that compliance by appropriate governmental agencies with such requirements must be anticipated, there is no warrant to avoid the EFCFA process, but that process must recognize the urgency of the needs of districts and students. That facilities funding has not been accomplished in the 1999-2000 and 2000-2001 school years is certainly regrettable, but at this time there is no relief that can be afforded for facilities not built or funding

[21] An example of a district's assessment of its students' circumstances and needs is detailed in Dr. Seplocha's certification regarding Perth Amboy's assessment.

not provided in those years, except to the extent that there may be enforceable rights based upon approvals already given, such as Perth Amboy claims. The more immediate issue is the provision of temporary facilities to allow for the maximum enrollment of preschoolers during the interim period until the permanent facilities are in place. The Supreme Court's mandate, as expressed in *Abbott V*, is absolutely clear. The necessary funding for needed temporary facilities must be supplied. If the DOE disputes the need for space in any district, then the parties must, if they cannot resolve their dispute, seek resolution through the administrative hearing process. If the need is not disputed, then there is no warrant for delay in providing the funding or the facilities themselves. The key, of course, is the need for realistic assessment of the needs of the several districts for temporary facilities. Counsel for Passaic and Elizabeth has strongly asserted that the number of modular units the Department proposes to supply through the EDA is insufficient to serve the needs of the districts, perhaps grossly so, pointing out at argument that the two districts he represents will themselves need a significant percentage of the proposed modules. The record here does not allow for a determination of this question, which is inextricably tied to the individual needs of specific districts, but the Sztuk certification proposes that the number being obtained will suffice, and the Department has presumably based that number upon a full evaluation of the needs of the districts. In that regard, much said already in this decision as to the absolute need for DOE oversight and careful assessment of the districts' needs bears repeating. To the extent that individual districts allege that they will not have the needed temporary facilities in place for the start of the new school year, or that they do not now have them and could actually use them at this time to fulfill *Abbott* mandates if in place, the districts may seek relief from the Commissioner, although of course it is the Commissioner's right to determine whether they present proper grounds for a contested case. It is hoped, as the Court urged, that the parties will resolve these issues without the need for hearings.

Summary, Conclusion and Order

In summary of the above, based on the record as presented by the parties and the arguments of counsel, I make the following findings and conclusions, as well as the following suggestions that are, in my view, worth further consideration by the Department and the districts.

To the extent that these require action, the parties are **ORDERED** to comply and act in accord with the following:

1. As of this time, the Department has not violated the Court's mandate to issue substantive educational standards. However, in order to avoid concerns that the *Expectations*, while an important step, are by themselves not a fully sufficient formulation of such standards, the Department must adopt the Framework document prior to the start of the 2001-2002 school year. If the adoption of the final document is not expected prior to June 15, 2001, then an interim, draft document should be issued so that additional substantive guidance can be available to the districts before the next school year begins.

2. Adoption of *N.J.A.C.* 6A:24-3.3(a)(8) is a positive step to promote the Court's concern regarding the need for districts and the DOE to assess and evaluate the enrollment within districts and the need for and planning of recruitment and outreach efforts. However, further refinement of the regulation to define the procedure for determining the "projected preschool population" may be warranted. In addition, consideration should be given to whether distinctions are appropriate regarding the percentage of enrollment of the projected preschool population of three-year-old versus four-year-old children in determining the "low" threshold for districts. Finally, while the difference in methods of calculation employed herein by Barnett and upon which Friddell relied to determine the percentage of enrollment in districts clouds the issue of whether in the present school year districts other than Elizabeth have less than the regulatory threshold of in excess of 50% and points up the apparent need for a regulatory formula for this calculation, the DOE must carefully consider the Barnett data and insist that districts that are below the threshold based upon the most up-to-date reliable data immediately formulate and present for approval and, as necessary, funding, corrective action plans in conformity with the regulation.

3. The Department must negotiate in good faith with Head Start programs in order to allow the inclusion of all willing programs within the districts' plans for providing high-quality Abbott preschool. The Department and the districts must act in coordination to assure that such

discussions are based upon fully adequate assessments of the needs of the several districts' students and the needs of the individual Head Start (or other community-based) programs. The determination of the funding to be offered to those programs that do not meet Abbott standards must be based on these assessments, and, to the extent that the determination is not supported by appropriate study and assessment, the funding cannot be pre-determined, across the board per-pupil amounts. The Department, and also the districts, must be able to support the funding levels offered with information, evaluations and calculations that will establish that the offers are reasonably geared to allow the deficient programs to deliver high-quality, Abbott-standard education. The record here does not allow the determination that the Department offers to Head Start were in fact adequate for this purpose. There does appear to be a lack of district- and program-specific analysis of the necessary level of funding.

4. The Department has not violated the Court's mandates in regard to the parental status issue.

5. The DOE clearly understands its obligation to assure that districts have all necessary funding for Abbott districts and programs and has demonstrated that understanding in some circumstances. Disputes over the implementation of specific district and program needs do not detract from that overall understanding. However, there appears to be some concern that the understanding is at times only theoretical.

6. Districts, as well as the Department, must engage in specific evaluations and assessments of the needs of their students, programs and community-based providers so as to determine in detail their specific requirements and to formulate plans and applications reasonably geared to meet those needs and thereby assure that Abbott-quality preschool is available for all eligible children. In addition, the DOE must make assessments and ultimately assure that the districts are providing such programs. In order to properly undertake these tasks, the DOE must issue guidelines, probably in the form of detailed regulations, that advise districts and providers as to the information deemed necessary to allow for the districts and the DOE to adequately understand the needs and plan, fund and carry out the programs, as well as assess their adequacy

and success. The exact details of what is necessary to do this must be left, in the first instance, to the DOE to determine.

7. Permanent-facility needs must be addressed through the EFCFA process. That process must of course allow for expeditious and well-reasoned determinations. The Department must address short-term facility needs immediately and fully, and determination as to the actual needs of the districts to allow for full implementation of the necessary programs must be based upon careful and detailed assessment of such needs. To the extent that there are disputes over the needs of specific districts, these must be determined on a case-by-case basis.

8. The dispute regarding Perth Amboy's claim to $2.6 million dollars that it contends was spent based upon specific DOE approval will be determined in a separate decision and counsel will be notified promptly of a date for conferencing that matter. Likewise, Vineland's claim for restitution of funds already spent will also be considered in a separate hearing.

9. To the extent that the ELC or any districts seek to pursue any further *specific* funding issues or other matters regarding the 1999-2000 school year or the 2000-2001 school year, they may do so in the context of the unconsolidated portions of pending cases. Counsel shall assess their positions in light of this decision and shall notify the judge assigned to the relevant case within twenty (20) days as to their intentions. The filing of any new appeals regarding the 2001-2002 school year shall not delay such determinations. Counsel shall also notify the assigned judge if the district or other petitioner determines to withdraw a pending case.[22]

[22] Although not directly at issue in this case, I believe that it is appropriate to express as a footnote to the summary and conclusions some thoughts regarding the timing of decision making in Abbott matters. The experience following *Abbott VI* suggests that the individual districts and the DOE can often resolve their disputes without the need for hearings at the OAL. However, I believe that if the resolutions are to occur in a time frame that allows the districts to know how they actually stand early in any given school year, the time for resolution must be limited. Thus, when a contested case is forwarded to the OAL, following a reasonable, yet expeditious, discovery schedule, the parties should be allowed a limited time in which to work out their differences. If no resolution has occurred, the case should go directly to hearing, so that an initial decision can be forwarded to the Commissioner for review and a final decision issued at an early date. As desirable as a resolution of a dispute without the need for a full hearing is, given the need to provide some assurance of the funding and programs to be available as early as possible in a school year

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

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

(if not before the school year begins), prolonged settlement negotiations should not be permitted to delay prompt resolution of the dispute, although of course settlement can still occur even during the active stage of the hearing. As for the DOE review process, complaints in this case about the delay in receiving decisions from the agency are at times matched by allegations that the districts did not present their final revised plans until long after the spring. There need to be fixed and firm dates for applications to be filed, for review to be completed, for decisions approving or disapproving to be issued, and for appeals to be filed. If the application is considered incomplete, review by the Department must be on the application that is presented and decisions should be made on the application presented to the extent possible, with resolution of the disputes on the application presented left to the appeal. At least this moves the matter along and sets the issues for the appeal, without long delays in the initial stages of the process. All interested parties, including the districts and their attorneys, the ELC, the DOE and the Attorney General and the OAL, must of course consider how to accomplish the expeditious movement of plans and applications, reviews and assessments, decisions and appeals. To the extent that the regulations already incorporate time frames, the effectiveness of those time frames may need consideration. In addition, the needs of all concerned for adequate staffing for the review and the hearing process must be carefully considered so that cases may proceed without undue delay. Adequate personnel to review plans and issue determinations, sufficient attorneys to handle multiple agency-level and OAL matters, and adequate numbers of judges to hear these cases must be available. Perhaps all interested groups should be involved in discussions to determine the best means to achieve the desired resolutions in a fair yet timely fashion.

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 10, 2001
DATE

JEFF S. MASIN, ACTING CHIEF ALJ

Receipt Acknowledged:

4/20/01
DATE

Debbie Antanaitis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 20 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONERS:

Certification of Dr. William Steven Barnett

Supplemental Certification of Dr. William Steven Barnett

Curriculum Vitae of William Steven Barnett

Certification of Cecile Dickey

Certification of Trish Morris-Yamba

Certification of Audrey West

Certification of Lorraine Johnson

Certification of Joan Ponessa

Exhibits in Support of Affidavit of Joan Ponessa, A thru X

Certification of Thomas G. Dunn, Jr., with Exhibits A and B

Certification of Dr. Robert H. Holster

Certification of John M. Rodecker

Certification of Margaret Herbert

Certification of Holly Seplocha, Ed.D., with Exhibits A thru L

DOE Non-compliance with *Abbott VI* Requirements for 2000-01 Charts

FOR THE RESPONDENT:

Certification of Michelle Miller with Exhibits A thru J

Certification of Kimberly Friddell with Exhibits A thru U

Amended Certification of Kimberly Friddell

Certification of Beth Sztuk

Early Childhood Education Program Expectations: Standards of Quality, April 2000 (internet report)

OAL DKT. NO. EDU 3236-01

IN THE MATTER OF THE	:	COMMISSIONER OF EDUCATION
ABBOTT GLOBAL ISSUES.	:	DECISION
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Timely exceptions were filed by the respondent Department of Education ("Department"), as were replies by Petitioners Hoyos, Doresa, Aranda and DeWitt ("petitioners") and participant Boards of Education of Passaic and Elizabeth ("participants").[1]

In its exceptions, the Department observes that the Initial Decision consists of various suggestions and a few orders, and requests that, to the extent these suggestions and recommended orders are adopted, any changes resulting from them should apply to early childhood education plan cycles beginning with the 2002-2003 school year. Specifically, completion of the Early Childhood Education Curriculum Framework should be set within a reasonable time from the date of the Commissioner's final decision; draft or interim frameworks are not appropriate for adoption, since these might differ substantively from the finalized framework, necessitating mid-year modification of plans and services. (Department's Exceptions at 2)

The Department next requests that the Commissioner clarify, to the extent the Initial Decision suggests otherwise, that the Court placed the entire state-level burden for assurance of quality early childhood education programs not exclusively on the

[1] Other petitioning/participating boards of education, although contributing to the record before the ALJ (Initial Decision at 5), made no submissions on exception.

Department of Education, but rather on the *State*. Therefore, the State must have the flexibility to allocate tasks to appropriate agencies other than the Department of Education, such as the Department of Human Services, the New Jersey Economic Development Authority, and the Commission on Higher Education. The State must also be able, in its discretion, to retain responsibility for accomplishing tasks itself, either directly or through procurement of services, rather than delegate them to districts. (Department's Exceptions at 2-3)

Finally, the Department urges the Commissioner to clarify that, while the Court plainly authorized collaboration with community providers in the delivery of early childhood education services, it did not *require* the use of any particular provider, including Head Start. Therefore, as with any other provider, if Head Start is unable or unwilling to deliver services meeting Abbott standards at a cost the State determines to be efficient, the State is under no obligation to collaborate with it or bring it up to Abbott standards, fiscally or programmatically. (Department's Exceptions at 3-4)

In reply to the Department's first exception, petitioners and participants contend that the record is devoid of factual basis for the Department's claims that compliance with the Initial Decision's recommended time frames is not feasible, and they strenuously object to any further delay in its implementation. Participants additionally contend that interim or draft curriculum frameworks would be neither inappropriate nor unworkable, since the Department routinely issues guidelines, standards and suggestions that are subject to change during the course of their implementation, and no reason is given why interim standards cannot be employed during the 2001-2002 school year with final standards to apply in 2002-2003 and thereafter. (Petitioners' Reply at 1, Participants' Reply at 2-3)

In reply to the Department's contention that responsibility for Abbott preschool programs may be delegated to State agencies other than the Department of Education, petitioners and participants respond that the Court unequivocally placed responsibility for providing required preschool programs on the Abbott districts and the Department of Education. Participants add that it is somewhat disingenuous for the Department to now back away from responsibility for programs it, itself, proposed to the Court, and that any means the Department chooses to implement the Court's mandates must be consistent with the Court's directives and result in prompt and timely fulfillment of obligations. (Petitioners' Reply at 1-2, Participants' Reply at 3-4)

Finally, in reply to the Department's contentions regarding its obligations to community service providers generally, and to Head Start in particular, petitioners and participants contend that the Court clearly required all Head Start programs to be included within districts' Abbott preschool plans, and that the only appropriate course of action with respect to Head Start is for the Department to assess what is needed to bring all Head Start programs up to Abbott standards and fund them accordingly. Even assuming, *arguendo*, that the Department's exclusion of Head Start on grounds of fiscal inefficiency were permissible under the Court's mandate, the record in this matter is totally devoid of factual evidence that would support such an action; indeed, it does not even include an explanation as to how and why the Department determined not to contract with Head Start. (Petitioners' Reply at 2, Participants' Reply at 4-5)

Over and above their replies to the Department's exceptions, petitioners and participants urge the Commissioner to adopt the findings, determinations, conclusions and recommendations of the Initial Decision in their entirety. At the very least the Commissioner should require the Department to direct completion of an Early

Childhood Education Curriculum Framework, interim if not final, at the earliest feasible date and in as much detail as possible; reaffirm the responsibility of every district to serve every eligible child in a quality preschool program and the responsibility of the Department to fund plans and programs for this purpose; require the Department to issue clear guidelines and standards for the specific information required to understand and evaluate the adequacy of plans and funding requests, rather than reviewing them based on preset cost determinations; assure expeditious decisions on requests for permanent facilities and provide for temporary facilities in the interim; and require the Department to establish fixed and firm dates for the early childhood program application and approval process. (Petitioners' Reply at 2-3, Participants' Reply at 1-2)

COMMISSIONER'S DETERMINATION

As set forth in the Initial Decision, petitioners[2] allege that, in a host of ways, the Department has failed to meet the mandate of the Court and has otherwise violated the law. Specifically, they allege:

> (1) Failure to provide timely and concrete guidance to enable and assure that districts plan and implement preschool for all children under the *Abbott VI* quality standards;
>
> (2) Failure to require the development and implementation of plans to provide high-quality preschool for all eligible three- and four-year-old children in the Abbott districts, based on need;
>
> (3) Failure to require the development and implementation of concerted and aggressive outreach and recruitment efforts to improve and maximize enrollments;
>
> (4) Failure to include Head Start children and programs in the districts' preschool plans and budgets;

[2] For purposes of the following discussion, "petitioners" refers to all petitioners and participants, consistent with the procedural explanation of the ALJ (Initial Decision at 4-5). Where specific filings are referenced, the submitting party is individually identified.

(5) Failure to require assessment of children's needs and the development and implementation of program plans and budgets based on those needs;

(6) Failure to require assessment of all school- and community-based programs and the development and implementation of improvement plans to enable each program to meet *Abbott VI* quality standards, including class size limits and teacher certification;

(7) Failure to require the development and implementation of uniform, age-appropriate content and curriculum for all programs;

(8) Failure to require the development and implementation of plans for transportation, social, health and other services, based on need;

(9) Failure to require the development and implementation of plans for safe and educationally adequate preschool facilities, including temporary and permanent facilities to address increased enrollments and the needs of unhoused children as a result of class size reduction;

(10) Failure to require the development and implementation of plans to provide preschool to children with disabilities, with limited English proficiency and other special needs;

(11) Failure to require the development and implementation of plans for district-wide assessments, supervision, technical assistance, coordination, training, evaluation and accountability measures to assure uniform, high-quality preschool education in all programs, whether community- or school-based, based upon an assessment of district-wide need;

(12) Failure to require the development and implementation of needs-driven district budgets and supplemental funding requests;

(13) Imposition of pre-determined, per-pupil funding amounts for preschool in community-based providers, based upon available state funding;
(14) Approval of district-revised plans for 2000-2001 that fail to comply with the *Abbott VI* preschool directives; and

(15) Arbitrary rejection of various components of district plans requiring supplemental funding for implementation. (Initial Decision at 6-7)

Based on these allegations, petitioners seek a decision[3] that "finds that the DOE's 2000-2001 implementation of preschool programs in the Abbott districts violates

[3] Petitioners agree that any relief must be prospective. (Initial Decision at 8)

Abbott V and VI, federal and state special education laws and state bilingual education law, and, as relief, directs the Commissioner to require and assist the Jersey City, Newark, Paterson and West New York districts, and other Abbott districts, to

> (1) Conduct a comprehensive assessment of the particular academic, social and health needs of preschool-age children;
>
> (2) Conduct an assessment of all school and community providers of preschool to determine their needs and develop site-specific improvement plans and budgets therefore to assure maximum enrollment of three- and four-year-old children without regard to parental status;
>
> (3) Assure inclusion of all children enrolled in federally funded Head Start and services for children with disabilities;
>
> (4) Assure timely transition to classes of fifteen students where necessary;
>
> (5) Assure sufficient and ongoing professional development;
>
> (6) Assure teacher certification for non-certified teachers with needed supports and accessible higher education and phase-in of comparability between district and provider salaries, benefits and schedules for similarly credentialed and experienced teachers;
>
> (7) Assure high-quality curriculum at each site;
>
> (8) Assure all necessary transportation, health and social services;
>
> (9) Assure needed facility improvements and, as necessary, expansion and/or new construction;
>
> (10) Assure adequate programs and staff for oversight, training assistance, etc., and adequate provider-specific and district plans, budgets, facilities and state funding." (Initial Decision at 6-8)

The Administrative Law Judge (ALJ) addresses petitioners' allegations by distilling them into a handful of broad systemic issues and, by and large, resolving them not through the customary findings of fact and conclusions of law, but rather through reflections and observations culminating in a handful of orders, most of which are more in the form of suggestions for consideration than of directives for specific action.

Recognizing the inherently difficult task before him, the ALJ himself acknowledges the unusual character of the resulting decision in transitional comments between his statement of the parties' positions and his own discussion of specific issues:

> Judging the legal sufficiency of any steps taken in an ongoing process that is intended to reach a goal that admittedly cannot be achieved in a definably short time is difficult. Similarly, where some possible action has not occurred, the determination as to whether that lack of action at any given time in the long-term process constitutes a legally actionable violation can be difficult to determine.*** To the extent that the evidence presented establishes that the DOE has not done what the Court mandated it to do, the remedy for such non-compliance necessarily must be directive, that is, the DOE must be ordered to comply, and in that vein, possibly be given somewhat more detailed directives as to how to assure that it does so.*** The decision here is therefore addressed to systemic concerns and is perceived as far more applicable to the next and future rounds of plans and applications, as any identified failings in the DOE's systemic response to the task set out for it by the Supreme Court must be immediately rectified so that the 2001-2002 school year can proceed in a more ordered and less contentious manner, and so that, in future years, the interested parties, agencies and groups can all address the issues in a more coordinated and cooperative manner. As a result, some of the comments and conclusions reached are perhaps more suggestive than they are adjudicative. (Initial Decision at 36-37)

He reiterates this view when reaching his actual orders, in comments introducing the Initial Decision's Summary, Conclusion and Order:

> In summary of the above, based on the record as presented by the parties and the arguments of counsel, I make the following findings and conclusions, as well as the following suggestions that are, in my view, worth further consideration by the Department and the districts. To the extent that these require action, the parties are ORDERED to comply and act in accord with the following: (Initial Decision at 56-57)

While the ALJ's approach is an understandable one – arguably the only feasible one under the circumstances – its result is paradoxical. The Department, noting the general absence of determinations that the evidence showed clear and pervasive violation of the Court's mandate, finds only limited bases on which to take specific exception. Petitioners, on the other hand, noting the limited extent of the Department's

exceptions, view the decision as a vindication of their claims and urge its immediate affirmance in all respects, contending that the Department's comment to the effect that no violation was demonstrated "flies in the face" of a detailed and well-reasoned determination. (Participants' Reply at 1)

The Commissioner, as agency head, stands in an unusual posture in reviewing a recommended decision of this nature. In accordance with the rules for adjudication of contested cases, he may accept, reject or modify findings of fact, conclusions of law and recommended orders based upon the record before him, and he does so below, to the extent that the Initial Decision presents these. However, where the ALJ has made suggestions for improvement, or expressed a conditional opinion because the record by which both he and the Commissioner are bound did not permit a firm conclusion, the Commissioner takes the ALJ's observations under advisement and, where appropriate, directs, as a matter of policy, further exploration and activity on the part of the Department.

Consistent with the parameters set forth above, the Commissioner now turns to the specific issues addressed in the Initial Decision.

Constitutional Basis for Preschool in the Abbott Districts

The ALJ analyzes the writings of the Court and concludes that he cannot find preschool to have been clearly declared a constitutional entitlement, although in the current context it is plainly a significant legal right. (Initial Decision at 37-38) The Commissioner concurs with this conclusion, which does not reappear in the Summary, Conclusion and Order.

Substantive Educational Standards

Addressing allegations that the Department has failed to meet the Court's directive for provision of substantive preschool educational standards, the ALJ reasons as follows: If the Department's adoption of its *Early Childhood Education Program Expectations: Standards of Quality* ("*Expectations*") document (Initial Decision at 18-19) is enough to satisfy the Court, then DOE has not violated the Court's mandate. However, the Department clearly intends to go further, as evidenced by its ongoing development of an *Early Childhood Education Curriculum Framework* ("*Framework*") document to give more specific guidance than is provided in the *Expectations*; thus it may be that the standards set by the *Expectations* are not substantive enough to meet the Court's mandate. If this is so, then the Department must move quickly to adopt more substantive standards in time for the 2001-2002 school year. (Initial Decision at 39)

From this reasoning, the ALJ concludes, and so orders, that although the Department is not in violation at this time, in order to truly meet the Court's mandate and avoid concerns that the *Expectations* are not fully sufficient as standards, the final *Framework*, or an interim version, must be in place by June 15, 2001, so as to apply to the 2001-2002 school year. The ALJ further states, with general reference to substantive educational standards, that the Department must insist on review of district early childhood education curriculum plans, seeking such information as the agency in its expertise determines to be necessary for this purpose, in order to ensure that the goal of effective schooling is being met. (Initial Decision at 39-40 and 57)

While wholeheartedly endorsing the ongoing process of developing the *Framework* document, the Commissioner cannot concur that the Department is in violation of the Court's mandate to provide substantive educational standards if the

Framework document is not in place prior to commencement of the 2001-2002 school year. In effect, the ALJ's analysis construes the Department's plan to develop the *Framework* as *per se* evidence that the *Expectations* are not sufficiently substantive to meet the mandate of the Court. The Commissioner disagrees. The *Expectations* document is analogous to the Core Curriculum Content Standards (CCCS). It is the definitive document that clearly establishes State standards for what students are expected to know and be able to do upon completion of preschool, and it offers a wealth of strategies and resources for development of programs and practices that will lead to the desired results. Like the CCCS, it is a "stand-alone" document, albeit one designed to permit ongoing supplementation by further resources and support strategies, both at the State and the local levels. That such supplementation is possible and, indeed, is being actively undertaken by the Department in an effort to encourage creation of the best programs achievable, does not alter the essential value and character of the *Expectations* document, nor render it inherently deficient in terms of meeting the Court's mandate for substantive preschool standards. To the contrary, the early childhood *Framework* document will be analogous to the frameworks adopted for each content area of the CCCS[4] – a supporting resource, developed by a broad-based panel of experts over a period of time subsequent to the establishment of standards, intended to enhance and amplify strategies previously presented in conjunction with those standards.[5]

---

[4] Both the CCCS and their corresponding frameworks are accessible through the Department's website at http://www.state.nj.us/njded/stass/index.html

[5] The Commissioner rejects petitioners' claim that the *Expectations* document is deficient because it does not deal with budgeting, professional development and "clear, measurable standards of high-quality classroom practice to which the teaching staff can be held accountable." (Initial Decision at 18-19) Not every matter to be addressed as part of Abbott implementation falls within the rubric of "substantive educational standards" as used by the Court in this context.

Because neither its effectiveness nor its validity is contingent upon existence of a corresponding *Framework*, the Commissioner finds the *Expectations* document to be more than adequate to guide development of high-quality preschool programs consistent with the Court's mandate. Thus, he can ascertain no reason why the *Framework* cannot continue to be developed as currently scheduled, through the same careful, inclusive and highly successful process that was used to develop the *Expectations* and the various CCCS frameworks, as described in the introductory sections of those documents. However, because the Commissioner is committed to assisting districts in achievement of preschool standards of quality and the *Framework* will be yet another valuable tool in that endeavor, he directs the Department to ensure that the planned schedule for development of the *Framework* be maintained as announced, without delay or extension, so that the *Framework* will be finalized and disseminated, as planned, by August 2002.

Additionally, the Commissioner finds the requirement for Department review and approval of district preschool program plans, including plans for a district curriculum that conforms to *Expectations* standards which are linked to the CCCS, to be implicit in the rules governing early childhood education operational plans at *N.J.A.C.* 6A:24-3.4. However, to the extent that district curriculum plans may *not* be undergoing sufficient review in the context of Department review of early childhood education operational plans or otherwise, the Commissioner directs that the Department revise its practices and procedures as may be necessary to include such review, and that it provide guidance to districts as to what they must submit in order for such review to occur. If necessary, the Department should also develop amendments to existing rules for presentation to the State Board of Education, so that, with public input and discussion,

that body may duly consider their promulgation pursuant to the Administrative Procedure Act (*N.J.S.A.* 52:14B). In order to insure that any changes to, or clarifications of, the review process are in place prior to the due date for submission of early childhood education operational plans for 2002-2003, so as to allow for adequate preparation by districts, the Commissioner directs that the Department develop and publicize any such revisions or clarifications by August 31, 2001.

Enrollment & Recruitment

The ALJ endorses basic principles which all parties recognize: that intensified outreach is necessary when enrollment does not reach a minimum threshold of eligible students, and that adequately funded plans are needed for ongoing and expeditious improvement of existing enrollment patterns even where the minimum threshold has been met, so that, as soon as practicable, access to preschool programs meeting State standards is available to all eligible students as intended by the Court. Noting that the current regulation establishing a threshold of 50 percent of eligible students is presumptively valid and not open to review herein, the ALJ discusses the discrepancy in the parties' views as to the correct method of determining the projected number of eligible three- and four-year-old students to which the threshold percentage is to be applied, and the possible impact of distinguishing between three- and four-year olds. Finding that the record does not permit him to draw a conclusion as to which of the parties' two respective methods results in the more reliable indicator, or indeed, what the proper method of calculation might actually be, the ALJ concludes that the Department should establish, by rule after due public input, a uniform standard for determining the number of eligible students in a district. In the Summary, Conclusion and Order, he states that "further refinement [of the current regulation] may be warranted," that the Department should carefully consider the

support such a claim. Neither does the record present any response to petitioners' allegation that the Department offered an inadequate, predetermined dollar amount to bring the programs up to Abbott standards, without any assessment of student or program needs; indeed, the record provides no explanation at all as to why agreement could not be reached. (Initial Decision at 45-47)

Based on this analysis, the ALJ concludes that he cannot find the Department to have met its burden of demonstrating that it acted in a reasonable and compliant manner with respect to Head Start. He further concludes that the Department violates the spirit and intent of the Court's directive, and its own rule, if it does, in fact, refuse to provide appropriate levels of funding based on particularized needs to willing but deficient Head Start programs, thereby requiring districts to duplicate Head Start services, as well as provide for those components found lacking in the rejected programs. Finally, he concludes that where the Department is going to reject a provider as impractical, it must have a clear, documented basis for doing so, so that the lawfulness of its action can be properly gauged. Accordingly, reiterating that the present record does not permit a determination that the Department's offer to Head Start was need-based and adequate, and that there appears to have been a lack of district- and program-specific analysis of the level of funding necessary to upgrade to Abbott standards, the ALJ orders that the Department must negotiate in good faith with Head Start; that the Department and districts must coordinate their efforts to assure that discussions with Head Start and other community providers are based on adequate assessments of student needs; and that funding must be based on such needs and not on pre-determined per pupil amounts. (Initial Decision at 47-48 and 57-58)

On the issue, the Commissioner cannot concur with the ALJ's analysis and conclusion, which appear to suggest that Head Start programs *must* be used, that the State has an independent obligation to negotiate with Head Start at the state level, and that, if a Head Start program – or for that matter any community preschool provider – is not offering a program that meets Abbott standards but is willing to do so, the State must pay for remediation of its deficiencies *regardless* of the availability of acceptable alternative means to serve the district's eligible student population.[6] If read in this manner, the Initial Decision would stand the relationship between Abbott districts and community providers on its head. Under applicable rules at *N.J.A.C.* 6A:24-3.3(b), districts are required to provide preschool programs through existing community providers willing and able to meet Abbott standards, *whenever practical.* Thus, identifying and contracting with appropriate providers is a *district* responsibility, subject to Department approval through review of the district's early childhood education operational plan. To the extent that a district seeks additional funding to bring willing but below-standard providers up to Abbott levels, the State surely has the right – indeed, the responsibility – to deny such funding in whole or part based on a determination that the bringing of any particular substandard non-district program, including a Head Start program, up to Abbott expectations is not cost-effective or is otherwise impractical, and to direct the district to serve its students in an acceptable alternative manner. Certainly, there is no independent obligation for the State to "negotiate" with any particular community provider, including Head Start, or for districts to contract with any particular provider, including Head Start. *However*, the Commissioner *does* concur that where the State determines not to supply

[6] There is no question but that students attending deficient programs, including deficient Head Start programs, may not be excluded from calculation of the eligible student population.

additional funding for a particular provider, such determinations cannot be made without consideration of student needs. Therefore, the Commissioner directs that, to the extent that the Department, in the formative stages of Abbott implementation, may ever have used pre-determined dollar amounts[7] or other apparently arbitrary standards as bases for excluding Head Start or other willing community providers from district preschool plans, this is not to occur. Rather, plans to use community providers, including Head Start, must be evaluated based upon student needs, with considerations of cost and practicality assessed relative to other means of meeting State standards.

Parental Status

The Commissioner fully concurs with the ALJ's summary conclusion and order that the record provides no evidence of the Department having violated the Court's mandate by denying, or permitting the denial of, preschool services to any student based on the status of his or her parent, vis-à-vis ineligibility to enroll their children in Head Start or otherwise. (Initial Decision at 48 and 58)

The Role of Assessment

The ALJ characterizes the crux of petitioners' complaints regarding the adequacy of the Department's direct and supplemental funding processes as follows: Districts have not properly examined and assessed the conditions, circumstances, strengths and weaknesses surrounding their delivery of an appropriate Abbott-quality preschool program, and have, therefore, failed to properly determine their needs and those of the local community-based centers. The Department has failed to insist upon such district activity so that it can properly oversee the planning and implementation

[7] That is, amounts derived through fiscal considerations without regard to reasonably determined actual costs for meeting needs or to the comparability of such costs among programs.

process, and do all that is necessary to assure its success. Failure to insist upon districts formulating plans and submitting them for assessment, in turn, has led to inadequate funding in a number of areas. The Department's response is that petitioners are attempting to foist a responsibility on districts to assess students and preschools prior to designing plans or revising them, a responsibility which the Court nowhere requires. (Initial Decision at 48-49)

The ALJ rejects the Department's position as totally unwarranted, especially after *Abbott VI*, *supra*. Instead, he holds that assessment must be viewed as central to any meaningful implementation of *Abbott*, which inherently demands ongoing evaluation of students, preschools and programs, to ensure that quality services are being delivered and identified needs are being met. In examining records of specific claims of inadequate funding vis-à-vis systemic issues, the ALJ finds that the Department understands its obligation to provide adequate funding, as evidenced by its provision of funding for early childhood education programs over and above the funds provided by Early Childhood Program Aid. He further finds, however, that while the funding at issue in the matters on record may, in fact, have been adequate, and appropriate underlying assessments may, in fact, have been made, the corresponding request determination letters do not indicate that Department decisions were based on specific assessments and analyses of district or student needs; to the contrary, they lack explanations, take little or no account of differences between districts, and generally create the appearance of the very arbitrariness that previously troubled the Court. With reference to this deficiency, the ALJ opines:

> In the end, regarding issues relating to the need for specific levels of funding, supplemental services and the funding therefore [*sic*], facilities, and the like, the DOE must carefully guide the districts as to the

> information it must have in order to fairly assess their needs and requests. It must insist that districts both assess and regularly monitor their own and community-provider programs. It must do so regarding teacher certification and the progression of staff towards mandated certification, and regarding the need for transportation and health services, overall special education staffing and funding (as opposed to pupil-specific needs properly determined under IDEA provisions, including due process hearings), and bilingual education. While the DOE might prefer to allow districts to deal with the planning and implementation of Abbott programs on their own, and while the districts do have the front-line responsibility for properly planning, assessing, monitoring and, where needed, revising the manner in which they deliver services, the DOE has an inescapable, constitutionally significant responsibility that requires that it not merely sit back and receive what the districts give it, that it not merely offer limited guidance and assistance to the districts, but that, as Justice Stein said, it boldly and even aggressively act as the strong and active insurer of the planning and implementation of Abbott preschool education.
>
> (Initial Decision at 54-55)

Following this discussion, the ALJ concludes that districts are required to conduct reasonable evaluations, reviews and assessments of themselves, their preschool children and their providers' circumstances and to use these as aids in formulating plans for the implementation of Abbott preschool. He further concludes that these must be made available to the Department so that it can conduct reasonable reviews and assessments of the districts' actions. Finally, he concludes that, above all, the Department must issue clear guidelines and standards concerning the information that it requires from districts to understand, evaluate and ultimately decide upon the adequacy of their plans, requested funding and program implementation. (Initial Decision at 49-55)

In the recommended orders based upon this section, the ALJ states that the Department clearly understands its obligation to provide adequate funding and has in some circumstances demonstrated that understanding, from which specific disputes do not detract. However, noting that "there appears to be some concern that the understanding is at times only theoretical," the ALJ directs:

> Districts, as well as the Department, must engage in specific evaluations and assessments of the needs of their students, programs and community-based providers so as to determine in detail their specific requirements and to formulate plans and applications reasonably geared to meet those needs and thereby assure that Abbott-quality preschool is available for all eligible children. In addition, the DOE must make assessments and ultimately assure that the districts are providing such programs. In order to properly undertake these tasks, the DOE must issue guidelines, probably in the form of detailed regulations, that advise districts and providers as to the information deemed necessary to allow for the districts and the DOE to adequately understand the needs and plan, fund and carry out the programs, as well as assess their adequacy and success. The exact details of what is necessary to do this must be left, in the first instance, to the DOE to determine. (Initial Decision at 58-59)

The Commissioner fully concurs that assessment of needs and evaluation of programs is central to any meaningful implementation of Abbott mandates; indeed, requirements for such assessment and evaluation are inherent throughout the detailed rules governing urban education reform in Abbott districts, at *N.J.A.C.* 6A:24-1.1 *et seq.* While the record is not conclusive on this point, as recognized by the ALJ, it would come as no surprise if, in the first stages of implementing so vast and new an undertaking as the Abbott initiative – where programs needed to be put into place quickly so as not to delay immediate benefit to Abbott students – assessment and evaluation processes as they pertain to preschool and supplemental programs may not have been as refined as they should ideally become. Thus, while recognizing that improvement has been an ongoing process that continues to this day, the Commissioner directs, with respect to preschool operational plans and requests for supplemental funding, that to the extent that the Department may not be ensuring that assessments of student need are occurring or providing sufficient guidance as to how they are to be conducted, to the extent that the Department may not be ensuring that programs are being evaluated for compliance with approved plans, and to the extent that the Department may not be making its

determinations on preschool and supplemental funding requests based on assessment of student needs, the Department shall, by August 31, 2001, recommend to the Commissioner such revisions to its practices and procedures as may be necessary to achieve these goals, as well as recommend whether any guidelines or rules may be warranted.[8]

Facilities

The ALJ concludes, and subsequently orders, that facilities needs must be addressed through the process established by the Legislature through the Educational Facilities Construction and Financing Act (EFCFA). He further concludes that short-term facilities needs must be promptly addressed through determination as to the actual needs of the districts to allow for full implementation of the necessary programs, based upon careful and detailed assessment of such needs, and that, to the extent that disputes exist over the needs of a specific district, these must be determined on a case-by-case basis in accordance with applicable appeal procedures. (Initial Decision at 55-56 and 59)

The Commissioner fully concurs with these conclusions and orders, clarifying that addressing of facilities needs must occur through the process established in the rules implementing EFCFA at *N.J.A.C.* 6:23A-1 *et seq.*[9]

Miscellaneous Orders

The ALJ makes recommendations regarding further procedures in the specific disputes pending at OAL with regard to Perth Amboy's and Vineland's claims to

[8] The respective roles of districts and the State in assessment and evaluation processes (see discussion at 84-85 below), and what specific information is necessary in order to ensure that needs are identified and met, is a matter to be determined through development of the directed procedures.

[9] It is noted that the State Board of Education in May 2001 proposed superseding rules, to be codified as N.J.A.C. 6A:26 upon adoption, consistent with the requirements of the Administrative Procedure Act (N.J.S.A. 52:14B).

restitution of funds already spent, and with regard to other discrete matters pertaining to the 1999-2000 or 2000-2001 school year. (Initial Decision at 59) The Commissioner concurs with these recommendations and adopts them in their entirety.

Time Frames for Submission/Review of Applications and Resolution of Disputes

In a footnote to his summary and conclusions, the ALJ finds it "appropriate to express***some thoughts regarding the timing of decision making in Abbott matters." The ALJ opines that, while resolution apart from the contested case hearing process is both possible and desirable, where this does not occur, the parties' time for resolution must be limited so that districts can know where they stand early in a given year; thus, OAL rules limiting the time for discovery and settlement efforts in cases of this type may be warranted. He further opines that the Department's application process suffers because there are no fixed time frames for submission of filings and rendering of decisions; he suggests that district papers should be due on dates certain, with Department decisions based on whatever is submitted and resulting claims of deficiency addressed on appeal, and that the effectiveness of rules already including time frames may need reconsideration. He urges all interested parties – such as the Department, districts, the Education Law Center, OAL and the New Jersey Economic Development Authority – to consider how to accomplish expeditious movement of plans, applications, reviews/assessments, decisions and appeals, suggesting that there should be "discussions to determine the best means to achieve the desired resolutions in a fair yet timely fashion." (Initial Decision at 59-60)

While these comments of the ALJ do not constitute a finding or order, it is clear from the record that problems exist with the time frames within which various Abbott determinations are occurring, although the Commissioner must observe with

respect to Department determinations that, as alluded to by the ALJ, this appears to be due in no small part to district failure to submit requested information and the ensuing protracted efforts to obtain such information. Therefore, the Commissioner directs the Department to examine this issue, identify the places where improvement is necessary and the means required to effectuate such improvement (for example, regulatory or operational revisions, additional staff, coordination with other affected agencies regarding possible changes to their rules and procedures, and so forth), and report its conclusions and recommendations to the Commissioner by August 31, 2001, so that the Commissioner may effectuate changes in preparation for the 2002-2003 school year.

Burden on the Department of Education

Although the issue was not addressed or analyzed by the ALJ as a discrete topic, the Department contends in its exceptions, *supra*, that the wording of the Initial Decision in several places implies that the Court placed the entire burden for assurance of quality early childhood education programs exclusively on the Department of Education, thus precluding reliance on other State agencies. The Department stresses that compliance with the Court's directive is a responsibility of the *State*, not solely of the Department of Education, and that the State must be given the flexibility to allocate its responsibility among agencies, such as the Department of Human Services, the New Jersey Economic Development Authority, and the Commission on Higher Education, which are appropriate to handle the necessary tasks. Additionally, the State must be accorded the ability, in its discretion, to handle responsibilities, such as, perhaps, the needs assessments recommended by the ALJ, on its own or through procurement of services, rather than by assigning them to local districts. Such allocation of State responsibilities

should not be viewed as inconsistent with the Court's directives, and the Initial Decision should not be construed to suggest that it is.

The Commissioner readily acknowledges that, because education is the fundamental right at issue in the Abbott rulings, the Department of Education is the State agency with primary responsibility for ensuring that Abbott mandates are met. However, he fully concurs with the Department that ultimate responsibility lies with the State, not exclusively with the Department of Education, and that, particularly in view of the wide-ranging nature of the Abbott directives, it would be both unwarranted and counterproductive to preclude the State in its discretion from allocating responsibilities among its various agencies and subdivisions as appropriate, so long as obligations to Abbott students are fulfilled.

Summary and Conclusion

Herein, the Commissioner is confronted with review of the Department's implementation of a task of enormous size, complexity and urgency, a task described by the Court in *Abbott VI* as nothing less than "a major transformation of the educational system serving the State's poor, urban districts." (*Supra,* at 101) It is clear from the record of this matter that, particularly since *Abbott VI*, a number of crucial formative tasks have been successfully accomplished (Initial Decision at 15-17), representing a Herculean effort of which the Commissioner is proud, a significant improvement in the education offered in poor, urban districts, and a good-faith commitment to the Abbott children as envisioned by the Court. That not every goal has yet been fulfilled to its utmost – that more remains to be done – should not be allowed to detract from the magnitude of what has already been accomplished. Pervasive bad faith and violation of Court directives, as alleged by petitioners, is not the same thing as a need for refinement,

improvement and ongoing readjustment, based on practical experience with a vast and unprecedented undertaking.

That being said, it is equally clear that the first stages of Abbott implementation are behind us and the time is now right for such refinement, improvement and readjustment. Although the Initial Decision did not present the unequivocal findings and conclusions sought by petitioners, the Commissioner does concur with the ALJ that there are specific ways in which effectuation of Abbott requirements might now be bettered, and that the Department must be proactive in seeing that this occurs.

Accordingly, the Commissioner specifically finds, determines and directs as follows:

1. The Commissioner declines, as did the ALJ, to find that the Department's implementation of early childhood education in the Abbott districts is generally in violation of *Abbott V*, *Abbott VI* or other applicable law.

2. The Commissioner affirms the ALJ's conclusion that preschool, while a significant legal right in the present context, has not been declared a Constitutional entitlement.

3. The Commissioner rejects the ALJ's conclusion on the necessity of the preschool *Framework* document and accordingly reverses his order directing its promulgation in final or interim form by June 15, 2001, finding instead that quality, Court-compliant preschool programs can be implemented based upon standards set forth in the detailed *Expectations* document already promulgated, together with rules of the State Board and

technical assistance provided by the Department. Notwithstanding, the Commissioner concurs that the *Framework* is an important part of the State's continuing commitment to Abbott children, and he directs that the schedule currently in place for its development be maintained without delay or extension, so that the *Framework* document will be finalized and disseminated by August 2002.

4. The Commissioner endorses the ALJ's observation that Department review of district preschool curriculum plans is required for implementation of the Abbott mandate, and to the extent this may not be sufficiently occurring as part of the Department's review of Early childhood education operational plans or otherwise, the Commissioner directs that the Department make, by August 31, 2001, such revisions to its practices and procedures as may be necessary to ensure district compliance with preschool standards.

5. The Commissioner affirms the ALJ's conclusion that a uniform regulatory method of determining the projected number of eligible preschool students is warranted, and he directs the Department to develop appropriate rule language for presentation to the State Board of Education at its August 2001 meeting, so that the Board may consider promulgation of rules in accordance with the Administrative Procedure Act.

6. The Commissioner endorses the ALJ's observation that review of district enrollment and recruitment plans is necessary for effective implementation of the preschool mandate, and, to the extent that these, or corrective action plans where necessary, may not be undergoing sufficient review as part of the Department's review of early childhood education operational plans or otherwise, the Commissioner directs that the Department make, by August 31, 2001, such revisions to its practices and procedures as may be necessary to ensure district compliance with established regulatory standards.

7. The Commissioner rejects the analysis, conclusion and order of the ALJ with regard to Head Start, to the extent that it appears to require use of Head Start or any other particular provider by districts, negotiation with Head Start or any other particular provider at the state level, or provision of funds to bring Head Start or any other willing community provider up to Abbott standards regardless of the availability of alternative means of serving students.

8. The Commissioner stresses that identifying and contracting with community providers is a district responsibility and is required when practical. He affirms the ALJ's finding that, to the extent that Department determinations on preschool program and funding applications may ever have been based on predetermined fiscal considerations rather than on assessment of student needs, this must not occur. He further directs that

the Department's method of review must be adjusted to the extent necessary, if any, to ensure that district plans to use community providers, including Head Start, are evaluated based upon student needs, with considerations of cost and practicality assessed relative to other means of meeting State standards, and that guidance is provided to districts as to the information the Department needs for adequate review.

9. The Commissioner affirms the ALJ's conclusion that the Department has not violated the Court's mandates in regard to exclusion of students based on parental status.

10. The Commissioner modifies the ALJ's directive with respect to needs assessments and program evaluation by clarifying that the State may allocate responsibility as it deems appropriate for particular tasks. However, the Commissioner concurs that assessments of student needs, and evaluation of programs, are essential to proper fulfillment of the Abbott mandate, and that the manner in which such assessments and evaluations are to be undertaken must be determined by the Department. Therefore, he directs, with respect to preschool plans and applications and requests for supplemental funding, that to the extent that the Department may not be ensuring that assessments of student need are occurring or providing sufficient guidance as to how they are to be conducted, to the extent that the Department may not be ensuring that programs are being evaluated for compliance with approved plans, and to the extent that the

Department may not be making its determinations on preschool and supplemental funding requests based on assessment of student needs, the Department shall, by August 31, 2001, recommend to the Commissioner such revisions to its practices and procedures as may be necessary to achieve these goals, as well recommend whether any guidelines or rules may be warranted.

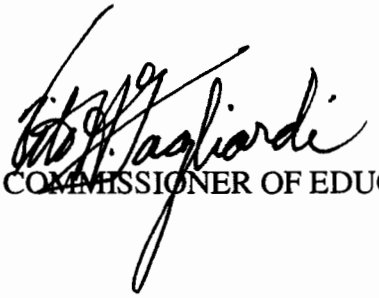
11. The Commissioner affirms the ALJ's conclusion that facilities issues must be addressed through the mechanism established by the Legislature for this purpose, that is, through EFCFA and its implementing rules.

12. The Commissioner affirms in their entirety the ALJ's orders (Initial Decision at 59, Nos. 8 and 9) with regard to further proceedings in the specific disputes pending, apart from the "global" issues determined herein.

13. The Commissioner concurs with the ALJ's suggestion that there is room for improvement in the various time frames operative in Abbott applications, determinations and appeals. He directs the Department to examine this issue, identify the places where improvement is necessary and the means required to achieve it, and report to him with conclusions and recommendations by August 31, 2001, so that he may effectuate changes in preparation for the 2002-2003 school year.

14. The Commissioner recognizes that the Department of Education has the primary state-level responsibility for ensuring that Abbott mandates are met, but clarifies the Initial Decision to the extent that it may be construed as finding that the Court placed this responsibility *exclusively* on the Department of Education, rather than on the State. He further clarifies that the State may retain tasks itself rather than delegate them to districts if, in its discretion, it deems that appropriate.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: June 1, 2001

Date of Mailing: June 1, 2001

D.R.P., on behalf of minor children, J.P. and J.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning parent challenged the Board's residency determination that her sons were not domiciled in Wayne and not entitled to a free public education there. The Board counterclaimed for tuition owed.

A settlement agreement was drawn up and the parties complied with the terms even though the agreement was never executed by petitioner. The ALJ concluded that all the issues in the matter were resolved and ordered the petition and counterclaim dismissed with prejudice.

The Commissioner agreed with the recommendation of the ALJ and dismissed the petition.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 7323-00

AGENCY DKT. NO 182-6/00

D.R.P. ON BEHALF OF MINOR CHILDREN,

J.P. AND J.P.,

Appellant,

v.

BOARD OF EDUCATION OF THE

TOWNSHIP OF WAYNE, PASSAIC COUNTY

Respondent.

George M. Holland, Esq., for petitioner D.R.P., (Lentz & Gengaro, attorneys)

Maria A. Giamonna, Esq., for respondent, (Fogarty & Hara, attorneys)

Record Closed: April 9, 2001 Decided: April 11, 2001

BEFORE **EDITH KLINGER**, ALJ:

On August 8, 2000, the Department of Education 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. Petitioner appealed the action of the Wayne Board of

Education (Board), which disenrolled her sons, J.P. and J.P., from the Wayne Public School District on the grounds that they were not domiciled in Wayne and not entitled to a free public education there. The Board counterclaimed against petitioner for the tuition owed for the time the children attended school in the District without entitlement.

A hearing was scheduled in this matter for August 28, 2001.

The Board notified the undersigned by letter, dated January 9, 2001, that the matter was resolved. A settlement agreement was drawn up by the parties under the terms of which the petitioner would pay the Board $2500 and J.P. and J.P. would no longer be enrolled in the District. A copy of this agreement is attached hereto.

On April 9, 2001, the undersigned received a letter from the attorney for the Board stating that the terms of the settlement have already been complied with and the Board's counterclaim has been satisfied. The letter also states that the Settlement Agreement was never executed by D.R.P. and her attorney is unable to make any further contact with her.

Based upon the above, I **CONCLUDE** that all issues in this matter have been resolved. Accordingly, it is **ORDERED** that the petition and counterclaim are 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.

April 11, 2001
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

4-18-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 19 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

al

RECEIVED
STATE OF NEW JERSEY
APR 9 12 21 PM '01

FOGARTY & HARA
COUNSELLORS AT LAW

RODNEY T. HARA
STEPHEN R. FOGARTY

JANE GALLINA MECCA
ELLEN MARIE WALSH
JANET L. PARMELEE
JOHN R. VREELAND
ANDREW P. ODDO
MARIA A. CIAMMONA
JENNIFER MAZAWEY

16-00 ROUTE 208 SOUTH
FAIR LAWN, NEW JERSEY 07410

(201) 791-3340
TELECOPIER (201) 791-3432

8/28/01

April 5, 2001

Honorable Edith Klinger, A.L.J.
Office of Administrative Law
185 Washington Street
Newark, New Jersey 07102-3011

Re: D.R.P. o/b/o J.P. and J.P., minors
v. Board of Education/Township of Wayne
O.A.L. Docket No.: EDUOS 07323-00N
Our File No.: 82/2955

Dear Judge Klinger:

This office represents the Wayne Township Board of Education (hereinafter referred to as the "Board"). By letter dated January 9, 2001, I informed Your Honor that the parties had reached a settlement in the above-referenced matter. Enclosed herein please find a copy of an unsigned Settlement Agreement.

Pursuant to the terms of the Settlement Agreement, the Petitioner was to pay the Board $2,500 in one lump-sum payment. In fact, these monies were paid by the Petitioner to the Board in accordance with terms of the Settlement Agreement. The Petitioner, however, has failed to execute the Settlement Agreement. Moreover, George M. Holland, Esq., counsel for the Petitioner, has indicated that he has not been able to contact his client to date or obtain the signed Settlement Agreement.

It is the Board's position that since the settled amount has been paid and these students are no longer enrolled in the Wayne Schools, this matter is resolved in its entirity and there is no need for a plenary hearing in this case. Accordingly, the Board withdraws its counterclaim without prejudice in light of the fact that Settlement Agreement remains unsigned. Moreover, we respectfully request that the Petition of Appeal be dismissed with prejudice for lack of prosecution.

If you should have any questions, of course, do not hesitate to contact us.

With kind regards, we are

Respectfully submitted,

FOGARTY & HARA

By: Maria A. Giammona
Maria A. Giammona

MAG:re
Enclosed
cc: Dr. Raymond V. Kwak (w/out enclosure)
Superintendent of Schools
Dr. Richard M. Linkh (w/out enclosure)
Assistant Superintendent of Schools
Mrs. Jeanette Makus (w/out enclosure)
Board Secretary/Business Administrator
Mr. George M. Holland, Esq. (w/out enclosure)

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
APR 9 12 21 PM '01

FOGARTY & HARA, ESQS.
16-00 Route 208 South
Fair Lawn, New Jersey 07410
(201) 791-3340
Attorneys for the Board of Education
for the Township of Wayne

D.R.P., on behalf of minor children J.P. and J.P.	:	BEFORE THE COMMISSIONER OF EDUCATION
v.	:	OFFICE OF ADMINISTRATIVE LAW
Board of Education of the Township of Wayne	:	O.A.L. Dkt. No. EDUOS/07323-00N Agency Ref. No. 182-6/00
	:	**SETTLEMENT AGREEMENT**

THIS AGREEMENT, made on the _____ day of _____, 2001, by and between Debra Rusin Pavone who currently resides at 18 Sherbrook Drive, Lincoln Park, New Jersey (hereinafter referred to as the "Parent") and the Board of Education of the Township of Wayne which has its offices located at 50 Nellis Drive, in the Township of Wayne, County of Passaic and State of New Jersey (hereinafter referred to as the "Board").

WHEREAS, the Parent filed a Petition of Appeal before the Commissioner of Education seeking a reversal of the disenrollment of J.P. and J.P. from the Wayne Township Public Schools;

WHEREAS, the Board filed an Answer to the Petition of Appeal and a counter-claim asserting that J.P. and J.P. were not residents of the Township of Wayne entitled to a free public

education and seeking tuition reimbursement in the amount of $9,991.30;

WHEREAS, the Parent filed an Answer to the Board's Counter Claim stating that J.P. and J.P. were entitled to attend the Wayne Township Public Schools as they were homeless;

WHEREAS, a plenary hearing in this matter was scheduled for January 10, 2001;

WHEREAS, further litigation of this matter would necessitate the disruption of the Board's educational program due to the necessary absence of administrators, teachers and office personnel who would be called to testify at the hearing, said hearing expected to require at least two (2) days to conclude;

WHEREAS, the continuation of this litigation would cause the Board to incur substantial financial costs that would significantly exceed the cost of this settlement;

WHEREAS, the parties agree that a settlement would be in the best interests of the Wayne Township Public Schools and therefore, the public; and

WHEREAS, the parties wish to amicably resolve their differences without the need to resort to any further litigation;

NOW, THEREFORE, in consideration of the aforementioned mutual premises and promises and in exchange for the consideration more particularly set forth below, the parties hereby agree as follows:

1. Parent agrees she is liable to the Board in the amount of $2,500. To that end, Parent agrees to remit payment in the amount of $2,500 to the Board in one lump-sum payment by

January 24, 2001. Payment shall be made by money order or cashier's check made payable to the Wayne Township Board of Education, which should be forwarded to Fogarty & Hara, Esqs., 16-00 Route 208 South, Fair Lawn, New Jersey 07410. Upon receipt of the check, the Parent will be forwarded a letter acknowledging receipt of payment.

2. The Parent agrees to withdraw her Petition of Appeal in the above-captioned matter bearing O.A.L. Docket No. EDUOS 07323-00N and Agency Reference No. 182-6/00, subject to the approval of this Agreement by the Office of Administrative Law and the Commissioner of Education.

3. The Board agrees to withdraw their Counter Claim for tuition in the above-captioned matter bearing O.A.L. Docket No. EDUOS 07323-00N and Agency Reference No. 182-6/00, subject to the approval of this Agreement by the Office of Administrative Law and the Commissioner of Education.

4. In the event the Parent defaults on her obligation to make payment to the Board in accordance with this agreement, the Board will proceed by summary action to enforce the terms of this settlement to obtain judgment in the amount of $5,000 and execute on the judgment. In addition, the Parent will be held responsible for the Board's attorneys' fees and costs which arise out of the Board's efforts to collect on the amount due to the Board.

5. The parties recognize that they have been represented by counsel of their own choosing and that they sign this Agreement as their own voluntary act and deed, and that they

fully understand the duties and obligations enumerated herein. This agreement shall be subject to the laws of New Jersey.

6. The parties shall sign mutual Releases, with respect to this matter specifically releasing the following: All claims, liabilities, loss, damage, direct or contingent, existing now or hereafter, which were alleged or could have been alleged in the herein matter bearing O.A.L. Docket No. EDUOS 07323-00N and Agency Reference No. 182-6/00.

7. This Settlement Agreement is subject to the Board's approval.

8. The Board President and Business Administrator shall be duly authorized to sign any and all papers to facilitate the within settlement.

9. 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 and year aforesaid.

WITNESS:

_____	_____
	Debra Rusin Pavone
Dated:	Dated:
WITNESS:	BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE
_____	_____
JEANETTE MAKUS Board Secretary/Business Administrator	JOANN DURR Board President
Dated:	Dated:

OAL DKT. NO. EDU 7323-00
AGENCY DKT. NO. 182-6/00

D.R.P., on behalf of minor children, J.P. and J.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, 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, the Commissioner agrees with the recommendation of the Administrative Law Judge dismissing the petition for the reasons stated in the Initial Decision.

Accordingly, the Petition of Appeal is hereby dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: JUN 04 2001

Date of Mailing: JUN 04 2001

* 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.

#174-01

EUGENE VAN NOTE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent challenged the Board's decision to refuse bus service to his son to two locations within Branchburg in accordance with court-approved joint custody/visitation agreement wherein his son lived with him 5 days a week and with his mother 2 days a week.

In light of the record and the testimony of the transportation supervisor that the Board revised its transportation policy to end the issuing of bus passes which allowed students to be picked up or dropped off at alternate sites during the school week and restricting transportation to alternate drop off/pick up sites only "on a 5 day per week basis," the ALJ found that the reasons for revising the policy were reasonable and prudent, and designed to promote Branchburg's responsibility to provide safe, efficient and effective bus transportation to its students. The ALJ concluded that the Board did not act unreasonably, arbitrarily or capriciously in denying petitioner's request for the alternative pick-up and discharge locations for his son. Moreover, the ALJ concluded because a person may have only one domicile, for the purposes of this matter petitioner's son may have only one residence or home. Noting that petitioner did not present the entire Final Judgment for Divorce, the ALJ did not find merit in petitioner's argument that his son's living arrangements resulted from a Superior Court adjudication. The ALJ further concluded that because the Board was not a party to the Superior Court action, it had no additional duty for the son's transportation to and from his parents' homes. Petition was dismissed.

The Commissioner agreed with and adopted the recommended order of the ALJ dismissing the petition with clarification. The Commissioner concurred with the ALJ that the record did not support petitioner's argument that the relief he sought must be granted by the Board because, *inter alia*, the living arrangements for his son resulted from a Superior Court adjudication. The Commissioner, however, did not concur with the ALJ's inference that the Board's not being a party in the divorce action before the Superior Court had any bearing on the controversy presented in this matter. Also, noting that the recent *Somerville v. Manville* court decisions were not applicable in this matter because those rulings were limited to the factual circumstances therein, the Commissioner agreed with the ALJ's conclusion that petitioner's son may have only one domicile/residence. Petition was dismissed.

June 4, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6262-00

AGENCY DKT. NO. 218-6/00

EUGENE VAN NOTE,

Petitioner,

v.

BRANCHBURG BOARD OF EDUCATION,

Respondent.

William B. Jones, II, Esq., for petitioner (Budd, Larner, Gross, Rosenbaum, Greenberg & Sade, attorneys)

David B. Rubin, Esq., for respondent

Record Closed: February 27, 2001 Decided: April 16, 2001

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner ("Van Note") appeals the denial by the respondent ("Branchburg") of Van Note's request that his son receive school bus transportation at 2 locations within Branchburg Township in accordance with court approved joint custody/visitation agreement. Branchburg

denies a statutory obligation to provide transportation to 2 dwellings of a student, and that its policy in this regard is not arbitrary, capricious or unreasonable.

Van Note's petition was filed with the Commissioner of Education on June 19, 2000 and thence transmitted to the Office of Administrative Law on August 7, 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. A prehearing conference was conducted on November 29, 2000 at which time the parties agreed that the matter could be heard on motion for summary decision with January 24, 2001 fixed as the date for oral argument. Prior to the date for oral argument, Branchburg's attorney advised that he wished to include testimony in the hearing record and January 30, 2001 was fixed as the date of the plenary hearing.

The hearing was conducted on January 30, 2001 at Bound Brook, New Jersey. Witnesses who testified and exhibits admitted into evidence are listed in the appendix. The parties were granted leave to submit post-hearing memoranda. The last submission was received at the Office of Administrative Law on February 27, 2001 which dates constitutes the closing date of the hearing record.

FINDINGS OF FACT

The post-hearing submissions of the parties indicate agreement of the following statements of material fact. Therefore these statement constitute Findings of Fact.

Van Note's son Jeffrey has attended Branchburg schools since kindergarten, and now into seventh grade. During those years Jeffrey's parents were living apart, petitioner living in Neshanic Station and Jeffrey's mother living in the area of Branchburg served by the Somerville post office. By agreement of his parents Jeffrey lived with his father 5 days each week and with his mother the other 2 days of the week.

Jeffrey's parents divorced in 1996. Their Property Settlement Agreement (Exhibit P-4) states, "The parties shall continue to have joint legal and physical custody of the child [Jeffrey]." During a school week Jeffrey lives at his father's house on Tuesday, and Thursday mornings.

Jeffrey is at his mother's house Wednesday, and Friday mornings. "Every other Monday Jeffrey stays with a different parent."

Prior to the 1998-1999 school year Branchburg granted Jeffrey a "bus pass" to board a school bus in the morning at the bus stop nearest to the parent's house at which he had awakened and to be returned to the bus stop nearest to the parent's house where he would be sleeping that night.

Branchburg instituted a new "bus pass" procedure for the 1998-1999 school year (Exhibits R-1 and P-3). The revised bus transportation policy, insofar as is material to this matter "allows for transportation of a student from an alternate pick-up location and/or an alternative drop-off location . . . for the current school year and on a 5 day per week basis." (Exhibit R-2 – form letter from Department of Student Transportation).

Jeffrey is not permitted to board the school bus in the morning or be dropped off from the school bus in the afternoon at the bus stop closet to Van Note's home but must use the bus stop nearest his mother's home.

ANALYSIS AND CONCLUSION

"Each school district shall provide, for all children who reside in the district and are required to attend the public schools therein . . . suitable educational facilities including. . convenience of access thereto . . .". *N.J.S.A.* 18A:33-1. "Whenever in any district there are elementary school pupils who live more than two miles from their public school of attendance or secondary pupils who live more than 2½ miles from their public school of attendance, the district shall provide transportation to and from school for these pupils." *N.J.S.A.* 18A:39-1.

"The board of education may make rules and contracts for the public transportation provided pursuant to this section." *N.J.S.A.* 18A:39-1. Pursuant to this legislated authority, Branchburg adopted a comprehensive transportation policy (Exhibit P-3) and charged its Transportation Supervisor, Gilbert Taylor with carrying out that policy.

Taylor testified that because of the increased number of students in the Branchburg School District and the inefficiency of the then existing transportation system, upon his becoming Transportation Supervisor in August 1998 he recommended that Branchburg end issuing bus passes which allowed students to be picked up or dropped-off at alternate sties during the school week. Taylor also testified that the procedure change was necessary because the district had grown to 2500 students and his office staff and bus drivers had an "easier" time not having to worry about "who is going where," children being on the wrong bus, getting off in the wrong area, and being on the bus without the driver's knowledge. Bus drivers are provided Bus Attendance lists (Exhibit R-3) and route directions (Exhibit R-4) which are changed only as students move into or out of the district.

Taylor thought it was possible for the Van Note situation to work, but expanding the policy district –wide would present administrative problems and may jeopardize the safety of using the buses.

Branchburg introduced a certified copy of excerpts of its November 16, 1998 meeting (Exhibit R-1) at which Taylor explained the new policy. The excerpted minutes introduce 2 concerns in this matter. The first is that Taylor addresses "transportations to locations other than the student's home . . .", and the second concern is that neither the minutes nor the Branchburg transportation policy (Exhibit P-3) indicate formal approval of Taylor's actions. The said transportation policy, as adopted October 20, 1997 refers to requests "for pick-ups or drop-off at locations other than the child's home shall be made in writing to the Transportation Supervisor" (at page 3 of 3).

Van Note's argument is that Jeffrey has 2 homes in Branchburg, and therefore Jeffrey should receive bus transportation to each home. *N.J.S.A.* 18A:1-1 states that the word "residence" when used in Title 18A of the New Jersey Revised Statutes "means domicile . . .". Therefore, because a person may have but only one domicile, I **CONCLUDE** that for the purposes of this matter Jeffrey may have only one residence or home. *American Employers' Insurance Co. v. ELF Altochem North America, Inc.*, 157 *N.J.* 580,590 (1999).

I do not find merit in Van Note's argument that Jeffrey's living arrangements result from a Superior Court adjudication. Van Note chose not to present the entire Property Settlement Agreement and the Final Judgment of Divorce so one is unable to divine whether the court had any knowledge of Jeffrey's ultimate visitation arrangements. Further, because Branchburg was not a party to the action before the court. I **CONCLUDE** that Branchburg has no additional duty for Jeffrey's transportation to and from his parents' homes.

Although the documentary evidence does not explicitly address Branchburg's formal approval of Taylor's actions in terminating bus passes for alternative drop-off points for students, the bus pass provision is not explicitly authorized by the transportation policy. Taylor has not denied a parent or guardian from having his/her child's bus stop location changed. However, in accordance with the policy provision, "all bus routes and bus stops shall be established annually," changes maybe thereafter made only when necessary "to establish an effective and efficient transportation system for [the] township."

Anyone may disagree with Taylor's decision to end bus passes, however, I **FIND** the reasons he expressed at the hearing for instituting the changes to be reasonable and prudent, and designed to promote Branchburg's responsibility to provide safe, efficient and effective bus transportation to its students. I **CONCLUDE** that Taylor did not act unreasonably, arbitrarily or capriciously in denying Van Note's request for the alternative pick-up and discharge locations for his son, Jeffrey.

ORDER

Accordingly, it is **ORDERED** that the petition filed 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 16, 2001
DATE

ANTHONY T. BRUNO, ALJ

Receipt Acknowledged:

4-18-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 19 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

tmp

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

Gilbert Taylor

EXHIBITS

For petitioner:

(attached to petitioner's post hearing memorandum)

P-1 Petition (Exhibit "A")

P-2 Letter dated 9/22/00 (Exhibit "B")

P-3 Branchburg transportation policy (Exhibit "C")

P-4 Pages 1, 6 and 7 of Property Settlement Agreement (Exhibit "D")

P-5 Correspondence between counsel – 12/4 and 12/19/00 (Exhibit "E")

For respondent:

R-1 Excepts (pp 119-121) Minutes of Board of Education meeting 11/16/98

R-2 Requests for exceptions to transportation policy with denials (1998)

R-3 Bus attendance record form

R-4 Bus driver routing sheet

OAL DKT. NO. EDU 6262-00
AGENCY DKT. NO. 218-6/00

EUGENE VAN NOTE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG, SOMERSET 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 and adopts the recommended order of the Administrative Law Judge (ALJ) dismissing the Petition of Appeal for the reasons set forth in the Initial Decision with the following clarification.

Initially, the Commissioner agrees with the ALJ that the record does not support petitioner's argument that the relief he seeks must be granted by the Board because, *inter alia,* the living arrangements for his son "result from a Superior Court adjudication."[1] (Initial Decision at 5) In so holding, however, the Commissioner does not concur with the ALJ's inference on page 5 of the Initial Decision that the Board's not being a party in the divorce action before the Superior Court has any bearing whatsoever on the controversy presented in the instant matter.

[1] Exhibit P-4, which contains several pages of the Property Settlement Agreement/Superior Court divorce decree between petitioner and his former wife, states only that that the parties have resolved the issues of custody, visitation and support and that they shall continue to have joint and physical custody of their son. Nothing in the record would support any inference that the Superior Court decree placed a duty on respondent to provide transportation to and/or from each of the parent's residences.

Further, the Commissioner concurs with the ALJ's conclusion that, for the purposes of this matter, petitioner's son may have only one domicile/residence. In so holding, the Commissioner is cognizant of the recent Appellate and Supreme Court decisions in *Somerville Bd. v. Manville Bd.*, 332 *N.J. Super.* 6 (App. Div. 2000), *aff'd* 167 *N.J.* 55 (2001) but does not find the decisions applicable herein because the rulings were limited to the factual circumstances presented in that specific matter. [2]

Accordingly, the petition is hereby dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: JUN 04 2001

Date of Mailing: JUN 04 2001

---

[2] The Somerville case dealt with the issue of which school district was to bear the expense of educating a student, placed in a private school for the handicapped, whose divorced parents, residing in two different school districts, had joint custody and the districts had an oral agreement for four years to share the costs of the education. The trial court held that the student was a domiciliary of Somerville for purposes of a free public education and that, prospectively, Somerville alone had responsibility for the student's education. The New Jersey Appellate Division reversed the lower court's determination, holding that "*Under the particular circumstances of this case*, fairness dictates that both districts bear equally the costs of the child's special education.***" (emphasis supplied) (at 17) On April 10, 2001, the New Jersey Supreme Court affirmed the Appellate Division decision. Further, it acknowledged, as did the Appellate Division, that the issue posed in the Somerville case is one that appropriately may be addressed by State regulation. With respect to this, the Supreme Court stated, "The Department of Education participated in this matter as *amicus curiae* before the Appellate Division, and provided that court with a draft regulation addressing issues of domicile and residency that had not as yet been published or the subject of public comment. We anticipate that any regulation adopted in the future by the Department addressing the issue before us would supersede our disposition of this appeal." (at 59) The Department's draft regulation dealing with domicile/residency is currently under discussion by the State Board of Education as Chapter 28 of Title 6A.

[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.

176-01

EDU # 7553-00 and 9906-00 (consolidated)
C # 176-01
SB # 20-01

JOHN HOWARD, JR.,

PETITIONER-RESPONDENT,

V.

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, June 5, 2001

For the Respondent-Appellant, Schwartz, Simon, Edelstein, Celso & Kessler (Stefani C. Schwartz, Esq., of Counsel)

For the Petitioner-Respondent, Andrew Babiak, Esq.

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

November 7, 2001

Date of mailing _____

175-01

#175-01

LUCILLE LUCY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF WASHINGTON TOWNSHIP, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

June 4, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3337-99
AGENCY REF. NO. 29-2/99

LUCILLE LUCY,
Appellant,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON,
Respondent.

Sanford R. Oxfeld, Esq., for appellant
(Balk, Oxfeld, Mandell & Cohen, attorneys)

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

Record Closed: April 10, 2001 Decided: April 11, 2001

BEFORE **IRENE JONES**, ALJ:

On February 19, 1999, petitioner filed a petition of appeal with the Department of Education challenging the respondent's, Washington Township Board of Education, action that charged her sick leave bank for certain absences. The Department transmitted the matter to the Office of Administrative Law on March 24, 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 matter was scheduled to be heard on August 27, 1999 but was

adjourned. Thereafter, a hearing was scheduled for January 25, 2001 but was adjourned because the parties had reached a settlement. A signed copy of the Stipulation of Settlement was forwarded to this office on April 10, 2001 and is attached hereto.

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

1. The parties have voluntarily agreed to the settlement as evidence 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.

4/11/01
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

4-18-01
DATE

Deborah A. Gutmanis
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 19 2001
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

Oxfeld Cohen, LLC
50 Commerce Street
Newark, New Jersey 07102
(973) 642-0161
Attorneys for Petitioner

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
RECEIVED
APR 10 9 00 AM '01

LUCILLE LUCY,

Petitioner,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON,

Respondent.

OFFICE OF ADMINISTRATIVE LAW

OAL Docket No.: EDUOR-03337-99N
Agency Ref. No.: 29-2/99

STIPULATION OF SETTLEMENT
&
DISMISSAL

WHEREAS the within matter has been amicably resolved by and between the parties, the same shall be and hereby is dismissed with prejudice but without costs upon the following terms.

1. Petitioner, Lucille Lucy, shall have forty-two and three-fourths (42 ¾) days restored to her accumulated sick days (seventeen (17) days of which shall be returned to the other teaching staff members who donated them to Lucy).

2. The Board will pay to Lucy eight and one-fourth (8 ¼) days' pay, at 1998-99 pay rate SR

3. The adjustment to Lucy's sick days records as well as the payment of eight and one-fourth (8 ¼) days shall take place within thirty (30) days of the date this matter is approved by the Administrative Law Judge.

Dated: 4-2-01

SANFORD R. OXFELD, ESQ.
On Behalf of Lucille Lucy

Dated: 3/24/01

PAUL E. GRIGGS, ESQ.
On Behalf of Washington Township Board of Education

OAL DKT. NO. EDU 3337-99
AGENCY DKT. NO. 29-2/99

LUCILLE LUCY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF WASHINGTON TOWNSHIP, MORRIS 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 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: JUN 04 2001

Date of Mailing: JUN 04 2001

176-01

JOHN HOWARD, JR.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Superintendent of Schools alleged the Board violated his tenure rights and *N.J.S.A.* 18A:17-20 when it invalidated his contract and failed to notify him in writing prior to July 1, 1999, that he would not be reappointed at the end of the term of his contract. The issue herein was whether, after rescinding the initial four-year contract for the 1992 to 1996 term in August 1995, the Board entered into a contract replacing the initial contract and a second contract for the term from 1996 to 2000. Petitioner asserted that there was a replacement contract, renewal and an addendum to the contract, and that certain actions of the Board ratified the renewal contract and that the Board's failure to properly notify him of nonrenewal triggered a third contract for 2000-2005 by operation of statute. Moreover, petitioner alleged that he was not given a 5% raise in accordance with his alleged 2000-2005 contract.

The ALJ found that whether there was a contract and/or whether the contract was ratified by Board action were purely issues of contract law. Citing *East Brunswick* and *Picogna* court decisions, the ALJ noted that although the Commissioner has jurisdiction to hear and decide cases arising under school laws, where a dispute does not arise under school laws, it is outside the Commissioner's jurisdiction, even though it may relate to school personnel. The ALJ found that the Commissioner lacked jurisdiction over the contract claims asserted by petitioner. Petition was dismissed for lack of jurisdiction; petitioner's motion for summary decision was rendered moot.

The Commissioner determined to reverse the Initial Decision of the ALJ and grant summary decision to petitioner. Following the passage of *P.L.* 1991, *c.* 267, establishing contractual tenure for superintendents, the Commissioner has consistently exercised his jurisdiction when faced with situations where appointment, contract rescission or modification of a superintendent's contract relates to questions of a superintendent's contractual tenure. The ALJ's reliance on *Picogna* was misplaced since Picogna was a *nontenured* assistant superintendent. Since it was undisputed that the Board herein appointed petitioner to an initial four-year contract beginning July 1, 1992 and ending June 30, 1996, pursuant to *N.J.S.A.* 18A:17-15 *et seq.*, therefore, petitioner held tenure as a superintendent when the Board acted to rescind the initial contract on August 15, 1995. The Commissioner found that by Resolution on August 15, 1995, the Board rescinded petitioner's initial contract and reappointed him to a new five-year term commencing June 1, 1995 and terminating on June 30, 2000, and by its subsequent actions and vote to modify the agreement on January 20, 1998, the Board ratified the terms of that agreement. Thus, petitioner was contractually tenured through June 30, 2000. As a result of the Board's failure to act to reappoint petitioner to a contract for the same term or a different term, or to provide notice of nonrenewal at least one year prior to the expiration of the 1995-2000 contract pursuant to N.J.S.A. 18A:17-20.1, petitioner was deemed reappointed for another five-year contracted term beginning July 1, 2000 and ending June 30, 2005 by operation of statute. The provisions of this 2000-2005 contract, including the 5% salary increases specified in the contract, thereby will remain in effect during its contractual term, unless either the petitioner and the Board elect to terminate the contract by mutual agreement or the Board prevails in the pending tenure proceedings. The Commissioner granted summary decision to petitioner with the exception of petitioner's claims of Open Public Meetings Act and Rice notice violations, which were rendered moot as a result of this determination.

June 5, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

ORDER OF DISMISSAL

CONSOLIDATED

OAL DKT. NOS. EDU 7553-00 &
EDU 9906-00

AGENCY DKT. NOS. 273-7/00 &
334-9/00

JOHN HOWARD, JR.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,

Respondent.

Andrew Babiak, Esq., appearing for Petitioner

Stephen J. Edelstein, Esq., appearing for Respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: March 2, 2001 Decided: April 4, 2001

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

Petitioner asserts that Respondent violated his tenure rights and *N.J.S.A.* 18A:17-20.2 when it invalidated his contract. Respondent has filed an application to

dismiss the petition for lack of subject matter jurisdiction. Petitioner responded and Respondent filed a letter brief reply, the deadline for which was March 2, 2001.

Since this application, if granted, would dispose of the matter, the determination must be rendered within 45 days.

The petition asserts that Dr. John Howard, Jr., Petitioner, was appointed, by contract, as Superintendent of Schools for the East Orange School District. The term of the contract was July 1, 1992 to July 1, 1996. On August 15, 1995, prior to the expiration of the initial contract, the Board, Respondent herein, adopted a resolution rescinding the contract; the same resolution by the Board provides, in pertinent part, that Respondent "will establish new employment contracts with Dr. Howard, the terms and conditions of which shall commence July 1, 1992 to terminate on June 30, 1995 and commence July 1, 1995 and terminate June 30, 2000." A renewal contract and addendum thereto have been executed by Petitioner and the Board President.

This Board, however, failed to notify Dr. Howard in writing prior to July 1, 1999, that he would not be reappointed at the end of the term of his contract.

DISCUSSION AND CONCLUSION

The statute provides that upon conclusion of the term of a contract, a superintendent shall be deemed reappointed for another contract term of the same duration as the previous contract unless he is either reappointed for a different term or the Board notifies him at least one year prior to the expiration of his contract, in writing, that he will not be reappointed at the end of the contract term. *N.J.S.A.* 18A:17-20.2. (Emphasis added).

In this case, the issue is whether, after rescinding the initial four-year contract for the 1992 to 1996 term in August, 1995, the Board entered into:

1) a contract replacing the initial contract; and
2) a second contract for the term from 1996 to 2000.

Petitioner asserts that, indeed, there was a replacement contract, a renewal, and an addendum to the contract. Moreover, he asserts that certain actions of the Board ratify the renewal contract.

Whether there is a contract and/or whether the contract was ratified by the action of the Board are purely issues of contract law. It has been long established that, although the Commissioner has jurisdiction to hear and decide cases arising under the school laws; where, however, a dispute does not arise under school laws, it is outside the Commissioner's jurisdiction, even though it may relate to school personnel. *Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick*, 48 *N.J.* 94, 102 (1966), citations omitted.

In the case of an Assistant Superintendent, who asserted, *inter alia,* contract and constitutional violations claims, the Appellate Division found that dismissal for lack of jurisdiction was appropriate and affirmed the decision below, notwithstanding the Respondent Board of Education's assertion that the case arose under the school laws because if, in fact, the Board had wrongfully terminated his employment, the assistant superintendent was thereby prevented from obtaining tenure. *Picogna v. Board of Educ.,* 249 *N.J. Super.* 332, 335 (App. Div. 1991).

In the case at bar, the term of a subsequent contract and the procedure for notification of intention to not reappoint, are matters which are settled by statute; however, those statutory requirements are triggered by the existence of a contract, which is the threshold issue in this case. Accordingly, I **FIND** that this tribunal lacks jurisdiction over the contract claim asserted by Petitioner; I **CONCLUDE**, therefore, that this matter should be dismissed for that reason.

Moreover, there being no claim arising under the school laws of this State before this tribunal, the claims of Petitioner under the Open Public Meetings Act and the corollary education statute, found at *N.J.S.A.* 18A:25-7, are also dismissed.

Finally, Petitioner has asserted a claim of violation of his contract when he did not receive a five percent raise in a separate case, OAL Dkt. No. EDU 9906-00, which has been consolidated with this case. Since the five percent raise is a contractual entitlement which is contingent upon the existence of a contract, I **FIND** that this claim, too, should be dismissed.

ORDER

I hereby **ORDER** that these petitions[1] be and hereby are **DISMISSED** for lack of jurisdiction.

I note for the record that this determination renders Petitioner's motion for summary decision 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.

[1] Petitions bearing OAL Dkt. No. EDU 7553-00 and EDU 9906-00 were consolidated by Order entered by the undersigned on January 9, 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.

April 4, 2001
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

4/6/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 10 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

jb

JOHN HOWARD, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination herein.

Arguing that the Commissioner has primary jurisdiction over all controversies arising under the school laws, petitioner excepts to the Administrative Law Judge's (ALJ) conclusion that the subject of this matter involves purely an issue of contract law and is, therefore, not within the Commissioner's jurisdiction. (Petitioner's Exceptions at 4) Citing numerous cases, petitioner contends that the Commissioner has never declined to assert jurisdiction in matters implicating superintendents and the manner in which they were appointed or the manner in which their employment was to cease. (*Id.* at 5) Thus, petitioner asserts, the fact that an issue involves the contract of a superintendent does not mean that the case is governed by contract law. (*Id.* at 7)

Pointing to *N.J.A.C.* 18A:17-20(b), petitioner underscores that a superintendent holds contractual tenure during the term of the employment contract and that the same tenure protections afforded to other certified employees also apply to superintendents. *See, West Village Civic Club, Inc., et al. v. Board of Education of the Township of Manchester et al.*, decided by the State Board June 5, 1996. (*Id.* at 6-7) Petitioner argues that the ALJ's conclusion that this matter involves a question purely of contract law stands the statutory scheme of contractual tenure on its head, averring that the statute contemplates the formation of a superintendent's contract by operation of law, and that even if a board does not take formal action to vote for the renewal of a superintendent's contract, simply by failing to act within the prescribed timelines, the superintendent is automatically granted a new contract for the same duration as the expired contract. (*Id.* at 8)

Moreover, petitioner argues, there are two scenarios regarding his employment rights under Title 18A where, by operation of statute, rather than by virtue of a contract, petitioner's contract would be automatically renewed through non-action by the Board. Under the first alternative, if the Board did nothing prior to the end of his initial contract, which ran from July 1, 1992 through June 30, 1996, petitioner would have obtained contractual tenure from July 1, 1996 through June 30, 2000 by virtue of the fact that the Board did not provide notice of renewal one year prior to the end of the initial contract, and, given that the Board did not provide him notice of nonrenewal on or before June 30, 1999, petitioner maintains, a subsequent contract for the period of July 1, 2000 through June 30, 2004 also would be triggered by operation of statute. (*Ibid.*)

Secondly, petitioner asserts that the Board rescinded his initial contract in accordance with *West Village Civic Club, supra*, and appointed him to a new five-year contract

from July 1, 1995 through June 30, 2000. (*Id.* at 9) If the Commissioner concludes that the Board properly rescinded the previous contract and entered into a new five-year contract, petitioner contends, he then had tenure in the superintendent's position from July 1, 1995 through June 30, 2000. Therefore, petitioner proffers, given that the Board failed to properly provide notice of nonrenewal, petitioner's contract was automatically renewed and he, therefore, has contractual tenure for the five-year period from July 1, 2000 through June 30, 2005. (*Ibid.*)

In addition to his argument that his tenure rights under *N.J.S.A.* 18A:17-20(b) are directly at issue in this matter, petitioner avers that the present dispute implicates *N.J.S.A.* 18A:17-15, *N.J.S.A.* 18A:20.1 and *N.J.S.A.* 18A:17-20.2 and, thus, the Commissioner has jurisdiction over this matter. (*Id.* at 9-10)

Further, arguing that it is well-settled that the Commissioner has ancillary jurisdiction to hear petitioner's claims arising under the Open Public Meetings Act (OPMA), (*See, N.J.S.A.* 10:4-6 *et seq.* and *Sukin v. Northfield Bd. of Educ.*, 171 *N.J. Super.* 184, 187 (App. Div. 1979)) and his notice rights pursuant to *Rice v. Union Cty. Reg. H. Sch. Dist. Bd. of Educ.*, 155 *N.J. Super.* 64 (App. Div. 1977), *certif. den.* 76 *N.J.* 238 (1978) because there is a significant nexus to education law, petitioner asserts that these claims should be addressed by the Commissioner in the event that the Initial Decision is reversed and the matter remanded to the OAL. (*Id.* at 10-11)

Pointing out that he has tenure during the term of his contract, petitioner submits that *Picogna v. Bd. of Educ.*, 249 *N.J. Super.* 332 (App. Div. 1991), *rev'd and remanded* 143 *N.J.* 391 (1996), relied on by the ALJ in reaching her determination, is distinguishable from the instant matter because "*Picogna* involved a *nontenured* assistant superintendent who brought a whistleblower claim under the Conscientious Employee Protection Act and constitutional

rights claims, in addition to a breach of contract claim." (emphasis in text) (*Id.* at 11) With respect to the other case relied on by the ALJ, *Board of Educ. of the Twp. Of East Brunswick v. Twp. Council of East Brunswick*, 48 *N.J.* 94 (1966), which finds that the Commissioner does not have jurisdiction merely because matters involve school personnel, petitioner submits that the *East Brunswick* decision is generally supportive of the Commissioner's broad authority to decide school matters and that "[t]here is no holding or conclusion that would prohibit the Commissioner from exercising jurisdiction over the tenure rights[']claims of a superintendent." (*Id.* at 11-12) Therefore, petitioner urges the Commissioner to reverse the Initial Decision and remand the matter to the OAL.

In its reply, the Board urges the Commissioner to adopt the ALJ's finding that "[w]hether there is a contract and/or whether the contract was ratified by the action of the Board are purely issues of contract law" and, thus, that this matter is outside the Commissioner's jurisdiction. (Board's Reply at 2)

In a counterstatement of the facts, the Board asserts that the resolution passed by the Board on August 15, 1995 recites the Board's intention to rescind petitioner's 1992 contract and to establish new employment contracts with petitioner, but that the Board did not take official action to approve a successor contract or set forth or approve specific terms of a new contract. (*Id.* at 3) Moreover, the Board posits that the 1995 contract language violates the explicit language in *N.J.S.A.* 18A:17-15, limiting superintendent's contracts to terms of three to five years, because it contains an automatic annual extension provision, thus converting the contract to a six-year agreement on the first effective date of the contract. (*Id.* at 4)

With respect to whether the Commissioner has jurisdiction to decide this matter, the Board cites *Picogna, supra*, and argues that the contract principles in *N.J.S.A.* 18A:17-15 and

N.J.S.A. 18A:17-20.1 are contained in Title 18A because they pertain to school personnel, but that "does not automatically convert this matter into 'school' law." (*Id.* at 5-6) The Board posits that the statutes governing contractual term limits and the renewal/termination process implicate traditional principles of contract law, not expertise in the educational field. (*Id.* at 6)

Moreover, the Board asserts that tenure is not the primary issue in this matter and that the ALJ correctly concluded that a determination must first be made with respect to which of petitioner's possible contracts is the controlling contract (if any) because the application of *N.J.S.A.* 18A:17-20.1 is meaningless until the contract question is answered. (*Id.* at 7-9) The Board also advances the argument that the procedure for renewal or termination of a superintendent's contract does not arise under *N.J.S.A.* 18A:17-20.2, but that it might potentially apply once a decision is made with respect to which contract governs petitioner's employment. (*Id.* at 10-11)

The Board further argues that there is no OPMA claim for which the Commissioner can exercise jurisdiction because: 1) there is not a sufficient nexus; and 2) the Board's notice satisfied the *Rice* notice requirements. (*Id.* at 11-13) Acknowledging that the Commissioner may have jurisdiction to consider a claim under *N.J.S.A.* 18A:25-7, which requires written notice of entitlement to have representation whenever a teaching staff member is required to appear before the Board concerning any matter that could adversely affect his employment, the Board proffers that the statute does not apply in this instance because it applies to teaching staff members who are required to appear at meetings or interviews before the Board. (*Id.* at 12)

Finally, the Board claims that petitioner's arguments differentiating the nontenured assistant superintendent in *Picogna, supra,* from a tenured employee are irrelevant to

the contractual dispute in this matter. (*Id.* at 13) Citing *Board of Educ. of the Twp. of East Brunswick, supra*, at 102, the Board argues that the involvement of school personnel in matters not arising under school laws does not place a matter within the Commissioner's jurisdiction. (*Id.* at 14) The Board, therefore, urges the Commissioner to adopt the recommended decision of the ALJ. (*Id.* at 15)

Upon careful and independent review of the record, the Initial Decision, the exceptions and the reply thereto filed in this matter, the Commissioner determines to reverse the Initial Decision of the ALJ and grant summary decision to petitioner for the reasons set forth below.

Initially, with respect to jurisdiction to hear this matter, *N.J.S.A.* 18A:6-9 sets forth the extent of the Commissioner's jurisdiction to hear and determine disputes, as follows:

> The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the state board or of the commissioner.

With the passage of *P.L.* 1991, *c.* 267 (*N.J.S.A.* 18A:17-15 *et seq.*), the Legislature eliminated *career tenure* for superintendents and instituted a system providing *a period of tenure during the duration of the contract.* The Assembly Education Committee Statement declares:

> This bill revises existing law regarding the tenure of a superintendent of schools to substitute for the present career tenure a period of tenure for the duration of the contract between the local board of education and the superintendent.
>
> ****
>
> The bill stipulates that a superintendent shall hold tenure during the term of the contract with the board and during the contract period shall not be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct, or other just cause.

(Assembly Education Committee, Statement to Assembly Bill No. 1131, *L.* 1991, *c.* 267)

The new statutory scheme not only provides tenure to superintendents during the period of their contract, but also provides *specific* conditions for renewing a superintendent's contract either by the negotiation of a new contract or by failure to properly notify a superintendent that his contract will not be renewed. *N.J.A.C.* 18A:17-20.1 provides that the initial contract shall be renewed for a term of the same duration as the original contract unless, by contract, the board appoints the superintendent to a different term or, at least one year prior to expiration of the contract, the board notifies the superintendent that he will not be reappointed. The primary issue in this case, therefore, is whether petitioner has contractual tenure under *N.J.S.A.* 18A:17 20.1 and, if so, the duration thereof.

In the instant matter, it is undisputed that the Board appointed petitioner to an initial four-year contract beginning July 1, 1992 and ending June 30, 1996. Pursuant to *N.J.S.A.* 18A:17-15 *et seq.*, therefore, *petitioner held tenure as a superintendent when the Board acted to rescind the initial contract on August 15, 1995.* Thus, the issues of: 1) whether the Board replaced the initial contract with a contract beginning July 1, 1992 and ending June 30, 1996, and reappointed petitioner to a second contract beginning July 1, 1996 and ending June 30, 2001; or 2) whether a second contract term from July 1, 1996 through June 30, 2000 was awarded by operation of statute, expressly arise from the effect of the Board's actions or inactions on petitioner's tenure rights as a superintendent as governed by school law, over which the Commissioner has primary jurisdiction pursuant to *N.J.S.A.* 18A:6-9.

The ALJ's reliance on *Picogna, supra,* is misplaced because petitioner in this matter was *contractually tenured* under *N.J.S.A.* 18A:17-15 *et seq.* at the time that the controverted contractual issues arose, whereas, Picogna was a *nontenured* assistant

superintendent who asserted contractual and constitutional claims. Unlike the protections afforded tenured employees, a board of education has almost unfettered discretion to discontinue the services of a nontenured employee absent a constitutional or statutory infirmity. *See, Dore v. Bedminister Twp. Bd. of Ed.*, 185 *N.J. Super.* 447 (App. Div. 1982); *Kufel v. Union County Vocational-Technical School District*, 96 *N.J.A.R.2d* (EDU) 446, *aff'd* 97 *N.J.A.R.* 2*d* (EDU) 317 (App. Div. 1997); *Gillison v. Board of Education of the City of Newark, Essex County*, 95 *N.J.A.R.* 2*d* (EDU) 157 (1993); and *Paladino v. Lacey Township Board of Education, Ocean County*, decided by the State Board of Education February 1, 1989. Although the Board in *Picogna, supra,* argued that school laws were controlling because, if the assistant superintendent was found to have been wrongfully terminated, he was therefore prevented from obtaining tenure, the Appellate Division found that:

> The contract claim of a *nontenured* school employee does not arise under the school laws simply because its outcome may later enable him to attain tenure under the school laws. *See Board of Ed., E. Brunswick Tp. v. Township Council, E. Brunswick*, 48 *N.J.* 94, 102, 223 *A.*2d 481 (1966) ("Where the controversy does not arise under the school laws, it is outside the Commissioner's jurisdiction even though it may pertain to school personnel.") Whether petitioner's employment was wrongfully terminated under the contract and under the CEP Act is for the court, not the Commissioner, to decide. (*Picogna, supra*, at 335)

Additionally, it is noted that in analyzing Picogna's tenure entitlement under *N.J.S.A.* 18A:28-5, the Supreme Court, citing *Canfield v. Board of Educ.*, 51 *N.J.* 400 (1968), found that:

> ***breach of a contract covering a full probationary period of employment that may have resulted in tenure had no breach occurred does not confer tenure in the absence of continued employment after service for the requisite number of consecutive years in the same district. (*Picogna, supra*, 143 *N.J.* at 401-402)

Moreover, since the passage of *P.L.* 1991, *c.* 267, establishing contractual tenure for superintendents, the Commissioner has consistently exercised his jurisdiction when faced with situations where appointment, contract rescission or modification of a superintendent's contract relates to questions of a superintendent's contractual tenure. *See, West Village Civic Club, Inc, supra; Graham v. Board of Education of the Town of Kearney*, 95 *N.J.A.R.*2d (EDU) 510; *Dunn v. Elizabeth Board of Education*, 96 *N.J.A.R.*2d (EDU) 279; and *Harrington v. Board of Education of the Township of Clinton*, 95 *N.J.A.R.*2d (EDU) 535.

Accordingly, for the reasons set forth above, the Commissioner rejects the ALJ's conclusion that the instant matter should be dismissed for lack of jurisdiction and, therefore, concludes that authority to decide the issues in this matter appropriately rests with the Commissioner.

Additionally, the Commissioner has determined to grant petitioner's motion for summary decision. Pursuant to *N.J.A.C.* 1:1-12.5(b) and *Contini v. Bd. of Educ. of Newark*, 286 *N.J. Super.* 106, 121 (App. Div. 1995) (*citing, Brill v. Guardian Life Insurance Company of America*, 142 *N.J.* 520 (1995), summary decision may be granted in an administrative proceeding if there is no genuine issue of material fact in dispute and the moving party is entitled to prevail as a matter of law. In this regard, notwithstanding the fact that the ALJ did not reach to the merits of the matter because she determined to dismiss the consolidated cases for lack of jurisdiction, both parties filed motions for summary judgment and answers thereto and, thus, the issues were fully briefed in the proceedings before the ALJ. In viewing the evidentiary documents and the arguments presented in this matter in the light most favorable to the Board, there is no "'genuine issue' of material fact" and the Commissioner has determined that

petitioner is entitled to prevail as a matter of law for the reasons that follow. *See Brill, supra,* at 540.

As stated above, it is undisputed that the Board appointed petitioner to an initial four-year contract beginning July 1, 1992 and ending June 30, 1996. It is also undisputed that that the Board did not notify petitioner that it did not intend to renew his contract before June 30, 1995, as required by *N.J.S.A.* 18A:17-20.1. (Petition of Appeal at 2, and Board's Opposition to Petitioner's Motion for Summary Decision at 2) Therefore, had nothing else occurred, petitioner would have been reappointed for another four-year contract beginning July1, 1996 through June 30, 2000 by operation of statute. However, on August 15, 1995, the Board acknowledges that it adopted a Resolution to rescind petitioner's 1992-1996 contract. (Board's Opposition to Petitioner's Motion for Summary Decision, Exhibit B, Answer to Petitioner's Interrogatory #18) The Board's Resolution of August 15, 1995 reads, as follows:

> BE IT RESOLVED: "that the Board of Education, upon the recommendation of the Superintendent of Schools, approve the following resolution."
>
> WHEREAS, in June 1992 the East Orange Board of Education entered into an employment contract with Dr. John Howard, Jr., the term of which is from July 1, 1992 through July 1, 1996; and
>
> WHEREAS, the East Orange Board of Education has determined the necessity of renegotiating said employment contract and thus, rescinding the current employment contract with Dr. Howard.
>
> NOW, THEREFORE, BE IT RESOLVED, on the 15th day of August 1995, the East Orange Board of Education *hereby rescinds the current employment contract of Dr. Howard*; and
>
> BE IT FURTHER RESOLVED, that the East Orange Board of Education will establish new employment contracts with Dr. Howard, the terms and conditions of which shall commence July 1, 1992 and terminate on June 30, 1995 and commence July 1, 1995 and terminate on June 30, 2000. (emphasis added) (Petitioner's Motion for Summary Decision, Exhibit A)

Although acknowledging that *the above resolution rescinded petitioner's initial contract*, the Board proffers the argument that the August 15, 1995 Resolution only expressed the Board's *intent* to establish new employment contracts and that the actual contracts were never approved. (Board's Opposition to Petitioner's Motion for Summary Decision at 2-3) As indicated above, *N.J.S.A.* 18A:17-15 *et seq.* establishes contractual tenure for superintendents. Accordingly petitioner was tenured under the initial contract from July 1, 1992 through June 30, 1996. Although a board has the authority to rescind an initial agreement with a superintendent prior to the conclusion of an existing contract and to reappoint the superintendent to a new contractual term, *Graham, supra*, contractual tenure protects a superintendent from a board rescinding an existing agreement without entering into a new contractual arrangement, except as provided for in *N.J.S.A.* 18A:17-20.2, which states that:

> During the term of any employment contract with the board, a superintendent shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming a superintendent or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of Title 18A of the New Jersey Statutes.

Absent the sustaining of tenure charges as indicated in *N.J.S.A.* 18A:17-20.2 above,[1] therefore, accepting, *arguendo,* the Board's claim that it did not act to reappoint petitioner to a new contract, the Board would have violated petitioner's tenure rights by acting *ultra vires* in rescinding his initial contract if it did so without entering into a new contractual agreement.

Pursuant to *N.J.S.A.* 18A:17-20.1, the Board had only two choices from which to select at the conclusion of petitioner's initial contract. The Board had to either 1) notify petitioner prior to June 30, 1995 that he would not be reappointed, or 2) reappoint petitioner by

[1] The Commissioner notes that tenure charges were subsequently filed against Dr. Howard on *January 12, 2001.*

contract for a different term. Rescission of the initial contract without reappointment during the period that petitioner was contractually tenured was not an option available to the Board under *N.J.S.A.* 18A:17-20.1. The Board acknowledges that it did not notify petitioner prior to June 30, 1995 that he would not be reappointed, and now claims that subsequent to the rescission of his existing contract, contrary to law, petitioner was not reappointed by contract.

Although in agreement with the Board that the language in the August 15, 1995 Resolution is somewhat ambiguous with respect to the establishment of the new contracts to which it refers, the Commissioner finds that review of the *specific* language in the Resolution, in light of statements of the Board members present on August 15, 1995, as well as the Board's subsequent actions, confirms that the August 15, 1995 Resolution rescinded the initial contract *and* reappointed petitioner to a new five-year term. Specifically, the Resolution states that, "the East Orange Board of Education will establish new employment contracts with Dr. Howard, the terms and conditions of which shall commence July 1, 1992 and terminate on June 30, 1995 and *commence July 1, 1995 and terminate on June 30, 2000.*"[2] (emphasis added) (August 15, 1995 Resolution of the Board)

Six board members were present at the August 15, 1995 meeting wherein the Board's Resolution was adopted. One Board member was absent. None of the Board members serving on August 15, 1995 serve on the current Board. According to petitioner's affidavit, three of the Board members are now deceased and petitioner submits that he attempted to obtain an affidavit from Ernestine Harris, the Board president in 1995, but was unable to do so because she

---

[2] If the Board had not acted, by operation of statute, petitioner's second four-year contract term would have also ended on June 30, 2000. Thus, unlike the situation in *West Village Civic Club, Inc., supra*, rescinding the initial contract and appointing petitioner to a new term did not extend the length of the contractual term beyond that which would have been triggered by the Board's failure to notify petitioner that he would not be reappointed as provided for in *N.J.S.A.* 18A:17-20.1.

was ill.[3] (Petitioner's Motion for Summary Decision at 2) The two remaining Board members, Daniel Desrivieres and Sheila Oliver, submitted affidavits on petitioner's behalf, which state:

> At the Board's meeting on August 15, 1995, the Board voted to approve a five-year employment contract with Dr. John Howard, Jr., Superintendent of Schools. The employment contract was dated August 15, 1995. The term of the employment contract was July 1, 1995 to June 30, 2000. (Affidavits attached to Petitioner's Motion for Summary Decision)

Although the minutes of subsequent Board meetings do not reflect further action to adopt the terms and conditions of a new contract, the Board's actions demonstrate that it recognized the existence of the five-year contract until the final year of the contract when it acted by Resolution on June 26, 2000 to terminate petitioner's contract as of June 30, 2000. (Petition of Appeal, Exhibit F) In support of his assertion of the validity of the 1995 contract, petitioner argues that, subsequent to the August 15, 1995 meeting, he was provided the salary[4] and benefits provided for in the 1995 contract with the exception of an automobile entitlement. (Petitioner's Motion for Summary Decision at 3) Moreover, the Board acknowledges that it agreed to several "modifications to the purported 1995 Contract" in December 1997 (Board's Opposition to Petitioner's Motion for Summary Decision at 4), and approved those modifications as an Addendum to the Employment Contract on January 20, 1998. (Petitioner's Motion for Summary Judgment, Exhibit 6, Board's Response to Interrogatory #38 and Petitioner's Exhibit 7) Given that the Board in this matter is authorized by statute to enter into a contract with an individual to serve as superintendent of its schools, by voting to modify the disputed 1995 contract and affording petitioner the salary and benefits set forth in the contracts other than the automobile,

---

[3] Ms. Harris' and petitioner's signatures appear on the disputed 1995-2000 contract.

[4] The Commissioner notes that the 1995 contract specifies that petitioner's salary for the 1995-96 school year would be $137,000. (Petition, Exhibit A) Petitioner asserts, and the Board concurs, that petitioner's salary for the 1999-2000 school year for $170,050. (Petition of Appeal at 2, #6 and Answer at 2, #6)

the Board acknowledged the validity of that contract and thereby ratified the 1995-2000 contract by its modification and conformance to the terms thereof. *See, Matter of Certain Amendments*, 133 *N.J.* 206, 221-223 (1993); *Houmann v. Mayor of Pompton Lakes*, 155 *N.J. Super.* 129, 159-160 (Law Div. 1977); *Grimes v. City of East Orange*, 288 *N.J. Super.* 275, 280 (App. Div. 1996).

Moreover, in the Board's Petition for Declaratory Ruling, filed before the Commissioner on April 14, 2000, (Commissioner Decision Number 130-00L), seeking a ruling on its contract options in the face of petitioner's assertion that the Board's failure to provide him with timely notice of nonrenewal of his 1995-2000 contract resulted in an automatic renewal of the terms and conditions of the soon to expire contract, the Board acknowledged the validity of the contract when it stated:

> 1. The East Orange Board of Education entered into a five year employment contract with its Superintendent of Schools, Dr. John Howard, Jr. that expires on June 30, 2000. (Petitioner's Motion for Summary Decision, Exhibit D, Board's Petition for Declaratory Ruling at 1, #1)

The Commissioner also notes that the Board recognizes the 1995 contract in tenure charges it filed against petitioner on January 12, 2001 (Agency Docket Number 17-1/01) by referencing a tax deferred annuity plan which was only provided for in the 1995 contract, not the 1992-1996 contract. Charge No. VI states:

> In accordance with the terms and conditions of the employment contract between petitioner and Dr. John Howard, Jr., petitioner is obligated, among other things, to make matching contributions to a tax deferred annuity plan on behalf of Howard. (Petitioner's Motion for Summary Decision, Exhibit #12)

For the reasons set forth above, therefore, the Commissioner finds that by Resolution on August 15, 1995, the Board rescinded petitioner's initial contract and reappointed petitioner to a new five-year term commencing July 1, 1995 and terminating on June 30, 2000,

and by its subsequent actions and vote to modify the agreement on January 20, 1998, the Board ratified the terms of that agreement.

With respect to the Board's argument that the 1995 contract is invalid because its terms impermissibly provide for an automatic extension, thus becoming a six-year contract on the first effective date of the contract in violation of *N.J.S.A.* 18A:17-15, the Commissioner observes that the contract expressly states that if any specific clause of the agreement "is illegal in Federal or State Law, the remainder of the Employment Contract not affected by such ruling shall remain in force." (1995-2000 Contract at 9) As found by the State Board in *West Village Civic Club, supra* at 9, *citing* "[I]t is well established that the law is a silent factor in every contract, and parties to a contract are presumed to have contracted with reference to existing law." *See also, Red Bank Bd. of Ed. v. Warrington et al.*, 138 *N.J. Super* 564, 568-569 (App. Div. 1976) and *Silverstein v. Keane*, 19 N.J. 13 (1955). To the extent that the renewal provision in the 1995 contract violates the specific term limitations for appointments of superintendents to not less than three years nor more than five years, specified in *N.J.S.A.* 18A:17-15, the Commissioner, therefore agrees with the Board that the renewal provision is invalid. However, the invalidation of that provision does not serve to invalidate the entire contract at issue. Although the Board asserts that the misinformation and confusion caused by the automatic renewal provision in the 1995 contract resulted in its failure to act pursuant to *N.J.S.A.* 18A:17-20.1 in June 1999, to notify petitioner of its intent to not renew his contract (Board's Opposition to Petitioner's Summary Decision at 9), the Commissioner finds that the Board's argument only substantiates the conclusion that the Board recognized the 1995-2000 contract as its contractual agreement with the superintendent.

N.J.S.A. 18A:17-15 specifically provides that a board of education is authorized to appoint a superintendent of schools "for a term of not less than three nor more than five years." *N.J.S.A.* 18A:20.1 is equally specific that, at the conclusion of the term of the initial contract or of any subsequent contract, the superintendent will be deemed appointed to another contracted term of the same duration unless the board appoints him for a different term of three to five years or notifies him in writing at least one year prior to the expiration of the first or subsequent contract that he will not be reappointed. Given the specificity in the statutes, the Commissioner finds the Board's explanation for its failure to act pursuant to *N.J.S.A.* 18A:20-1 disingenuous. The obligation to resolve any "confusion or misinformation" to assure the Board's compliance with statutory requirements when appointing, contracting, reappointing or advising petitioner that he would not be reappointed was inherently the responsibility of the Board and its attorney.

On June 26, 2000, the Board adopted a Resolution stating, in pertinent part:

> WHEREAS, *N.J.S.A.* 18A:17-20.1 provides for renewal of a Superintendent's employment contract unless notice of nonrenewal is given one year prior to its expiration date; and
>
> WHEREAS, although the Board did not give notice of nonrenewal to Dr. Howard prior to June 30, 1999, it believes that applicable legal and equitable principles operate to excuse such lack of notice; and
>
> WHEREAS, the Board wishes to retain all of its legal prerogatives with respect to the employment of the Superintendent;
>
> NOW, THEREFORE, BE IT RESOLVED that Board does hereby direct that Notice be given to Dr. John Howard of the Board's intention not to renew any existing employment agreement between Dr. Howard and the Board as of June 30, 2001, unless the Board and Dr. Howard should mutually agree upon a successor contract; and
>
> BE IT FURTHER RESOLVED, that this Resolution is approved without prejudice any of the Board's legal rights whatsoever with respect to the Superintendent's employment, including but not

> limited to the Board's right to maintain, upon further review, that any existing contract of employment will terminate or has terminated as of June 30, 2000. (Board's Motion to Dismiss, Exhibit E)

As fully explicated above, petitioner was contractually tenured through June 30, 2000. As the Board acknowledges in its June 26, 200 Resolution, although it was aware of the requirement to give petitioner notice of nonrenewal of his contract one year prior to June 30, 2000 if it did not intend to renew petitioner's contract, it failed to do so. Accordingly, as a result of the Board's failure to act to reappoint petitioner to a contract for the same term or a different term, or to provide notice of nonrenewal at least one year prior to the expiration of the 1995-2000 contract pursuant to *N.J.S.A.* 18A:17-20.1, petitioner is deemed reappointed for another five-year contracted term beginning July 1, 2000 and ending June 30, 2005 by operation of statute. The provisions of the 2000-2005 contract renewed by operation of statute, including the 5% salary increases specified in the contract, will, therefore, remain in effect during its contractual term, unless either the petitioner and the Board elect to terminate the contract by mutual agreement or the Board prevails in the pending tenure proceedings.

The Commissioner, therefore, grants summary decision to petitioner with the exception of petitioner's claims of OPMA and *Rice* notice violations, which are rendered moot as a result of this determination.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: JUN 05 2001

Date of Mailing: JUN 05 2001

[5] 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.

177-01

IN THE MATTER OF THE TENURE	:	
HEARING OF JAMES STEWART,	:	
NEW JERSEY STATE DEPARTMENT	:	COMMISSIONER OF EDUCATION
OF CORRECTIONS.	:	DECISION
_____	:	

June 5, 2001

AGENCY DKT. NO. 62-3/01

IN THE MATTER OF THE TENURE	:	
HEARING OF JAMES STEWART,	:	
NEW JERSEY STATE DEPARTMENT	:	COMMISSIONER OF EDUCATION
OF CORRECTIONS.	:	DECISION
	:	

This matter, in which tenure charges were certified against respondent, a tenured teacher, for sleeping on the job, was opened before the Commissioner on March 9, 2001. Two requests for an extension for filing an Answer to the charges were granted because the parties were engaged in efforts to settle the matter. On May 24, 2001, the parties submitted a duly executed Settlement Agreement to the Commissioner for his review and approval.

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: 6|5|01

Date of Mailing: 6|5|01

01 MAY 24 AM 11:26

JAMES STEWART	)	Agency Docket No. 62-3/01
	)	
v.	)	SETTLEMENT AGREEMENT
	)	
NEW JERSEY DEPARTMENT OF CORRECTIONS	)	
	)	

Appellant James Stewart having been charged with sleeping on duty and a penalty of a 3 week suspension having been sought, the parties hereto agree to settle this matter in accordance with the following terms:

1. Appellant admits that on January 23, 2001, at 10:50 in the morning, Mr. Hendricks and Mr. Gripp observed him sitting motionless in the law library with his eyes closed, apparently asleep. Appellant also acknowledges that he received letters of counseling for sleeping on duty on July 21, 2000 and November 23, 1992.

2. Respondent agrees to reduce the penalty associated with the current charge of sleeping on duty from a 3 week suspension to a 5 day suspension without pay and forfeiture of 2 vacation days.

3. Appellant understands that sleeping on duty within a correctional facility is a serious offense which places his own safety at risk. He acknowledges that any future infraction will result in tenure charges being filed.

4. The parties hereto stipulate that this agreement shall fully dispose of all issues in controversy between them with regard to this matter.

5. The appellant will not receive any back pay, counsel fees, costs or any other monetary relief as a result of this settlement.

6. The Personnel File for the appellant will be amended to reflect the provisions of this agreement.

7. This stipulation of settlement shall not constitute a precedent in any other matter involving another employee.

8. The appellant waives all claims, suits, or actions, whether known, unknown, vested or contingent, civil, criminal, or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Corrections, or their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information and disputes giving rise to this action up to the date of this

agreement, including but not limited to all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Conscientious Employee Protection Act, and any contract express or implied.

9. This Agreement will only become effective when it is approved by the Commissioner of the Department of Education. Any disapproval by the Commissioner shall not interfere with the rights of either party to pursue this matter further.

Authorization has been given by the Department of Corrections to agree to this settlement, the parties have read this settlement agreement, and freely and voluntarily agree to its provisions.

Kristine Laguidara 5/22/01
For the Appointing Authority (Date)

James Flemer May 18, 2001
Appellant (Date)

Benjamin Spivack 5/18/01
Appellant's Representative (Date)

178-01

D.M., on behalf of minor child, B.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

June 6, 2001

OAL DKT. NO. EDU 6448-00
AGENCY DKT. NO. 272-7/00

D.M., on behalf of minor child, B.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4, along with copies of the notification sent to the petitioner by OAL on April 18, 2001, providing petitioner ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by petitioner, the petition is dismissed with prejudice due to petitioner's failure to appear at hearing or provide an explanation for her nonappearance.

Each count of the Board's counterclaim is, therefore, is deemed to be admitted and petitioner is hereby ordered to pay tuition for the period of B.N's ineligible attendance in the District'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.*

COMMISSIONER OF EDUCATION

Date of Decision: 6|6|01

Date of Mailing: 6|6|01

* 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 the date of mailing to the parties.

179-01

RAMSEY TEACHERS ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Education Association challenged the respondent Board's use of noncertified school nurses serving as school health aides in school facilities when certified school nurses were not present. The Board denied that it was improperly utilizing noncertified school nurses.

At the OAL, petitioner moved for summary decision and the Board cross-moved to dismiss the petition. The ALJ denied petitioner's motion and granted the Board's motion to dismiss the petition. The ALJ concluded that the use of a noncertified nurse from 12:15 p.m. to 3:00 p.m., while the certified school nurse assigned to a school facility was not present, did not contravene the applicable statute, as the noncertified nurse was supplementing the services of the certified school nurse assigned to the facility from 8:45 a.m. to 12:15 p.m., which is specifically authorized by *N.J.S.A.* 18A:40-3.3.

The Commissioner affirmed the decision of the ALJ, concluding that the Board's division of duties between a certified school nurse and a noncertified school nurse serving as a school health aide (who is a nurse) does not contravene the applicable statutes.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
MOTION FOR
SUMMARY DECISION
OAL DKT. NO. EDU 3080-00
AGENCY DKT. NO. 12-1/00

RAMSEY TEACHERS ASSOCIATION,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY,
Respondent

Louis P. Bucceri, Esq., for petitioner
(Bucceri & Pincus, Attorneys)

Robert M. Jacobs, Esq., for respondent
(Winne, Bantua, Rizzi, Hetherington & Basralian, P.C., attorneys)

Record Closed: February 14, 2001 Decided: April 20, 2001

BEFORE **IRENE JONES**, ALJ:

Petitioner, Ramsey Teachers Association, filed a verified petition with the Commissioner of Education wherein it challenged the respondent's, Ramsey Board of Education (the District) use of non-certified school nurses when certified school nurses were not present in the school building. The Department of Education transmitted the

petition 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.

Prior to the scheduled hearing date, the petitioners filed a Motion for Summary Judgment. The respondent filed an Answer/Cross Motion seeking dismissal of the petition. The record closed on February 14, 2001.

FACTS

I **FIND** the following **FACTS** to be undisputed, thus they are adopted as the **FACTS**:

The District employs three (3) part-time certified school nurses in grades kindergarten through fifth grade. Two (2) full-time certified nurses are assigned to its middle and high schools. On October 14,1999, the District hired a School Health Aide, Brenda Calabrese, (Calabrese) for its Tisdale School. Calabrese is a Registered Nurse, however she is not a certified school nurse and does not hold a school nurse endorsement. (*N.J.A.C.* 6:11-11.7). The certified nurse, Beverly VandenBerger, is in the Tisdale school daily between 8:45 a.m. and 12:15 p.m. Calabrese staffs the office from 12:00 noon to 3:00 p.m. Thus, she is the only person staffing the nurse's office after 12:15 p.m., Monday through Friday.

Pursuant to the job description, as set forth in Exhibit A, a School Health Aide is required to assist the certified nurse with maintaining the health office and its records, such as immunization and confidential records; attend to the health needs of pupils and staff; render first aid for injuries and illnesses; weigh and measure students; send notices of medical examinations; dispense medication pursuant to Board policy under the direction of a certified school nurse as approved by the school physician; transport or arrange transportation of ill or injured persons to appropriate destinations; and assist the certified nurse in multifacted administrative duties, such as, coordinate examinations for athletic programs; assist the building administration with budgetary

concerns for the health office; order supplies; and assist with the preparation of reports related to accidents and worker's compensation claims, among other duties.

A school nurse works under the direction and supervision of the medical inspection. A nurse is required to: assist with physical examinations as set forth in *N.J.S.A.* 18A:40-4; conduct yearly screening for scoliosis on all pupils; conduct annual audiometric screenings. . .; maintain student health records; observe and recommend to school principal the exclusion of students who show evidence of communicable disease; and lecture to teachers on communicable disease and other health concerns...

ARGUMENT

The petitioner asserts that *N.J.S.A.* 18A:40-3.3 bars the use of a non-certified person to perform nursing services in a public school when a certified nurse is not in the building. More particularly, it contends that a school health aide who is not certified may only "supplement" the services of a certified nurse when the latter is also present.

Respondent asserts that such an interpretation of the statute would totally frustrate the manner in which nursing services are delivered in today's educational settings. Undisputedly, the District is statutorily obligated to have school nursing services performed by a certified nurse who holds an endorsement as a school nurse. However, if the petitioner's contention were to be accepted, a School Health Aide could only be present when the certified school nurse is actually in the same place as the health aide. Thus, the aide would only be circulating with or shadowing the certified nurse. Such a scenario was not the intent of the statute that expressly provides for local school Districts to supplement the services provided by certified school nurses with non-certified nurses (school health aides).

Further, the language in the statute that provides that a non-certified nurse be assigned to same building/complex as the certified nurse does not require that the certified nurse presence for every minute when the school health aide is in the building. Indeed, *N.J.S.A.* 18A:40-3.3 does not mandate that a local school district must have a

certified school nurse present in each building/complex on a full-time basis. Rather, a certified nurse may "circulate" between buildings, thus being present in a particular building only part time. Indeed, Governor Whitman conditionally vetoed the original bill because it required school nurses to be present in all cases

Moreover, if the Legislature had intended such a result, it could have provided so in the statute by expressly requiring that the certified nurse to be present at all times when an School Health Aide is present. For example, *N.J.S.A.* 18A:40-3.4 expressly provides that secretarial or clerical duties that assist in providing nursing services may only be done under the supervision of a certified school nurse. Here, *N.J.S.A.* 18A:40-3.3 does not require such direct supervision. Thus, the only reasonable interpretation of the statute is that the certified school nurse and the School Health Aide may be assigned to the same building, and each responsible to perform their respective job duties and responsibilities, subject only to the limitations set forth in Title 18A and *N.J.A.C.* 6:29-1.2.[1]

DISCUSSION, FINDINGS AND CONCLUSIONS

N.J.S.A. 18A:40-3.3 provides in its pertinent part:

> A school district shall only utilize or employ for the provision of nursing services in the public schools of the district persons holding an educational services certificate with an endorsement as a school nurse issued by the State Board of Examiners, except for those non-nursing personnel who are otherwise authorized by statute or regulation to perform specific health related services. A school district may supplement the services provided by the certified school nurse with non-certified nurses, provided that the non-certified nurse is assigned to the same school building or school complex as the certified school nurse.

[1] Respondent contends that this position is consistent with the view of the New Jersey Department of Education recently expressed in a State Board of Education meeting of January 3, 2001 wherein it proposed to repeal *N.J.A.C.* 6:29, and to adopt a new chapter, *N.J.A.C.* 6A:16, including proposed rules and regulations to effectuate the purposes of *N.J.S.A.* 18A:40-3.3. These proposed rules and regulations would expressly permit the certified school nurse to delegate nursing tasks to non-certified school nurses consistent with their license. (See Exhibit B).

I **FIND** that the current division of duties between the certified school nurse and school health aide does not violate *N.J.S.A.* 18A:40-3.3. The School Health Aide is expressly limited to performing work for which she is licensed by law.

I further **FIND** that while it is true that the statute provides that a "school district may only utilize or employ for the provision of nursing services in the public schools of the district persons holding an educational services certificate with an endorsement as a school nurse. . . " *N.J.S.A.* 18A:40-3.3. The statute also makes exceptions for "those non-nursing personnel who are otherwise authorized by statute or regulation to perform specific health related services." Thus, the statute allows the use of non-certified nurses to perform a proscribed set of tasks, and there is no evidence that the health aide at the Tisdale School is performing any prohibited tasks.

Furthermore, I **FIND** that the purpose of the statute was to introduce some flexibility into the school health system – a goal the governor supported in her veto message – by allowing the limited use of school health aides. It must be noted that the legislation vetoed by the Governor covered special education students, it is nonetheless instructive herein.

I am further persuaded that a local school district is not required to have a certified school nurse present in each building because the nurse is permitted to circulate among buildings, working part time in each one. Under the petitioner's interpretation of the statute, a school health aide could not be present in a school building unless a certified school nurse was also present in the building. This would limit the school health aide to merely "shadowing" the certified nurse, as respondent puts it – an interpretation that could not have been the intent of the Legislature. I **CONCLUDE** that if the Legislature had intended or was mandating the full-time hiring of school nurses, it could have expressly provided for same in the statute.

Thus, for the foregoing reasons, petitioner's motion for summary judgment is hereby **DENIED** and respondent's cross motion to **DISMISS** the petition 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.

4/20/01
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

4/23/01
DATE

Debbie Antanaitis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 26 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sej

RAMSEY TEACHERS ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record in this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4, and were duly considered by the Commissioner in reaching his determination.

In its exceptions, petitioner argues that the Administrative Law Judge's (ALJ) interpretation of *N.J.S.A.* 18A:40-3.3, adopted July 1, 1999, renders that statute superfluous because her reading means that the new law adds nothing, simply maintaining the status quo existing prior to its adoption. (Petitioner's Exceptions at 1) Petitioner points out that *N.J.S.A.* 18A:40-3.3 mandates that "nursing services" are to be provided by certified staff only and that the statute "does not say 'certified nursing services' or 'nursing services which require certification' when it describes what 'shall only' be performed by a certified nurse." (emphasis in text) (*Id.* at 2)

Although admitting that there is an exception provision in the statute for non-nursing employees, petitioner submits that, contrary to the ALJ's analysis, this provision does

not refer to noncertified nurses, but rather to individuals who are not nurses, such as lifeguards, emergency medical technicians, etc. (*Ibid.*) Pointing to the Summary of Bill in the Governor's conditional veto, petitioner contends that the purpose of the bill was not to introduce flexibility in the system as the ALJ states, but rather to provide that "*a school district shall only utilize or employ for the provision of nursing services in the public schools of the district, persons holding an educational services certificate with an endorsement as a school nurse issued by the State Board of Examiners.*" (emphasis in text) (*Id.* at 3, quoting Summary of Bill, Exhibit A, page 2, attached to the Jacobs Certification) Petitioner further maintains that the governor supported the bill's purpose, but that her concerns were "related to specialized care for individuals with special needs *** and that supplementation of certified nurses be allowed *if* a certified nurse is assigned to the same building or complex." (emphasis in text) (*Ibid.*, quoting Exhibit A, page 3)

Pointing to *Old Bridge Twp. Ed. Assoc. v. Bd. of Ed. of the Tp. Of Old Bridge*, decided by the Commissioner November 26, 1997, *aff'd* State Board April 1, 1988, petitioner asserts that the system which existed prior to the enactment of *P.L.* 1999, *c.* 153 was the most flexible because the preexisting system permitted the use of noncertified nurses without regard to certified nurse building assignments, and that respondent's use of a certified nurse for half a day and a noncertified nurse for the other half day is merely a subterfuge to pay cheaper salaries, provide fewer benefits and to avoid the accrual of tenure. (*Id.* at 4) Moreover, petitioner argues that the intent of the legislation was to permit a noncertified nurse to assist in covering a school or school complex, and that there is nothing in *N.J.S.A.* 18A:40-3.3 which justifies the ALJ's interpretation that "assigned to" means that a certified school nurse's presence is only required for that part of a day when the non-certified nurse in not present. (*Ibid.*)

Acknowledging that the statute permits a noncertified school nurse to act as a temporary substitute when a certified school nurse is temporarily absent, *see N.J.A.C.* 18A:40-3.5, petitioner argues that that is not the situation in the instant matter because the certified and noncertified nurse are never in the building at the same time, except for a fifteen minute overlap in their work schedules. (*Id.* at 5) Moreover, petitioner posits that, since the Board admits that it authorizes its school health aides to assist in tasks, responsibilities and duties reserved for certified school nurses, the noncertified nurse is either only assisting the certified school nurse for fifteen minutes each day or is performing these responsibilities after the school nurse leaves.

Finally, arguing that the purpose of *N.J.S.A.* 18A:40-3.2 *et seq.* is to promote the use of certified school nurses, petitioner asserts that the Commissioner should reverse the Initial Decision and find that a certified school nurse is required in the Tisdale school each day for the full day and that hereafter a full time certified nurse must be hired whenever the Board hires new employees for its nursing positions in any of its buildings. (*Ibid.*)

In its reply, the Board asserts that the ALJ's interpretation of *N.J.S.A.* 18A:40-3.3 is the only reasonable interpretation, and that there is no evidence that the school health aide in question is independently performing any tasks specifically reserved for the certified school nurse. (Board's Reply at 2) The Board further submits that the ALJ correctly concluded that there is no requirement that a school district must have a full-time, certified school nurse present in each building. (*Ibid.*)

Moreover, the Board argues that petitioner's contention that non-nursing personnel refers solely to individuals who are not nurses is a strained interpretation of the statute because it must be construed to permit, for instance, a lifeguard to perform health-related services without the presence of a certified school nurse, but would not permit a registered nurse

within the job description of school health aide to perform services without a certified school nurse present. (*Id.* at 4) The more reasonable interpretation, the Board posits, is that the phrase non-nursing personnel refers to individuals not holding an Educational Services Certificate and, thus, non-nursing personnel would include noncertified registered nurses serving as school health aides. (*Ibid.*)

Arguing that its practices are in accordance with the intent and language of *N.J.S.A.* 18A:40-3.3, the Board objects to the inference that it is perpetrating a subterfuge of the legislative intent. (*Id.* at 4-5) The Board further asserts that the certified school nurse in the Tisdale School provides those services which are required to be performed by an individual holding an educational services certificate, and that the school health aide is limited to assisting the certified school nurse when both individuals are present in the building. (*Id.* at 5) At all other times, the Board avers, the school health aide is expressly limited to performing those tasks which are not required to be performed by the certified school nurse. (*Ibid.*) Therefore, the Board urges the Commissioner to adopt the Initial Decision as the final decision in this matter. (*Ibid.*)

Upon careful and independent review of the record, the Initial Decision, the exceptions and the reply thereto, the Commissioner is in agreement with the ALJ that *N.J.S.A.* 18A:40-3.3 does not expressly require that a certified school nurse be physically present whenever a non-certified nurse performs duties supplementing the services provided by the certified school nurse (*see N.J.S.A.* 18A:40-3.5), and that there is no evidence that the registered nurse serving as a school health aide at Tilsdale School is functioning in a manner not in compliance with the applicable regulation, *N.J.A.C.* 6A:16-2.1(e) and (f). Therefore, the

Board's current division of duties between the certified school nurse and the school health aide does not violate the statute at issue.

Moreover, the Commissioner finds unpersuasive petitioner's argument that the ALJ's holding simply maintains the status quo prior to the adoption of P.L. 1999, c. 153, and thus renders the new law a nullity. To the contrary, prior to the adoption of P.L. 1999, c. 153, there was no requirement that noncertified nurses be assigned to a school building or school complex where a certified school nurse is assigned.

Accordingly, the Commissioner determines to deny petitioner's motion for summary judgment and to grant the Board's cross motion to dismiss the petition for the reasons expressed in the Initial Decision.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6|7|01

Date of Mailing: 6|7|01

* 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.

179-01

EDU # 3080-00
C # 179-01
SB # 21-01

RAMSEY TEACHERS ASSOCIATION, :

PETITIONER-APPELLANT, :

V. :

BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY, :

RESPONDENT-RESPONDENT. :

STATE BOARD OF EDUCATION

DECISION ON MOTION

Decided by the Commissioner of Education, June 7, 2001

For the Petitioner-Appellant, Bucceri and Pincus (Louis P. Bucceri, Esq., of Counsel)

For the Respondent-Respondent, Winne, Banta, Rizzi, Hetherington & Basralian (Robert M. Jacobs, Esq., of Counsel)

For the amicus curiae New Jersey School Boards Association, John J. Burns, Esq., of Counsel

The State Board of Education grants the motion for leave to appear as amicus curiae made in this matter by the New Jersey School Boards Association pursuant to N.J.A.C. 6A:4-2.1. The School Boards Association is directed to submit its brief within ten days of the date of this decision.

September 5, 2001

Date of mailing SEP 07 2001

181-01

ROGER GILBERT,

PETITIONER,

V.

BOARD OF EDUCATION OF MONMOUTH-OCEAN EDUCATIONAL SERVICES COMMISSION, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

June 7, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2941-99
AGENCY DKT. NO. 83-4/99

ROGER GILBERT,
Petitioner,
v.
BOARD OF EDUCATION OF MONMOUTH-OCEAN EDUCATIONAL SERVICES COMMISSION, MONMOUTH COUNTY,
Respondent.

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

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

Record Closed: April 19, 2001 Decided: April 20, 2001

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on May 14, 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 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.

April 20, 2001
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

4/23/01
DATE

Debra Antanaitis /ls
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 25 2001
DATE

Jeff S. Masin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

SETTLEMENT AGREEMENT

This Agreement is made this 4th day of April, 2001 by and between Monmouth-Ocean Educational Services Commission ("Commission") and Roger Gilbert ("Mr. Gilbert").

RECITALS

A. For a number of years, Mr. Gilbert has acted as a per case psychologist for the Commission.

B. During these years of work, Mr. Gilbert has received various assignments, including psychological evaluations of different quantity and annual reviews.

C. To date, Mr. Gilbert has had the option to decline assignments at his discretion.

D. When his assignment of psychological evaluations decreased, Mr. Gilbert complained that he wanted additional psychological evaluations assigned while at the same time declining to accept annual reviews.

E. When the Commission's assignment of psychological evaluations did not increase to a level acceptable to Mr. Gilbert, he filed a Petition with the Commissioner of Education arguing that he had acquired tenure and was entitled to an unspecified number of assignments.

F. In response, the Commission asserted that Mr. Gilbert acted in the non-tenurable position of per case psychologist because he served as a *de facto* substitute for the Commission's regularly employed psychologists.

G. Counsel for both parties exchanged motions for summary judgment and during the oral argument, the parties discussed a possible resolution short of decision.

H. Mr. Gilbert and the Commission exchanged proposals and with some modifications, the Commission's counter-offer was accepted by Mr. Gilbert subject to t he approval of the Commissioner of Education ("Commissioner") to the terms and conditions of the settlement.

THEREFORE, in consideration of the mutual covenants contained herein, the Commission and Mr. Gilbert agree as follows:

1. The Recitals are incorporated herein.

2. Mr. Gilbert agrees to withdraw his Petition with prejudice in consideration for the settlement contained herein.

3. Until his retirement, Mr. Gilbert will be assigned no less than 25 psychological evaluations to be distributed as best as practicable throughout the school year, which assignments shall begin in September, 2000. The Commission also agrees to pledge its best efforts to assign Mr. Gilbert up to 35 psychological evaluations for each academic year until Mr. Gilbert's effective date of retirement..

4. In exchange, Mr. Gilbert shall timely, professionally and appropriately complete his assignments and must accept the assignments of a minimum of 25 psychological evaluations for each academic year until his retirement, must complete 30 annual reviews for each academic year until his retirement and must complete such other work which the Commission deems appropriate for his position of psychologist, provided such other work

does not conflict with Mr. Gilbert's duties and functions as a West Long Branch school psychologist.

5. Mr. Gilbert and the Commission (a) agree that they will take no action to publish the terms and conditions of this settlement to third parties, and (b) agree that the terms and conditions herein reflect no existing practice, no pre-existing agreement and no creation or affirmation of tenure rights.

6. This Settlement Agreement is contingent upon the approval of the Commissioner of Education.

7. This Settlement Agreement contains all the terms and conditions of the parties' agreement and cannot be modified or changed unless all parties to do so in writing.

McOMBER & McOMBER, P.C.
Attorneys for Respondent,
Monmouth-Ocean Educational Services Commission

By: _____
J. PETER SOKOL, ESQ.

Dated: 3/2/01

MONMOUTH-OCEAN EDUCATIONAL
SERVICES COMMISSION

By: _____
President

Dated:

By: _____
Secretary

Dated: 4/4/01

KLAUSNER, HUNTER & ROSENBERG
Attorneys for Petitioner, Roger Gilbert

By: Stephen B. Hunter
STEPHEN B. HUNTER, ESQ.

Dated: 2/27/01

ROGER GILBERT

Dated: 3/10/01

a:\agreements\agreement.04 (dcg)

OAL DKT. NO. EDU 2941-99
AGENCY DKT. NO. 83-4/99

ROGER GILBERT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF MONMOUTH-OCEAN EDUCATIONAL SERVICES COMMISSION, 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.

COMMISSIONER OF EDUCATION

Date of Decision: 6|7|01

Date of Mailing: 6|7|01

180-01R

COTA POSSIEN-KANIA,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN, MIDDLESEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON REMAND

SYNOPSIS

Petitioner, tenured school social worker and substance awareness coordinator, contended that the Board's assigning her to be an in-class support instructor was violative of law and code since she did not possess certification as a teacher. She sought appointment to one of two positions for which she was qualified. ALJ determined that because the relief requested by petitioner could no longer be granted in this matter due to changed circumstances since petitioner was no longer assigned to the position of in-class support instructor, the case did not present any issue of great public importance compelling a definitive resolution. ALJ granted the Board's motion to dismiss this matter as moot.

Noting that there was clearly a reasonable potential for recurrence of the alleged improper assignment, the Commissioner reversed the ALJ's Initial Decision dismissing the matter as moot. Commissioner remanded the matter to the OAL for a determination on petitioner's underlying claim that the Board's assignment of her to an in-class support instructor position was improper.

On remand, the ALJ found that the Board acted within its authority and utilized petitioner as a highly qualified resource person to assist and complement the Health Department Family Life Program, not to teach. *N.J.A.C.* 6:29-4.2(g). The ALJ found that a certified teacher was always present with petitioner in the classroom while she was assisting the students. Thus, the ALJ ordered that the Board's assignment of petitioner as an in-class support instructor for the school year 1998-99 was valid. Petition was dismissed.

In light of the record and the transcript of the hearing, the Commissioner affirmed the Initial Decision with modification. The Commissioner concurred with the ALJ that use of petitioner's expertise in the classroom as a resource to the health teachers was not necessarily improper or violative of specific statute or code. The Commissioner, however, concluded that the Board's failure to take sufficient steps at the outset to clearly define petitioner's role as a classroom resource person and to provide her and the teachers with the necessary follow-up and supervision, paved the way for misapprehensions and missteps in performance. Petition was dismissed.

June 7, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8088-99

AGENCY DKT. NO. 471-10/98

(ON REMAND EDU 10342-98)

COTA POSSIEN-KANIA,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN, MIDDLESEX COUNTY,

Respondent.

Nancy I. Oxfeld, Esq., for petitioner (Oxfeld Cohen, attorneys)

Richard M. Salsberg, Esq., for respondent (DeCotis, Fitzpatrick, Gluck, Hayden and Cole, attorneys)

Record Closed: December 8, 2000 Decided: April 20, 2001

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, who holds certificates as a substance awareness coordinator and as a school social worker and has attained tenure with respondent, challenges respondent's assignment of her as an in-class support instructor in the health program for school year 1998 alleging that this constitutes an assignment for which a teaching certificate is required and which petitioner does not possess. Accordingly, the petitioner seeks a determination that this assignment was a violation of the law.

The original petition was filed on October 13, 1998, and was scheduled for hearing on June 22, 1999. At the hearing on that date, respondent's motion to dismiss for reasons of mootness was granted and an initial decision was entered on June 23, 1999. On August 9, 1999, the Commissioner of Education reversed the initial decision since this alleged improper action, under the circumstances of this case, is one capable of repetition, yet evading review. As a result, the matter was remanded for determination on petitioner's underlying claim that respondent's assignment of her to an in-class position was improper.

The remand was transmitted to the Office of Administrative Law (OAL) on September 13, 1999, for hearing as a contested case. The matter was scheduled for hearing on February 17, 2000, but was adjourned at the request of attorney for petitioner due to a court conflict. The matter was rescheduled for hearing on September 14, 2000, and on that date a hearing was held and concluded. However, the record remained open to permit the attorneys to obtain a transcript of the hearing and to arrange for the submission of briefs. After briefs were submitted, the record closed on December 8, 2000. The 45-day statutory period within which to file the initial decision was extended by orders of extension to April 22, 2001.

FACTUAL DISCUSSION

The following is not intended to be a complete summary of all of the testimony and evidence, but is intended to summarize those portions of the record which are relevant to the issues herein.

1. Testimony at prior hearing on June 22, 1999

At the prior hearing held on June 22, 1999, attorney for respondent moved to dismiss the petition on the basis of mootness. Respondent was directed to produce evidence supporting its motion, and it produced Dr. Arthur Travlos, the Superintendent of Schools. Although Dr. Travlos' testimony was provided for the limited purpose of supporting the motion to dismiss, it is part of the record in this proceeding.

Dr. Travlos testified that during the 1998-99 academic year, petitioner was assigned duties as a substance abuse coordinator and was also assigned to help support the health program. Petitioner's assignment as an in-class support instructor in the health program was for the purpose of supporting health teachers in those areas of the health curriculum where petitioner has expertise.

Dr. Travlos testified that petitioner was advised when this assignment was made that it was a limited assignment for the purpose of assisting health teachers in the health program until they became fully familiar with the subject areas within petitioner's area of expertise. She was advised that when it was determined that her expertise and assistance were no longer necessary she would be reassigned.

Dr. Travlos indicated that the decision was made by Dr. Burkhardt, the high school principal, in April 1999 that petitioner's expertise would no longer be needed for the next school year. As a result petitioner was taken out of this in-class support position for the 1999-2000 school year. Dr. Travlos emphasized that if petitioner's expertise and assistance had been needed for the 1999-2000 school year, her assignment would have continued. However, based upon the determination that her assistance was no longer needed, he confirmed that she has been removed from the assignment as in-class support and she will not be returned to the health program.

For school year 1999-2000 petitioner was to be assigned as a school social worker to conduct small group counseling sessions. He testified that as a courtesy petitioner was advised of her reassignment by Dr. Burkhardt in June 1999. He explained that this is not an assignment

that requires formal Board approval, because such approval is necessary only for transfers between buildings or in matters involving transfers between areas which are the subject of certificates, and the action of assigning petitioner to small group counseling sessions is his decision. He testified that he has made this decision.

On cross-examination, Dr. Travlos admitted that the school year 1999-2000 reassignment of petitioner could be changed, and he emphasized that petitioner would still be in the health program as an in-class support if she was needed, or if she is needed in the future. However, that was not his intention.

2. Testimony at the remand hearing on September 14, 2000

At the hearing on remand on September 14, 2000, petitioner Cota Possien-Kania testified that she was hired by the school district on August 8, 1987, and held a certificate as a school social worker at the time. In 1989, she obtained an emergency substance awareness certificate which became a permanent certificate in 1991, or 1992. She holds no educational certificates.

Ms. Possien-Kania testified that prior to the 1998-99 school year, she was assigned to the school district's Pupil Improvement Program (PIP). This is quasi-alternative education program for grades 7 through 12 which served 50 to 60 non-special education students who participate in the program for three days each week, one period per day. She spent one day per week counseling special education students. She then took over as substance awareness coordinator on February 5, 1999.

The PIP program consisted of two staff members with petitioner as a counselor for the program operating under a school social worker's certificate. Ms. Marybeth Connolly provided the academic component, which was for support only. When petitioner was assigned to PIP, she would take individuals and groups of PIP students out of the class for counseling. Ms. Connolly is a certified teacher who taught the class and petitioner did support services and determined if the student's difficulties were based on social or emotional problems. Petitioner explained that she rarely became involved in the academic component and she was usually involved with

motivating students and dealing with problems. She never lectured in classes and she was not involved in working with students on academics in the PIP program.

As the substance awareness coordinator petitioner took referrals from parents, teachers, and students when there was suspected substance abuse.

Petitioner testified that in June 1998, she received no indication that her assignment would be changed for the following school year. However, in the second week of September 1998, she was advised of a change of assignment for the 1998-99 school year. She received a letter from Dr. Burkhardt (R-2) removing her completely from PIP and assigning her as an in-class support instructor to assist the Health Department's new Family Life Program. There were three experienced teachers assigned to this new health program, but petitioner was required to provide 10 hours in the awareness training component. She went to see Dr. Burkhardt several times, and he explained to her that she was to support the three teachers. However, her role in the classroom was not clear. Dr. Burkhardt chose to place her there because a number of topics which would come up in her counseling sessions would be the subject of the program and the teachers felt overwhelmed with the new program. She indicated that the teacher's guide for these courses contain nothing about having a social worker or a substance awareness coordinator present and participating in the course work. Despite this, she was assigned to work with Ms. Del Rosario in the seventh grade, ninth period; Mr. Hummel in the eighth grade, tenth period; and Mr. Ulrich, in the ninth grade, various periods, for a total of three periods per day.

Petitioner testified that the subject matter of the program differed for each grade level and she tried to approach it as a co-teacher. Her areas of expertise in the seventh grade class involved conflict resolution, refusal skills, and social aspects. For the eighth grade, her areas of expertise were similar. The regular teacher would give a lecture on the subject for the day and then she participated in interactive areas. For ninth grade, there was a more traditional classroom approach. While petitioner was assisting Mr. Ulrich in his ninth grade class Mr. Ulrich was out sick for a time, and petitioner testified that she actually taught, tested and graded the class.

On cross-examination, petitioner testified that she has a substance abuse coordinator certificate and she also could have been a guest lecturer in the health curriculum and would have

been a facilitator, but not a teacher. She identified her job description (R-1) and identified the letter of September 3, 1998 (R-2) in which she was assigned to be an in-class support instructor. She felt that this letter does not clearly indicate what was meant and Dr. Burkhardt never made it clear whether she was to teach, develop lesson plans or grade students. The teachers did the lesson plans and she never did them, but she would add to them or suggest additions.

Petitioner indicated that during Mr. Ulrich's absence, there was a certified substitute assigned to the class. She did not lecture each day, but did so when covering areas in which she is proficient. She was involved in discipline in the form of in-class reprimands. She also graded some papers and tests based on an answer key. She occasionally assigned homework, but she did not prepare progress reports. She would go over grades with the teachers and she kept her own attendance. There were occasions when other teachers were absent and either substitute teachers handled the class or the students were brought to the gymnasium. She was observed by Dr. Burkhardt and Mr. Pennisi. She identified two classroom observations (R-4A and R-4C), a summary evaluation (R-4D), and her response to the first classroom evaluation (R-4B) which was included to support her claim that she was performing teaching duties.

Tammy Del Rosario testified that she is a teacher of health and physical education and is in her thirteenth year at the school district. For the 1998-99 school year, a new health curriculum was introduced. She and Dan Hummel wrote up the new curriculum and she was trained in it. She taught this in seventh, eleventh and twelfth grades. At the beginning of the 1998-99 school year she learned from Dr. Burkhardt that petitioner would be assisting in the classroom. She brought up to Dr. Burkhardt the question what petitioner would be doing and he explained that it would be like when the school nurse would come in and help them, or "something like that."

Petitioner was assigned to Ms. Del Rosario's seventh grade class and was there every day. Ms. Del Rosario used her mostly on conflict resolution, mediation and refusal skills. Ms. Del Rosario had no training on how to use a substance awareness coordinator in the class.

On cross-examination, Ms. Del Rosario testified that she taught three health classes and petitioner was only involved with one. She denied ever asking Dr. Burkhardt for any classroom assistance and denied saying that she did not feel competent. She understood that petitioner was

to be like an assistant and she may have used the term "team teacher." She was both pleased and not pleased with this arrangement. She was pleased because of petitioner's areas of expertise, but she was not pleased because she did not need her. She conversed with petitioner because she was puzzled as to how she was going to use petitioner in the classroom. Petitioner indicated to her that she was unhappy because it took her away from her area of expertise. Ms. Del Rosario testified that petitioner's involvement was similar to what a nurse would do, that is, each would teach a certain area. Petitioner never presented a written lesson plan or plan book. Ms. Del Rosario handled the discipline, the report cards and assigned and graded homework. In some of the sections, petitioner did the grading. If the parents had a problem, they would speak to Ms. Del Rosario.

Charles S. Ulrich testified that he has been employed by the Dunellen School District as a health and physical education teacher since October 1983. School year 1998-99 brought a new health curriculum and he became aware that petitioner was to be in the classroom. He spoke to Dr. Burkhardt who advised him that petitioner's role was to help him teach, but Dr. Burkhardt gave him no further information. Petitioner was in his ninth grade health class and she helped him teach the class. She taught in her areas of expertise and she did the bulk of lecturing regarding alcohol and tobacco. The curriculum also included sex education and nutrition. There was nothing in the material which said how a substance awareness coordinator was to be involved.

On cross-examination, Mr. Ulrich indicated that petitioner talked to the class everyday. He may have temporarily left her alone on occasion. He prepared the lesson plans and, as to discipline, it was his class and he would report any improper conduct. On occasion, petitioner assigned homework. He graded the tests and homework, but sometimes petitioner would. He entered the grades in the grade book and he took attendance.

Arthur L. Travlos testified that he is the Superintendent of Schools and was hired on July 1, 1996. During the 1997-98 school year, petitioner was the student assistance counselor for two days a week and assigned to the PIP program three days a week. He identified her job description as a social worker (R-5). For the 1997-98 school year, the PIP program involved students with problems involving discipline, disaffected students, and those who needed

additional assistance. The students who were in the PIP class were there based on staff, parent, administrator, or guidance referrals. Ms. Connolly was the PIP teacher who was certificated to handle the academic component, and petitioner was to handle the social component, for example, if the home was not supportive or if the student was experiencing problems with peers. The guideline for petitioner was that she was to spend six-tenths of her time in the PIP program with the balance as the student assistance counselor. Petitioner was not certified as a teacher, but would interact with students and would try to help students improve on their schooling. Dr. Travlos indicated that there were occasions when he could not find petitioner.

In June 1998, petitioner's assignment for the 1998-99 school year was to be the same as in the 1997-98 school year. However, Dr. Travlos was contacted by Dr. Burkhardt who explained that the new Family Life Program health curriculum had created anxiety among the staff and they needed help to teach it. Dr. Travlos indicated that the school district had purchased this new program from a manufacturer, but it had volatile components, for example, showing a condom on a finger, and other similar examples. Ms. Nellie Eyerman, the Director of Curriculum, chaired the committee involved with this new component. They were hoping that the staff could implement the program independently, but it became apparent that the teachers were becoming uneasy and they voiced their concerns about their ability to implement this new program. The one person in the school district who was most competent in several of the areas of the new curriculum was petitioner. There were concerns about the PIP program if petitioner were to be transferred, but Dr. Travlos told Ms. Connolly that if any PIP student was in crisis, intercession should be by the guidance counselors and by school district's child study team members.

Dr. Travlos identified the Board of Education policy on assignment and transfer of personnel (R-7). He also testified that petitioner's job duty in the new program was to act as a resource for health teachers in her areas of competence and expertise. This involved refusal skills, teaching of self-esteem, and instruction with respect to sex, drugs and alcohol. He indicated that at no time was petitioner asked to teach, and that she was solely an in-class support person. He did not discuss this directly with petitioner.

Dr. Travlos testified that petitioner filed a Level II grievance (R-8) and as a result, he met with petitioner and told her what she was actually expected to do (R-9). She was not expected to perform any teacher responsibilities and this was made clear to her. He indicated that petitioner was never left alone, and whenever the regular teacher was absent, the school district always hired a certified substitute.

Dr. Travlos testified that following the 1998-99 school year petitioner was no longer needed in the health classes. The teachers are familiar with the subject matter and are comfortable with it and do not need support.

On cross-examination, Dr. Travlos indicated that in school years prior to 1998-99 petitioner was available to any teacher who needed her to assist. In the new health program for 1998-99, petitioner was there to make contributions to the class and to share ideas. She was never expected to deliver the lessons, and in areas not within her expertise, her role was to be passive. The curriculum company gave training to teachers. However, petitioner had the expertise in certain areas to assist the health teachers in providing instruction to students. The curriculum company or publisher did not recommend the use of a school social worker or an substance awareness coordinator. He did not personally talk to the health teachers about this situation.

On re-direct examination, Dr. Travlos indicated that he wanted the new health curriculum program to be first-rate and wanted to give full support to the program.

Donald J. Burkhardt testified that he is Principal of the Dunellen High School. He was part of the decision to place petitioner in the new health curriculum program. He had concerns about the new program and Ms. Del Rosario was extremely concerned about the new curriculum. Mr. Ulrich also expressed concerns about it. He felt that he had enough individuals to otherwise cover PIP counseling and he spoke to petitioner about this new role. He specifically told petitioner that she was not to be a teacher. He also indicated that it never occurred to him to place petitioner in class alone because she is not a certified teacher. He always made sure that if the teacher was not present, the class was covered by a substitute.

On cross-examination, Dr. Burkhardt indicated that petitioner was not in the class to provide crisis counseling or referral services. There was nothing in the curriculum as to which area she was to provide assistance. She was only to provide assistance in her areas of expertise. He met with the two teachers involved in the classes and told them to accept petitioner as a resource. He also met with petitioner at the end of each marking period. The only letter in which he gave written directions as to petitioner's duties was his letter of September 13, 1998. On re-redirect examination, Dr. Burkhardt indicated he had no problem with petitioner leaving a class in order to provide counseling.

LEGAL DISCUSSION AND ANALYSIS

This matter arises out of a dispute regarding petitioner's assignment to assist certified health teachers of the Family Life Program established pursuant to *N.J.A.C.* 6:29-4.2(g). Petitioner's position is that this assignment was improper because it required her to perform teaching duties for which a teaching certificate is required and which petitioner does not possess. Both parties submitted excellent briefs in support of their respective positions, and that which follows addresses their respective legal arguments.

1. Arguments of petitioner

Petitioner points out that there are extensive regulations regarding what certifications are required to provide instruction in various fields, and specifying that in those positions in which instruction is not traditional, such as school nursing, instruction may still be provided in relevant areas. Thus, while health teachers, physical education and health teachers, and school nurses are certified to teach health, substance awareness coordinators and school social workers are not. They are only available as a resource to the teaching staff, and should not be assigned as in-class support instructors for the provision of an entire course of instruction in health or any other area.

Petitioner argues that three types of certificates are provided for by the regulations: Instructional, Administrative and Educational Services. *N.J.A.C.* 6:11-2.3. A "certificated" employee is eligible to serve under a certificate in any of the specific endorsements he or she has

received under that certificate. The regulations provide a number of specified endorsements for individuals holding certificates. A certificated employee can be transferred among endorsements within a particular certificate and is entitled to preference in a reduction in force over a non-tenured employee in categories determined by the State Board. *N.J.A.C.* 6:3-5.1 [other citations omitted].

In the present matter petitioner has one certificate, an educational services certificate, with two endorsements: school social worker and substance awareness coordinator. Petitioner does not dispute that the respondent has the right to assign petitioner to any position consistent with the endorsements on her educational services certificate as a school social worker and a substance awareness coordinator. However, petitioner argues that the respondent cannot assign her to a teaching position for which she holds no certificate. Thus, petitioner argues that petitioner's assignment as an in-class support instructor in the health classes is outside the scope of her certificate.

Petitioner contends that the State Board of Education has extensively regulated the areas of school social work and health education and that both the Legislature and the State Board have provided extensive legislation and regulation in the area of substance abuse. She contends that a review of the relevant legislation and regulation concerning the job of school social worker and substance awareness coordinator shows that in-class support instruction is not an appropriate assignment for an individual with either of these endorsements.

N.J.S.A. 18A:40A-18(b) specifically provides for the position of substance awareness coordinator by stating:

> The position of substance awareness coordinator shall be separate and distinct from any other employment position in the district, including, but not limited to district guidance counselors, school social workers and school psychologists.

N.J.S.A. 18A:40A-18(c) specifically identifies the substance awareness coordinator job duties by providing:

> It shall be the responsibility of the substance awareness coordinator

> to assist with the in/service training of school district staff concerning substance abuse issues and the district program to combat substance abuse; serve as an information resource for substance abuse curriculum development and instruction; assist the district in revising and implementing substance abuse policies and procedures; develop and administer intervention services in the district; provide counseling service to pupils regarding substance abuse problems; and where necessary and appropriate, cooperate with juvenile justice officials in the rendering of substance abuse treatment services.

Petitioner asserts that there is no reference to providing in-class support services in the statutory description of the position. The statute also refers to the substance awareness coordinator's role as being to, ". . . serve as an information resource for substance abuse curriculum development and instruction." Petitioner argues that an information resource is not assigned to the classroom on a daily basis.

Petitioner argues that nothing in the regulations regarding substance abuse, found at *N.J.A.C.* 6:29-6.1 to -6.5., indicates that instruction is to be provided on a regular basis by anyone other than a certificated teaching staff member. Petitioner additionally refers to the regulations regarding Safe and Drug Free Schools, *N.J.A.C.* 6:29-10.1 to -10.6 which make no reference to curriculum and instruction.

Petitioner contends that there is no provision which indicates that a substance awareness coordinator or a school social worker is to teach in areas related to their certifications, although there is such a heading with regard to the school nurse certification. The description under the school nurse endorsement show that a school nurse may teach in certain areas, while school social workers and substance awareness coordinators may not. The description of the school social worker endorsement at *N.J.A.C.* 6:11-11.8 (a) indicates that this endorsement is required for service as a school social worker in any school district in the State. The description of the endorsement for substance awareness coordinator states at *N.J.A.C.* 6:11-11.5(a) that :

> This endorsement is required for anyone, regardless of his or her current endorsements, was responsible for performing the duties stated in *N.J.S.A.* 18A:40A-18C.

Petitioner asserts that the difference between the regulations and requirements to receive an endorsement as a school social worker or substance abuse coordinator and those required to receive an endorsement as a school nurse are critical for this case. Petitioner contrasts the foregoing school social worker or substance abuse coordinator provisions with the description of the endorsement for school nurse which states at *N.J.A.C.* 6:11-11.7(a) as follows:

> This endorsement authorizes services as a school nurse in elementary, secondary and vocational schools, and teaching in areas related to health.

Petitioner points out that the regulations clearly provide that school nurses may be utilized to provide teaching in areas related to health, but there is no such provision made with regard to substance awareness coordinators or school social workers. There is no reference in the regulations to either social workers or substance awareness coordinators as providing instruction. The regulations also provide for only specific certifications to teach health education either under a health education endorsement, *N.J.A.C.* 6:11-6.2(a)(10), or a health and physical education endorsement, *N.J.A.C.* 6:11-6.2(a)(11).

2. Arguments of respondent

Respondent contends that it properly utilized petitioner as a resource person in the Family Life Program pursuant to *N.J.A.C.* 6:29-4.2(g) and that it properly reassigned petitioner pursuant to *N.J.S.A.* 18A:25-1 and 18A:11-1(d) which grants to the Board the unfettered right to transfer teaching staff members between and among appropriate assignments. Thus, respondent argues that the petition must be dismissed.

Respondent points out that the school district's health curriculum is a part of the state-mandated Family Life Program which is designed to develop students' understanding of the physical, mental, economic, social, emotional and psychological aspects of interpersonal relationships; the physiological and psychological foundations of human development, sexuality and reproduction; and to provide the opportunity for pupils to acquire knowledge which will support the development of responsible personal behavior, strengthen their own family life now and aid in establishing strong family life for themselves in the future. *See, N.J.A.C.* 6:29-4.2(a)

While this provision was repealed in May 2000, it was in effect during the time of petitioner's disputed assignment.

Respondent points out that *N.J.A.C.* 6:29-4.2(g) provides that during the course of Family Life instruction, "[d]istricts may use resource people to assist with their programs; that is, physicians, members of the clergy, attorneys, parents and guardians, school social workers, school psychologists, law enforcement personnel, and others as necessary."

Respondent argues that when interpreting a statute, one must first look at the wording of the statute to ascertain its plain meaning and intent. *Bergen Commercial Bank v. Sisler,* 157 *N.J.* 188, 202 (1999). The primary task is to "effectuate the legislative intent in light of the language used and the objects sought to be achieved." *New Jersey Educ. Ass'n v. Board of Trustees. Public Employees' Retirement System,* 327 N.J. Super. 326, 332-33 (App. Div. 2000). It contends that the plain meaning of *N.J.A.C.* 6:29-4.2(g) is to grant to the Board the power to utilize a number of different people as resources to aid Family Life instruction. The regulation even names specific people including police officers, doctors and lawyers. Most importantly, the regulation even specifically lists school social workers among those whom schools can and should utilize to enhance the Family Life program.

Respondent argues that this is exactly what occurred in the present matter. Petitioner, a school social worker, was reassigned to the health curriculum in order to enhance the program by assisting teachers with her expertise in the social aspects of the program. Petitioner is a certified school social worker. A certified teacher was always present with her in the classroom while she was assisting the students. Respondent contends that testimony was introduced that petitioner did not perform the duties of a classroom teacher. Thus the respondent argues that it acted within its power, as stated in *N.J.A.C.* 6:29-4.2, by placing petitioner in the Family Life program to assist and supplement the teacher, and that she was performing the same function while assisting the Family Life teachers - counseling students on the dangers of drugs, alcohol and tobacco, refusal skills, conflict resolution and other social aspects of health - as she did previously in the PIP program.

Respondent contends that there was simply a need in the Health Department Program that

had to be fulfilled because the two health teachers had expressed concerns that they did not have expertise in certain areas of the health program dealing with conflict resolution, peer mediation, refusal skills, sex education and other social aspects of health. Dr. Burkhardt and Dr. Travlos decided that petitioner was the ideal person to fulfill these needs because she addressed these same student concerns in the PIP program. Thus, respondent contends that it acted within its authority and utilized petitioner as a highly qualified resource person to assist and complement the health program.

Furthermore, respondent points out that *N.J.S.A.* 18A:25-l gives to boards of education broad power to reassign and transfer staff members, and that *N.J.S.A.* 18A:11-l(d) states that a school board shall:

> [p]reform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.

In *Board of Education of Asbury Park v. Asbury Park Ed. Assn.*, 145 *N.J. Super.* 495 (Ch. Div. 1976), the teachers went on strike to protest assignments to extracurricular and co-curricular activities. The court held that a board of education has the power to assign teachers to extracurricular activities, so long as the assignment was reasonable, nondiscriminatory, related to a teacher's interest and expertise, and does not require excessive hours. *Id.* at 506.

Respondent contends that the Legislature has expressly vested local school boards with the power to employ, promote, transfer and dismiss teaching staff members. *N.J.S.A.* 18A:ll-1; *N.J.S.A.* 18A:l6-l; *N.J.S.A.* l8A:28-9; *Dunellen Bd. of Ed. v. Dunellen Ed. Sass's*, 64 *N.J.* 17, (1973). Although such a personnel decision has some impact on a teacher's welfare, that factor is less significant than and outweighed by the board's managerial responsibility to make personnel decisions in the manner which it considers most likely to promote the overall goal of providing all students with a thorough and efficient education. *Ridgefield Park Ed. Sass's v. Ridgefield Park Bd. of Ed.*, 78 *N.J.* 144, 156 (1978). In fact, Dr. Travlos testified that was his intention in this case. The PIP program was operating efficiently and Petitioner's expertise was needed to assist the health teachers in order to provide all students with a thorough education.

Respondent contends that the reassignment of Petitioner was proper and in the best interest of the students because it improved the structure and efficiency of the entire school. The PIP program was operating efficiently, however, the health curriculum, part of the State-mandated Family Life program, required assistance and supplementation in the areas of peer mediation, refusal skills, self-esteem, sex education, and drug and alcohol abuse .Petitioner's areas of expertise. In fact, petitioner was simply reassigned to assist the health program instead of the PIP program. "Reassignment" is a far less onerous personnel action than is "transferring" a teaching staff member; nevertheless, there is an abundance of authority which grants local school boards the power to transfer staff members. "Transfer" refers to the right of a school board to assign a teacher to a position within the scope of his or her certification. *Carpenter v. Bd. of Ed. of Rumson*, 322 *N.J. Super.* 522, 529 (App. Div. 1999). A tenured teacher may be involuntarily transferred to another position within his or her certification where no loss of salary or other reduction in employment is suffered and the teacher is not singled out for the transfer on a prohibited basis. *Id*

Thus, the respondent contends that it properly reassigned petitioner pursuant to *N.J.S.A.* 18A:25-1 and *N.J.S.A.* 18A:11-1(d) which grant the Board the unfettered right to transfer teaching staff members between and among appropriate assignments.

3. Discussion and analysis

When the testimony is examined closely it appears clear that most of the essential facts in this matter are not disputed. The only area of dispute involves the specifics of petitioner's duties during her assignment to the Health Department's Family Life Program. While the specifics of her duties were unclear at the time of her original assignment to the Health Department's Family Life Program, the testimony of Dr. Travlos was that as a result of a grievance originally filed by petitioner in September 1998, (R-3 and R-8) it was made clear to petitioner that she was not expected to perform any teacher responsibilities. In addition, the testimony of Dr. Burkhardt was that he spoke to petitioner about her new role and specifically told her that she was not to be a teacher, and she was only to provide assistance in her areas of expertise.

Accordingly, I make the following **FINDINGS OF FACT:**

1. Petitioner Cota Possien-Kania was hired by the school district on August 8, 1987, as a school social worker.

2. Petitioner presently has one certificate, an educational services certificate, with two endorsements: school social worker and substance awareness coordinator.

3. Prior to the 1998-99 school year, petitioner was assigned to the school district's Pupil Improvement Program (PIP), a quasi-alternative education program taught by a certified teacher which served non-special education students who participate in the program for three days each week, one period per day; she was also assigned as a school social worker to conduct small group counseling sessions and counseling special education students, and she was the substance awareness coordinator. She never lectured in classes and she was not involved in working with students on academics in the PIP program.

4. According to Dr. Travlos the Family Life Program which was to be newly implemented in the 1998-99 school year had volatile components and the one person in the school district who was most competent in several of the areas of the new Program was petitioner.

5. For the 1998-99 academic year, petitioner was assigned duties as a substance abuse coordinator and also received a letter from Dr. Burkhardt dated September 3, 1998, removing her from the PIP Program and assigning her as an in-class support instructor to assist the Health Department's new Family Life Program (R-2).

6. Dr. Travlos testified that petitioner's job duty in the new program was to act as a resource for health teachers in her areas of competence and expertise, and that at no time was petitioner asked to teach, and that she was solely an in-class support person, although he did not discuss this directly with petitioner.

7. Dr. Burkhardt chose to place petitioner in the Health Department's new Family Life Program because it had a number of topics which would come up in her counseling sessions would be the subject of the program.

8. Petitioner's assignment as an in-class support instructor in the health program was for the purpose of supporting health teachers in those areas of the health curriculum where petitioner has expertise. This assignment was for the limited purpose of assisting health teachers in the health program until they became fully familiar with the subject areas within petitioner's area of expertise.

9. Petitioner went to see Dr. Burkhardt several times, and he explained to her that she was to support the three teachers. However, petitioner felt that her role in the classroom was not clear.

10. Petitioner testified that while she was assisting Mr. Ulrich in his ninth grade class Mr. Ulrich was out sick for a time, and she actually taught, tested and graded the class, although during Mr. Ulrich's absence, there was a certified substitute assigned to the class.

11. Petitioner did not lecture each day, but did so when covering areas in which she is proficient. She graded some papers and tests based on an answer key and she occasionally assigned homework

12. One of the teachers testified that petitioner's involvement was similar to what a nurse would do, that is, each would teach a certain area. Dr. Burkhardt advised another of the teachers that petitioner's role was to help teach, but gave him no further information.

13. Petitioner helped teach the classes by teaching in her areas of expertise.

14. Dr. Travlos testified that as a result of petitioner filing a grievance (R-8) he met with her and made clear to her that she was not expected to perform any teacher responsibilities (R-9); that she was never left alone, and whenever the regular teacher was absent, the

school district always hired a certified substitute. She was never expected to deliver the lessons, and in areas not within her expertise, her role was to be passive.

15. Dr. Burkhardt spoke to petitioner about this new role and specifically told her that she was not to be a teacher, and that it never occurred to him to place petitioner in class alone because she is not a certified teacher. She was only to provide assistance in her areas of expertise.

16. If petitioner had been needed for the 1999-2000 school year, the challenged assignment would have continued, but based on the determination that her assistance was no longer needed she has been removed from the assignment as in-class support and she will not be returned to the health program.

N.J.A.C. 6:29-4.2(g) provided that during the course of Family Life instruction, "[d]districts may use resource people to assist with their programs; that is, physicians, members of the clergy, attorneys, parents and guardians, school social workers, school psychologists, law enforcement personnel, and others as necessary." The clear meaning of *N.J.A.C.* 6:29-4.2(g) is to grant to the individual school districts the power to utilize a number of different people as resources to aid Family Life instruction, and it even names specific people including school social workers among those who are permitted to be utilized to enhance the Family Life Program.

Petitioner, who is a certified school social worker, was reassigned to the new Health Department Family Life Program in order to enhance the program by assisting teachers with her expertise in the social aspects of the program. I have found as a fact that a certified teacher was always present with petitioner in the classroom while she was assisting the students. Therefore, I **FIND** that respondent acted within its authority and utilized petitioner as a highly qualified resource person to assist and complement the Health Department Family Life Program.

It is acknowledged that the regulations clearly provide that school nurses may be utilized to provide teaching in areas related to health, but there is no such provision made with regard to substance awareness coordinators or school social workers. However, I **FIND** that petitioner's role was to was to act as a resource for health teachers in her areas of competence and expertise,

and that at no time was petitioner asked to teach, and that she was solely an in-class support person. I **FIND** that it was made clear to petitioner that she was not expected to perform any teacher responsibilities, she was not expected to deliver lessons, and in areas not within her expertise, her role was to be passive.

In addition, I **FIND** that the action of respondent assigning petitioner as an in-class support instructor is further supported by *N.J.S.A.* 18A:25-l which gives to boards of education broad power to reassign and transfer staff members, and *N.J.S.A.* 18A:11-l(d) which states that a school board shall:

> [p]erform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.

Based upon the foregoing, I **CONCLUDE** that respondent's assignment of petitioner as an in-class support instructor in the Health Department's Family Life Program for school year 1998-99 was valid and should be **AFFIRMED.**

DECISION AND ORDER

For the reasons stated above, it is hereby **ORDERED** that respondent's assignment of petitioner as an in-class support instructor in the School District's Health Department's Family Life Program for school year 1998-99 is valid and is hereby **AFFIRMED**, and petitioner'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.

April 20, 2001
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

4/23/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 25 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

mph

APPENDIX

LIST OF WITNESSES:

For petitioner:

Cota Possien-Kania

Tammy Del Rosario

Charles L. Ulrich

For respondent:

Arthur L. Travlos

Donald J. Burkhardt

LIST OF EXHIBITS:

For respondent:

R-1 Job Description for Student Assistance Counselor

R-2 Donald J. Burkhardt letter of September 3, 1998

R-3 Petitioner Level I Grievance, dated September 18, 1998

R-4A Instructional Observation Report of Petitioner, dated November 20, 1998

R-4B Addendum to November 20, 1998 Observation

R-4C Instructional Observation Report of Petitioner, dated March 22, 1999

R-4D Summary Evaluation Report of Petitioner, dated April 12, 1999

R-5 Job Description, School Social Worker

R-6 Job Description, Teacher

R-7 Board of Education Policy #3130 on Assignment and Transfer of Personnel

R-8 Level II Grievance

R-9 Response by Dr. Arthur Travlos to Level II Grievance, dated October 14, 1998

R-10 Response by Board of Education, dated December 2, 1998 to Level III Grievance

R-11A Instructional Observation Report Form

R-11B Instructional Observation Report in a Non-Instructional Setting Form

OAL DKT. NOS. EDU 8088-99 AND EDU 10342-98 (ON REMAND)
AGENCY DKT. NO. 471-10/98

COTA POSSIEN-KANIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN, MIDDLESEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto were considered by the Commissioner in reaching his decision.[1]

Upon careful and independent review of the record in this matter, which included a transcript of the hearing conducted on September 14, 2000, the Commissioner determines to affirm the Initial Decision, with modification. Like the Administrative Law Judge (ALJ), the Commissioner finds that the Board's design to apply petitioner's expertise within the classroom as a resource to the health teachers was not necessarily improper or violative of specific statute or code.[2] However, the Commissioner further concludes that the Board's failure to take sufficient steps *at the outset* to clearly define petitioner's role as a classroom resource person vis-

[1] Both the exceptions and reply essentially reiterate arguments that were presented in papers previously submitted to the OAL.

[2] The Board cites as authority for its action, *inter alia*, *Carpenito v. Bd. of Ed. of Rumson*, 322 *N.J. Super.* 522 (App. Div. 1999), which is erroneously identified as "*Carpenter*" in the Initial Decision at page 16.

à-vis the health teachers, *and* to provide petitioner and the teachers with necessary follow-up and supervision as they implemented what was apparently a unique model for curriculum delivery in the District, no doubt paved the way for misapprehensions and, as the testimony adduced herein substantiates, missteps in performance.

Here, the Commissioner notes that Ms. Del Rosario testified that she was informed that petitioner would be "sort of assisting [her in the] classroom" (Tr. at 49); that she and petitioner were initially "puzzled" about implementing the new arrangement (Tr. at 53); and that she viewed petitioner's participation in her classroom as similar to that of a school nurse (Tr. at 49, 55-56), notwithstanding that the school nurse is specifically authorized to teach "in areas related to health." (*N.J.A.C.* 6:11-11.7(a)) Mr. Ulrich testified that he was made aware of petitioner's participation in his classroom "[b]y word of mouth from Mrs. Kania or some of the other health teachers" (Tr. at 61); that he was not sure whether he was approached by Dr. Burkhardt or vice-versa about the reassignment; and, in any event, he was told petitioner would be in his ninth grade classroom "to help [him] teach," but he was given no further information. (*Ibid.*)

Dr. Burkhardt indicated that, in his initial discussion with petitioner, he "never went down a list" of what she could or could not do in the classroom (Tr. at 103); indeed, even the written notice of petitioner's reassignment from the District, dated September 3, 1998, was ambiguous, since she was told she would be used as an "in-class support *instructor.*"[3] (emphasis added) (Exhibit R-2) Moreover, Dr. Burkhardt acknowledged that, other than his initial meeting

[3] It was not until Dr. Burkhardt's memorandum dated September 18, 1998 that he clarified, "I meant for this to be generic. I am not assigning you to be an in-class support instructor for special education. Your position is to be a supporting role for the Health teacher in charge of the class. Your role is to assist the teacher and provide technical expertise from your vast background as a Social Worker and [Substance Awareness Coordinator] counselor." (Exhibit R-3)

with petitioner and the health teachers, he had no subsequent meetings to evaluate petitioner's role, although he did meet with petitioner at the end of each marking period. (Tr. at 107) Recognizing that the Board's purpose in reassigning petitioner was to ensure successful delivery of a new curriculum, it should have taken greater care to avoid confusion, unnecessary duplication and the possibly inappropriate performance of tasks within the classroom, the very setting which was meant to be enhanced by this reassignment.

Accordingly, the Initial Decision is affirmed, with modification, for the reasons expressed by the ALJ.[4] The Petition of Appeal is dismissed.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 6|7|01

Date of Mailing: 6|7|01

[4] To the extent the Initial Decision also employs the term "instructor" when referring to petitioner's position as a resource person within the classroom, the Commissioner does not adopt it as an appropriate designation.

[5] 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.

183-01

#183-01

OAL DKT. NO. EDU. 2963-01
AGENCY DKT. NO. 159-6/01

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
DEREK COPELAND AND COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,	:	DECISION
RESPONDENTS.	:	
	:	

June 11, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DENYING APPLICATION
FOR EMERGENT RELIEF
AND DISMISSING THE CASE
FOR LACK OF JURISDICTION
OAL DKT. NO. EDU 2963-01
AGENCY DKT. NO. 159-6/01

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

Petitioner,

v.

DEREK COPELAND, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Respondents.

Thomas M. Toman, Jr., Esq., for petitioner (Murray, Murray and Corrigan, attorneys)

Stephen P. Weissman, Esq., and **William G. Schimmel**, Esq., for respondents (Weissman & Mintz, attorneys)

Record Closed: June 11, 2001 Decided: June 11, 2001

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

This matter commenced on June 6, 2001 when the Board of Education of the City of Camden (hereinafter petitioner) filed a verified petition of appeal with the Commissioner of Education requesting a determination whether respondent Derek Copeland, and approximately fourteen other custodians similarly situated, all formerly employed by petitioner "are entitled to tenure or have any other entitlement to a hearing to challenge the basis for their non-renewal." Also on June 6, 2001, petitioner filed an application for temporary emergent relief enjoining arbitration scheduled for June 12, 2001 between the respondents and the petitioner before Arbitrator Joel Weisblatt. Petitioner filed a letter memorandum dated June 6, 2001 and a certification of counsel Karen A. Murray in support of the motion for temporary emergent relief.*

By letter dated June 7, 2001, counsel for respondents advised the Commissioner that it was their position the Commissioner did not have jurisdiction over the matter and requested that the Commissioner refrain from transmitting the case to the Office of Administrative Law until respondents could file their responsive brief the next day. By letter also dated June 7, 2001, the Commissioner's office advised counsel for respondents that the file would be transmitted to the OAL where the Commissioner's jurisdiction over this matter would be determined as a threshold issue. By letter dated June 7, 2001, counsel for petitioner replied to respondents jurisdictional assertions, and on June 7, 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.

On June 8, 2001 respondents filed a brief in opposition to petitioner's motion to restrain the arbitration, together with the certification of William G. Schimmel, Esq. An original and two copies of a corrected brief in opposition to petitioner's motion to restrain arbitration was promptly filed thereafter.

Oral argument on the motion for emergent relief took place as scheduled on June 11, 2001 at the Trenton office of the Office of Adminsitrative Law.

---

* Since the first date scheduled for the commencement of this arbitration before Arbitrator Weisblatt was in March 2001, any "emergency" with respect to the within matter was one strictly created by petitioner.

For all the reasons set forth in respondents' well written and reasoned brief, petitioner's application for a temporary restraining order prohibiting the arbitration from going forward on June 12, 2001 is hereby **DENIED**. At the oral argument in this matter, both counsel agreed that this case is not about whether the custodians would have a right to a hearing on the reasons for non-renewal/termination before the Commissioner of Education. They also agreed that this case is not about whether these custodians have tenure under *N.J.S.A.* 18A:17-3. Therefore all of respondents' rights with respect to his (their) employment by petitioner are set forth in the written contract of employment which incorporates the agreement between the Camden Board of Education and the Communications Workers of America, AFL-CIO, Local 1079, Custodial and Maintenance Employees. *N.J.S.A.* 18A:6-9 provides that "the Commissioner shall have jurisdiction to hear and determine all controversies and disputes *arising under the school laws* . . ." A dispute between parties to a contract who simply happen to be a school board and an employee does not present a controversy over which the Commissioner has jurisdiction. *Smith v. Willingboro Township, Burlington County*, 97 *N.J.A.R.* 2d (EDU) 205, 206-207. Such matters do not require the educational expertise of the Commissioner and are properly brought in a court of competent jurisdiction (or with respect to the threshold issue of negotiability, before the Public Employees Relations Commission. See *Ridgefield Park Ed. Assn. v. Ridgefield Park Bd. of Ed.*, 78 *N.J.* 144 (1978) and respondents' brief pages 1 through 10.)

Furthermore, since none of the custodians has claimed any tenure rights under *N.J.S.A.* 18A:17-3 and none has requested a hearing before the Commissioner of Education concerning the reasons for a non-renewal/termination, petitioner's request for a determination on those issues constitutes a petition for a declaratory ruling pursuant to *N.J.A.C.* 6A:3-2.1. The procedure for obtaining such a declaratory ruling has not been followed, thereby depriving the Commissioner of an opportunity to make the determination whether to entertain such petition. Since such determination is within the sole discretion of the Commissioner and since he has not granted such a request because one has not been made, the entire petition of appeal herein is hereby **DISMISSED WITHOUT PREJUDICE**.

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

OAL DKT. NO. EDU 2963-01

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 11, 2001
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

June 11, 2001
DATE

Deborah Antonetti mh
DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

/cad

OAL DKT. NO. EDU. 2963-01
AGENCY DKT. NO. 159-6/01

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
DEREK COPELAND AND COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,	:	DECISION
RESPONDENTS.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.

Upon such review, the Assistant Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34, affirms the Initial Decision, denying emergent relief and dismissing this matter for lack of Commissioner of Education jurisdiction, for the reasons well stated therein.

Accordingly, the recommended decision of the OAL is adopted and the within matter is hereby dismissed.

IT IS SO ORDERED.*

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: JUN 11 2001
Date of Mailing: JUN 11 2001

* 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.

#184-01

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

June 11, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8056-00

AGENCY DKT. NO. 330-9/00

IN THE MATTER OF THE TENURE HEARING OF GERALD PETROVEY, SCHOOL DISTRICT OF THE TOWNSHIP OF WOODBRIDGE

Gordon J. Golum, Esq., for petitioner (Wilentz, Goldman & Spitzer, attorneys)

G. Robert Wills, Esq., for respondent (Wills, O'Neill & Mellk, attorneys)

Record Closed: April 23, 2001 Decided: April 23, 2001

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

STATEMENT OF THE CASE

The Woodbridge Township Board of Education brought charges of unbecoming conduct against Gerald Petrovey, a tenured custodian.

This matter was transmitted to the Office of Administrative Law on October 10, 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.

Following two prehearing conferences, the parties reached amicable resolution of the matter.

The parties have agreed to settle this matter and have prepared the attached agreement 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 charges do not implicate moral turpitude.

3. The sound public policy of New Jersey favors settlements.

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

I **CONCLUDE** that this settlement 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 further note that the parties have agreed to waive the rights to file exceptions and cross-exceptions.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 2 3 2001
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

4/25/01
DATE

Debbie Antanaitis/gp
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 2 6 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jh

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (hereinafter referred to as "***AGREEMENT***") made this 15th day of March, 2001 between ***THE WOODBRIDGE TOWNSHIP BOARD OF EDUCATION*** (hereinafter referred to as "***BOARD***"), ***GERALD PETROVEY*** (hereinafter referred to as "***EMPLOYEE***") and ***THE WOODBRIDGE TOWNSHIP EDUCATION ASSOCIATION*** (hereinafter referred to as "***ASSOCIATION***");

WHEREAS, in September 2000, the BOARD certified tenure dismissal charges against EMPLOYEE to the Commissioner of Education ("***COMMISSIONER***") pursuant to N.J.S.A. 18A:6-11 (the "***CHARGES***") (Agency Docket No. 330-9/00; OAL Docket No. EDU 08056-00) and;

Whereas, the ***COMMISSIONER*** transmitted the ***CHARGES*** to the Office of Administrative Law for a hearing; and

Whereas, the ***EMPLOYEE*** has proposed a settlement of the ***CHARGES***; and

Whereas, the ***BOARD*** has determined that it is in the best interest of the ***BOARD*** to withdraw the ***CHARGES*** and enter into this ***AGREEMENT*** with ***EMPLOYEE***; and

Whereas, EMPLOYEE agrees to enter into this ***AGREEMENT*** without admitting any of the ***CHARGES***.

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

1. The parties stipulate to the dismissal of the tenure dismissal proceeding brought by the ***BOARD*** against ***EMPLOYEE*** (Agency Docket No. 330-9/00; OAL Docket

No. EDU 08056-00) upon the execution of this ***AGREEMENT*** by both parties and subject to the approval of this ***AGREEMENT*** by the Administrative Law Judge and the ***COMMISSIONER***.

2. ***EMPLOYEE*** hereby resigns his employment with the ***BOARD*** effective May 19, 2001 or the date that ***EMPLOYEE*** gains employment in a position that provides salary and benefits equal to or greater than the amount of the position that is hereby resigned, whichever is earlier. The salary and benefits derived from any employment secured prior to June 30, 2001 will be used to mitigate salary and benefit payments payable through June 30, 2001. ***EMPLOYEE*** shall notify the ***BOARD*** when employment is secured prior to June 30, 2001.

3. ***EMPLOYEE*** hereby surrenders any tenure rights that he has with the ***BOARD*** upon execution of this ***AGREEMENT***. ***EMPLOYEE*** shall simultaneously submit his letter of resignation in the form attached hereto as Exhibit A upon execution of this ***AGREEMENT***.

4. In consideration of the settlement, the ***BOARD*** shall pay ***EMPLOYEE*** his salary through May 19, 2001, and his 29 total accrued vacation days, personal days and birthday day, which will be paid out in normal salary payments from May 19, 2001 through June 30, 2001 or until employment is secured, as explained in Paragraph 2 hereof, whichever is earlier. Payment of salary shall be less the standard payroll deductions made for ***EMPLOYEE*** (e.g. taxes, social security, pension, etc.) and based upon the payroll schedule utilized by the ***BOARD***.

5. ***EMPLOYEE*** shall no longer be entitled to any payments or benefits/emoluments from the ***BOARD*** as of June 30, 2001 or until employment is secured, as explained in Paragraph 2 hereof, whichever is earlier, subject to the U.S. Consolidated Omnibus Budget Reconciliation Act (COBRA).

6. In consideration of the foregoing, ***EMPLOYEE*** shall simultaneously execute with the execution of this ***AGREEMENT*** the form of General Release attached hereto as Exhibit B.

7. The ***BOARD*** agrees that any information provided to a potential employer of ***EMPLOYEE*** would be limited to such information about his employment that is designated as "public" information by N.J. Executive Order No. 11 (November 15, 1974; Gov. Brendan Byrne) and other laws, which includes the basic facts of his employment tenure in the Woodbridge Township School District.

6. This ***AGREEMENT*** shall become part of the ***EMPLOYEE'S*** employment record and maintained as a part of his personnel file.

7. The ***BOARD***, ***ASSOCIATION***, and ***EMPLOYEE*** agree that the within ***AGREEMENT*** does not violate the terms and conditions of their present Collective Bargaining Agreement and has been freely and voluntarily entered into as an alternative to formal disciplinary proceedings pursuant to the Collective Bargaining Agreement and the laws of the State of New Jersey.

8. The ***EMPLOYEE*** expressly acknowledges that he has had the benefit of representation through the ***ASSOCIATION*** and that he fully understands the terms and provisions of the within ***AGREEMENT***, has had adequate opportunity to deliberate concerning its contents and has voluntarily executed this ***AGREEMENT***.

WOODBRIDGE TOWNSHIP BOARD OF EDUCATION

Eileen Kaczmarek, President

Vincent S. Smith, Secretary

Gerald Petrovey

GERALD PETROVEY, Employee

WOODBRIDGE TOWNSHIP EDUCATION ASSN.

Toyce Collins , President

April 17, 2001

#1947099 (109304.036)

3.R

Exhibit A

Woodbridge Township Board of Education
School Street
P.O. Box 428
Woodbridge, New Jersey 07095

Dear Board of Education:

Please accept my resignation as an employee of the Woodbridge Township Board of Education effective (a) May 19, 2001 or (b) the date I attain employment in a position that provides salary and benefits equal to or greater than the amount of the position that is hereby resigned, whichever is earlier. I understand this resignation is irrevocable.

Very truly yours,

Gerald Petrovey

Gerald Petrovey

Dated: 3/27/01

OAL DKT. NO. EDU 8056-00
AGENCY DKT. NO. 330-9/00

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

The record, Settlement Agreement and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 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.

In so holding, however, the Commissioner observes that the settlement included with the Initial Decision sets forth terms that were to be effectuated prior to approval of the settlement terms by the Commissioner pursuant to *N.J.A.C.* 1:1-19.1. The Administrative Law Judge and the parties are cautioned against effectuating terms of a settlement agreement in controverted matters that have been duly transmitted to the OAL 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: JUN 11 2001

Date of Mailing: JUN 12 2001

#185-01

BOARD OF EDUCATION OF THE BOROUGH OF CARLSTADT, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

June 11, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1577-00
AGENCY DKT. NO. 391-12/99

BOARD OF EDUCATION OF THE BOROUGH OF CARLDSTAT,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD,
Respondent.

Mark T. Janeczko, Esq., for petitioner
(Feintuch, Porwich & Feintuch, attorneys)

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

Record Closed: April 23, 2001 Decided: April 23, 2001

BEFORE **KEN R. SPRINGER**, ALJ:

This matter was transmitted to the Office of Administrative Law on February 14, 2000 for a hearing pursuant to *N.J.S.A.* 52:14B-1 to –13 and *N.J.S.A.* 52:14F-1 to –15.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

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

1. The parties have voluntarily agreed to the settlement, as evidenced by their signatures or 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 23, 2001
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

4-27-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY - 1 2001
DATE

OFFICE OF ADMINISTRATIVE LAW

al

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

APR 23 1 48 PM '01

MARK T. JANECZKO
ATTORNEY AT LAW
109 HACKENSACK STREET
WOOD-RIDGE, NEW JERSEY 07075
(201)939-8800
ATTORNEY FOR PETITIONER,
CARLSTADT BOARD OF EDUCATION

CARLSTADT BOARD OF EDUCATION,	**BEFORE THE COMMISSIONER OF EDUCATION OF N.J.**
Petitioner	
vs.	**AGENCY REF. NO. 391-12/99**
	EDUOS C1577-00N
RUTHERFORD BOARD OF EDUCATION,	
Respondent	**STIPULATION OF SETTLEMENT AND DISMISSAL WITH PREJUDICE**

The matter in difference in the above entitled action having been amicably adjusted and settled by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed with prejudice, with no costs assessed to either party, pursuant to the following terms:

1. The Rutherford Board of Education shall receive from the Carlstadt Board of Education the sum of $6,000.00, as payment in full for any and all tuition charges,

transportation costs, and all other costs associated with H.B. and N.B. attending school in the district of Rutherford, which are the subject matter of *Carlstadt Board of Education v. Rutherford Board of Education*, OAL Docket No. EDUOS C1577-00N, Agency Ref. No. 391-12/99.

2. The Carlstadt Board of Education agrees to dismiss with prejudice its petition filed with the Office of Administrative Law related to the matter of *Carlstadt Board of Education v. Rutherford Board of Education,* OAL Docket No. EDUOS C1577-00N, Agency Ref. No. 391-12/99, and against the Rutherford Board of Education.

3. The Rutherford Board of Education agrees to dismiss with prejudice any and all counterclaims, counter petitions, or other pleadings filed or otherwise related to the matter of *Carlstadt Board of Education v. Rutherford Board of Education,* OAL Docket No. EDUOS C1577-00N, Agency Ref. No. 391-12/99, against the Carlstadt Board of Education.

4. The parties hereby release, waive and forever discharge any and all past, present or future claims that they may have against each other which arise from this matter or which are in any way related to the calculation of, demand for, and payment of tuition, transportation costs or other costs by the Rutherford Board of Education for H.B. and N.B. attending school in the Rutherford school district.

5. This agreement contains the entire agreement and understanding between the parties and constitutes a full and final agreement in any and all issues relating to this matter.

6. This agreement shall be governed by the laws of the State of New Jersey.

7. If, during the term of this agreement, a specific clause of the agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the

agreement shall not be affected by such a ruling and shall remain in full force and effect.

8. The parties shall be bound by the terms and conditions of this agreement finding it to be in the best interests of the public, consistent with public policy, fair and equitable under all circumstances surrounding this matter.

9. The terms and conditions of this agreement are subject to the ratification and approval by the Carlstadt Board of Education and the Rutherford Board of Education.

10. The parties have entered into this agreement freely and voluntarily with a full understanding of their rights and the contents of this agreement.

11. 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.

12. Both parties acknowledge that their agreement to settle this matter is subject to the approval of the Office of Administrative Law and the Commissioner of Education. If such approvals are not given, this agreement and all stipulations, releases and acknowledgments shall be rendered null and void and the parties shall be returned to the status quo existing prior to this agreement with said litigation being reinstated.

13. It is agreed between the parties that the payment referred to herein shall be made no later than the 30th day following receipt of notification that this agreement has been approved by the Commissioner of Education.

14. Nothing in this agreement shall be deemed to constitute a past practice or precedent as to the rights or liabilities of the parties in any future dealings between the parties.

15. The parties acknowledge that the execution of this agreement does not constitute an admission by either party of any: (a) violation of any statute, law or stipulation; (b) breach of contract, actual or implied; or (c) admission of any tort.

CARLSTADT BOARD OF EDUCATION

By: Elaine Stevens

Elaine Stevens, President

Dated: 3/12/01

RUTHERFORD BOARD OF EDUCATION

By: Lisa B. Willis

President

Dated: 4/2/01

OAL DKT. NO. EDU 1577-00
AGENCY DKT. NO. 391-12/99

BOARD OF EDUCATION OF THE BOROUGH OF CARLSTADT, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Stipulation of Settlement and Dismissal With Prejudice, 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: JUN 11 2001

Date of Mailing: JUN 12 2001

186-01

IN THE MATTTER OF THE SUSPENSION :

OF THE TEACHING CERTIFICATE OF :

VINCENT MONTALBANO, SCHOOL DISTRICT:

OF RIDGEFIELD PARK TOWNSHIP, :

BERGEN COUNTY. :

_____:

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Board sought the suspension of respondent's teaching certificate for one year because respondent failed to resign from his position in accordance with statute. Respondent sought dismissal of the petition.

The ALJ determined that respondent failed to give proper notice of his resignation and that a one year suspension of his teaching certificate was appropriate. The ALJ found that respondent failed to present any credible mitigating factors, and noted that respondent provided less than the required 60 days notice, resigned solely because he had secured alternative employment as a police officer and took minimal steps to ensure a smooth transition for his class.

The Commissioner affirmed the ALJ's decision, holding that respondent departed on short notice knowing that a suitable replacement had not been found, and that his sudden departure disrupted his class. Because respondent presented no compelling argument or mitigating factors warranting a shorter period of suspension, the Commissioner suspended respondent's certification for a period of one year from the date of his decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
MOTION FOR
SUMMARY JUDGMENT
OAL DKT. NO. EDU 3588-00
AGENCY DKT. NO. 87-2/00

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF VINCENT MONTALBANO, SCHOOL DISTRICT OF RIDGEFIELD, BERGEN COUNTY

Susanna L. Mould, Esq., for petitioner, Ridgefield Park Board of Education (Fogarty and Hara, attorneys)

Harold N. Springstead, Esq., for respondent (Springstead & Maurice, attorneys)

RECORD CLOSED: February 8, 2000 **DECIDED**: April 24, 2001

BEFORE **IRENE JONES**, ALJ:

On February 23, 2000, petitioner, the Ridgefield Park Board of Education (Board or Petitioner) filed a verified petition with the Commissioner of the State Board of Education seeking an Order that the respondent, Vincent Montalbano Show Cause as to why his teaching certificate should not be suspended for one year for violating *N.J.S.A.* 18A:26-10. On March 14, 2000, the respondent filed a timely answer asserting affirmative defenses and requesting a dismissal of the petition.

On April 14, 2000, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13. Plenary hearings were scheduled for March 14 and 15, 2001. On January 16, 2001, the Board filed a motion for summary decision. On January 31, 2001 the respondent filed a cross motion seeking dismissal of the matter. A reply was filed on February 8, 2001 at which time the record closed. The time for the issuance of the Initial Decision was extended by Order of the Commissioner until May 9, 2001.

FACTS

I **FIND** the following **FACTS** to be undisputed, thus, they are adopted as the **FACTS** herein.

1. Respondent, Vincent Montalbano ("Montalbano") holds a New Jersey teaching certificate with an endorsement of "Teacher of the Handicapped."

2. Montalbano was hired by the Ridgefield Park Board of Education ("Board") as a Special Education Teacher on June 28, 1995, commencing on September 1, 1995, at Ridgefield Park Junior Senior High School.

3. After submitting numerous applications to the Washington Township Police Department in Bergen County, Montalbano was offered a position with that department to begin in February of 2000.

4. During the pendency of his job application and offer of employment ,Montalbano was still under a teaching contract with tenured status with the Ridgefield Park Board of Education.

5. On January 19, 2000, Montalbano submitted a written resignation to the Board, effective on January 31, 2000, thus giving the Board twelve (12) days notice.

6. The Board met that evening and resolved to accept Montalbano's resignation, effective March 17, 2000.

7. Montalbano did not report to work as a teacher after January 31, 2000.

8. Although the Board placed ads for Montalbano's position, it was not able to replace him, thus his class assignments were covered with existing personnel.

DISCUSSION AND ANALYSIS

The Board's motion for summary decision seeks forfeiture of respondent's teaching certificates for a period of one year. The respondent agrees that the matter should be submitted for summary decision, but that no suspension should be imposed, and that the petition be dismissed.

Pursuant to the Uniform Administrative Procedure Rules, a party may move for summary decision, and it 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 no 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.S.A.* 1:1-12/5(b).]

In administrative proceedings, as in the courts, it is "the movant's burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact." *Judson v. Peoples Bank and Trust Company of Westfield,* 17 *N.J.* 67, 74 (1954). Thus, "[a]ll references of doubt are drawn against the movant in favor of the opponent of the motion. The papers supporting the motion are closely scrutinized and the opposing papers indulgently treated." *Id.* at 75.

The New Jersey Supreme Court in Brill v. Guardian Life Insurance Co. 142 *N.J.* 520 (1995), provided further guidance for summary judgment analysis, applying the

summary judgment standard employed by the federal courts. Under Brill, once the movant has presented competent evidence tending to show the absence of any genuine issue for trial, the nonmovant must do more than simply create some doubts as to the material facts. Moreover, the nonmoving party cannot rely on disputed issues of fact that are insubstantial. Rather, *Brill* requires the nonmovant to raise a factual issue substantial enough to sustain a reasonable conclusion in the nonmovant's favor if a hearing were held. If the evidence, along with reasonable inferences, could sustain a judgment in favor of the nonmovant, the motion must be denied.

A determination of whether there exists a genuine issue of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *Id.* at 540.

The parties agree to the underlying facts. Further, there is agreement that no genuine issue of material fact exists. Consequently, I **FIND** the matter is ripe for summary decision.

N.J.S.A. 18A:26-10 governs the suspension of teaching certificates for wrongful cessation of the performance of duties. It provides that:

> Any teaching staff member employed by a board of education, who shall, without the consent of the Board, cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner *may*, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.
>
> [*Ibid.*]

N.J. S.A. 18A: 28-8 establishes the procedure by which a teaching staff member must provide notice of resignation to a board of education. Additionally, it authorizes

the Commissioner to suspend a teacher's certificates if that teacher fails to comply, and provides:

> Any teaching staff member, under tenure of service, desiring to relinquish his position shall give the employing board of education at least 60 days written notice of his intention, unless the board shall approve of a release on shorter notice and if he fails to give such notice he shall be deemed guilty of unprofessional conduct and the commissioner may suspend his certificate for not more than one year.
>
> [*Ibid.*]

N.J.A.C. 6:11-3.8 also authorizes the Commissioner to suspend teaching certificates if a teacher is guilty of unprofessional conduct. A teacher may be found guilty of unprofessional conduct if a teacher fails to complete his or her contractual period of employment without the consent of the board. The regulation states that:

> (a) A teacher employed by a district board of education who shall, without the consent of the district board of education, leave the school before the expiration of the term of his or her employment, shall be deemed guilty of unprofessional conduct.
>
> (b) The Commissioner of Education may, upon receiving notice of the fact, suspend the certificate for a period not exceeding one year.
>
> [*Ibid.*]

Clearly, as stated, neither the statute or the regulations impose an automatic one year suspension period. Rather, the Commissioner's authority to suspend a license has been deemed discretionary. Thus, it has been held that "By using the term 'may' as opposed to 'shall' in this statute [*N.J.S.A.* 18A:26-10], it appears the Legislature did not intend the suspension of a teacher's certificate to be automatic, even if the board's consent is not obtained prior to the cessation of performance of duties." *Bd. of Educ. Of Black Horse Pike Regional School District v. Mooney*, 1984 *S.L.D.* 810, 814, adopted *Commissioner of Education*, 1984 *S.L.D.* 821. Consequently, the

Commissioner must evaluate the facts and circumstances specific to the case to determine if the teacher wrongfully ceased to perform his or her duties. *Ibid.*

In the *Mooney* case, the respondent provided notice on May 3 that she would be resigning her teaching position effective May 27. *Id.* at 811. She needed to resign because her husband had received a promotion that required relocation to another state. After the school board accepted the resignation, the respondent sought to resign a week earlier than anticipated. *Id.* at 812. The board would not accept the earlier resignation date and informed respondent that if she resigned on that date her teaching certificate would be suspended. The respondent nevertheless resigned on the earlier date. *Ibid.*

The board initiated suspension proceedings, and it was found that suspension was improper. Specifically, it was concluded that the central purpose of *N.J.S.A.* 18A:26-10 is:

> Not to prevent a teaching staff member from leaving his or her teaching position; rather, it is to provide the local board of education with a reasonable opportunity to obtain a replacement and to acquaint the replacement with the background of the students and the duties and responsibilities of the particular teaching position.

The ALJ considered the following factors to be persuasive: 1) the respondent had a compelling need for an early release and her action was not precipitated by rashness or dissent; 2) the respondent gave immediate notice to the board in writing and assisted in the development of a program through the end of the school year; 3) the respondent met with her successor in order to establish the program, including lesson plans, and she left final grades for her classes; 4) the board had the ability to replace the respondent as of the requested release date and it did in fact replace respondent with the same teacher who would have replaced her whether she left on May 20 or May 27, 1983; 5) the respondent did not seek release from her employment in order to obtain employment elsewhere in New Jersey; and 6) the respondent's

annual performance report for the year showed an above average record at the time the relationship with the school board terminated.

Here, unlike in Mooney, no similar mitigating factors have been presented. Notably, the respondent does not dispute that the notice he gave was insufficient and that he ceased teaching contrary to the 60 day requirement contained in *N.J.S.A.* 18A:26-10. Second, the respondent's need for early release of the contract was based solely upon his securing alternative employment as a police officer in the State of New Jersey. Finally, the actions taken by the respondent to insure that his class made a smooth transition were, at best, minimal and consisted only of the following:

> I tried to make a schedule for teachers to cover classes; I discussed the classroom duties and students with those teachers; after I left, I completed the second marking period grades; and sent notice of openings to surrounding colleges including William Paterson College, Kean University and Montclair University. (Exhibit D)

In *I/M/O the Suspension of the Teaching Certificate of Robert J. Burgess, School District of the Township of Clinton, Hunterdon County,* 1983 *S.L.D.* 183, adopted *Commissioner of Education,* 1983 *S.L.D.* 195, the respondent teacher therein provided notice on January 29, 1982 that he would resign effective February 15, 1982. *Id.* at 184. He needed to resign in order to accept a lucrative non-teaching position. The board accepted his resignation and noted that it would "do all in their power to try and replace him by February 15," but that he would not be released earlier than 60 days unless the Board procured a suitable replacement teacher. *Id.* at 190.

However, the board failed to find a replacement teacher until March 8 because of the absence of the superintendent between February 8th and 16th Consequently, the Board did not act until March 8, the day of the next scheduled meeting. *Id.* at 187.

It was concluded that suspension was not warranted because the board had failed to fulfill its promise to accelerate the replacement process and the teacher therein had taken steps to assist his replacement. It was reasoned "that neither the Board nor

its chief school administrator in fact carried out the promise made to Burgess on February 1, that all in their power would be done to replace him by February 15th . *Id.* at 191.

In the present case, there was no promise made to the respondent on January 19, 2000. The Board met that evening and resolved to accept his resignation, effective March 17, 2000. It was made clear in a memorandum dated January 20, 2000, that the respondent would not be let out of his contract until March 17, 2000. Nevertheless, respondent notified the Superintendent of Schools that he intended to cease teaching the following week, and did not return to work after January 31, 2000.

In *East Amwell Twp. Bd. of Ed. v. Acken*, 1986 *S.L.D.* 2803, adopted *Commissioner of Education*, 1986 *S.L.D.* 2803, aff'd *St. Bd.,* 1987 *S.L.D.* 2513, the respondent teacher's husband was transferred to Florida, and she remained employed by the board during the school year after his transfer, although she spent her summers in Florida. The respondent provided 11 days written notice that she intended to resign her position as a tenured teacher. *Id.* at 2809. It was concluded that the respondent was guilty of unprofessional conduct for failure to provide the statutorily mandated notice. *Id.* at 2814. Cf: In *I/M/O the Suspension of the Teaching Certificate of Falco*, EDU 9283-98, Final Decision (May 24, 1999) http://lawlibrary.rutgers.edu/oal/search.html, wherein unprofessional conduct charges were sustained for failure to give timely notice notwithstanding a claim of emotional stress. *Id.* at 20. The Commissioner found this contention without merit, and held that the circumstances did not justify Falco not fulfilling the terms of his employment with the board, by not giving the 60 days requisite notice. *Ibid.*

However, *I/M/O the Suspension of the Teaching Certificate of Rogers*, 1989 *S.L.D.* 1962, adopted *Commissioner of Education*, 1989 *S.L.D.* 1968, a nontenured elementary teacher of the handicapped resigned without giving the requisite statutory notice in order to take a position working with severely handicapped children. The ALJ considered three factors: 1) that the board was able to find a replacement within a week 2) that respondent's erroneous belief that he could back out of the contract was

credible; and, most importantly, 3) the respondent's motivation. *Id.* at 1965-1966. The ALJ found that not fulfilling the contract with the Board by taking the position working with severely handicapped children was not to "feather his own nest, but rather from honest and more noble motivations." *Ibid.* Even under these facts, however, the ALJ concluded that it was appropriate to suspend Roger's certificate for three months. *Ibid.*

Here, the respondent has failed to advance any mitigating factors that would compel the conclusion that a suspension for less than one year is appropriate. The Board placed ads to fill the respondent's position, but was unable to find a suitable replacement requiring the petitioner to cover respondent's classes with other staff members. The respondent was well aware of the statutory notice requirement as he does not dispute that the notice he gave was insufficient, and that he ceased his employment contrary to the 60 day requirement. Finally, I conclude that the respondent left his position to "feather his own nest." While it was a life long dream of the respondent to become a police officer, I am persuaded that the respondent could have waited until another position became available at the police academy, which would have allowed him to give adequate notice to the Board.

I therefore **FIND** and **CONCLUDE** that respondent failed to give proper notice of resignation pursuant to *N.J.S.A.* 18A:28-8 and therefore the petitioner has demonstrated that the respondent engaged in unprofessional conduct and that his teaching license should be and is hereby suspended for a period of one year pursuant to *N.J.S.A.* 18A::26-10 and *N.J.A.C.* 6:11-3.8.

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

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

4/24/01
DATE

Irene Jones
IRENE JONES, ALJ

Receipt Acknowledged:

4-27-01
DATE

Deborah A. Contantino /es
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY - 1 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sej

OAL DKT. NO. 3588-00
AGENCY DKT. NO. 87-2/00

IN THE MATTTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	COMMISSIONER OF EDUCATION
VINCENT MONTALBANO, SCHOOL DISTRICT:		DECISION
OF RIDGEFIELD PARK TOWNSHIP,	:	
BERGEN 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 excepts to the Administrative Law Judge's (ALJ) conclusion that he was guilty of misconduct and failed to advance any factors which would mitigate against suspension of his certificate for one year. Respondent notes in this regard that:

> [T]he ALJ made no mention of [his] outstanding record during his employment with the Board. In his letter to the Board, he listed 27 accomplishments of which he was proud in his service to the District. The Board was asked in interrogatories if there were any errors in the 27 separate accomplishments and to describe those errors. The Board disagreed with his statement that he used only two personal days. He also claimed that he never used "all four sick days in one year." The Board disagreed since staff receive ten days per year ***. Board records show that he used only two sick days during his employ. The Board did not take issue with respondent's statement that he "always had excellent evaluations" nor the 25 other achievements including that he was always a positive influence on all the students and gave them the best education possible. (Respondent's Exceptions at 4)

Thus, respondent reasons that the within matter is analogous to *Mooney, supra.,* wherein the Commissioner considered respondent's above average record of performance for the year and declined to assess the departing teacher with a penalty.

Similarly, respondent maintains that this matter is akin to *Burgess, supra*, wherein the Board accepted the teacher's resignation, noting that it would try to find a replacement, but would not release him earlier than 60 days unless it found one. There, the Commissioner found that because the Board had failed to keep its promise to accelerate the replacement process, suspension was not warranted. By comparison, respondent notes that Superintendent Benfatti, when urging that he reconsider his decision to leave, also told him that he would be released earlier than March 17, 2000 if a replacement was found. Thus, respondent argues that the ALJ's finding that "no promise was made to the respondent and that it was clear that he would not be let out of his contract until March 17, 2000" was erroneous. (*Id.* at 5)

Finally, respondent challenges the ALJ's finding that he left the Board's employ "to feather his own nest." (*Id.* at 6) Instead, respondent advances, as in *Rogers, supra*, his leaving to become a police officer was a "noble motivation." (*Ibid.*) Moreover, respondent notes that the ALJ's finding that he "could have waited until another position became available at the policy academy," (Initial Decision at 9) is simply incorrect, based on the record. "Having an opening in the police academy has nothing to do with being appointed to the police department," respondent contends. (Respondent's Exceptions at 6) Thus, respondent urges that the Commissioner reject the findings and conclusions of the ALJ and dismiss the within suspension proceedings. In the alternative, respondent asserts that a penalty far less than one year is warranted.

In response, the Board underscores that although respondent appears to be arguing the opposite, the case law supports the conclusion that a one-year suspension is the general rule when teachers fail to provide local boards with the statutory notice of intent to leave their positions. (Board's Reply at 1) Thus, the cases which respondent cites are not only exceptions to the general rule, but are distinguishable from the instant matter, according to the Board.

Specifically, the Board notes that, contrary to the facts in *Mooney, supra,* respondent herein was not compelled to leave his teaching position when he did. Rather, he could have waited for the next opportunity for a police officer's position in Washington Township or another town. (*Id.* at 2) Respondent, having resigned when he did, the Board argues, left the District in a difficult position. "It is exactly for this type of motivation that *N.J.S.A.* 18A:26-10 was drafted." (*Ibid.*) Additionally, contrary to the situation in *Mooney*, respondent was never told that his early departure would be acceptable. Neither did respondent take extraordinary measures, as the ALJ noted, to ease the transition for those left to cover his classes. Thus, the Board reasons that respondent's good record of performance in the District is without significance where the other *Mooney* factors are not present, since "[t]he ultimate effect that respondent's actions had on the district are in no way lessened by respondent's past record." (*Ibid.*)

Likewise, the Board argues that *Burgess, supra*, is distinguishable from the instant matter in several key aspects. First, the *Burgess* board actually resolved to let Burgess out of his contract if a replacement was found. Additionally, there was an available replacement, but the board, for reasons unacceptable to the Commissioner, failed to promptly act to appoint her. Finally, the teacher in *Burgess* took extraordinary measures to ease the transition by preparing lesson plans, reviewing the plans with his principal and other sixth grade teachers, leaving

personal items for use by the replacement teacher and offering to meet with that teacher on his own time. (*Ibid.*) By contrast, the Board herein did not resolve to let respondent out of his contract if and when a replacement was found, no replacement was available before respondent left the District and respondent took no such extraordinary measures. (*Id.* at 3)

Finally, the Board contends that *Rogers, supra*, is also distinguishable from the instant matter because, therein, a replacement was available for the teacher. (*Ibid.*) Additionally, in *Rogers*, the Commissioner acknowledged that the teacher left the district to work with severely and multiply handicapped children, which the Commissioner deemed a noble motivation. (*Ibid.*) By contrast, the Board herein asserts, there was no replacement available for respondent and, although he left to take a job that he always wanted:

> [T]he noble choice would have been to continue working in his position in the Ridgefield Park School District where he was desperately needed for the statutory time period, not to take a position that he always wanted without regard for the effect that would have on the special education students and the staff and administration he left behind. (*Ibid.*)

For these reasons, the Board requests that the Commissioner affirm the decision of the ALJ.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ that there is ample documentation to support the Board's position that respondent's undeniable failure to comply with the provisions of *N.J.A.C.* 18A:26-10 and 18A:28-8 is sufficient to warrant the suspension of his teaching certificate for a period of one year. In so finding, the Commissioner determines there can be no dispute that respondent abandoned his class for another job: (a) knowing that he was not yet "released" from his position in the Ridgefield Park School District; (b) only 12 days after the delivery of his written resignation; and (c) knowing that a suitable replacement was not yet employed. *See, Dumont Board of Education v. Andrew Zweig*, 1988 *S.L.D.* 904, 910.

Despite respondent's urging, for the reasons set forth by the ALJ in the Initial Decision and advanced by the Board, the Commissioner concurs that this matter is not analogous to *Mooney, supra*; *Burgess, supra*; or *Rogers, supra.* Moreover, while respondent properly observes that Superintendent Benfatti indicated that he would be released earlier than March 17, 2000 *if* a replacement was found (Affidavit of Irene Benfatti at 3), notably, he does not dispute the ALJ's finding that "[a]lthough the Board placed ads for [his] position, it was not able to replace him ***." (Initial Decision at 3) Neither does respondent dispute the superintendent's attestations in this regard that:

> 2. After respondent *** left the Board's employ, I tried to replace him. An advertisement to fill his vacant position was posted in the district and advertised in the newspaper.***
> 3. No responses to that advertisement were received.
> 4. I would have preferred to replace Mr. Montalbano. However, since no responses were received to the advertisement for the position, I resorted to covering his classes with existing staff. This was not done easily.
> 5. The resulting situation was one that caused a strain on the district as well as the covering teachers.
> 6. For the 2000-2001 school year, Mr. Montalbano's former position has been filled. However, the district is still short one special education teacher.
> 7. It has been my experience that substitute teachers are hard to find. Further, it is my experience that special education teachers are very difficult to find. When you are looking for one in the middle of a school year, it is almost impossible.
>
> (Second Affidavit of Irene Benfatti at 1, 2)

Pursuant to the enabling statute, as noted *supra*, the Commissioner has both the authority and the discretion to suspend a teacher's certificate for a period of up to one year for relinquishing his position without "at least 60 days written notice of his intention***." *N.J.S.A.* 18A:28-8. The Commissioner has recognized that "[t]he sudden departure of a teacher who has been working with a group of pupils for four months results in a disruption of the educational

program to those pupils, if only because of a sudden change in teachers." *See, Dunellen Borough Board of Education v. David T. Drake*, 1987 *S.L.D.* 2016, 2019. Thus, although the Commissioner acknowledges the predicament in which respondent found himself when he was offered a position commencing mid-year in the Washington Township Police Department after having submitted numerous applications, there is no question that he "violated the letter and intent of the statute, resulting in disruption of his *** class." *Dumont Board of Education, supra,* 1988 *S.L.D.* at 912. Inasmuch as respondent was a tenured teacher, the Board also offers a compelling policy consideration:

> The Legislature has established a system for protecting the school community from disruption to the relationship under which experienced teachers provide an education to the students within the school district. By statute, tenured teachers have the security of knowing they can continue to hone their skills and provide their services to the students of their districts indefinitely, and that they will only be removed or non-reappointed under extreme circumstances and after lengthy proceedings. *** Because of these statutory protections, a school board makes a significant investment by granting tenure to any teacher. In exchange for this investment, the Legislature requires that tenured teachers provide their employers with a minimum of sixty days' notice of their intent to discontinue to serve the school district.*** (Board's Letter Brief in Support of Motion to Dismiss at 7-8; citations omitted)

Accordingly, the Commissioner concurs with the ALJ that respondent is guilty of unprofessional conduct and, as such, his teaching certificate should be suspended for a period of one year, which period shall 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 the within decision.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6|11|01

Date of Mailing: 6|12|01

* 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.

189-01

IN THE MATTER OF THE TENURE HEARING	:	
OF REBECCA CONNOR, SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF PLEASANTVILLE,	:	DECISION
ATLANTIC COUNTY.	:	

June 14, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6549-00

AGENCY DKT. NO. 292-8/00

IN THE MATTER OF THE TENURE HEARING OF REBECCA CONNOR, SCHOOL DISTRICT OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY

Ned Rogovoy, Esq., for petitioner (Waltman, Reilly & Rogovoy, attorneys)

Joseph Marono, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: April 25, 2001 Decided: April 26, 2001

BEFORE **LILLARD E. LAW,** ALJ:

This matter was transmitted to the Office of Administrative Law on August 31, 2000, 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 with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a 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.

26 April 2001
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

4-30-01
DATE

Deborah A. Gutmann/CS
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 1 2001
DATE

Jeff S. Masin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLP
Ten James Street
Florham Park, New Jersey 07932
TEL. (973) 301-0001; FAX (973) 301-0203
Attorneys for City of Pleasantville Board of Education

IN THE MATTER OF THE TENURE HEARING OF REBECCA CONNOR, CITY OF PLEASANTVILLE SCHOOL DISTRICT, ATLANTIC COUNTY.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY DKT. NO. 292-8/00 OAL DKT. NO. EDU 6549-00 **SETTLEMENT AGREEMENT**

This Settlement Agreement is made by and between Rebecca Connor who resides at 500 Bay Avenue, #506N, Ocean City, New Jersey and the City of Pleasantville Board of Education (hereinafter "the Board"), with offices located at 115 W. Decatur Avenue, Pleasantville, New Jersey. In consideration of the mutual promises and undertakings contained in this Agreement, and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned state:

WHEREAS, Ms. Connor is a tenured employee of the Board, having been employed as a speech correctionist by the Board since on or about September 1, 1990; and

WHEREAS, the Board certified tenure charges against Ms. Connor to the Commissioner of Education captioned: *In the Matter of the Tenure Hearing of Rebecca Connor, City of Pleasantville School District, Agency Dkt. No. 292-8/00.*

IT IS on this 12th day of December 2000, agreed that:

1. Ms. Connor will sign and tender an irrevocable and permanent letter of resignation in the form attached hereto as "Attachment A", to be effective December 12, 2000. Ms. Connor understands that by signing her resignation and this Agreement she is permanently ending all of her rights to tenure, seniority and employment in the Pleasantville School District.

2. Ms. Connor shall receive the amount of $16,019.10, which represents compensation for 120 calendar days of employment commencing on or about September 1, 2000 and

APR 25 11 57 AM '01
FILED

3a

ending on or about December 31, 2000, subject to the usual payroll deductions. Payment of this amount shall be made within seven business days of approval of the settlement by the Commissioner of Education. The Board also agrees to maintain health benefits for Ms. Connor for a period of 104 days, commencing December 12, 2000 and terminating on March 26, 2001, subject to mitigation by any health insurance coverage provided to Ms. Connor through March 26, 2001 by any subsequent employer.

3. Aside from the foregoing, Ms. Connor waives and releases any and all other rights to back pay, compensation for unused sick days and any other benefits to which she may otherwise be entitled by virtue of her employment with the Board.

4. Ms. Connor understands that, upon her filing of an application for retirement with the Teachers Pension and Annuity Fund (TPAF), or upon receipt of any employment inquiries, the Board will be required to provide accurate information. Upon receipt of any employment inquiries, the personnel office of the Pleasantville School District shall provide a "neutral" recommendation, consisting of the dates of Ms. Connor's employment in the district and the fact that she tendered her resignation.

5. This Agreement is subject to approval by the Board, by an appropria resolution. In the event that this Agreement is not ratified by the Board, it shall be null and void.

6. Ms. Connor agrees to sign the Release annexed hereto, waiving any and all claims to damages, salary, benefits, back pay, recoupment of monies or any other civil/administrative claim or cause of action, whether known or unknown, against the Board and its agents, employees, servants and other persons referenced in said Release. Said Release shall be in the form annexed hereto as "Attachment B" and shall be signed at the time of the signing of this Agreement by Ms. Connor.

7. The Board acknowledges and declares that, in light of Ms. Connor's submission of her irrevocable letter of resignation, it is not in the best interests of the Pleasantville School community or the taxpayers of the City of Pleasantville to proceed with a hearing on the charges.

* It is understood that the comissioner shall refer the entire matter to the Bd of Ed counsel for their independent review.

8. Should the Commissioner refuse to approve the within settlement, then this Agreement shall be null and void and the subject charges shall continue in full force and effect. Further, Ms. Connor agrees and understands that should the settlement be rejected by the Commissioner of Education, the Board shall not resume payment of her salary until the first day of the newly rescheduled tenure hearing as per N.J.S.A. 18A:6-14. *

9. Ms. Connor acknowledges that she has consulted with an attorney of her own choosing prior to signing this Agreement and accompanying Release, and that she signs this Agreement and Release as her own voluntary act and deed, and that she fully understands the duties and obligations enumerated herein.

10. This Agreement contains the entire understanding of the parties. Unless explicitly set forth herein, all other promises, representations or agreements shall not be binding upon the parties.

11. 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 and year aforesaid.

WITNESS:

Ned Rogovoy, Esq. — Rebecca Connor

Dated: 12/12/00

WITNESS:

Christopher M. Mullins, C.P.A., Board Secretary/Business Administrator — Dr. Andrew Carrington, Superintendent

Dated: 12/19/00

PLEASANTVILLE BOARD OF EDUCATION
BUSINESS OFFICE

115WEST DECATUR AVENUE – PLEASANTVILLE, NEW JERSEY 08232
609-677-8108 FAX 609-677-8118

CHRISTOPHER J. MULLINS, CPA
BUSINESS ADMINISTRATOR / BOARD SECRETARY

January 8, 2001

I hereby certify and attest that the following is a true copy of an extract taken from the Minutes of the Meeting of the Board of Education of the City of Pleasantville, dated December 19, 2000.

FILED
APR 25 11 57 AM '01

C Mull

Christopher J. Mullins, CPA
Business Administrator/
Board Secretary

ACTION:
MOTION BY: Royal SECONDED BY: Graves
ROLL CALL YES: Amaro; Gray; Graves; Harmon; Hyman; Royal; Caldwell; Page. NO: None. ABSENT: Leary.

WHEREAS, on or about August 17, 2000, the Pleasantville Board of Education (hereinafter "Board") suspended tenured speech correctionist Rebecca Connor from her employment without pay pursuant to N.J.S.A. 18A:6-14 pending the determination of the Commissioner of Education with regard to tenure charges filed by the Board against Rebecca Connor for inefficiency, unbecoming conduct and/or other just cause; and

WHEREAS, on the first scheduled day of hearing before Administrative Law Judge Lillard Law, Ms. Connor agreed to tender an irrevocable and permanent letter of resignation in lieu of proceeding with the hearing, subject to certain conditions as set forth in a Settlement Agreement between the parties; and

WHEREAS, the Board has reviewed the terms of the Settlement Agreement and finds them to be satisfactory and the proposed settlement to be in the best interests of the school district;

WHEREAS, the Board recognizes that the terms of the Settlement Agreement are subject to final approval by the Commissioner of Education;

NOW THEREFOR, BE IT RESOLVED, that the Board ratifies the Settlement Agreement between it and Rebecca Connor, a copy of which shall be made a part of the minutes of this meeting; and

BE IT FURTHER RESOLVED that the Board will not proceed with a hearing on the tenure charges absent refusal by the Commissioner of Education to approve the proposed Settlement Agreement.

TO: PLEASANTVILLE BOARD OF EDUCATION

Please be advised that I resign my teaching position ~~retroactive to September 3, 2000 and effective immediately upon approval.~~ effective December 13, 2000

Dated: December 12, 2000

Rebecca A Connor
REBECCA CONNOR

Wed Rogovoy
Atty for WST.

ATTACHMENT "B"

GENERAL RELEASE

This GENERAL RELEASE is given as of the 12th day of December, 2000, from **REBECCA CONNOR**, residing at 500 Bay Avenue, #506N, Ocean City, New Jersey (hereinafter referred to as "Connor"), to **THE BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,** 115 W. Decatur Avenue, Pleasantville, New Jersey (hereinafter referred to as the "Board").

1. In consideration of the payments made, or to be made, to or on behalf of Connor by the Board and the promises contained in the annexed Settlement Agreement (the "Agreement"), Connor hereby UNCONDITIONALLY RELEASES AND FOREVER DISCHARGES the Board, its trustees, officers, employees, agents, servants, representatives, attorneys, successors, heirs, executors and assigns (all of whom are hereinafter collectively referred to as the "Releasees") from all claims, liabilities, demands and causes of action, whether known or unknown, fixed or contingent, that Connor may have or claim to have against the Board for any reason as of the date of execution of the Agreement, including, but not limited to:

(i) Any and all claims asserted or which could have been asserted;

(ii) Any and all claims, charges or complaints asserted, or which could have been asserted, concerning any aspect of Connor's employment with the Board, any agreement concerning such employment or her resignation from such employment, including, but not limited to, any and all claims of wrongful or constructive discharge or breach of contract, any and all claims for equitable estoppel, any and all claims for employee benefits, and any and all claims of discrimination on any basis, including, but not limited to, any and all claims under: Title VII of the Civil Rights Act

of 1964, as amended; the Americans with Disabilities Act; the Age Discrimination in Employment Act of 1967, as amended; the Civil Rights Act of 1966, 42 U.S.C. §1981; the Older Worker Benefit Protection Act; the Worker Adjustment and Retraining Notification 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 Constitution; and any other federal or State statute covering the employment relationship, under the common law or in equity or arising under any agreement, understanding or promise, written or oral, formal or informal, between Connor and the Board;

(iii) Any and all claims for back pay, reinstatement, sick pay, vacation pay, liquidated, compensatory and punitive damages, and attorneys' fees, disbursements and costs, which Connor or her legal representatives, heirs, executors, administrators, successors, and assigns ever had, now have, or hereafter can, shall, or may have against the Releasees by reason of any matter, cause, or thing whatsoever from the beginning of time to the day of the date of Connor's execution of the Agreement.

2. Connor represents and warrants that she has never commenced or filed, and she covenants and agrees never to commence or file or aid or in any way, prosecute or cause to be commenced, or prosecuted, against the Releasees any action, charge, complaint or other proceeding, whether administrative, judicial, legislative or otherwise, including, but not limited to, any action or proceeding contesting the validity of this Release or attempting to negate, modify or reform it, or for attorneys' fees, disbursements or costs, based upon or seeking relief on account of actions or failures to act by the Releasees which may have occurred or failed to occur before the date of Connor's execution of the Agreement.

3. Connor and anyone who succeeds to her rights and responsibilities, such as her heirs, executors, personal legal representatives, assigns and successors are bound by this Release.

IN WITNESS WHEREOF, Connor has signed this Release on the date set forth below.

Rebecca A. Connor
REBECCA CONNOR

WITNESS:

_____

DATED: 12/12/00

STATE OF NEW JERSEY
COUNTY OF ATLANTIC } **ss:**

On December 12, 2000, before me personally came Rebecca Connor, known to me to be the individual described in and who executed the foregoing Release, and she duly acknowledged to me that she voluntarily and knowingly executed the said Release, after having read and understood said document.

Ned Rogovoy
Attorney of N.J.

OAL DKT. NO. EDU 6549-00
AGENCY DKT. NO. 292-8/00

IN THE MATTER OF THE TENURE HEARING	:	
OF REBECCA CONNOR, SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF PLEASANTVILLE,	:	DECISION
ATLANTIC COUNTY.	:	

The record, Settlement Agreement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 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. The matter is hereby dismissed subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

Date of Decision: 6|14|01

Date of Mailing: 6|14|01

190-01

DR. DENNIS L. GRIMMETT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARDS OF EDUCATION OF THE TOWNSHIP OF BERLIN, THE BOROUGH OF CHESILHURST, THE BOROUGH OF CLEMENTON, THE BOROUGH OF LINDENWOLD, THE BOROUGH OF PINE HILL, THE TOWNSHIP OF WATERFORD AND THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,	:	DECISION
RESPONDENTS.	:	
	:	

June 15, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4933-00

AGENCY DKT. NO. 168-5/00

DR. DENNIS L. GRIMMETT,

Petitioner,

v.

BOARDS OF EDUCATION OF:
THE TOWNSHIP OF BERLIN,
THE BOROUGH OF CHESILHURST,
THE BOROUGH OF CLEMENTON,
THE BOROUGH OF LINDENWOLD,
THE BOROUGH OF PINE HILL,
THE TOWNSHIP OF WATERFORD
AND THE TOWNSHIP OF WINSLOW,

Respondents.

Beth L. Finkelstein, Esq., for petitioner

Vito A. Gagliardi, Jr., Esq., for respondents Berlin Township Board of Education, Clementon Borough Board of Education, Lindenwold Borough Board of Education, Pine Hill Borough Board of Education and Winslow Township Board of Education (Porzio, Bromberg & Newman, attorneys)

Emmett E. Primas, Jr., Esq., for respondent Chesilhurst Borough Board of Education

Betsy Bissett, Esq., for respondent Waterford Township Board of Education

Record Closed: April 27, 2001 Decided: April 27, 2001

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

Dennis L. Grimmett, assistant superintendent of the Lower Camden County Regional School District Number One, which is to be dissolved, claimed tenure and seniority rights to such a position in one of the constituent school districts upon dissolution.

The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13.

Counsel conferred over several months and reached amicable resolution of the matter. The parties have prepared the attached settlement agreement and submit it together with a resolution from each board of education authorizing entry into the agreement.

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

1. The parties have voluntarily agreed to the settlement as evidenced by authorized signatures on the agreement true copies of resolutions authorizing entry into the agreement, and

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

I note that in Part 4 of the agreement payment to the petitioner for unused days of sick leave accrued is addressed. The agreement calls for one-half of the agreed amount of this payment to be made on or before February 1, 2001, a date before submission of the agreement for approval. Under ordinary circumstances, this could not be approved. In recognition of the unique situation herein, I **ORDER** that the payment of these funds shall not constitute an

impediment to approval of the entire agreement provided the monies shall be returned in the event this agreement is not approved by the Commissioner of Education.

I **CONCLUDE** that this agreement as modified 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.

APR 2 7 2001
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

5-1-01
DATE

Deborah M. Attanasio /CR
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 2 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jh

STIPULATION OF SETTLEMENT AND AGREEMENT

THIS AGREEMENT is made and entered into this 26th day of April, 2001, by and between the

BERLIN TOWNSHIP BOARD OF EDUCATION, located at 234 Mt. Vernon Avenue, West Berlin, New Jersey 08091-1231;

CHESILHURST BOROUGH BOARD OF EDUCATION, located at 551 Edwards Avenue, Chesilhurst, New Jersey 08089-1115;

CLEMENTON BOROUGH BOARD OF EDUCATION, located at Audubon Avenue, Clementon, New Jersey 08021-4499;

LINDENWOLD BOROUGH BOARD OF EDUCATION, located at 1017 East Linden Avenue, Lindenwold, New Jersey 08021-1126;

PINE HILL BOROUGH BOARD OF EDUCATION, located at 1003 Turnerville Road, Pine Hill, New Jersey 08021-6526;

WATERFORD TOWNSHIP BOARD OF EDUCATION, located at 1106 Old White Horse Pike, Waterford, New Jersey 08089-1899;

WINSLOW TOWNSHIP BOARD OF EDUCATION, located at 113 Central Avenue, Blue Anchor, New Jersey 08037-1667;

HEREINAFTER referred to collectively as the **BOARDS** and **DR. DENNIS L. GRIMMETT**, residing at 530 Maple Avenue, Haddonfield, New Jersey 08033, (hereinafter referred to as the "Respondent" or "Assistant Superintendent").

WITNESSETH:

WHEREAS, Dr. Grimmett is a tenured assistant superintendent of the Lower Camden County Regional High School District #1 (LCCR);

WHEREAS, on or about May 12, 1998, the voters of the seven constituent districts voted to dissolve the Lower Camden County Regional High School District #1,and a dissolution date of July 1, 2001, has been set by the Commissioner of Education;

WHEREAS, the Petitioner filed a petition against the constituent boards of education before the Commissioner of Education of the State of New Jersey under the Agency Docket Number 168-5/00 and Agency Reference Number EDU-4933-00 (hereinafter "the litigation") ;

WHEREAS, the subject matter of the litigation was to assert the petitioner's right to continued employment by one of the constituent districts following the dissolution of LCCR under *N.J.S.A.* 18A:13-64;

WHEREAS, the constituent districts desire to amicably resolve the Litigation and to provide for the terms and conditions of Dr. Grimmett's employment following the date of dissolution of LCCR;

NOW THEREFORE, the foregoing Boards, as set forth above, and Dr. Grimmett, for the consideration herein specified, agree as follows:

1. **TERM.** This Agreement shall cover the term from June 30, 2001 to June 30, 2002.

2. **TERM AND CONDITIONS OF EMPLOYMENT.** Dr. Grimmett shall cease his employment with the LCCR Board of Education upon dissolution. He shall be entitled to any and all benefits due and owing pursuant to his current employment contract and any other district policies, including but not limited to, payment for unused accumulated sick and vacation time with the LCCR Board of Education. The Winslow Township Board of Education, effective upon the date of dissolution of the LCCR shall employ Dr. Grimmett in the position of Director, Administrative Services. The job description for the position, to which the parties have mutually agreed , is annexed to this Agreement and made a part

hereof as Exhibit A. The position is to be a TPAF position. Dr. Grimmett is to remain employed in the position for the term July 1, 2001 through June 30, 2002. Thereafter, effective midnight, June 30, 2002, he resigns, rejects and surrenders any employment rights he might have with the Winslow Township Board of Education and all other constituent districts. The Winslow Township Board of Education hereby also agrees that it shall not eliminate or abolish the position during the term of this Agreement. In addition, the compensation and terms of the position are to be controlled by this Agreement . Dr. Grimmett shall be a tenured employee during his employment by the Winslow Township Board of Education, and his employment shall be subject to *N.J.S.A.* 18A:6-10.

Except as otherwise provided herein, Dr. Grimmett shall be employed under the terms and conditions as provided under the Management Team Agreement, between the Winslow Township Administrators Association and the Winslow Township Board of Education covering the period from July 1,1998-June 30, 2001. A true copy of the Management Team Agreement is annexed hereto and made a part hereof as Exhibi B. Although Dr. Grimmett shall be accorded the benefits provided for by the Management Team Agreement he shall not be required to join the Winslow Township Administrators Association.

A. Medical Benefits. Dr. Grimmett shall be provided the same medical benefits as are currently being provided to the Principals and Assistant Principals. Thus, Dr. Grimmett shall receive full family coverage which shall include the following: Medical, Dental, Vision, and Prescription plans as is currently being provided. Coverage in these plans shall be equal to or better than that which is being provided to any bargaining group other than the Winslow Township Administrator's Association. Dr. Grimmett shall also be provided with a Health Maintenance Organization option. However, the Winslow Township Board of Education's obligation for the premium payment for an HMO shall not exceed the Board's obligation for the traditional indemnity plan at the family coverage rate.

B. Salary. During the term of this Agreement, Dr. Grimmett shall not be reduced in compensation, including salary and benefits. The Winslow Township Board of Education shall pay Dr. Grimmett a salary of $99,000 for the school year 2001-2002. The annual salary rate shall be paid to Dr. Grimmett in accordance with the schedule of salary payments in effect for other certified employees.

C. Vacation. The Winslow Township Board of Education shall grant Dr. Grimmett 20 vacation days annually which shall all become available to him, effective July 1, 2001. Dr. Grimmett shall be permitted to be reimbursed for all unused vacation days accumulated after he commenced his employment by the Winslow Township Board of Education either at the conclusion of the term of his employment, upon retirement, or upon his resignation from the Director of Administrative Services position at his full per diem rate. The per diem rate shall be calculated at 1/240th of his then-current salary. This provision is in addition to and not in lieu of Dr. Grimmett's right to be paid for unused accumulated sick or vacation days resulting from his employment by LCCR.

D. Association Memberships. The Winslow Township Board of Education shall pay 100 percent of Dr. Grimmett's membership fees and or charges to the New Jersey Association of School Administrators.

E. Sick Days. Dr. Grimmett, as a 12-month employee, shall be allowed sick leave with full pay for 13 working days for the period beginning July 1, 2001 to June 30, 2002. At the conclusion of his employment with Winslow Township Board of Education, Dr. Grimmett shall be compensated for all unused sick days, accumulated during his employment at Winslow at the rate of forty (40%) percent of his daily rate.

F. Personal Leave Days. Dr. Grimmett shall be given three personal days which shall all be immediately available upon the commencement of his employment (July 1, 2001). All unused personal days shall be converted to accumulated sick leave.

3. **OTHER COMPENSATION.** Dr. Grimmett shall receive the sum of ten thousar ($10,000) dollars from the Respondents, payable as follows:

(1) $5,000 (which will be advanced by the Winslow Township Board of Education)within fifteen (15) days of the Commissioner's approval of this Agreement, and

(2) $5,000 on or before July 31, 2001 (which shall be payable through the LEA but shall be the responsibility of all of the Respondents in the event the LEA is unable to pay).

4. **PAYMENT FOR SICK TIME.** The Boards hereby agree to pay Dr. Grimmett for all unused sick days he has accumulated in LCCR. The payment for said sick days shall be calculated at his per diem rate which shall be 1/240th of his salary for the 2000-2001 school year which is $94,317.00. Upon signing of this Agreement, Dr. Grimmett has 87 accumulated unused sick days. The payment shall be made to Dr. Grimmett in two equal installments and shall not exceed $45,000.00. The first payment shall be made on or before February 1, 2001, the second payment shall be made on or before June 15, 2001, or as otherwis negotiated between Dr. Grimmett and LCCR. This payment shall be made to Dr. Grimmett, by LCCR regardless of the application of the language contained within the LCCR Management Team Agreement, or the LCCR Central Office Administrators' Terms of Employment, or regardless of any settlements which have been reached with regard to the litigation which occurred concerning the Dissolution Incentive Plan ("DIP"). To the extent that any or all of this payment has not been paid to Dr. Grimmett by LCCR prior to the dissolution, it shall be paid post dissolution by the Boards (Respondents) through the LEA, on or before July 31, 2001. The Boards which are the Respondents herein, shall guarantee the payment of this money to Dr. Grimmett on or before July 31, 2001, in the event that the payment cannot be accomplished through the LEA. In addition, Dr. Grimmett shall be entitled to receive payment of this money by operation of the dissolution of LCCR and will not be required by the Boards to either resign or retire from LCCR from his position as Assistant Superintendent. However, should Dr. Grimmett be required to resign from his positio

as Assistant Superintendent of LCCR, in order to be compensated from LCCR for accumulated sick and vacation time, the Boards, including but not limited to Winslow Township Board of Education, shall be required to honor all of the terms and conditions of this Agreement.

5. **PAYMENT TO ESTATE.** If the Assistant Superintendent dies before the contract term of this Agreement has been completed, payment of the ten thousand ($10,000) dollar lump sum, together with payment for any unused accumulated sick and vacation time, shall be made to Dr. Grimmett's estate.

6. **RESIGNATION**. By the operation of this Agreement, Dr. Grimmett shall resign from the position of Director, Administrative Services effective on June 30, 2002. The resignation shall be null and void if the Boards fail to execute and fulfill all of the terms and conditions of this Agreement.

7. **MUTUAL RELEASE and INDEMNIFICATION**

A. Dr. Grimmett hereby agrees to release and forever discharge the Boards, its individual members, successors, assigns, and agents from any and all past, present, and future claims, suits, actions at law or in equity of any kind, in any forum that he may have against it, and agrees that execution of this Agreement shall serve as full and final satisfaction of same, except for any claims arising from a breach of this Agreement or any provision thereof. He shall dismiss with prejudice, and without costs the matter presently pending before the Commissioner of Education.

B. The Boards and their members hereby agree to release and forever discharge Dr. Grimmett from any and all claims, suits, actions at law or in equity of any kind, in any forum that they may have against him, and agrees that execution of this Agreement shall serve as full and final satisfaction of same, except for any claims arising from a breach of this Agreement or any provision thereof.

C. The mutual releases set forth herein are entered into voluntarily and willingly and without any duress or coercion. Both parties agree to be bound by their respective releases and agree that their respective successors shall be bound by the releases and all other provisions of this Agreement.

D. Specifically excluded from Dr. Grimmett's release is his right, upon cessation of employment with the Boards, to obtain continued medical coverage at his own expense as authorized by the Consolidated Omnibus Reconciliation Act of 1986 (COBRA), any rights he may have arising under the Teacher's Pension and Annuity Fund (TPAF) and related statutes and regulations, any rights he may have under the New Jersey Workers' Compensation Law, *N.J.S.A.* 34:16-1, *et seq.*, and any rights he may have in his individual capacity to assert any claim for personal injuries that may result and/or be discovered subsequent to the execution of this Agreement, caused by the negligent or intentional acts or omissions of the parties.

8. DISMISSAL OF LAWSUIT. Upon the execution of this Agreement by all parties to this lawsuit, upon the approval by all the Boards of Education of the terms contained herein, and upon the approval of the Commissioner of Education, this action shall be dismissed with prejudice against all parties to the Agreement.

9. CONSULTATION WITH COUNSEL. The parties represent that they have consulted with their respective attorneys before signing this Agreement and are fully satisfied with the advice received.

10. EXECUTION IN COUNTERPARTS and FACSIMILE SIGNATURES. This Agreement may be executed in two (or more) counterparts, each of which counterparts, when executed and delivered, shall be deemed to be an original, and all of which counterparts, taken together, shall constitute but one and the same Agreement. An original signature transmitted by facsimile shall be deemed to be an original for purposes of this Agreement.

11. APPROVAL BY THE COMMISSIONER. The parties acknowledge that this Agreement is contingent upon the approval of the Commissioner of Education.

WHEREAS, duly authorized officers of the Boards have approved the terms and conditions of this Agreement; and,

WHEREAS, Dr. Grimmett has approved of the terms and conditions of the Agreement; and,

WHEREAS, this Agreement has been approved by the Boards of Education named above;

IN WITNESS WHEREOF, they set their hands and seals to the Agreement effective on the day and year first above written.

Witness	President Berlin Township Board of Education
Witness	President Chesilhurst Borough Board of Education
Witness	President Clementon Borough Board of Education
Witness	President Lindenwold Borough Board of Education
Witness	President Pine Hill Borough Board of Education
Witness	President Waterford Township Board of Education
Witness	President Winslow Township Board of Education
Witness	President Chesilhurst Borough Board of Education
Witness	Dr. Dennis L. Grimmett

DATED:

WHEREAS, Dr. Grimmett has approved of the terms and conditions of the Agreement; and,

WHEREAS, this Agreement has been approved by the Boards of Education named above;

IN WITNESS WHEREOF, they set their hands and seals to the Agreement effective on the day and year first above written.

Witness	President Berlin Township Board of Education
Witness	President Chesilhurst Borough Board of Education
Witness	President Clementon Borough Board of Education
Witness	President Lindenwold Borough Board of Education
Witness	President Pine Hill Borough Board of Education
Witness	President Waterford Township Board of Education
Witness	President Winslow Township Board of Education
Witness	President Chesilhurst Borough Board of Education
Witness	Dr. Dennis L. Grimm

DATED:

WHEREAS, Dr. Grimmett has approved of the terms and conditions of the Agreement; and,

WHEREAS, this Agreement has been approved by the Boards of Education named above;

IN WITNESS WHEREOF, they set their hands and seals to the Agreement effective on the day and year first above written.

Witness	President Berlin Township Board of Education
Witness	President Chesilhurst Borough Board of Education
Witness	President Clementon Borough Board of Education
Witness	President Lindenwold Borough Board of Education
Witness	President Pine Hill Borough Board of Education
Witness	President Waterford Township Board of Education
Witness	President Winslow Township Board of Education
Witness	President Chesilhurst Borough Board of Education
Witness	Dr. Dennis L. Grimmett

DATED:

WHEREAS, Dr. Grimmett has approved of the terms and conditions of the Agreement; and,

WHEREAS, this Agreement has been approved by the Boards of Education named above;

IN WITNESS WHEREOF, they set their hands and seals to the Agreement effective on the day and year first above written.

Witness	President Berlin Township Board of Education
Witness	President Chesilhurst Borough Board of Education
Witness	President Clementon Borough Board of Education
Witness	President Lindenwold Borough Board of Education
Witness	President Pine Hill Borough Board of Education
Witness	President Waterford Township Board of Education
Witness	President Winslow Township Board of Education
Witness	President Chesilhurst Borough Board of Education
Witness	Dr. Dennis L. Grimme

DATED:

WHEREAS, Dr. Grimmett has approved of the terms and conditions of the Agreement; and,

WHEREAS, this Agreement has been approved by the Boards of Education named above;

IN WITNESS WHEREOF, they set their hands and seals to the Agreement effective on the day and year first above written.

Witness	President Berlin Township Board of Education
Witness	President Chesilhurst Borough Board of Education
Witness	President Clementon Borough Board of Education
Witness	President Lindenwold Borough Board of Education
Witness	President Pine Hill Borough Board of Education
Witness	President Waterford Township Board of Education
Witness	President Winslow Township Board of Education
Witness	President Chesilhurst Borough Board of Education
Witness	Dr. Dennis L. Grimmett

DATED:

WHEREAS, Dr. Grimmett has approved of the terms and conditions of the Agreement; and,

WHEREAS, this Agreement has been approved by the Boards of Education named above;

IN WITNESS WHEREOF, they set their hands and seals to the Agreement effective on the day and year first above written.

Witness	President Berlin Township Board of Education
Witness	President Chesilhurst Borough Board of Education
Witness	President Clementon Borough Board of Education
Witness	President Lindenwold Borough Board of Educatio
Witness	President Pine Hill Borough Board of Education
Witness	President Waterford Township Board of Education
Witness	President Winslow Township Board of Education
Witness	President Chesilhurst Borough Board of Education
Witness	Dr. Dennis L. Grimmett

DATED:

4m

WHEREAS, Dr. Grimmett has approved of the terms and conditions of the Agreement; and,

WHEREAS, this Agreement has been approved by the Boards of Education named above;

IN WITNESS WHEREOF, they set their hands and seals to the Agreement effective on the day and year first above written.

Witness	President Berlin Township Board of Education
Witness	President Chesilhurst Borough Board of Education
Witness	President Clementon Borough Board of Education
Witness	President Lindenwold Borough Board of Education
Witness	President Pine Hill Borough Board of Education
Witness	President Waterford Township Board of Education
Witness	President Winslow Township Board of Education
Witness	President Chesilhurst Borough Board of Education
Witness	Dr. Dennis L. Grimmett

DATED:

4N

Winslow Township Public Schools
Proposed Job Description

[redacted]

EMPLOYMENT: Twelve months. Compensation and terms to be determined by the Board of Education.

QUALIFICATIONS:

1. School Administrator Certificate of Eligibility
2. Successful experience as a teacher and central office administrator.
3. Knowledge of New Jersey Law, Administrative Code, rules, regulations and procedures.
4. Demonstrated effectiveness in administration and supervision.
5. Strong leadership and communication skills.

REPORTS TO: Superintendent of Schools

STAFF SUPERVISED: Transportation Coordinator, Safety/Security Personnel

POLICY DEVELOPMENT

Performance Responsibilities:

1. Assist in the development, administration and interpretation of policies of the Board of Education.
2. Will work with Policy Committee in the development of standard operating procedures reflective of a PK-12 school district.
3. Will disseminate and review said policies and procedures with Board of Education and staff.
4. Will update policies and procedures in a systematic manner.

DISTRICT SAFETY AND SECURITY:

Performance Responsibilities:

1. Will be responsible for all components of the district's safety and security program inclusive of the areas outlined:
   a. maintain and update staff identification process for entry into schools.
   b. maintain electronic entry/security systems in effect at all district's schools.
   c. oversee and chair the district's safety committee.

d. develop, promote and implement safety and prevention programs for staff and students.
e. develop and maintain a School Emergency Operation Plan for every school in the district including:
   - State of Authorization
   - Chain of Command
   - Emergency Closing Procedures
   - Critical Incidents Kit
   - Evacuation Procedures
   - Lock Down Procedures
   - Floor/Site Plans
   - Aerial Photograph
   - Building Photographs

f. will maintain close working relationships with local/county law enforcement agencies as an ongoing mechanism for establishing safety and security as a top priority.
g. will provide leadership with Building Administrators in establishing and implementing school safety programs and procedures for staff and students.
h. will coordinate and implement safety and security trainings, as needed for staff and students.
i. will inform the school community on a systematic basis of the district's policies and procedures as they relate to safety and security.
j. Will oversee, evaluate, and monitor any personnel directly responsible for the security and safety of children.

TRANSPORTATION SUPERVISION:

Performance Responsibilities:

1. Be responsible for supervising the Coordinator of the transportation system.
2. Insure compliance with rules and regulations governing transportation as specified by the New Jersey Department of Education.
3. Make final recommendations to the superintendent for the appointment of qualified drivers.
4. Support the Transportation Coordinator's efforts to provide training, as needed, to bus drivers, clerical staff, and others associated with transportation.
5. Approve the scheduling and assignment of drivers and buses to routes and field trips.

6. Give final approval for the Transportation Coordinator's development of all bus routes and assignment of students, including special education, to the proper routes and bus stops in compliance with board policy.
7. Oversee the Transportation Coordinator's maintenance of all appropriate transportation records , inventory of equipment and supplies.
8. Ensure that the Transportation Coordinator maintains, repairs and inspects buses in a safe and timely manner.
9. Will work with the Board Secretary and Transportation Coordinator in the development of specifications for the purchase of transportation equipment and vehicles.
10. Works in concert with the Transportation Coordinator in making recommendations for the improvement of services, reduction of transportation costs, improving safety conditions, and replace of vehicles.
11. Mediates problems related to transportation only after issues remain unresolved at the Transportation Coordinator's level.
12. Evaluate the Transportation Coordinator on an annual basis and give approval to the Coordinator's evaluations of bud drivers and related staff for reappointment purposes.

EVALUATION: Performance of this job will be evaluated annually by the Superintendent of Schools

APPROVED:

MANAGEMENT TEAM AGREEMENT

BETWEEN

THE WINSLOW TOWNSHIP ADMINISTRATORS ASSOCIATION

AND

THE WINSLOW TOWNSHIP BOARD OF EDUCATION

July 1, 1998 – June 30, 2001

PROFESSIONAL DEVELOPMENT 7
ADVANCED STUDY 7
CONFERENCES/WORKSHOPS 7
SPECIAL MEETINGS/CONFERENCES/WORKSHOPS 7
STATE AND NATIONAL CONVENTIONS 8
ASSOCIATION MEMBERSHIPS 8
HEALTH INSURANCE PROTECTION 8
USE OF AUTOMOBILE 8
SALARY 8
SALARY SCHEDULES 8
Principals' Salary Guide 9
Assistant Principals' Salary Guide 9
SALARY FORMULA 9
SALARY ADJUSTMENTS 9
SALARY "GRANDFATHER CLAUSE" 9
FUTURE CONTRACT NEGOTIATIONS 10
DURATION OF AGREEMENT AND SIGNATURES 10

Management Team Agreement
Between The
Winslow Township Administrators Association
And
The Winslow Township Board Of Education

PREAMBLE

This agreement entered into this Seventh Day of December, 1998, by and between the Board of Education of Winslow Township, Blue Anchor, New Jersey, hereinafter called the "Board", and the Winslow Township Administrators Association, hereinafter called the "Association".

PHILOSOPHY STATEMENT

The Winslow Township Board of Education and the Winslow Township Administrators Association agree to work as a Management Team[1] in order to promote educational excellence, to ensure that all students receive a thorough and efficient education, and to provide educational services in the most cost-efficient manner.

Furthermore, both parties agree to do whatever is necessary to create an environment of trust and mutual respect.

To this end, the Board of Education and the Administrators Association recognize the role of the Board of Education, that is, to establish policy and serve in the capacity of employer, as well as the role of the administrative staff to implement board policy and serve as the leaders of the schools' educational program.

In order to function in these roles, the Association agrees to:

---

[1] The Management Team is a formally constituted body of administrators who exercise collaboratively all the administrative processes: goal setting, planning, organizing, implementing, coordinating, communicating, decision-making, and evaluating. It is composed of central office and building level administrative and supervisory personnel. The Management Team is responsible for executing the policies of the School Board. As in other collaborative efforts, when appropriate, input is gathered from teachers, students, parents, and community.

- Pursue professional excellence at all times
- Continually improve management skills
- Serve as models of professional excellence to all members of the staff
- In policy and personnel matters, to follow the administrative chain of command at all times
- Provide advice and consultations regarding personnel and policy matters through established channels
- Avoid public criticism of the Board, its members, and its policies
- Uphold all policies of the Board

In addition, the Board of Education agrees to:

- Provide administrators with opportunities to improve their management skills
- Provide incentives to administrators to improve these skills
- Respect the administrative chain of command by not discussing policy matters and professional appointments with administrators unless they have cleared this with the Superintendent and the Board
- Avoid public criticism of administrators
- Provide the necessary resources, within financial constraints, to ensure the accomplishment of the District's educational goals

RECOGNITION

In accordance with N.J.S.A. 34:13A-1 et. seq., the Board recognizes the Winslow Township Administrators Association herein known as "the Association", as the exclusive and sole representative for discussion of the terms and conditions of employment of all certified personnel, whether under contract, on leave, on a per diem basis, employed, or to be employed by the Winslow Township Board of Education, hereinafter known as "the Board" including only Principals and Assistant Principals.

ASSOCIATION/ADMINISTRATION LIAISON

In order to properly implement effective and continuing communication and to resolve differences, Association representatives will meet with the Superintendent on a regular basis.

RESOLVING DIFFERENCES

Definition

A difference is any complaint or claim that there has been an improper application, interpretation, or violation of any term or provision of this Agreement, administrative decision, board policy, or state statute affecting an individual, group of members, or the Association.

used for additional sick leave as needed in subsequent years. The need for presentation of a medical certificate after sick leave shall be at the discretion of the Board of Education. Administrative employees will be paid for unused sick leave upon retirement at the rate of forty percent (40%) of their daily rate with a maximum of one hundred and ten (110) days effective July 1, 1998.

The administrator, in order to be eligible for this benefit, must notify the Board in November prior to the adoption of the budget for the fiscal year in which he/she plans to retire. The only exception to this rule would be an unforeseen illness that necessitated retirement and, when applicable, to the beneficiary of the administrative employee.

Temporary Leaves of Absence

All administrative employees shall be entitled to the following leaves of absence with pay:

Death in Family

Every administrator shall be granted leave, without deduction, of up to five (5) days in case of death within the immediate family (i.e., father, mother, brother, sister, husband, wife, child, mother-in-law, father-in law). This leave may be extended by the use of personal leave.

Funerals

An allowance of one (1) day shall be granted to attend the funeral of other relatives of the administrative employee (i.e., uncle, aunt, grandmother, grandfather, cousin, niece, and nephew). This leave may be extended by the use of personal days.

Personal

All administrators shall be granted personal leave of no more than three (3) days per year without deduction for personal reasons. Except in extreme emergency, personal leave must be approved in advance.

This personal leave, if unused at the conclusion of the fiscal year, shall be added to the accumulated sick leave on the first day of the next fiscal year.

Legal

Each administrative employee shall be granted time off without deduction in pay for any appearance in a court of law, or other judicial proceeding, wherein the administrative employee's presence is required by the Board of Education, the Superintendent, or as a result of a subpoena by another district employee in the course of his/her employment with the Winslow Township Board of Education.

VACATION

Vacation accrues for the twelve (12) month administrators commencing July 1 through June 30. Vacation will be credited at the commencement of the following fiscal year. Vacation days are not cumulative from one fiscal year to the next fiscal year, but five (5) days vacation may be carried over to be used the following year or be reimbursed in cash upon advance written notice of intention.

If an administrator retires or resigns during the contract year, he/she shall receive all earned prorated vacation days or full payment for all said days at the discretion of the Board of Education. If an administrator is unable to use earned vacation prior to June 30th due to illness, the unused vacation time may be carried over to be used during the following fiscal year (July 1-June 30). If an administrator dies during the year, the beneficiary shall be paid for all unused vacation.

Administrators with one or more years of administrative service in the District shall receive twenty (20) days vacation a year.

With the prior written approval of the Superintendent, an administrator may work on up to two (2) holidays per year. The administrator will receive a compensatory day for each approved day. Such compensatory days may be taken in the period from the day after teachers are released for the year up to the workday before teachers return for the next school year.

Assistant Principals shall be employed on a ten (10) month basis (September 1 - June 30). They shall work five days in August to help prepare for the opening of school. Should the Board determine that assistant principals will become twelve (12) month employees, they will receive the same terms and conditions as all other twelve (12) month employees in this bargaining unit.

HOLIDAYS

Twelve month administrators shall receive annually a minimum of fifteen (15) holidays, up to two (2) professional days for the teachers' convention in November if approved by the Superintendent, and will be required to work one-half (1/2) of the work days during the winter and spring recesses.

Ten month Assistant Principals shall not work any of the days that the teachers have off during the school year since they do not earn vacation.

ADMINISTRATIVE VACANCIES

All vacancies in administrative positions, caused by death, retirement, discharge, resignation or by the creation of new positions, shall be filled pursuant to the following:

- Such vacancies shall be adequately publicized, including a notice in every school (by position, through the Superintendent's bulletin, or otherwise) as far in advance of the date of filling such vacancy as possible (ordinarily at least thirty (30) days in advance and in no event less than seven (7) days in advance). The Superintendent may concurrently publicize the position outside the school district.

STATE AND NATIONAL CONVENTIONS

Attendance at the PSA, national, state, or similar conventions will be permitted with the approval of the Superintendent. The method used for determining attendance at such conferences shall be by seniority on a rotating basis. Cost will be paid by the Board of Education.

The aforementioned criteria are intended as guidelines. As indicated in the agreement, the Superintendent reserves the right to approve/disapprove requests based upon the merit of the request.

ASSOCIATION MEMBERSHIPS

Each administrator will be entitled to association memberships of his or her choice which are paid for by the Board up to a maximum of one percent (1%) of his or her salary or $800, whichever is higher.

HEALTH INSURANCE PROTECTION

Health and Insurance benefits shall be provided for Principals and Assistant Principals, and their eligible dependents by the Board of Education. These benefits shall include the following: Medical, Dental, Vision, and Prescription Plans as currently offered to all other groups. Coverage in these plans shall be equal to or better than that provided to any other bargaining group. If the Board of Education successfully negotiates changes in any of the existing plans of health insurance protection with any other group, this article will be subject to re-negotiation with the Board of Education and the Administrators.

The Board will also provide Health Maintenance Organization (HMO) options for members of the Association. However, the Board's obligation for the premium payment of any HMO shall not exceed the Board's obligation for the traditional indemnity plan at the family coverage rate regardless of the coverage status of a particular unit member.

USE OF AUTOMOBILE

All members of the Association who may be required to use their own automobiles in the performance of their duties shall be reimbursed at the mileage rate approved by the Board.

SALARY

Salary Schedules

The salary guides for the school years 1998-1999, 1999-2000, and 2000-2001 are as follows:

Principals' Salary Guide

A	$70,500
B	$72,500
C	$75,500
D	$78,500
E	$81,500
F	$84,190
G	$86,706
H	$89,449
I	$92,333

Assistant Principals' Salary Guide

A	$57,000
B	$58,395
C	$61,395
D	$64,395
E	$66,800
F	$68,930
G	$71,446
H	$73,736
I	$76,166

Salary Formula

The salaries are determined by the following formula: Base Salary + $50.00 Per Graduate Credit + $1000.00 Longevity for ten (10) or more years in administration in the Winslow Township School District. Credits will be defined as all graduate credits above the MA Degree. Principals are twelve (12) month employees.

Salary Adjustments

Following proper documentation of credits, salaries will be adjusted in July and January of each year as per Board policy.

Salary "Grandfather Clause"

Administrators employed prior to June 30, 1995, by the Winslow Township Board of Education will continue to be paid for all graduate credits for which they were previously paid and are hereby "grandfathered" by this contract. All administrators hired after June 30, 1995, will only be paid for graduate credits earned after they earn the necessary certification for the position they hold.

FUTURE CONTRACT NEGOTIATIONS

The parties agree to enter into negotiations over a successor agreement in accordance with N.J.S.A. 34:13A-1 et seq., in a good faith effort to reach agreement on all matters concerning the terms and conditions of Administrators' employment. Negotiations shall begin no later than January 1, 1998.

DURATION OF AGREEMENT AND SIGNATURES

This agreement shall be effective as of July 1, 1998, and shall continue in effect until June 30, 2001. This agreement shall not be extended by oral or written Agreement and it is expressly understood that it shall expire on the date indicated.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be signed by their respective members.

WINSLOW TOWNSHIP
BOARD OF EDUCATION

By _____
President, Board of Education

By _____
Board Secretary/Business Administrator

WINSLOW TOWNSHIP
ADMINISTRATORS
ASSOCIATION

By _____
Negotiation Team Member

By _____
Negotiation Team Member

By _____
Negotiation Team Member

BERLIN TOWNSHIP SCHOOL DISTRICT

Huster Administration Building

225 GROVE AVENUE
WEST BERLIN, NEW JERSEY 08091

SUPERINTENDENT OF SCHOOLS
Howard M. Paynter, Jr.
(856) 767-9480/9403
Fax: (856) 767-8235

BOARD OF EDUCATION
BUSINESS ADMINISTRATOR
Gene Mercoli
(856) 767-9403
Fax: (856) 767-8235

SUPERVISOR OF SPECIAL SERVICES
Robert E. Jackson, Jr.
(856) 768-2684
Fax: (856) 767-9486

April 6, 2001

Porzio, Bromberg & Newman, P.C.
163 Madison Ave
Morristown, NJ 07962-1997

ATTENTION: Vito A. Gagliardi, Jr.

REFERENCE: Dr. Dennis Grimmett, Settlement

Dear Mr. Gagliardi:

Below are the required action items pertaining to the Dr. Dennis Grimmett settlement:

Item 15e - Motion by Mr. Miller and seconded by Mr. DeGeorge to formally authorize the Board's Special Counsel, Vito Gagliardi, Jr., to execute, on the Board's behalf, the attached settlement agreement with Dr. Dennis Grimmett, Assistant Superintendent for Lower Camden County Regional High School District No. 1. Motion passed by a unanimous roll call vote.

I certify that the above action item is recorded in the minutes of the Berlin Township Board of Education's meeting of March 8, 2001.

Board Secretary

April 6, 2001

IDEA PART B

Motion by Mrs. Robinson, seconded by Mrs. Alwan to accept the IDEA Part B Preschool 2000-01 grant for $2,392.00
Motion carried by roll call vote – 5 ayes.

LONGEVITY PAY
J. Wolffbrandt

Motion by Mrs. Alwan, seconded by Mrs. Almore to approve a longevity payment to Ms. Wolffbrandt in the amount of $1,500 For 25 years of service.
Motion carried by roll call vote – 5 ayes.

PUBLIC HEARING DATE
March 28, 2001

Motion by Mrs. Abdul-Hamid, seconded by Mrs. Robinson to set and advertise Wednesday, March 28, at 6:30 p.m. for the Public Hearing on the Budget.
Motion carried by roll call vote – 5 ayes.

ADJUSTED STATE AID FIGURES

Motion by Mrs. Abdul-Hamid, seconded by Mrs. Robinson to approve the 2000-01 adjusted state amounts as attached.
Total increased amount= $131,260.
Motion carried by roll call vote – 5 ayes.

GRUNNETT VS ET AL

Motion by Mrs. Abdul-Hamid, seconded by Mrs. Almore to approve settlement agreement Grimmett vs. et al.
Motion carried by roll call vote – 5 ayes.

HANNA VS ET AL.

Motion by Mrs. Abdul-Hamid, seconded by Mrs. Almore to approve Hanna vs et al.
Motion carried by roll call vote – 5 ayes.

MISSION STATEMENT

Motion by Mrs. Robinson, seconded by Mrs. Abdul-Hamid to adopt the district's Mission statement.
Motion carried by roll call vote – 5 ayes.

I certify this to be a true copy of the Minutes of February 13, 2001.

3/21/01

Ella M. Brown
Administrative Secretary

+ bb

2. Payment Transactions:
   a. Approve transfers in the amount of $1,450.00.
   b. Payroll Transfers:

DATE	TRANSACTION	AMOUNT
01/11/01	TO: WARRANT FOR: PAYROLL	$79,137.06
01/11/01	TO: WARRANT FOR: PAYROLL AGENCY	$57,984.92
01/29/01	TO: WARRANT FOR: PAYROLL	$76,560.26
01/29/01	TO: WARRANT FOR: PAYROLL AGENCY	$50,904.36
01/30/01	TO: WARRANT FOR: PAYROLL AGENCY	$ 9,766.96

3. Investment Report:
   a. Certificate Of Deposit Activity:

C.D.#	DATE	AMOUNT	MATURITY DATE	INTEREST
2505019774	12/20/00	$248,006.53	01/17/01	$1,205.59

Withdrawn For Capital Expenses: $6,913.63

Reinvested:

C.D.#	DATE	AMOUNT	MATURITY DATE
2505020129	01/17/01	$242,298.49	02/22/01

4. Settlement Agreement in Grimmett v. Berlin Township Board of Education, et al., Docket No. EDUOA 04933-00S, subject to the terms and conditions reference therein.

5. Tuition and transportation for student #168 to attend Archway Programs, as per the IEP, at a cost of $26,700.00 (pro-rated) starting March 5, 2001.

6. Approve tuition for homeless student #H-01 to attend Bullock School, Glassboro, New Jersey, at a tuition rate of $8,086.00 (pro-rated).

7. Accept the resignation of Board Member Michele D. Goodfellow effective immediately.

8. Approve Temptrol Corporation to provide service to HVAC units as per attached contract dated April 1, 2001 through June 30, 2001 at a cost of $1,100.00 - State Contract #604506.

9. Acceptance of the Treasurer's Report and Secretary's Report in accordance with 8A:17-36 and 18A:17-9 for the month of January, 2001. The Treasurer's Report and the Secretary's Report are in agreement for the month. The Board Secretary certifies that no line account has been overexpended and that sufficient funds are available to meet the district's financial obligations for the remainder of the fiscal year.

I hereby certify the foregoing to be a true copy of the minutes of the Clementon Board of Education meeting held on March 20, 2001.

Carol Anne Visalli

Carol Anne Visalli, Board Secretary

H. Consideration to approve Resolution authorizing a lease agreement with the County of Camden for Video Teleconferencing Equipment pursuant to the Tech 2000 Program.

Video Teleconferencing Equipment Lease Agreement

A motion was made by Miss Heins, seconded by Mr. Geary, to approve item H., as listed in the Agenda under New Business.

Roll call vote: Mr. Geary - yes, Mrs. Glover - yes, Miss Heins - yes, Ms. Hershman - yes, Mr. Smith - yes, and Mrs. Moncrief - yes.

Six voting yes and zero voting no. The motion carries.

I. Consideration to approve the agreement between Grimmett vs. Berlin Township et al. Docket No. EDUOA 04933-OOS, subject to the terms and conditions referenced therein.

Grimmett vs. Berlin Twp.

A motion was made by Mr. Geary, seconded by Mrs. Glover, to approve item I., as listed in the Agenda under New Business.

Roll call vote: Mr. Geary - yes, Mrs. Glover - yes, Miss Heins - yes, Ms. Hershman - yes, Mr. Smith - yes, and Mrs. Moncrief - yes.

Six voting yes and zero voting no. The motion carries.

A motion was made by Miss Heins, seconded by Mr. Geary, to open the meeting to the public.

Opened to the Public #2

Roll call vote: Mr. Geary - yes, Mrs. Glover - yes, Miss Heins - yes, Ms. Hershman - yes, Mr. Smith - yes, and Mrs. Moncrief - yes.

Six voting yes and zero voting no. The motion carries.

Bob Clancy, Fourth Grade teacher at #5, asked if the fifth grades were going back to their home schools in the coming school year. There are rumors going around that they might be going to the Junior High School, or they might stay at #5. He asked if there had been any decision by the Board about where the fifth grades will go.

Mrs. Moncrief said no, there has not been. She said every year at this time, you look at your facilities, your rooms, at a lot of things, but there has been absolutely no motion at the Board level to move anything. Everything is as it was.

I hereby certify that this is a true copy of the Lindenwold Board of Education minutes.

Robert F. Wachter Jr.

Robert F. Wachter, Jr., School Business Administrator

I hereby certify that this is an exact copy of the March 27, 2001 minutes of the Pine Hill Board of Education.

Carol Mascioli

First Reading/Draft Proposal of Policy #6146.22 - Grading of Combined "Semester" Courses

Motioned by Mrs. Thompson, seconded by Mr. Taylor, to approve Item #19 of the Superintendent's Report - The first reading/draft proposal of Policy #6146.22 - Grading of Combined "Semester" Courses. Roll call vote. All in favor: Ms. Madeza, Mrs. Parker, Mrs. Oehrl, Mrs. Thompson, Mrs. LaFountain, Mr. Taylor, Mr. Gallagher, Mrs. Snow. Abstain: Ms. Narducci (8-0-1)

First Reading/Draft Proposal of Policy #5113.11 - Student Lateness to Class and Cutting

Motioned by Mr. Taylor, seconded by Mrs. LaFountain, to approve Item #20 of the Superintendent's Report - The first reading/draft proposal of Policy #5113.11 - Student Lateness to Class and Cutting. Roll call vote. All in favor: Ms. Madeza, Ms. Narducci, Mrs. Parker, Mrs. Oehrl, Mrs. Thompson, Mrs. LaFountain, Mr. Taylor, Mr. Gallagher, Mrs. Snow (9-0-0)

CURRICULUM

Approval of 2001-2002 School Year Calendar - Draft C

Motioned by Mr. Taylor, seconded by Mrs. LaFountain to approve Item #21-A of the Superintendent's Report - The approval of 2001-2002 School Year Calendar as shown in Draft C. Roll call vote. All in favor: Ms. Madeza, Ms. Narducci, Mrs. Parker, Mrs. Oehrl, Mrs. Thompson, Mrs. LaFountain, Mr. Taylor, Mr. Gallagher, Mrs. Snow (9-0-0)

Approval of 2001-2002 School Year Calendar - Alternate Draft F

Motioned by Mr. Taylor, seconded by Mrs. LaFountain to approve Item #21-B of the Superintendent's Report - the approval of 2001-2002 School Year Calendar as shown in Alternate Draft F. Roll call vote. All in favor: Ms. Madeza, Ms. Narducci, Mrs. Parker, Mrs. Oehrl, Mrs. Thompson, Mrs. LaFountain, Mr. Taylor, Mr. Gallagher, Mrs. Snow (9-0-0)

UPDATE OF LOWER CAMDEN COUNTY REGIONAL

Approval of Agreement for Dr. Grimmett

Motioned by Mr. Taylor, seconded by Mr. Gallagher to approve Item #22 of the Superintendent's Report - the approval of the agreement for Dr. Grimmett. Roll call vote. All in favor: Ms. Madeza, Ms. Narducci, Mrs. Parker, Mrs. Oehrl, Mrs. Thompson, Mrs. LaFountain, Mr. Taylor, Mr. Gallagher, Mrs. Snow (9-0-0)

REPORT OF THE CLERK OF THE WORKS

Mr. O'Donnell reviewed the following:

Middle School

- Started painting C Wing upstairs. Brick veneer is going up.
- The gym floor has been poured.
- Meeting is scheduled for the end of the week with DEC and Liber Rich.

Glenn School

- Corner markers have been marked by the surveyor.
- Footings will begin by the end of the week.
- Having a problem finding masons for work.

C&T

- Fire Alarm and Exit Lights - approximate $6,000 - $7,000 to repair/replace. Ms. Narducci requested an itemized breakdown for the next meeting.

WATERFORD TOWNSHIP BOARD OF EDUCATION

1106 OLD WHITE HORSE PIKE
WATERFORD, NEW JERSEY 08089
District Web Site: www.ccts-ettc.org/waterford

GARY L. DENTINO
Superintendent of Schools
(856) 767-0331

EARL J. VASSALLO
Assistant Superintendent for Business
Board Secretary
(856) 768-1473

March 13, 2001

I hereby certify that the following is a true copy of the February 21, 2001 Waterford Township Board of Education meeting:

Dissolution

A motion was made by Ralph Condo, seconded by Josephine Masso and carried by unanimous roll call vote to proceed to settle the two legal matters discussed in closed session.

Earl J. Vassallo
Assistant Superintendent for Business/Board Secretary

EJV:th
CertMinD2.21

WINSLOW TOWNSHIP BOARD OF EDUCATION

JOHN C. OBERG • BUSINESS ADMINISTRATOR

113 CENTRAL AVENUE
BLUE ANCHOR, NEW JERSEY 08037-9554

PHONE: 609-561-4102 FAX: 609-561-6378

Motion made by Mrs. Harvey, seconded by Mrs. Pizzuto to approve all agenda items as presented:

Personnel

15. D. Grimmett Settlement and Agreement

Approve the terms and conditions of the agreement as discussed in executive session.

In roll call voting the following was recorded:

Jody Harvey	*-Yes (recuse page 11)*
Margaret Hightower	*-Yes (recuse page 13)*
Joseph Pino, Sr	*-Yes.*
Janice Pizzuto	*-Yes*
James Powell	*-Yes*
Betsy Rusnak	*-Yes*
Jacqueline Smiley	*-Yes*
John Thornton	*-Yes*
Michael Bibb	*-Yes*

This is to certify that the above is a true copy of the motion adopted by the Board of Education of Winslow Township in regular session held on Monday, April 2, 2001.

John C. Oberg, Business Administrator/Board Secretary

OAL DKT. NO. EDU 4933-00
AGENCY DKT. NO. 168-5/00

DR. DENNIS L. GRIMMETT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARDS OF EDUCATION OF THE TOWNSHIP OF BERLIN, THE BOROUGH OF CHESILHURST, THE BOROUGH OF CLEMENTON, THE BOROUGH OF LINDENWOLD, THE BOROUGH OF PINE HILL, THE TOWNSHIP OF WATERFORD AND THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,	:	DECISION
RESPONDENTS.	:	

The record, Stipulation of Settlement and 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 Assistant Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34, 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.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 6|15|01

Date of Mailing: 6|15|01

192-01

WALTER F. RUSAK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

June 18, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3598-00

AGENCY DKT. NO. 48-2/00

WALTER F. RUSAK,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,

Respondent.

Andrew Babiak, Esq., for Petitioner

Raymond L. Hamlin, Esq., for Respondent
(Hunt, Hamlin & Ridley, attorneys)

Record Closed: April 30, 2001 Decided: May 1, 2001

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on April 14, 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.

A telephone conference was scheduled for March 7, 2001. During the conference, 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.

May 1, 2001
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

5-4-01
DATE

Deborah A. Gilmartin CR
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY - 8 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

RECEIVED
STATE OF NEW JERSEY
DEPT OF EDUCATION
APR 30 2 17 PM '01

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

WHEREAS WALTER RUSAK and the IRVINGTON BOARD OF EDUCATION,("THE BOARD") having amicably agreed to resolve their differences, and hereby stipulate and agree that the matter entitled WALTER RUSAK vs. IRVINGTON BOARD OF EDUCATION, under docket number EDUOA-03598-00N, Agency Ref. No. 48-2/00, shall be settled upon the terms and conditions stated herein;

WHEREAS, the Board Members of the IRVINGTON BOARD OF EDUCATION, having the authority to act on behalf of the Board of Education, have agreed after due consideration to settle all claims related to the employment of WALTER RUSAK in connection with his duties and responsibilities as an administrator and his claims which were filed challenging his removal from the position of Assistant Superintendent of Schools and the IRVINGTON BOARD OF EDUCATION and WALTER RUSAK having determined that it would be in the best interests of the IRVINGTON BOARD OF EDUCATION and WALTER RUSAK to enter into such 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. WALTER RUSAK was appointed as a teaching staff member of THE BOARD, on or about November 23, 1971, and has been an employee of THE BOARD since that time.

2. On or about February 4, 2000, WALTER RUSAK filed a Petition with the Commissioner of Education, challenging his transfer from the position of Assistant Superintendent to Principal.

3. THE BOARD and WALTER RUSAK, through discussions between their respective counsel determined that it would be most beneficial to the parties involved to enter into the within agreement. Moreover, in furtherance of the within Settlement Agreement both parties agree that there were no findings made with respect to the petition.

4. In furtherance of the within settlement, it is agreed by and between WALTER RUSAK and THE BOARD, that WALTER RUSAK shall retire effective September 30, 2002. To that end, WALTER RUSAK shall tender his letter of retirement on or before March 21, 2001, effective September 30, 2002, which same shall be voted upon and accepted by THE BOARD at its March 2001, meeting. Said tendering and acceptance by THE BOARD shall be contingent upon the Commissioner of Education's acceptance of the terms and conditions of the within agreement. Moreover, WALTER RUSAK'S resignation shall not be effective or binding unless and until (1) it is approved by THE BOARD, and (2) the terms and conditions of the within Settlement Agreement are complied with by THE BOARD.

5. WALTER RUSAK shall continue to provide services to the IRVINGTON BOARD OF EDUCATION as a "Principal", under the terms and conditions of his certification from the date of this agreement through June 30, 2001, at which time

WALTER RUSAK shall be on administrative leave with pay until the date of his retirement on September 30, 2002.

6. WALTER RUSAK shall continue to receive salary benefits in accordance with this Settlement Agreement through the date of his retirement on September 30, 2002. It is further agreed and acknowledged as of the execution of the within agreement that WALTER RUSAK's salary, shall be $120,786.00, (retroactive) from the date of March 1, 2001, through the date of his retirement. Said salary predicated upon a twelve (12) month academic year. WALTER RUSAK will not be entitled to any salary increments or increases above the $120,786.00, salary during the remainder of his employment. WALTER RUSAK shall be covered by THE BOARD's health and medical plans for administrators during the period covered by the within agreement. Upon retirement WALTER RUSAK shall be entitled to all the benefits and perquisites of a retiring Board employee and/or retiring administrator as provided by the administrative collective bargaining agreement including but not limited to health insurance and payment for unused vacation days.

7. Both parties, after fully considering this matter, have concluded that it is in the best interests of THE BOARD and WALTER RUSAK to settle the within matter involving WALTER RUSAK, in addition to the fact that there is a potential for further escalation of substantial legal and administrative costs, personal time and that parties' interest would be better served in resolving this matter through the within settlement which resolves all issues, currently in dispute.

2C

8. The within Settlement Agreement shall satisfy in full the matter entitled; ***WALTER RUSAK vs. IRVINGTON BOARD OF EDUCATION*** under docket number EDUOA-03598-00N and Agency Ref. No. 48-2/00 and any other claims or demands which WALTER RUSAK now has or may have against THE BOARD up to and including the date of this Settlement Agreement. Disputes concerning this settlement Agreement shall be determined by a court of competent jurisdiction or administrative agency. Upon execution of the within agreement all matters involving WALTER RUSAK and THE BOARD shall be dismissed and/or withdrawn with prejudice.

9. WALTER RUSAK agrees to honor all duties and assignments as directed in good faith by the Superintendent of Schools in accordance with his assignment as Principal.

10. THE BOARD agrees that, if upon the request of WALTER RUSAK any third party makes an inquiry into his employment history with THE BOARD, after his retirement, that such inquiry shall be handled in a professional and courteous manner in accordance with the confidentiality provisions of this Agreement. Moreover, all inquiries, if any, shall be directed solely to the Superintendent of Schools, who shall be the only employee of THE BOARD authorized to respond to any such inquiry. THE BOARD and WALTER RUSAK agree that the reference letter attached here to as Exhibit "A" shall be the only document supplied by THE BOARD to prospective employers.

11. In consideration of the promises and undertakings of THE BOARD under this Settlement Agreement, WALTER RUSAK agrees to release and give up any and all

claims against THE BOARD including any claims from the beginning of the world up to the date of his execution of this agreement, and specifically all claims related to the matter currently pending before the Office of Administrative law, under docket number EDU-03598-00N and agency Ref. No. 48-2/00. The following claims are specifically excluded from this release provision : (i) any claim alleging a breach of a term or condition of this agreement; (ii) any claims for physical injuries that may result and/or be discovered subsequent to the execution of this agreement caused by the negligent or intentional acts of the parties or their agents or in the course of performance of assigned duties on the worksite due to any hazardous or unsafe condition; (iii) any claim or right to obtain continued medical coverage at his own expense as authorized by the Consolidated Omnibus Reconciliation Act of 1986 (COBRA) ; (iv)any claim or right under the Teachers' Pension and Annuity Fund and related statutes and regulations; and (v) any rights he may have under New Jersey's Workers Compensation laws. WALTER RUSAK acknowledges that he fully understands the terms of this agreement and voluntarily executed it.

12. THE BOARD agrees to release and forever discharge WALTER RUSAK from any claims, suits, tenure charges, actions at law or in equity of any kind it may have against WALTER RUSAK agrees that execution of this Agreement shall serve as full and final satisfaction of same, except for any claims advising from a breach of this Agreement or any provision hereof. THE BOARD acknowledges that it has voluntarily and willingly granted this release and agrees that its successor shall be bound there by.

13. THE BOARD acknowledges and agrees that disclosure of personnel records including this Settlement Agreement is governed by the Right to Know Law codified at N.J.S.A. 47: 1A-1, et seq., Executive Order No. 11 (Nov. 15, 1974) and case law interpreting them. Pursuant to the Right to Know Law and Executive Order No. 11, the only information in this Settlement Agreement and the only personnel information in connection with WALTER RUSAK's employment with THE BOARD which is deemed public is: (1) his name; (2) title; (3) salary; (4) payroll records; (5) length of service; and (6) letter of reference. All other information, except as otherwise provided by law is deemed confidential and shall not be released to the public absent a written release by WALTER RUSAK, or by a lawful order of a court of competent jurisdiction or pursuant to a rule of court of competent jurisdiciton.

14. It is understood that neither the execution of this Agreement nor any other action taken by THE BOARD in connection with this settlement constitutes an admission by THE BOARD of any violation of any law, duty or obligation, or that any decision or action with respect to WALTER RUSAK was unwarranted, unjustified, retaliatory, discriminatory or otherwise unlawful. THE BOARD specifically disclaims any liability to WALTER RUSAK.

15. The parties have entered into this Settlement Agreement solely to compromise the disputed claims. No findings of any kind have been made or issued by any court regarding the merits of the claims of this action and neither party purports to be the

prevailing party in this action.

16. All parties to this Agreement and their counsel participated in the negotiation and drafting of this Settlement 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.

17. This Settlement Agreement and MUTUAL RELEASE referred to herein sets forth the entire agreement between WALTER RUSAK and THE BOARD , and supersedes all prior agreements or understandings, if any, between the parties regarding the subject matter of this Settlement Agreement. This Settlement Agreement shall be construed in accordance with the laws of the State of New Jersey.

18. The parties acknowledge that they have consulted with their respective attorneys regarding this Settlement Agreement and Mutual Release, that the terms of this Settlement Agreement and Mutual Release have been explained to them and that they have represented to their attorneys that they have read this Settlement Agreement and Mutual Release and fully understand it and agree to be bound thereby.

19. In furtherance of this agreement, WALTER RUSAK agrees to waive use of 150 of his 300 sick days. THE BOARD shall pay WALTER RUSAK for 150 sick days at the rate specified in the administrators collective bargaining contract in effect on the date of his retirement. Said payment shall ve made within the time provided by the administrators collective bargaining agreement.

20. WALTER RUSAK and THE BOARD agree that WALTER RUSAK shall receive $10,000.00, as payment for back pay, relating back to the filing of the Petition. Said payment shall be subject to income tax withholdings in accordance with the Federal and State Tax laws. Said payment shall be made within thirty (30) days after the Commissioner of Education's approval of this Settlement Agreement.

21. WALTER RUSAK will forego any claim that he may have had to the position of Assistant Superintendent and any claim for tenure in that title/position.

22. THE BOARD and its individual members shall not make any disparaging remarks about WALTER RUSAK.

23. THE BOARD agrees to indemnify WALTER RUSAK in accordance with N.J.S.A. 18A:16-6 and -6.1 and any amendments thereto.

24. If WALTER RUSAK dies prior to his retirement, THE BOARD shall make all payments hereunder to his estate.

25. THE BOARD agrees that WALTER RUSAK may obtain letters of recommendation or reference from individual board members (past and present) and or staff members.

26. In the event THE BOARD withholds salary payments from WALTER RUSAK, THE BOARD will be required to reimburse WALTER RUSAK, reasonable attorneys fees if he was compelled to file an application in a court of competent jurisdiction to recover said payments. THE BOARD will not be required to reimburse WALTER

wh

RUSAK, in the event tenure charges are preferred against him pursuant to Title 18A, or criminal charges are filed against him, except as required by law, during the remainder of his employment.

27. THE BOARD will continue to pay all union dues on behalf of WALTER RUSAK, and will pay his dues to the New Jersey Association of School Administrators during the course of his employment.

IN WITNESS WHEREOF the parties hereunder have signed this agreement as their voluntarily act and agree to be bound thereby.

Witness

WALTER RUSAK

Witness

ANDREA Mc ELROY, President
Irvington Board of Education

Dated: 4/25/01

2)

EXHIBIT "A"

To Whom It May Concern:

Walter F. Rusak began his career in education in 1971 as a Social Studies teacher in the Irvington Public School System. He was appointed assistant principal after three years and was appointed principal of Chancellor Avenue school from 1976 to 1980 and principal of Union Avenue school from 1980 to 1998.

While in the district Mr. Rusak assisted in the building program by writing educational specifications for the district building program which built one elementary school and additions on two middle schools.

In 1985 Mr. Rusak received a Dodge Foundation Educational Grant which assisted in the training of the entire Union Avenue School faculty. This professional development grant was under the direction of Madeline Hunter.

Under his guidance and leadership each school maintained a high quality of education, high test scores and pupils were well disciplined. His professional manner was recognized by the educational community and teachers.

In October 1998, Mr. Rusak was appointed to the position of Assistant Superintendent of Schools. During his two year of service he assisted in bringing the district from a deficit to a six million dollar surplus. In addition, the district showed an increase in HSPT test results.

In this capacity he was also in charge of the reorganization of the entire district from K-6, K- 8, 7-8, 9-12 organized for various sections of the town, to a K-5, central 6, 7-8 and 9-12 high school plan. Mr. Rusak was responsible for the distribution of staff, re-districting of students and movement of school supplies. This was completed successfully.

During his years in Irvington Mr. Rusak has maintained a near perfect attendance record.

In summary Mr. Rusak is a hard working, dedicated school administrator. He had many successes in our large urban district. He has the respect of the pupils, teachers, parents and community. We would recommend him for employment in his chosen educational field.

OAL DKT. NO. EDU 3598-00
AGENCY DKT. NO. 48-2/00

WALTER F. RUSAK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Settlement Agreement and Mutual 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 the parties' compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6|18|01

Date of Mailing: 6|18|01

193-01

MARILYN VASEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

June 18, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7333-96

AGENCY DKT. NO. 224-6/96

MARILYN VASEN,

Petitioner,

v.

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

Respondent.

Gail Oxfeld Kanef, Esq., for Petitioner
(Oxfeld & Cohen, LLC, attorneys)

Alan J. Schnirman, Esq., for Respondent
(Schnirman & Charney, attorneys)

Record Closed: April 24, 2001 Decided: April 24, 2001

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on July 9, 1996, 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 January 17, 2001 at the OAL, 185 Washington Street, Newark, New Jersey. At 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 24, 2001
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

5-2-01
DATE

Deborah A. Gilmartin /CA
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY - 3 2001
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

OXFELD COHEN, LLC
50 Commerce Street
Newark, New Jersey 07102
(973) 642-0161
Attorneys for Respondent

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

APR 24 8 43 AM '01

MARILYN VASEN,	:	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW**
Petitioner,	:	**OAL DOCKET NO. EDUOR 07333-96N**
-vs-	:	
LINDEN BOARD OF EDUCATION,	:	**SETTLEMENT AGREEMENT**
Respondent.	:	
	:	

This matter having come before the Court upon Petition of Marilyn Vasen and the Linden Board of Education having denied the allegations of the Petition and the parties having amicably resolved the issues between them,

IT IS ON THIS day of , 2001 hereby agreed as follows:

1. The Respondent, Linden Board of Education agrees to pay to Petitioner, Marilyn Vasen the sum of $5500 in full satisfaction of any salary claimed by Ms. Vasen for the period of time April 1, 1996 through April 30, 1996. The Respondent Board of Education agrees to make all appropriate deductions from the $5500 and agrees to make all appropriate pension contributions it would normally make from employee salaries.

2. In exchange for the above consideration, Petitioner, Marilyn Vasen agrees to withdraw the within Petition of Appeal with prejudice.

3. This matter shall not serve as a precedent in matters involving any other district employee.

Marilyn Vasen
MARILYN VASEN

ALAN J SCHNIRMAN
ATTORNEY FOR LBOE

DATED:

OAL DKT. NO. EDU 7333-96
AGENCY DKT. NO. 224-6/96

MARILYN VASEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINDEN, 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.

COMMISSIONER OF EDUCATION

Date of Decision: 6|18|01

Date of Mailing: 6|18|01

194-01

W. H. and L.H., on behalf of minor child, S.H., :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

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

:

RESPONDENT.

:

June 18, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7216-00
Agency Reference No. 143-5/00

W. H. and L. H. o/b/o minor child, S.H.

Petitioners,

v.

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

Respondent.

W. H. and L. H., o/b/o S. H., for petitioner, *pro se*

Joseph M. Wenzel, Esq., for respondent
(Thomas M. McCormack, P.C.)

Record Closed: April 26, 2001 Decided: April 26, 2001

BEFORE **MICHAEL L. RAVIN,** ALJ:

STATEMENT OF THE FACTS

W. H. and L. H., parents of S. H., appeal the residency determination of S. H. made by the Union Township School District, 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 August 3, 2000, 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 April 12, 2001. Prior to 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.

April 26, 2001
DATE

Michael L. Ravin
MICHAEL L. RAVIN, ALJ

Receipt Acknowledged:

5-2-01
DATE

DEPARTMENT OF EDUCATION

MAY - 3 2001
DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

jrp

Thomas M. McCormack, P.C.
A Professional Corporation
38 Roseland Avenue
Roseland, New Jersey 07068
(973) 228-7818
Attorneys for Respondent

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

MAR 23 3 28 PM '01

OAL DKT NO. EDU 72/6-00

W.H. and L.H.. on behalf of minor child, S.H. Petitioner vs. Board of Education of the Township of Union, Union County, Respondent.	Department of Education Agency Docket No. 143-5/00

SETTLEMENT STIPULATION, DISMISSAL AND MUTUAL RELEASE

AGREEMENT and stipulation made this 4th day of January 2001, between Wendell Huggins and LaSaunda Huggins, on behalf of minor child, Savon Huggins, 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, Savon Huggins.

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.** Wendell Huggins and LaSaunda Huggins shall pay the Board of Education of the Township of Union the total cash sum of One Thousand Dollars ($1000.00). This amount is to be paid by Wendell Huggins and LaSaunda Huggins in the following manner: $100.00 shall be due simultaneously with the signing of this stipulation; $200.00 shall be due on February 28, 2001; $200.00 shall be due on March 31, 2001; $200.00 shall be due on April 30, 2001; $200.00 shall be due on May 31, 2001; and $100.00 shall be due on June 30, 2001. This amount once paid in full ($1000.00) represents the settlement of all claims and by and for tuition due and owing for educational services provided to Savon Huggins for School Year 1999-2000. 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 June 30, 2001; 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 Wendell Huggins and LaSaunda Huggins.** Wendell Huggins and LaSaunda Huggins, on their own behalf and on the behalf of their heirs, personal representatives, successors and assigns, including but not limited to Savon Huggins, 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 Wendell Huggins and LaSaunda Huggins 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 Wendell Huggins and LaSaunda Huggins in that certain petition filed with the State of New Jersey Department of Education, Bureau of Controversies and Disputes, Agency Docket No. 143-5/00, captioned "W.H. and L.H. on behalf of minor child, S.H., Petitioner vs. Board of Education of the Township of Union, Union County, Respondent". Wendell Huggins and LaSaunda Huggins hereby represent and acknowledge that this is a legally binding instrument, that there are no representations or promises made to them which are not contained in this instrument, and that the only obligation of Wendell Huggins and LaSaunda Huggins shall be to pay the Board of Education of the Township of Union the said above-mentioned sum of $1000.00.

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 Wendell Huggins and LaSaunda Huggins and their 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, inte , 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 Wendell Huggins and LaSaunda Huggins 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 Wendell Huggins and LaSaunda Huggins, 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. 143-5/00, captioned "W.H. and L.H. on behalf of minor child, S.H., Petitioner vs. Board of Education of the Township of Union, Union County, Respondent". The Board of Education of the Township of Union hereby represents a 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 Wendell Huggins and LaSaunda Huggins shall be to pay the Board of Education of the Township of Union the said above-mentioned sum of $1000.00.

4. **Dismissal.** The parties hereby agree and stipulate that this case is voluntarily dismissed with prejudice and without costs.

IN WITNESS WHEREOF, the parties hereto have executed this stipulation as of the day and year first written above.

PETITIONER:

LaSaunda Huggins

Wendell Huggins

RESPONDENT:
Board of Education of
Township of Union

By:

Title: Board Secretary

ATTEST:

Joseph M. Wenzel, Esq.
Attorney for Respondent

OAL DKT. NO. EDU 7216-00
AGENCY DKT. NO. 143-5/00

W. H. and L.H., on behalf of minor child, S.H.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

It is noted that the terms of the agreement call for payment of moneys by petitioners prior to the Commissioner's review and approval of the agreement. The parties are hereby reminded that effectuating settlement terms prior to their approval by the Commissioner is improper and done at the peril of the parties.

Notwithstanding the above, 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|18|01

Date of Mailing: 6|18|01

195-01
(SB) 24-01

C #195-01L
SB # 24-01

K.D., on behalf of minor child, K.D.,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF NORTH HALEDON, PASSAIC COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Assistant Commissioner of Education, June 19, 2001

For the Petitioner-Appellant, K.D., pro se

For the Respondent-Respondent, Lindabury, McCormick & Estabrook
(Anthony P. Sciarrillo, Esq., of Counsel)

K.D. (hereinafter "petitioner") filed a petition with the Commissioner of Education challenging the determination of the Board of Education of the Borough of North Haledon (hereinafter "Board") that her daughter was not entitled to a free public education in that district. The Board filed a counterclaim seeking tuition from the petitioner for the period of her daughter's ineligible attendance in the district.

On June 19, 2001, the Assistant Commissioner of Education issued a letter decision in which he dismissed the petition for failure to state a claim for which relief could be granted. The Assistant Commissioner concluded that the petitioner had failed to demonstrate that she and her daughter were domiciled within the North Haledon School District so as to be entitled to a free public education in that district pursuant to

N.J.S.A. 18A:38-1. The Assistant Commissioner granted the Board's counterclaim for tuition and directed the petitioner to reimburse the Board for the period of her daughter's ineligible attendance in the North Haledon School District from January 24, 2001, when he found that the petitioner clearly understood that Hawthorne was responsible for the education of her daughter, through her daughter's last day of school in North Haledon.

The petitioner filed the instant appeal to the State Board, contending, inter alia, that the amount of tuition calculated by the Board following the Assistant Commissioner's decision – $4,888.88 – is excessive. More specifically, the petitioner maintains that the amount being charged by the Board for her daughter's resource center instruction is unreasonable. The Board counters that the amount of tuition owed by the petitioner "was calculated based upon the adopted tuition rate for non-resident students plus the cost of resource center support per child divided by the total number of school days to arrive at a per diem cost of $53.14....Pursuant to the Commissioner's decision, this per diem amount was then multiplied by 92 days, for January 25, 2001 through June 22, 2001, for a total of $4,888.88." Answer Brief, at 2.

After a thorough review of the record, we affirm the decision of the Assistant Commissioner that the petitioner has not demonstrated that she is domiciled in North Haledon. Accordingly, we concur with the Assistant Commissioner that the petitioner is responsible for tuition for the period of her daughter's ineligible attendance in that district.

However, the record does not permit a determination of the petitioner's contention regarding the specific amount of tuition calculated by the Board following the Assistant Commissioner's decision.

N.J.S.A. 18A:38-1(b) provides in pertinent part that:

> If in the judgment of the commissioner the evidence does not support the claim of the parent or guardian, the commissioner shall assess the parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance....

The issue of the amount of tuition to which the Board is entitled was not litigated in the proceedings below and, therefore, was not addressed or determined by the Assistant Commissioner. Since the record before us does not permit such a determination, we remand this matter to the Commissioner for the limited purpose of determining the Board's "total annual per pupil cost" as it applies to the educational program provided to the petitioner's daughter, particularly with regard to the resource center, and for a resultant determination of the amount of tuition to which the Board is entitled.

We do not retain jurisdiction.

Kathleen A. Dietz abstained.

January 2, 2002

Date of mailing JAN 04 2002

196-01

196-01E

B.S. AND E.S., on behalf of minor child,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WANAQUE, PASSAIC COUNTY AND BOARD OF EDUCATION OF THE BOROUGH OF RINGWOOD, PASSAIC COUNTY,	:	DECISION ON MOTION
RESPONDENTS.	:	

June 22, 2001

01 JUN 14 AM 10:34

PORZIO, BROMBERG & NEWMAN, P.C.
100 Southgate Parkway
Morristown, NJ 07962-1997
(973) 538-4006
Attorneys for Respondent Ringwood Board of Education

BERNIE SZILAGYI and ELLEN SZILAGYI, Petitioners, v. BOROUGH OF WANAQUE BOARD OF EDUCATION, BOROUGH OF RINGWOOD BOARD OF EDUCATION, ARTHUR JORDAN TRANSPORTATION, MURPHY BUS COMPANY, Respondents.	BEFORE THE COMMISSIONER OF EDUCATION AGENCY REFERENCE NO. 136-5/01 OAL DOCKET NO. EDU-3849-01 **ORDER DENYING PETITIONERS' EMERGENT APPLICATION**

THIS MATTER having been opened to the Court upon application of Edward P. Azar, Esq., attorney for the Petitioners Bernie Szilagyi and Ellen Szilagyi for emergent relief; and the Court having read and reviewed the moving papers submitted and any opposition thereto; and oral argument having been held on June 6, 2001; and for good cause having been shown,

It is on this 13 day of June, 2001,

ORDERED that the motion of Petitioners for emergent relief be and hereby is denied.

EDU 3849-01

A copy of the within Order shall be served upon all counsel within 7 days from the date of entry.

Hon. Jeffrey A. Gerson, A.L.J.

OAL DKT. NO. EDU 3849-01
AGENCY DKT. NO. 136-5/01

B.S. AND E.S., on behalf of minor child,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WANAQUE, PASSAIC COUNTY AND BOARD OF EDUCATION OF THE BOROUGH OF RINGWOOD, PASSAIC COUNTY,	:	DECISION ON MOTION
RESPONDENTS.	:	

The audiotape of the hearing of this emergent matter conducted at the Office of Administrative Law (OAL) on June 6, 2001, and the 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 as he concurs with the ALJ's hearing determination that petitioners have not satisfied the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982); most notably, they have fully failed to demonstrate that irreparable harm will result absent the grant of such relief.

Accordingly, the within application for emergent relief is hereby denied. This matter on its merits will proceed at the OAL as expeditiously as possible consistent with the recommendation of the ALJ.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Decision 6|22|01

Date Mailed 6|22|01

198-01

198-01R

MARTIN COHEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JAMES R. DURR, MEMBER, BOARD OF EDUCATION OF THE TOWNSHIP OF CHESTERFIELD, BURLINGTON COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

SYNOPSIS

Petitioner alleged that respondent, a Chesterfield Board member, was not a resident of the District. Respondent, who was divorcing his spouse, while acknowledging that he sometimes was away from the home, provided documentation listing the Chesterfield property as his residence.

N.J.S.A. 18A:12-3 states that membership in a local board of education terminates immediately when a board of education member ceases to be a bona fide resident of the district. The ALJ found no proof that respondent was no longer residing in Chesterfield. The ALJ found that respondent testified credibly and presented documentation such as bills, tax records, *etc.*, that listed Chesterfield as his address. The ALJ denied petitioner's request for a declaration that respondent was not a bona fide resident of Chesterfield Township. The Commissioner remanded the matter to the OAL for further findings of fact and credibility determinations with regard to the testimony of two witnesses for petitioner.

On remand, the ALJ further examined the testimony of petitioner's two witnesses, and made findings of fact and credibility determinations with respect to those witnesses. The ALJ determined that respondent resides in Chesterfield and dismissed the petition.

The Commissioner adopted the decision of the ALJ as his own.

June 22, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 470-01

AGENCY DKT. NO. 78-2/00

(REMAND OF EDU 4104-00)

MARTIN COHEN,

Petitioner,

v.

JAMES R. DURR MEMBER, BOARD OF EDUCATION OF THE TOWNSHIP OF CHESTERFIELD, BURLINGTON COUNTY,

Respondent.

Peter Emmons, Esq., for petitioner

James R. Durr, respondent, *pro se*

Record Closed: March 15, 2001 Decided: May 7, 2001

BEFORE **KATHRYN A. CLARK**, ALJ:

STATEMENT OF THE CASE

In the original petition, OAL Dkt. #EDU 4104-00, the petitioner, Martin Cohen, asserted that James R. Durr, a member of the Board of Education of the Township of Chesterfield, Burlington County, was not a resident of the District.

In the remand, OAL Dkt. #EDU 470-01, the Department of Education asked for additional factual findings and credibility assessments to permit the Commissioner to resolve fairly whether the petitioner met his burden. The remand was received by the Office of Administrative Law on February 9, 2001. On March 15, 2001, the petitioner advised this Administrative Law Judge's chambers that he would not participate in a telephone conference, and that he would rely on the record of the April 17, 2001 hearing. The record accordingly closed.

POSITIONS OF THE PARTIES

Petitioner claimed that James Durr (hereinafter Durr)is not a resident of Chesterfield Township, and has not been a resident since June, 1998, and that as such, he is not entitled to sit on the Chesterfield Township Board of Education (hereinafter Board). Petitioner asked that Durr be removed from the Board, and that an accounting be made of all actions taken by the Board during the past 2 years, and that all actions taken as a result of Durr's participation or influence, either directly or indirectly, be reviewed by the Board for their continued validity.

Martin R. Cohen, petitioner, testified that he formed his belief that Durr did not live in Chesterfield Township through an unsigned letter (P-1) to the Board, which listed many complaints, including a comment that a Board member, Durr, does not reside in Chesterfield[1].

Cohen then investigated the County divorce court records, and found the Complaint (P-2) and Answer (P-3) in Durr's divorce action[2]. Based on the Answer to the divorce petition, Cohen wrote the Board saying that Durr should resign. The matter was considered by the Board on February 7, 2000, with further discussion on February 14, 2000.

---

[1] The full text of the comment reads "Disregard of School Board member residency requirements as stated in NJ Statute 18-A. Jim Durr currently resides in a township other than Chesterfield and consequently should have been directed to resign by the School Board President. Exhibit #1: 1, 4, 5. NJ Statute 18A 'Bonafide resident' " . . . "see attached Exhibit #1 New Jersey School Board Member Code of Ethics"

This letter was presented by petitioner's wife, Dr. Marlene Cohen, and Kim Cesaro to the Board at their June 16, 1999 Board meeting. P4, page 5.

[2] The Complaint filed on behalf of Elizabeth Durr lists James Durr's address as 279 Sykesville Road, Wrightstown (which is within the school district), but goes on to say that "(o)n or about June, 1998, the Defendant (Durr) moved out of the marital home and with (sic) his paramour causing the Plaintiff to become upset." In the Answer filed on behalf of James Durr by John E. Kurts, Esq., Durr's residence is given as 66 Bunting Bridge Road, New Hanover Township.

At the February 7 meeting, Durr asked to respond to the assertions, and he offered the same explanation again at the hearing. Durr said that he had given John E. Kurts, Esq., the attorney he originally engaged for his divorce action, the mailing address of 66 Bunting Bridge Road for the mailing of any documents related to the divorce proceedings, so that his wife would not be bothered by receiving such mailings at 279 Sykesville Road. Durr said that Kurts had used the 66 Bunting Bridge Road address as Durr's address in the Answer, and that Durr did not catch the error when he signed the Answer. Prior to this matter reaching the Board, Durr said that his present attorney for the divorce action, Henry Tutek, Esq., filed an amendment to the Answer in the divorce action, correcting Durr's address to 279 Sykesville Road, Chesterfield. He also presented copies of utility bills, telephone bills and cancelled checks for property taxes he paid for 279 Sykesville Road. Durr said he regretted that a suggestion had been made that anyone on the Board acted improperly or in violation of a Code of Ethics by not removing him from the Board, or by allowing his son to remain in Chesterfield schools[3].

At the February 14 meeting, petitioner stated that a Board member said that his letter would not be answered by the Board (P-4, pages 4-6). The Board's minutes (P-4, at page 2) reveal that a Board member (Mary Mazzoni) did say that she would not dignify the comments about her or her ethics, or the comments about any other Board member, by a response. Also at the February 14 meeting, Durr said that he explained again to Cohen that the first divorce Answer had been incorrect, and had been amended by the court.

Elizabeth Durr was subpoenaed by petitioner. She said that she and her then-husband built the house at 279 Sykesville Road in 1989. They became separated in June, 1998, when Mr. Durr left the residence. Mrs. Durr assumed he went to his girlfriend's house in New Hanover (66 Bunting Bridge Road). To contact him, Mr. Durr left his cell phone number, and his girlfriend's telephone number.

Mrs. Durr believes Mr. Durr still lives at 66 Bunting Bridge Road, New Hanover Township. Since July, 1999, Mrs. Durr has lived at 263 Sykesville Road, which is in North

---

[3] Durr said that the School Board attorney had concluded that, since the parents share Joint Custody, as long as Durr remains a resident of Chesterfield Township, his son can remain in Chesterfield schools.

Hanover Township. She said that Mr. Durr's business (florist) is at the marital home at 279 Sykesville Road, and that he comes there to work at 279 Sykesville Road every day. It was his "constant presence" in the house at 279 Sykesville Road that made her move to 263 Sykesville Road.

Casey Durr, the daughter of Elizabeth and James, was also subpoenaed by petitioner. She said that her father moved out of 279 Sykesville Road in June, 1998, and that she believed he lives at 66 Bunting Bridge Road, New Hanover Township.

Respondent said that Mrs. Cohen (petitioner's wife) and Kim Cesaro (the presenters of P-1 at the June 16 Board meeting) ran as unsuccessful write-in candidates in a recent school board election.

Upon cross-examination, Mr. Durr said that he never moved out of his residence at 279 Sykesville Road, but that he was temporarily displaced. He said that he stayed sometimes at 66 Bunting Road, and sometimes at his parents, and sometimes he slept in his car during the early days of the divorce proceedings. He said that his residence remained at 279 Sykesville Road, and that it still is his residence. The divorce is not yet final and no distribution of assets has yet been made.

Petitioner recalled Mrs. Durr, who said that Mr. Durr did not sleep overnight at 279 Sykesville Road from June, 1998 through July, 1999.

FINDINGS OF FACT

James Durr is a member of the Chesterfield Township Board of Education. He and his wife are in the process of obtaining a divorce. The family home is at 279 Sykesville Road, Chesterfield.

In the Answer in the pending divorce action, Durr's residence is given as 66 Bunting Bridge Road, New Hanover Township. This address was given in error, and it has been corrected to 279 Sykesville Road in front of the appropriate court.

Durr presented at the hearing copies of bills for 1999 property taxes for James Durr Wholesale Florist, Inc. at 279 Sykesville Road, Chesterfield. Durr's Driver's License, utility bills and tax forms list 279 Sykesville Road, Chesterfield as his address. His magazine subscriptions come to this address. There was no showing of the establishment of any residence for Durr with the 66 Bunting Bridge Road address, other than the divorce Answer (supra).

DISCUSSION

Durr testified credibly that it was better for him sometimes to be out of the house particularly through the early stages of the divorce, but that he never gave up the house at 279 Sykesville Road as his residence. He also testified credibly that he gave his first attorney the address of his girlfriend as a mailing address, so that divorce-related matters would not be coming to 279 Sykesville Road while his wife still lived there. The first attorney inadvertently entered the mailing address as Durr's residence address in the divorce Answer, and Durr signed the Answer without noticing the error. This mistake has since been corrected through appropriate channels.

James and Elizabeth and Casey Durr all said that Durr continued to spend considerable time, including his work days, at 279 Sykesville Road. From the testimony, it is probable that he slept elsewhere during most of the time in question. But residence is not entirely dependent upon where someone lays his head. The totality of the circumstances should be viewed. Here, Durr continued to maintain 279 Sykesville Road as his residence for his financial transactions, tax purposes, driver's license and other major life activities. Magazines and club subscriptions were sent to him at 279 Sykesville Road. Mail sent to him at the Bunting Bridge address was returned by the post office as undeliverable. There was no showing that he ever established a residence for himself at 66 Bunting Bridge Road.

James and Elizabeth and Casey Durr were all entirely credible in their testimony, but Elizabeth and Casey knew only part of the story. They said that Durr lived at 66 Bunting Bridge Road, but just because he slept there most nights does not make 66 Bunting Bridge Road his residence. He maintained significant contacts with 279 Sykesville Road, he gave none of them up, he established no new contacts at 66 Bunting Bridge Road, he intended to keep 279

Sykesville as his residence, he is there practically every day at his business, and at the hearing, he said that he still lives at 279 Sykesville Road.

The statute, at *N.J.S.A.* 18:12-3, states that membership in a local board of education terminates whenever that member ceases to be a bona fide resident of that district.

> ***N.J.S.A.* 18A:12-3 Cessation of membership**
>
> Whenever a member of a local or regional board of education shall cease to be a bona fide resident of the district, or of any constituent district of a consolidated or regional district which he represents, or shall become mayor or a member of the governing body of a municipality, his membership in the board shall immediately cease; and, any member who fails to attend three consecutive meetings of the board without good cause may be removed by it. Whenever a member of a county special service school district or a member of a county vocational school district shall cease to be a bona fide resident of the district, or shall hold office as a member of the governing body of a county, his membership on the board shall immediately cease.

The question then becomes, did Durr cease being a bona fide resident of Chesterfield Township? To answer this, one must look to the concept of residence. There is no precise legal definition of "*bona fide* resident." It is largely a matter of intention.

Here, Durr's bills, taxes, magazine subscriptions and driver's license all list 279 Sykesville Road, Chesterfield as his address. Durr testified credibly that sometimes he does not stay at 279 Sykesville Road, Chesterfield overnight. but this is because of the unsettled situation caused by the divorce. No evidence was presented that James Durr has or is about to change his residence to another address. Rather, the evidence indicates that Durr continues to maintain 279 Sykesville Road as his residence.

Therefore, the petition to declare that James Durr is not a bona fide resident of Chesterfield Township is **DENIED.**

Mrs. Durr and Casey Durr were both subpoenaed by petitioner to appear. It was evident that, even though they were both entirely credible witnesses, their appearance at the hearing was

not a comfortable event for either of them. There is obviously no "love lost" between petitioner and respondent, but to subpoena respondent's soon-to-be-ex-wife and his daughter to testify against him in a matter unrelated to the divorce petition was of questionable delicacy, and utility.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 7, 2001
DATE

Kathryn A Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

5/9/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 9 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

es

WITNESSES

For Petitioner:

Martin Cohen, petitioner

For Respondent:

James Durr
Elizabeth Durr
Casey Durr

DOCUMENTS IN EVIDENCE

For The Court:

C-1 Letter, Louise Zoilkowski, Board Secretary, September 8, 2000

For Petitioner:

P-1 Document, no author, June 16, 1999, to the Chesterfield Township Board of Education, 2 pages
P-2 Complaint, 4 pages
P-3 Civil Action Answer, 3 pages
P-4 Minutes, Chesterfield Township Board of Education Regular Meeting, February 14, 2000
P-5 Interrogatories, 9 pages

For Respondent:

None

OAL DKT. NOS. EDU 0470-01 AND EDU 4104-00 (ON REMAND)
AGENCY DKT. NO. 78-2/00

MARTIN COHEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JAMES R. DURR, MEMBER, BOARD OF EDUCATION OF THE TOWNSHIP OF CHESTERFIELD, BURLINGTON COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record and Initial Decision On Remand issued by the Office of Administrative Law have been reviewed.[1]

Upon review of the record, the Commissioner agrees with and adopts as his own the findings of fact and conclusions of law reached by the Administrative Law Judge. Accordingly, the Petition of Appeal is hereby dismissed for the reasons set forth in the Initial Decision.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 6|22|01

Date of Mailing: 6|26|01

[1] The Commissioner notes for the record that petitioner's two witnesses, respondent's former wife and daughter, are still listed in the Initial Decision on Remand as witnesses for respondent rather than for petitioner. However, as is clear from the present decision, the ALJ examined the testimony of the witnesses and made findings of fact and credibility determinations in keeping with the Commissioner's prior decision remanding the matter to OAL.

[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.

199-01

FRANK WRIGHT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

June 22, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9514-97
Agency Dkt. No. 294-8/97

FRANK WRIGHT,

Petitioner,

v.

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

Respondent.

Gail Oxfeld Kanef, Esq., for petitioner
(Oxfeld Cohen, attorneys)

Alan J. Schnirman, Esq., for respondent

Record Closed: April 23, 2001 Decided: April 30, 2001

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law on October 1, 1997 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 stipulation of settlement which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidence 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.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a 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 30, 2001
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

5-11-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 14 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

cb

OXFELD COHEN, LLC
50 Commerce Street
Newark, New Jersey 07102
(973) 642-0161
Attorneys for Petitioner

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

APR 23 2 10 PM '01

FRANK WRIGHT,	:	**BEFORE THE COMMISSIONER OF EDUCATIOON OF THE STATE OF**
Appellant,	:	**NEW JERSEY**
-vs-	:	OAL DKT. NO.: EDU 9514-97
LINDEN BOARD OF EDUCATION ,	:	AGENCY REF. NO.: 294-8/97
Respondent	:	**SETTLEMENT AGREEMENT**

This matter having come before the Commissioner of Education upon Petition of Appeal filed by Petitioner Frank Wright and the Linden Board of Education having denied the allegations of the Petition of Appeal, the parties have amicably resolved the dispute between them as follows:

1. The Respondent, Linden Board of Education hereby agrees to credit Petitioner's sick day bank with an additional twenty (20) sick days.

2. In exchange for the above credit to Petitioner's sick day bank, the Petitioner agrees to withdraw the within appeal with prejudice.

Frank Wright
FRANK WRIGHT

LINDEN BOARD OF EDUCATION
ALAN J SCHNIRMAN
ATTORNEY FOR THE LINDEN
BOARD OF EDUCATION

DATED:
FRANK WRIGHT settlement agreement 97-609 1-10-01

3a

OAL DKT. NO. EDU 9514-97
AGENCY DKT. NO. 294-8/97

FRANK WRIGHT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINDEN, 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 the parties' compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6|22|01

Date of Mailing: 6|26|01

200-01

DOREEN BARCA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT,	:	
AND,	:	
DIANE PAUSTIAN,	:	
RESPONDENT-INTERVENOR.	:	

SYNOPSIS

Petitioner challenged the Board's determination to employ Respondent Diane Paustien as a teacher of foreign language, arguing that petitioner was entitled to the position based on her tenure and seniority rights. The Board denied that petitioner is entitled to the position.

At the OAL, Paustien moved to intervene, which application was granted by the ALJ. The ALJ, based on stipulated facts, determined that petitioner was entitled to the position, as she had worked in the district under both her supervisor and instructional certificates, and achieved tenure in both positions, prior to being terminated because of a reduction in force several years before the position at issue became available. Because petitioner had a right to the position based on her tenure and seniority, the ALJ concluded that the respondent Board was required to offer the position to her, and improperly hired Paustien instead.

The Commissioner affirmed the decision of the ALJ for the reasons set forth therein, and ordered the Board to reinstate petitioner to a foreign language position to which she is entitled and to provide her all back pay, benefits and emoluments, subject to mitigation, to which she is entitled.

June 22, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 2192-00

AGENCY DKT. NO. 46-2/00

DOREEN BARCA,

Petitioner,

v.

BOARD OF EDUCATION OF
THE TOWNSHIP OF HOLMDEL,
MONMOUTH COUNTY,

Respondent,

and

DIANE PAUSTIAN,

Respondent-Intervenor.

Julia S. Dasaro, Esq., for petitioner (Levinson Axelrod, attorneys)

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

Gail Oxfeld Kanef, Esq., for respondent-intervenor (Oxfeld Cohen, LLC, attorneys)

Record Closed: March 30, 2001 Decided: May 11, 2001

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter commenced on February 2, 2000, when Doreen Barca (hereinafter petitioner) filed a petition of appeal with the Commissioner of Education seeking an order that the Board of Education of the Township of Holmdel (hereinafter respondent) had violated her tenure and seniority rights by appointing Diane Paustian (hereinafter respondent-intervenor) to fill a position which had become vacant, *i.e.,* Teacher of Foreign Language. An answer was filed on behalf of respondent on February 15, 2000, and on March 21, 2000, 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.

The motion of respondent-intervenor seeking leave to intervene was unopposed. A prehearing conference was conducted on August 1, 2000, at which time it was determined that a joint stipulation of facts would be submitted and cross-motions for summary decision would be filed. An order was entered on August 2, 2000, granting respondent-intervenor's motion for leave to intervene and memorializing the determinations from the prehearing conference. The issue to be addressed was articulated as follows:

> Did respondent violate petitioner's tenure/seniority rights by employing non-tenured or less senior teaching staff members in the position Teacher of Foreign Language (French or Spanish)?

A joint stipulation of facts was filed on December 5, 2000. A letter memorandum dated January 17, 2001 was received on behalf of petitioner. Respondent's letter memorandum was dated the same day and was received on January 18, 2001. A letter memorandum dated January 19, 2001, on behalf of respondent-intervenor, was received on January 22, 2001. Thereafter, oral argument took place by telephone conference call on March 6, 2001, following which the record remained open for the receipt of additional information. By letter dated March 6, 2001, counsel for respondent transmitted copies of four annual performance reports for petitioner, as well as three observations/evaluations. By letter dated March 13, 2001, counsel for respondent transmitted copies of the job posting and job description for Supervisor of Foreign Language/Art/Music. By letter dated March 15, 2001, counsel for petitioner transmitted a copy of a letter dated May 4, 1994, from Wayne J. Oppito, Esquire, to Martin M. Barger, Esquire, counsel for respondent, to

which respondent replied by letter dated March 20, 2001. Nothing further having been received from any of the parties, the record closed on March 30, 2001.

FINDINGS OF FACT

The joint stipulation of facts submitted by the parties provides as follows:

1. Petitioner holds certificates to teach Spanish and French (issued in 1982), as well as a Supervisor's Certificate.

2. Petitioner was employed by the Holmdel Township Board of Education as supervisor of Foreign Languages from September 1, 1988 until June 30, 1994.

3. As part of her Supervisory duties, petitioner taught two classes in Holmdel for each year she was employed. Petitioner is currently not in possession of a job description for supervisor, however, will attempt to secure same and amend this record upon receipt.

4. On or about April 18, 1994, the Superintendent of Schools in Holmdel, Dr. Susan Leglise, advised petitioner that her position had been abolished. As a result, petitioner was not offered a contract for the 1994-1995 school year.

5. In October 1999, the acting superintendent of schools informed petitioner that a position to teach in Holmdel had become available and that pursuant to her "Reduction in Force" rights, she was entitled to same. That letter states:

   > The Board of Education accepted the retirement of a full-time Spanish teacher at Holmdel High School effective, January 1, 2000. Since you are first on a preferred eligibility list in order of seniority for reemployment, I am offering you this position upon vacancy in compliance with *N.J.S.A.* 18A:28-12.
   >
   > Please complete the acceptance reply by November 24, 1999 on the bottom of this letter and return it to me in the envelope provided.

6. Sometime thereafter, petitioner was notified that she was not entitled to this position and that it had been offered to

her in error, but that she could apply for the position when it was posted. The November 3, 1999 letter withdrawing the offer provided:

> On October 20, 1999, I offered you an opportunity to accept or refuse a full-time teaching position at Holmdel High School effective January 2000. I was in error in offering this position to you under *N.J.S.A.* 18A:28-12, since you had not established tenure entitlement as a teacher. Your reduction in force entitlement is to an administrative position from which you were riffed. Therefore, my previous offer of employment under these conditions is rescinded and withdrawn.
>
> The full-time Spanish position is available beginning in January and I encourage you to apply. Your application will be considered among those that respond to our vacancy advertisement. I apologize for any inconvenience this may have caused.

7. Petitioner did, in fact, apply for the position, but it was offered to another applicant who accepted same. Intervenor, Diane Paustian, holds an Instructional Certificate in Nursery, Elementary and Spanish Education. Intervenor was hired as a full-time Spanish teacher at some time during the 1999-2000 school year and is teaching Spanish full-time in the 2000-2001 school year.

The following additional relevant facts appear from the additional exhibits which were submitted after the oral argument. Petitioner's job description as "Supervisor, Grades 6-12 Foreign Language/Art/Music" required the following qualifications:

1. Valid New Jersey Teacher's Certificate in area of supervision (or in one area if two are supervised)

2. Valid New Jersey Supervisor's Certificate

3. A major in the area of supervision (or in one area if two are supervised)

4. Minimum of three years teaching experience in the area of supervision (or in one area if two are supervised)

5. Ability to assume leadership and responsibilities inherent in the position of supervisor

The job description listed four major responsibilities, "Instructional Leadership, Professional Development, School and Community Relations, and Instruction." With respect to instruction, the job description specified, "Maintains a .4 teaching load in assigned areas." During the several years she held the position, petitioner was formally evaluated both as a Teacher of Spanish and/or French and as a Supervisor. By letter dated May 4, 1994, Wayne J. Oppito, Esquire, counsel for the New Jersey Principals and Supervisors Association, wrote to counsel for respondent on petitioner's behalf as follows:

> This letter is to confirm our telephone conversation in which I indicated that it was my opinion that Doreen Barca has a seniority entitlement to a position of teacher due to the elimination of her current position of supervisor to be effective July 1, 1994. This opinion is based upon the following reasons.
>
> *N.J.A.C.* 6:3-5.1(f) states:
>
> > Whenever a person shall hold employment simultaneously under two or more subject area endorsements or in two or more categories, seniority shall be counted in all subject area endorsements and categories in which he or she is or has been employed. For purposes of calculating seniority entitlement, there shall be no distinction between academic years and calendar years.
>
> Ms. Barca has held employment simultaneously in two or more categories, supervisor and teacher. Accordingly, her seniority is credited in both categories.
>
> In the Matter of the Seniority Rights of Certain Teaching Staff Members Employed by the Old Bridge BOE and the Edison BOE, decided by the Commission, Aug. 6, 1984; aff'd. State BOE, Jan. 2, 1985; aff'd. App. Div. June 17, 1986 (A-2241-84T6 and A-2531-84T6 unreported), the Commissioner determined that teaching staff members employed in two or more categories attain full seniority in all categories. The Commissioner determined on p.12 of his decision:
>
> Petitioner's contention is further buttressed by the conscious deletion of the language in the prior *N.J.A.C.* 6:3-1.10(1) which limited seniority

> entitlements to the category in which the individual spent the greatest portion of his or her time.
>
> Further, it may be noted that the State Board provided additional proof of its intent to provide full seniority in all categories or subject area endorsements served when it further amended the regulations at its November 1983 meeting to strike a sentence concerning the seniority rights of teaching principals because that sentence was inconsistent with the intent of the full paragraph. The sentence removed was as follows:
>
> > "The seniority rights of principals who teach shall be counted in the appropriate principal's category."
>
> Such further deletion makes absolutely clear the State Board's intent that principals who teach should receive seniority both as principals and teachers.

As noted by the Commissioner on p. 13 of his decision:

> Further, pro-rating of seniority under such circumstances would provide opportunities for abuse wherein seniority could be manipulated to advantage or disadvantage of one individual as opposed to another.

> In light of the above, it is clear that Ms. Barca has full seniority entitlement as both a supervisor and a teacher. I have enclosed a copy of the above-cited decisions for your convenience.
>
> Thank you for your time and attention to this matter.

The record does not reveal what, if anything, occurred after Mr. Barger received Mr. Oppito's letter, until the occurrence of the above-recited facts which commenced the within action.

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 whether 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.

In the within matter, the parties agree that the facts relevant to a determination of the issue are not in dispute. Accordingly, this matter is ripe for summary decision.

Respondent and respondent-intervenor argue that petitioner has no seniority entitlement to the position Teacher of Spanish currently held by respondent-intervenor because petitioner obtained tenure in the district in the position Supervisor only. Both parties argue that petitioner obtained tenure under her administrative certificate (Supervisors endorsement). Respondent-intervenor cites *Dennery v. Board of Education*, 131 *N.J.* 362 (1993), for the correct proposition that tenure status is earned in a specific "position" and tenure rights earned through serving under a single certificate are not transferable to another certificate. Respondent-intervenor concludes that petitioner did not serve under her instructional certificate because her position title was supervisor and she was paid as a supervisor. Respondent's argument is essentially the same, *i.e.*, that petitioner was not hired as a teacher and therefore does not have tenure as a teacher. Respondent also argues that because petitioner took no further action in 1994, after Mr. Oppito's letter to counsel for respondent, she has waived or abandoned whatever rights she might

otherwise have had to a teaching position in respondent's district. For the reasons which follow, I **CONCLUDE** that respondents' arguments are without merit. Both the facts and the law compel the conclusion that petitioner has a superior entitlement to the position Teacher of Spanish which became available in January 2000, and which is currently held by respondent-intervenor.

As previously explained on numerous occasions, see, *e.g., Howley and Bookholdt v. Ewing Bd. of Ed.*, 6 *N.J.A.R.* 509 (1982); *Connor v. Bd. of Ed. of Township of Cinnaminson*, 96 *N.J.A.R.* 2d (EDU) 861, tenure is a legislative status, not a contractual one, and in order to be protected by the status, a teaching staff member must have met the precise conditions articulated in the statute. In order to acquire tenure in any position in the public schools in any district, the teaching staff member must be a citizen of the United States (*N.J.S.A.* 18A:28-3), must hold an appropriate certificate for the position, issued by the State Board of Examiners, in full force and effect (*N.J.S.A.* 18A:28-4) and, pursuant to *N.J.S.A.* 18A:28-5, must hold employment in the district for:

> (a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) the equivalent of more than three academic years within a period of any four consecutive academic years.

The undisputed facts in this matter reveal that for the five-year period during which petitioner was employed by respondent, her job description required her to hold a valid instructional certificate and to perform the instructional duties of a classroom teacher on a .4 basis. In accordance with *Spiewak v. Board of Education of Rutherford*, 90 *N.J.* 63, 74 (1982), any teacher who actually performs duties under a required certificate for the requisite period of time obtains tenure under that certificate. Petitioner in the within matter taught either Spanish or French for five years under the instructional certificate bearing endorsements allowing her to do

so. The duties she performed and the certificates/endorsements, which she held, are no different from those persons in *Spiewak, supra*, many of whom also did not teach a full class load during the year. Mere possession of an instructional certificate while holding a position which requires an administrative certificate would not result in the holder obtaining tenure under both certificates, but that is clearly not the case in the within matter. Petitioner is not attempting to transfer tenure rights earned under one certificate to a position under another certificate like the employee in *Dennery, supra.* Rather, through her work experience petitioner earned tenure under both certificates. *Alice Lightdale v. Board of Education of Union County Regional High School District No. One*, and *William Coyle,* 96 *N.J.A.R.* 2d (EDU) 106, cited and discussed by the parties, is actually a seniority case, not a tenure case, and therefore, is not directly on point. The difference between "tenure" and "seniority" is explained in *Howley and Bookholdt v. Ewing Bd. of Ed., supra,* and has been recognized by the courts in *Lichtman v. Ridgewood Board of Ed.,* 93 *N.J.* 362, 368 (1983), and *Ellicott v. Board of Ed.*, 251 *N.J. Super.* 342, 349, (App. Div. 1991), *i.e.*, tenure is a statutorily defined status for all teaching staff members who have fulfilled the conditions of *N.J.S.A.* 18A:28-5, and seniority is a mechanism for ranking all tenured teaching staff members so that reductions in force and reemployment can be effected in an equitable fashion and in accord with sound educational policies. In the within matter, respondent-intervenor is a non-tenured employee and accordingly, there are no competing interests among tenured teaching staff members which need to be addressed through discussion of the seniority regulations. Of some peripheral relevance, however, is the Commissioner's comment in his decision adopting the ALJ's opinion in *Lightdale, supra,*:

> The law is well settled to permit simultaneous accrual of seniority rights in more than one seniority category. (*N.J.A.C.* 6:3-5.1(f).) In the instant matter, the Commissioner finds that consistent with the ALJ's determination, Coyle is entitled to seniority credit in the category for guidance counselors, as well as the category for directors. The Commissioner so determines not merely because Coyle possessed a guidance counselor endorsement, but because he actually performed services under that endorsement. The Commissioner further concurs that the quantity of cases held by Coyle is not determinative in such analysis, but rather his actual service as a guidance counselor, notwithstanding that such service was rendered in the position of director of guidance. Finally, the Commissioner concurs that licensing requirements are distinguishable from assignment of job duties, so that the dual

> certification required herein is a function of Board action, not State. *Id.* at 109. (Emphasis added.)

Accordingly, if seniority were an issue in the within matter, I would **CONCLUDE** that petitioner simultaneously accrued seniority rights not only in the category Supervisor, but also in the secondary category/subject matters actually taught by her. As did the Board in *Lightdale, supra,* respondent herein required petitioner to possess and to use both her subject matter endorsements under her instructional certificate and her Supervisor's endorsement on her administrative certificate. Furthermore, since the rights of tenured teaching staff members on preferred eligibility lists remain inchoate until a position becomes available to which they are entitled, petitioner's rights were not violated until respondent appointed the respondent-intervenor to such a position. Consequently, the petition of appeal herein was timely filed within the 90-day period required by *N.J.A.C.* 6A:3-1.3, and there are no facts in this record which could support a conclusion that petitioner waived her rights to the position.

For all of the foregoing reasons, petitioner's motion for summary decision is **GRANTED**. The summary decision motions of respondent and respondent-intervenor are **DENIED**. It is hereby **ORDERED** that respondent reinstate petitioner to the position Teacher of Foreign Language to which she is entitled by virtue of her tenure rights, together with an award of back pay, benefits and seniority credit to which she would have been entitled, subject to reasonable mitigation.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 11, 2001
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

14 May 2001
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 15 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

OAL DKT. NO. EDU 2192-00
AGENCY DKT. NO. 46-2/00

DOREEN BARCA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT,	:	
AND,	:	
DIANE PAUSTIAN,	:	
RESPONDENT-INTERVENOR.	:	

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 and Initial Decision, the Commissioner is in full agreement with the Administrative Law Judge's findings and conclusions of law for the reasons well stated in the Initial Decision.

Accordingly, petitioner's Motion for Summary Decision is granted and the summary decision motions of respondent and respondent-intervenor are denied. As correctly determined by the ALJ, petitioner was not only required by the Board to hold a valid instructional certificate in the area of her supervisor position but *she actually taught* under that

certificate; thus, having served the requisite period of time set forth in *N.J.S.A.* 18A: 28-5 under *both* her instructional *and* supervisor certificates, petitioner acquired tenure not only in the position of supervisor, but also in the position of teacher. The Board is, therefore, ordered to reinstate petitioner to a foreign language teacher position to which she is entitled based on her tenure and/or seniority rights, together with all back pay, benefits and emoluments, subject to reasonable mitigation.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6|22|01

Date of Mailing: 6|26|01

* 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.

201-01

C# 201-01L
SB # 23-01

BOROUGH OF PINE HILL AND LESLIE GALLAGHER,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, BOARD OF EDUCATION 0F THE BOROUGH OF LINDENWOLD, AND BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,

RESPONDENTS-RESPONDENTS.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, June 28, 2001

For the Petitioners-Appellants, Perskie, Nehmad & Perillo (Salvatore Perillo, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Borough of Pine Hill, Sahli & Padovani (Ronald W. Sahli, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Borough of Lindenwold, Wade & Wood, LLC (John D. Wade, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Township of Winslow, Parker, McKay & Criscuolo (Frank P. Cavallo, Jr., Esq., of Counsel)

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

October 3, 2001

Date of mailing OCT 05 2001

202-01

BOARD OF EDUCATION OF THE TOWNSHIP OF MARLBORO, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
CHRISTINE STRONG,	:	DECISION
RESPONDENT.	:	

June 29, 2001

AGENCY DKT. NO. 59-3/01

BOARD OF EDUCATION OF THE TOWNSHIP OF MARLBORO, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
CHRISTINE STRONG,	:	DECISION
RESPONDENT.	:	

For Petitioner: Ellen Marie Walsh, Esq. (Fogarty & Hara)

This matter, having been brought before the Commissioner of Education by the Board of Education of the Township of Marlboro (Board) by way of a Petition of Appeal filed on March 7, 2001, requesting that respondent be ordered to pay the Board tuition in the amount of $412.88; and

Whereas, respondent was sent a copy of the petition by the Board on March 5, 2001; and

Whereas, the Commissioner, by notice dated April 3, 2001, directed that an Answer to the petition be submitted pursuant to *N.J.A.C.* 6A:3-1.5; and

Whereas, the Commissioner notified respondent, by regular and certified mail on May 30, 2001, 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 basis pursuant to the Commissioner's authority granted by *N.J.A.C.* 6A:3-1.5(e); and

Whereas, there is no indication that respondent did not receive such communications; and

Whereas, neither respondent, nor any attorney on her behalf, has filed an Answer to the charges against her; thus, each count of the charges against respondent is deemed to be admitted; and

Whereas, the Commissioner's review of the petition indicates that: (1) respondent enrolled her daughter as a kindergarten student in the District's schools in the summer of 2000; (2) at the time of enrollment, respondent presented proof of domicile in the District; (3) on or about December 6, 2000, as a result of a routine telephone call by the Registrar to respondent's listed address, the Registrar was told that respondent no longer lived at that address; (4) on or about December 8, 2000, the District informed respondent that she was required to submit proof of residency in the District or she would be billed for tuition; (5) having received no response from respondent, on or about December 19, 2000 the District informed respondent of the amount of her tuition obligation; (6) to date, respondent has neither supplied proof of residency nor payment of tuition; (7) M.S. stopped attending school in the District after December 22, 2000; and

Deeming such charges to be admitted in the absence of an Answer being submitted by respondent, the Commissioner finds that respondent's daughter was ineligible, pursuant to the provisions of *N.J.S.A.* 18A:38-1, to attend school free of charge in the Marlboro School District for the month of December 2000 as set forth by the Board in its petition; now, therefore

IT IS ORDERED on this _____day of June 2001, that summary decision shall be granted to the Board of Education of Marlboro Township, and that respondent shall pay tuition in the amount of $412.88, as requested by the Board, for the period of time in which her daughter, M.S., was ineligible for a free education in the Marlboro Township School District.

There being no provision for the grant of attorney's fees or costs within the Commissioner's authority, said fees and costs are not herein granted. *See Pascack Valley Regional High School v. Kwon*, 93 *N.J.A.R.* 2d (EDU) 897, 898 (1993), citing *Balsley v. North Hunterdon Board of Education*, 117 *N.J.* 434 (1990).*

COMMISSIONER OF EDUCATION

Date of Decision: 6|29|01

Date of Mailing: 7|02|01

* 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.

203-01

BOARD OF EDUCATION OF THE TOWNSHIP OF MARLBORO, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
SHARON CALERO,	:	
RESPONDENT.	:	

June 29, 2001

AGENCY DKT. NO. 122-4/01

BOARD OF EDUCATION OF THE TOWNSHIP OF MARLBORO, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
SHARON CALERO,	:	
RESPONDENT.	:	

For Respondent: Ellen Marie Walsh, Esq. (Fogarty and Hara)

This matter having been opened before the Commissioner of Education by way of Petition of Appeal filed on April 25, 2001, seeking tuition reimbursement pursuant to *N.J.S.A.* 18A:38- 3; and

The Commissioner having directed respondent by notices dated May 10, 2001 and June 1, 2001 to file an Answer to the petition against her; and

As of this date, neither respondent, nor any attorney on her behalf, having filed an Answer to the petition against her, and each count of the petition against respondent having been deemed to be admitted; and

The Board having averred that respondent's son attended school for a total of 14 days while respondent was not properly domiciled in the district; now therefore

IT IS ORDERED on this _____ day of June 2001 that summary decision shall be granted in favor of the Board of Education and that respondent shall pay tuition

in the amount of $553.28 due the Board for the 14 days that respondent's son attended free public school in the Board's district as a nonresident pupil. There being no provision for the grant of attorney's fees or costs within the Commissioner's authority, said fees and costs are not herein granted. *See Pascack Valley Regional High School v. Kwon*, 93 *N.J.A.R.* 2d (EDU) 897, 898 (1993), *citing Balsley v. North Hunterdon Board of Education*, 117 *N.J.* 434 (1990).*

COMMISSIONER OF EDUCATION

Date of Decision: 6|29|01

Date of Mailing: 7|2|01

* 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.

204-01

BOARD OF EDUCATION OF NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION AND MICHAEL AZZARA, ASSISTANT COMMISSIONER,	:	DECISION
RESPONDENTS,	:	
V.	:	
RUSSELL A. PEPE AND KATHLEEN PEPE,	:	
INTERVENOR-RESPONDENTS.	:	

SYNOPSIS

Petitioner challenged the determination of the Assistant Commissioner that the Department would not review its application to install lighting on its athletic field, which was based on his determination that athletic field lighting does not affect educational adequacy and that the Department only reviews and approves capital projects of school districts relating to educational adequacy.

The ALJ concluded that the Commissioner does not have jurisdiction over an issue merely because it relates to a school. The ALJ noted that athletic field lighting for nighttime use is not an issue of educational adequacy and, therefore, the Department is not required to review the issue pursuant to the provisions of *N.J.A.C.* 6:22-1.1; instead, it is an issue for the municipal planning board to decide and the planning board herein previously rejected the Regional Board's application for 70-foot-high towers, a decision upheld by the Law Division and then affirmed by the Appellate Division. Even though the Court stated that a school board has a choice between applying to either the Department of Education or the municipal planning board, the ALJ did not accord this statement any weight since this is not supported by regulation and the Regional Board already made its choice of the planning board. It may not have a "second bite of the apple." The ALJ ordered respondents' motion for summary decision granted and the petition dismissed.

The Commissioner adopted the findings and determination in the Initial Decision as his own. The Commissioner clarified that the determining factor in triggering a Department review is not whether some nexus exists between proposed nighttime lighting and the District's educational program, but whether the Department review is required pursuant to *N.J.A.C.* 6:22-1.11. Motion for summary decision was granted and the petition was dismissed.

July 2, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
DECISION ON MOTION
FOR SUMMARY DECISION

OAL DKT. NO. EDU 5492-00
AGENCY DKT. NO. 141-5/00

BOARD OF EDUCATION OF NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL DISTRICT,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION,

Respondent.

William Strasser, Esq., for petitioner
(Strasser & Strasser Associates)

David M. Repetto, Esq., for Russell A. Pepe and Kathleen Pepe, Interveners
(Harwood Lloyd, LLC, attorneys)

Allison Colsey Eck, Deputy Attorney General, for respondent
(John J. Farmer, Attorney General of New Jersey, attorney)

Record Closed: May 11, 2001 Decided: May 15, 2001

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

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

On December 20, 1999, petitioner, the Northern Highlands Regional High School Board of Education, authorized the filing of an application to respondent, the New Jersey Department of Education (Department), to install six 68-foot light towers on its high school athletic field. Its application for 70-foot-high towers had previously been rejected by the Borough of Allendale Planning Board, a decision upheld by the Law Division and then affirmed by the Appellate Division. *Northern Highlands Regional High School Sports Association, Inc. v. Borough of Allendale Planning Board v. Russell A. Pepe, et al.,* No. A-5355-97 (App. Div. May 19, 1999).

On December 17, 1999, intervener-respondents Russell A. Pepe and Kathleen Pepe filed an Order to Show Cause in the Bergen County Superior Court to restrain the School Board from proceeding with filing its application with the Department. This order was denied because adversaries were not given notice and the School Board had not taken action in contravention of any court orders.

On January 24, 2000, the Pepes filed another Order to Show Cause in the Bergen County Superior Court. Meanwhile, on February 2, 2000, the Department of Education advised the School Board that it was declining to review the application because it was not required to review it under *N.J.A.C.* 6:22-1. On March 9, 2000, Judge Gerald C. Escala dismissed the Order to Show Cause, finding that it was up to the Commissioner to determine whether or not the application was reviewable by the Department.

Petitioner filed a petition for declaratory judgment on May 1, 2000. On November 1, 2000, the Commissioner decided that the issues needed to be clarified, and the case was sent to the OAL. The respondent has moved for summary decision.

DISCUSSION:

A. A controversy "arising under the school laws"

*N.J.S.A.*18A:6-9 states:

> The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the state board or of the commissioner. For the purposes of this Title, controversies and disputes concerning the conduct of school elections shall not be deemed to arise under the school laws.

In *Board of Education of the City of Asbury Park v. Murnick*, 224 *N.J. Super.* 504 (App. Div. 1988), the Appellate Division discussed *N.J.S.A.*18A:6-9. That case involved an attempt by a school board to acquire a piece of private property in order to construct a public school facility for approximately 600-700 elementary students. A trial judge had stated that the Commissioner's jurisdiction over the issue was "ambiguous." *Id.* at 511. The Appellate Division, however, stated that this was incorrect. The court stated that the question of whether the property was an appropriate school site and whether it was properly approved for such a purpose "arises under the school laws and falls within the scope of the Commissioner's special expertise." *Id.* at 513. The issue involved size requirements, and the court assumed that the size requirements were a result of "thoughtful deliberations by the State Board and that the State Board considered site size to impact on educational quality.... It is evident to us that if a major variation from the requirement is to be allowed, it is for the Commissioner to make that essential educational determination in the first instance." *Ibid.*

The case at bar is distinguishable from *Murnick*. Rather than a school building, this case involves an application to install light towers on a high school athletic field. *N.J.A.C.* 6:22-1.1 enumerates the types of building construction work that require review by the Department of Education:

(a) Types of building construction work requiring a review by the Department of Education are *as follows*:

1. New school buildings including pre-fabricated facilities;

2. An addition to an existing school building;

3. A change involving the total number of instructional spaces or the number of any one kind of instructional space;

4. A change in the dimensions (volume and/or area) of any instructional space;

5. A change of use as defined in *N.J.A.C.* 6:22-5.2;

6. The utilization of pre-manufactured trailers and vans; and

7. Any site or school building change or alteration for the purpose of making the site and school barrier free and accessible to handicapped persons as per *N.J.A.C.* 5:23 and Section 504 of the Federal Rehabilitation Act of 1973.

(b) Other construction projects that do not require a review for educational adequacy shall be submitted to the local municipal construction enforcing agency in accordance with *N.J.A.C.* 5:23-2.

[*N.J.A.C.* 6:22-1.1 (emphasis added.]

The use of the phrase "as follows" shows that the list of projects requiring Department review is finite. Were it possible to add other options to the list, the regulation might have contained a more ambiguous word, such as *includes*. Furthermore, in the New Jersey Register, *N.J.A.C.* 6:22-1.1 was summarized as follows:

> This subchapter *defines* the types of building construction work requiring review for educational adequacy by the Department of Education...
>
> [30 *N.J.R.* 3619 (October 5, 1998) (emphasis added).]

This limits the projects that require review to those listed in the regulation. Projects that do not require a review for educational adequacy—in other words, those not listed under *N.J.A.C.* 6:22-1.1(a)—"shall be submitted to the local municipal construction

enforcing agency in accordance with *N.J.A.C.* 5:23-2 [the Uniform Construction Code]." *N.J.A.C.* 6:22-1.1(b). As *N.J.A.C.* 6:22-1.1(a) is exhaustive, it is clear that projects that are not listed therein are not required to be reviewed by the Department.

Athletic field lighting is not among the items listed under *N.J.A.C.* 6:22-1.1(a). Therefore, the Department is not required to review it.

If this is the case, it would be paradoxical to assert that the Commissioner has jurisdiction over the issue. The Commissioner is the chief executive and administrative officer of the Department of Education. *N.J.S.A.* 18A:4-22(a). If the issue of athletic field lighting cannot be reviewed by the Department, then it cannot be reviewed by the Commissioner either.

An issue does not fall under the school laws merely because it is connected to a school. For example, *N.J.S.A.* 18A:6-9 itself excludes issues relating to the conduct of school elections from the Commissioner's jurisdiction.

Another area specifically excluded from the Commissioner's jurisdiction is contractual disputes, unless only incidental interpretation of the contract is necessary to resolve the education claim. See *New Jersey Educ. Ass'n v. Trenton Bd. of Educ.,* 92 *N.J.A.R.*2d (EDU) 481, 489. The courts have affirmed the Commissioner's lack of jurisdiction over contract disputes. See, *e.g., Picogna v. Bd. of Educ. of Tp. of Cherry Hill, Camden County,* 249 *N.J. Super.* 332, 335 (App. Div. 1991).

Additionally, school disputes arising under title relating to taxation have been held to be outside the Commissioner's jurisdiction. *Bd. of Ed. of Borough of Fair Lawn v. Mayor and Council of Borough of Fair Lawn,* 143 *N.J. Super.* 259 (Law Div. 1976), *aff'd.* 153 *N.J. Super.* 480.

Finally, an Administrative Law Judge (ALJ) held that the Commissioner lacked jurisdiction over an issue involving the Open Public Meetings Act, *N.J.S.A.* 10:4-6, when it was not connected to a school-related issue. See *Rovello v. Hopewell Valley Regional School District Bd. of Educ.,* 93 *N.J.A.R.*2d (EDU) 313. In *Rovello,* petitioners

claimed that the Commissioner had jurisdiction because the issue was related to the issuance of a school bond. The ALJ stated that "if the only and/or significant issue presented before the Commissioner concerns an Open Public Meeting Act purported violation, absent a significant nexus to an underlying substantive school law issue, the Commissioner is without jurisdiction..." *Id.* at 316. The ALJ went on to find that the Commissioner lacked jurisdiction, a decision that the Commissioner adopted.

Similarly, in the case at bar, there is no "significant nexus to an underlying substantive school law issue." As the Department points out, schools implement their curricula only during the day, and that is true even for physical activities. Therefore, athletic field lighting, which would be used only at night, would not benefit the school curriculum in any way.

B. The unreported Appellate Division decision

This case first came before the Appellate Division in *Northern Highlands Regional High School Sports Association, Inc. v. Borough of Allendale Planning Board v. Russell A. Pepe, et al.,* No. A-5355-97 (App. Div. May 19, 1999). In summarizing the law, the court stated that

> *N.J.S.A.* 18A:18A-16, as amended in 1990, and the regulations thereunder, provide that school building construction, including additions and reconfigurations, be submitted to the Department of Education for its review. *N.J.A.C.* 6:22-1.1(a). However for lesser construction projects that do not require review for "educational adequacy," the regulations give the school board the choice of either having the department review its plans or the local municipal code enforcing agency.
>
> [*Northern Highlands Regional High School Sports Association, Inc. v. Borough of Allendale Planning Board v. Russell A. Pepe, et al.*, Docket No. A-5355-97T2 (May 19, 1999) at 8.]

The Board of Education claims that this has the effect of *stare decisis* and that therefore, the school board has the choice of either having the Department or the local planning board review its plans. The Department, on the other hand, claims that the

court's statement was merely *dicta* and not a holding of the case. I am in agreement with the Department's position for the following reasons.

In this part of the opinion, the Appellate Division is attempting to summarize law. It is not attempting to set forth a procedure for the future; it is not giving a directive to be followed. It provides no citation for its statement that there is a choice; actually, there seems to be no basis for the statement.

The Board of Education claims that the word *shall* in the phrase "construction projects that do not require a review for educational adequacy *shall* be submitted to the local municipal construction enforcing agency," *N.J.A.C.*6:22-1.1(b) (emphasis added), denotes not something mandatory, but a choice. Yet this interpretation is incorrect. "Under the 'plain meaning' rule of statutory construction, the word 'may' ordinarily is permissive and the word 'shall' generally is mandatory." *Aponte-Correa v. Allstate Ins. Co.*, 162 *N.J.* 318, 325 (2000). Furthermore, the word *shall* is "used in laws, regulations or directives to express what is mandatory." *Webster's Third New International Dictionary* 2085 (1976). Finally, "[a] statute should be interpreted in accordance with its plain meaning if it is clear and unambiguous on its face and admits of only one interpretation." *Bd. of Educ. of the Twp. of Neptune in County of Monmouth v. Neptune Twp. Educ. Ass'n*, 144 *N.J.* 16, 25 (1996) (citations omitted).

It must be observed that *dictum* is something that "contains propositions not essential to the determination of" a case. *See, U.S. v. Ricks*, 5 *F.*3d 48, 50 (3rd Cir. 1993). In *Ricks*, the appellant relied on *dictum* contained in a previous Third Circuit decision. The *Ricks* court found that this *dictum* conflicted with the plain text of the Sentencing Guidelines, with precedent, and with federal case law generally and therefore held that it "is not and has never been law in this court and therefore never achieved the jurisprudential quality of a decision." *Ibid.* (citation omitted). Also, "*dicta*, if carefully weighed and found wanting, does not control." *State v. D. Allen*, 212 *N.J. Super.* 276, 280 (Law Div. 1986).

Furthermore, in his March 9, 2000, decision concerning an Order to Show Cause related to this litigation, Judge Escala questioned the Appellate Division's *dictum*, stating:

> I think the Appellate Division wittingly or unwittingly was merely reciting what it perceived to be the historical background. I don't think that it was anymore than that. And I don't find that they're enunciating a finding, a conclusion of law that an applicant has the right to go either way.
>
> And if you have other than what they happen to say in that decision, if you have any other authority for that, because it seems to me that perhaps they picked up on some history of the case that came up from below and incorrectly recited the history of the case in order just to illustrate how it got where it was. And it was irrelevant to the point that having opted voluntarily to go before the local board, you were stuck with what they did.
>
> [Transcript of Order to Show Cause, March 9, 2000, at 20:16-21:5.]

Finally, if petitioner's current application is treated as the same as that originally filed before the planning board several years ago, then one can argue that even if the Appellate Division's *dictum* is correct, Northern Highlands has already made its choice between the planning board and the Department. It has chosen the planning board, which rejected the application, and Northern Highlands may not have a second bite of the apple.

Therefore, the unreported Appellate Division decision stating that there is a choice has no bearing on the present circumstances.

CONCLUSION:

In sum, the Commissioner does not have jurisdiction over an issue merely because it relates to a school. Athletic field lighting for nighttime use is not an issue of educational adequacy, and therefore the Department of Education is not required to review the issue. Instead, it is an issue for the municipal planning board to decide. This issue does not come under the school laws and therefore is not under the Commissioner's jurisdiction.

The unreported Appellate Division's statement that a school board has a choice between applying to either the Department of Education or the municipal planning board is merely *dicta* and is not supported by the regulation. Therefore, this statement has not been accorded weight in these proceedings. Furthermore, even if this *dicta* is correct, Northern Highlands has already made its choice. In addition, I do not find that there are any disputed facts here that require a hearing in this matter. I do not find that the letter provided by petitioner today or the arguments of counsel changes this decision.

Order

It is hereby **ORDERED** that respondent's motion for summary decision is granted and petitioner's appeal is dismissed.

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

This recommended 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.

I, Anna M. Leggett, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Elinor R. Reiner's oral decision as edited by the ALJ for form but not substance, rendered in the above matter on May 11, 2001.

DATED May 15, 2001

Anna M. Leggett

ANNA M. LEGGETT, secretary

May 15, 2001

DATE

Elinor R. Reiner

ELINOR R. REINER, ALJ

Receipt Acknowledged:

5-15-01

DATE

Deborah A. Whitmore 19

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 21 2001

DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

al

OAL DKT. NO. EDU 5492-00
AGENCY DKT. NO. 141-5/00

BOARD OF EDUCATION OF NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION AND MICHAEL AZZARA, ASSISTANT COMMISSIONER,	:	DECISION
RESPONDENTS,	:	
V.	:	
RUSSELL A. PEPE AND KATHLEEN PEPE,	:	
INTERVENOR-RESPONDENTS.	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Pursuant to the requirements of *N.J.A.C.* 1:1-18.4(a), petitioner's exceptions were untimely filed.[1]

Upon review of the record and Initial Decision, the Commissioner agrees with and adopts as his own the findings and conclusions of the Administrative Law Judge (ALJ) that the issue of school athletic field lighting for nighttime use is not an issue which must, pursuant to the provisions of *N.J.A.C.* 6:22-1.1, be the subject of review for educational adequacy by the respondent Department of Education (Department), and that even if the dicta found in the

[1] *N.J.A.C.* 1:1-18.4(a) requires that exceptions be filed within thirteen (13) days of the date the Initial Decision is mailed to the parties by the OAL. The Initial Decision was mailed to the parties by the OAL on May 21, 2001. Therefore, exceptions were due at the latest on June 4, 2000 because the thirteenth day, June 3, fell on a Sunday. In the instant matter, petitioner's exceptions were dated June 5, 2001, mailed on June 8, 2001, and filed with the Commissioner on June 12, 2001.

unreported Appellate Division decision in *Northern Highlands Regional High School Sports Association, supra,* was correct, petitioner has already made its choice -- the municipal planning board which rejected the application for the controverted athletic field lighting .

In affirming the Initial Decision, however, the Commissioner wishes to clarify that portion of the Initial Decision which states that "schools implement their curricula only during the day, and that is true even for physical activities. Therefore, athletic field lighting, which would be used only at night, would not benefit the school curriculum in any way." (Initial Decision at 6) The Commissioner finds this statement inaccurate in that there are some nontraditional curricula offerings/educational programs which districts across the State implement in the evening, such as "Twilight" or "Sunset" schools, and/or at night, such as adult high schools. Additionally, there are some extracurricular activities which occur after the regular school day and at night. Nonetheless, this does not mean that the Department must, pursuant to *N.J.A.C.* 6:22-1.1, conduct a review of a district's proposal for outdoor lighting of a school athletic field for *educational* adequacy *merely* because an extracurricular activity, such as sports or interscholastic athletic events, may have some nexus to a district's physical education program. In other words, the determining factor in triggering a Department review is *not* whether some nexus exists between proposed nighttime lighting and the district's educational program, but whether Department review is required pursuant to *N.J.A.C.* 6:22-1.1.

Accordingly, for the reasons set forth in the Initial Decision, as clarified herein,

respondent's Motion for Summary Decision is granted and the Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 7|02|01

Date of Mailing: 7|02|01

[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.

204-01

C # 204-01
SB # 25-01

BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	
PETITIONER-APPPELANT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION AND MICHAEL AZZARA, ASSISTANT COMMISSIONER,	:	
RESPONDENTS-RESPONDENTS,	:	
V.	:	
RUSSELL A. PEPE AND KATHLEEN PEPE,	:	
INTERVENORS/RESPONDENTS-RESPONDENTS	:	

Decided by the Commissioner of Education, July 2, 2001

For the Petitioner-Appellant, Strasser & Associates (William I. Strasser, Esq., of Counsel)

For the Respondents-Respondents, Allison Colsey Eck, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

For the Intervenors/Respondents-Respondents, Harwood Lloyd L.L.C. (David M. Repetto, Esq, of Counsel)

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

October 3, 2001

Date of mailing OCT 05 2001

205-01

L.C.S., on behalf of minor children, J.E.S. AND J.A.S.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, GLOUCESTER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

July 2, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 960-00

AGENCY DKT. NO. 39-1/00

L.C.S. ON BEHALF OF MINOR CHILDREN, J.E.S. AND J.A.S.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, GLOUCESTER COUNTY,

Respondent.

Charles W. Dortch, Jr., Esq., for petitioner (Sumners, George & Dortch, attorneys)

Robert Becker, Esq., for respondent (Becker & Duffield, attorneys)

Record Closed: May 15, 2001 Decided: May 15, 2001

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

This matter was transmitted to the Office of Administrative Law (OAL) on March 8, 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 consent order indicating the terms thereof, which is attached and fully incorporated herein.

The stipulation of settlement entered into by the parties is hereby adopted

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 settlement 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.

May 15, 2001
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

5/17/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 18 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

es

SUMNERS GEORGE & DORTCH, P.C.
CHARLES W. DORTCH, JR., ESQ.
112-14 N. Third Street
Camden, New Jersey
(856) 966-3400
Attorneys for Petitioner

LONESE CRAWFORD-SMITH On behalf of the minor children J.E.S. and J.A.S. Petitioner, v. MONROE TOWNSHIP BOARD OF EDUCATION Respondent.	: : : : : : : : : : : :	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDU05-00960-005 Agency Reference No.: 39-1/00 CONSENT ORDER

This matter having been opened to the Court by Lonese Crawford-Smith on behalf of the minor children J.A.S. and J.E.S., Charles W. Dortch, Jr. of Sumners George & Dortch, P.C., appearing on behalf of Lonese Crawford-Smith and Robert P. Becker, Esquire, of Becker and Duffield appearing on behalf of Monroe Township Board of Education and the parties having reached an amicable settlement and for good cause shown;

It is on this day of ORDERED,

1. Respondent agrees to pay the Petitioner the sum of $2,000.00 payable in monthly installments of $50.00 per month commencing April 15, 2001 until the debt is paid in full. Payments shall be made to the Law Offices of Becker and Duffield, Attorneys for Respondent at 47 Cooper Street, P.O. Box 57, Woodbury, NJ 08096-7075 and made payable to the Monroe Township Board of Education.

2. Should the Petitioner fail to pay in accordance with the terms set forth herein, within thirty (30) days of the due date, then and in that event, Respondent may enter judgment against Petitioner for the sum of $2,000, giving credit for any part paid pursuant to the terms of this Consent Order. In the event of default, as set forth herein, Respondent shall be permitted to enter Judgement against the Respondent on Ex Parte Application with supporting Certification without notice.

3. The execution of the Consent Order is not an admission of guilt by Petitioner and is entered in an effort to amicably resolve all outstanding issues with Respondent. This settlement resolves all outstanding issues pursuant to this appeal. There shall be no further action by either party, in regard to this matter, except as set forth in this Order.

4. All terms of this settlement shall be confidential. Any willful breach of confidentiality in regard to the terms of this Order may subject the breaching party to appropriate actions in accordance with applicable law.

5. The Petition is hereby dismissed.

STEVEN REBACK, A.L.J.

I hereby consent to the terms of the within Order.

LONESE CRAWFORD-SMITH

WITNESS

MONROE TOWNSHIP
BOARD OF EDUCATION

WITNESS

OAL DKT. NO. EDU 960-00
AGENCY DKT. NO. 39-1/00

L.C.S., on behalf of minor children, J.E.S. AND J.A.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, GLOUCESTER COUNTY,	:	DECISION
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. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

Date of Decision: 7|2|01

Date of Mailing: 7|3|01

206-01

RITA M. HANNA,	:	
PETITIONER,	:	
V.	:	
BOARDS OF EDUCATION OF: THE TOWNSHIP OF BERLIN, THE BOROUGH OF CHESILHURST, THE BOROUGH OF CLEMENTON, THE BOROUGH OF LINDENWOLD, THE BOROUGH OF PINE HILL, THE TOWNSHIP OF WATERFORD, AND THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENTS.	:	

July 2, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4932-00

AGENCY DKT. NO. 211-6/00

RITA M. HANNA,

Petitioner,

v.

BOARDS OF EDUCATION OF:
THE TOWNSHIP OF BERLIN,
THE BOROUGH OF CHESILHURST,
THE BOROUGH OF CLEMENTON,
THE BOROUGH OF LINDENWOLD,
THE BOROUGH OF PINE HILL,
THE TOWNSHIP OF WATERFORD
AND THE TOWNSHIP OF WINSLOW,

Respondents.

Douglas A. Baker, Esq., for petitioner

Vito A. Gagliardi, Jr., Esq., for respondents Berlin Township Board of Education, Clementon Borough Board of Education, Lindenwold Borough Board of Education, Pine Hill Borough Board of Education and Winslow Township Board of Education (Porzio, Bromberg & Newman, attorneys)

Emmett E. Primas, Jr., Esq., for respondent Chesilhurst Borough Board of Education

Betsy Bissett, Esq., for respondent Waterford Township Board of Education

Record Closed: May 10, 2001 Decided: May 15, 2001

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

Rita M. Hanna, school business administrator of the Lower Camden County Regional School District Number One, which is to be dissolved, claimed tenure and seniority rights to such a position in one of the constituent school districts upon dissolution.

The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13.

Counsel conferred over several months and reached amicable resolution of the matter. The parties have prepared the attached settlement agreement and submit it together with a resolution from each board of education authorizing entry into the agreement.

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

1. The parties have voluntarily agreed to the settlement as evidenced by authorized signatures on the agreement true copies of resolutions authorizing entry into the agreement, and

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

I note that in Part 4 of the agreement payment to the petitioner for unused days of sick leave accrued is addressed. The agreement calls for one-half of the agreed amount of this payment to be made on or before February 1, 2001, a date before submission of the agreement for approval. Under ordinary circumstances, this could not be approved. In recognition of the unique situation herein, I **ORDER** that the payment of these funds shall not constitute an

impediment to approval of the entire agreement provided the monies shall be returned in the event this agreement is not approved by the Commissioner of Education.

I **CONCLUDE** that this agreement as modified 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.

MAY 15 2001
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

5/17/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 18 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jh

PORZIO, BROMBERG & NEWMAN, P.C.
100 Southgate Parkway
Morristown, NJ 07962-1997
(973) 538-4006
Attorneys for Respondents
Boards of Education of Berlin Township,
Clementon, Lindenwold, Pine Hill and Winslow Township

RITA M. HANNA, Petitioner, v. BOARDS OF EDUCATION OF BERLIN TOWNSHIP, CHESILHURST BOROUGH, CLEMENTON BOROUGH, LINDENWOLD BOROUGH, PINE HILL BOROUGH, WATERFORD TOWNSHIP and WINSLOW TOWNSHIP, Respondents.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL DOCKET NO. EDUOA 04932-00 AGENCY DOCKET NO. 211-6/00 **SETTLEMENT AGREEMENT**

Petitioner Rita Hanna ("Dr. Hanna"), and Respondent Boards of Education of Berlin Township, Chesilhurst, Clementon, Lindenwold, Pine Hill, Waterford and Winslow Township (collectively "Boards"), having duly negotiated the terms of a settlement of this matter, hereby agree as follows:

1. RIGHTS AND RESPONSIBILITIES

Dr. Hanna shall cease her employment with the Lower Camden County Regional High School District ("LCCR") upon dissolution of same, said dissolution having been approved by referendum held in the seven communities served by the LCCR on May 12, 1998 and a dissolution date of June 30, 2001 having been established by the Commissioner of Education. She shall be entitled to any and all benefits due and owing under her current employment contract with the LCCR Board of Education. The Winslow Township Board of Education, in its capacity as LEA for the dissolved LCCR, shall employ Dr. Hanna in pensionable position, namely Director of Business Services, Transition Team, from July 1, 2001 through June 30, 2002 on a full-time basis and from July 1, 2002 through June 30, 2003 in a part-time capacity. Dr. Hanna and the LEA may choose to negotiate for future employment thereafter on a per diem basis. Dr. Hanna shall be considered a tenured employee during the two-year period, and her employment shall otherwise be governed by *N.J.S.A.* 18A:6-10; a job description is attached hereto as Exhibit A.

2. COMPENSATION

Dr. Hanna shall receive her salary of $109,050 for the 2001-2002 school year. Dr. Hanna shall receive as part of this compensation health insurance including dental, prescription and vision; NJASBO and ASBO International membership; attendance at the ASBO conferences (and any conferences that Winslow Township as LEA may approve). Dr. Hanna shall be permitted to attend, and have all reasonable expenses paid for, the NJASBO conference to be held in Atlantic City in May 2002. Specifically excluded are expenses associated with any other conferences or conventions, as well as any leave time benefits.

Additionally, Dr. Hanna shall be paid a fee of $40,000 for service for the 2002-2003 school year and will work a schedule mutually negotiated by Dr. Hanna and the LEA. It is specifically understood that during the second year she will receive none of the benefits referenced above.

It is anticipated that all monies referenced will be paid out of the LEA funds from the dissolved LCCR proportionally in accordance with statute. However, the Waterford and Chesilhurst Boards will not be charged with, or contribute toward, the $40,000 for the second year.

3. **MUTUAL RELEASES**

Dr. Hanna hereby agrees to release and forever discharge the Boards, their individual members, successors, assigns and agents from any and all past, present, and future claims, suits, actions at law or in equity of any kind, in any form, that they may have against them, and agrees that execution of this settlement agreement shall serve as full and final satisfaction of same, except for any claims arising from a breach of this settlement agreement or any provision thereof. She will dismiss with prejudice her petition presently pending before the Commissioner of Education.

The Boards and its members hereby agree to release and forever discharge Dr. Hanna from any and all past, present, and future claims, suits, actions at law or in equity, in any form, that it may have against her, and agrees that execution of this settlement agreement shall serve as full and final satisfaction of same, except for any claims arising from a breach of this agreement or her employment obligations or any provision thereof.

This document is entered into voluntarily and willingly without any duress or coercion. All parties agree to be bound by their respective releases and agree that their respective successors shall be bound by the releases and all other provisions of this Agreement.

4. **CONSULTATION WITH COUNSEL**

The parties represent that they have consulted with their respective attorneys before signing this document and are fully satisfied with the advice received.

5. **EXECUTION IN COUNTERPARTS AND VIA FACSIMILE**

This agreement may be executed in two or more counterparts, each of which, when executed and delivered, shall be deemed to be an original and all of which counterparts, when taken together, shall constitute but one agreement. An original signature transmitted by facsimile shall be deemed to be an original for the purposes of this Agreement.

6. **APPROVAL**

Extracts of the meetings of the respective Boards where this settlement was approved are attached hereto as Exhibit B. The parties acknowledge that this agreement is contingent upon the approval of the Commissioner of Education.

Rita Hanna EdD — 3-16-01

Rita Hanna, Petitioner — Date

_____ — _____

Berlin Township Board of Education — Date

_____ — _____

Berlin Township Board of Education — Date

_____ — _____

Chesilhurst Borough Board of Education — Date

_____ — _____

Chesilhurst Borough Board of Education — Date

_____ — _____

Clementon Borough Board of Education — Date

_____ — _____

Clementon Borough Board of Education — Date

4. **CONSULTATION WITH COUNSEL**

The parties represent that they have consulted with their respective attorneys before signing this document and are fully satisfied with the advice received.

5. **EXECUTION IN COUNTERPARTS AND VIA FACSIMILE**

This agreement may be executed in two or more counterparts, each of which, when executed and delivered, shall be deemed to be an original and all of which counterparts, when taken together, shall constitute but one agreement. An original signature transmitted by facsimile shall be deemed to be an original for the purposes of this Agreement.

6. **APPROVAL**

Extracts of the meetings of the respective Boards where this settlement was approved are attached hereto as Exhibit B. The parties acknowledge that this agreement is contingent upon the approval of the Commissioner of Education.

Rita Hanna Ed.D — 3-16-01
Rita Hanna, Petitioner — Date

[signature] — 4-12-01
Berlin Township Board of Education — Date

[signature] — 4.12.01
Berlin Township Board of Education — Date

Chesilhurst Borough Board of Education — Date

Chesilhurst Borough Board of Education — Date

Clementon Borough Board of Education — Date

Clementon Borough Board of Education — Date

4. **CONSULTATION WITH COUNSEL**

The parties represent that they have consulted with their respective attorneys before signing this document and are fully satisfied with the advice received.

5. **EXECUTION IN COUNTERPARTS AND VIA FACSIMILE**

This agreement may be executed in two or more counterparts, each of which, when executed and delivered, shall be deemed to be an original and all of which counterparts, when taken together, shall constitute but one agreement. An original signature transmitted by facsimile shall be deemed to be an original for the purposes of this Agreement.

6. **APPROVAL.**

Extracts of the meetings of the respective Boards where this settlement was approved are attached hereto as Exhibit B. The parties acknowledge that this agreement is contingent upon the approval of the Commissioner of Education.

Rita Hanna, Petitioner	Date
Berlin Township Board of Education	Date
Berlin Township Board of Education	Date
Mary Ellen Tallmore Chesilhurst Borough Board of Education	2/22/01 Date
Chesilhurst Borough Board of Education	2/22/01 Date
Clementon Borough Board of Education	Date
Clementon Borough Board of Education	Date

4. **CONSULTATION WITH COUNSEL**

The parties represent that they have consulted with their respective attorneys before signing this document and are fully satisfied with the advice received.

5. **EXECUTION IN COUNTERPARTS AND VIA FACSIMILE**

This agreement may be executed in two or more counterparts, each of which, when executed and delivered, shall be deemed to be an original and all of which counterparts, when taken together, shall constitute but one agreement. An original signature transmitted by facsimile shall be deemed to be an original for the purposes of this Agreement.

6. **APPROVAL**

Extracts of the meetings of the respective Boards where this settlement was approved are attached hereto as Exhibit B. The parties acknowledge that this agreement is contingent upon the approval of the Commissioner of Education.

Rita Hanna Ed. D. — 3-16-01

Rita Hanna, Petitioner — Date

Berlin Township Board of Education — Date

Berlin Township Board of Education — Date

Chesilhurst Borough Board of Education — Date

Chesilhurst Borough Board of Education — Date

James D. Murphy — 4/24/01

Clementon Borough Board of Education — Date

C. Borsalli, SBA — 4/24/01

Clementon Borough Board of Education — Date

Cathy Mowrey Lindenwold Borough Board of Education	4/9/01 Date
Robert F. Hughes Jr. Lindenwold Borough Board of Education	4/9/01 Date
Pine Hill Borough Board of Education	Date
Pine Hill Borough Board of Education	Date
Waterford Township Board of Education	Date
Waterford Township Board of Education	Date
Winslow Township Board of Education	Date
Winslow Township Board of Education	Date

Lindenwold Borough Board of Education	Date
Lindenwold Borough Board of Education	Date
Pine Hill Borough Board of Education	4-9-01 Date
Pine Hill Borough Board of Education	4-9-01 Date
Waterford Township Board of Education	Date
Waterford Township Board of Education	Date
Winslow Township Board of Education	Date
Winslow Township Board of Education	Date

Lindenwold Borough Board of Education	Date
Lindenwold Borough Board of Education	Date
Pine Hill Borough Board of Education	Date
Pine Hill Borough Board of Education	Date
Waterford Township Board of Education	Date 4/26/01
Waterford Township Board of Education	Date 4/26/01
Winslow Township Board of Education	Date
Winslow Township Board of Education	Date

Lindenwold Borough Board of Education	Date
Lindenwold Borough Board of Education	Date
Pine Hill Borough Board of Education	Date
Pine Hill Borough Board of Education	Date
Waterford Township Board of Education	Date
Waterford Township Board of Education	Date
Winslow Township Board of Education	Date 3-7-01
Winslow Township Board of Education	Date 3.7.01

BERLIN TOWNSHIP SCHOOL DISTRICT

Huster Administration Building

225 GROVE AVENUE
WEST BERLIN, NEW JERSEY 08091

SUPERINTENDENT OF SCHOOLS
Howard M. Paynter, Jr.
(856) 767-9480/9403
Fax: (856) 767-8235

BOARD OF EDUCATION
BUSINESS ADMINISTRATOR
Gene Mercoli
(856) 767-9403
Fax: (856) 767-8235

SUPERVISOR OF SPECIAL SERVICES
Robert E. Jackson, Jr.
(856) 768-2684
Fax: (856) 767-9488

May 3, 2001

Porzio, Bromberg & Newman, P.C.
163 Madison Ave
Morristown, NJ 07962-1997

ATTENTION: Vito A. Gagliardi, Jr.

REFERENCE: Dr. Rita M. Hanna, Settlement

Dear Mr. Gagliardi:

Below is the required action items pertaining to the Dr Rita M. Hanna settlement:

Item 14A - Motion by Mr. Magazzu and seconded by Mr. Woodward to formally authorize the Board's Special Counsel, Vito Gagliardi, Jr., to execute, on the Board's behalf, the attached settlement agreement with Dr. Rita M. Hanna, School Business Administrator / Board Secretary for Lower Camden County Regional High School District No. 1. Motion passed by a unanimous roll call vote.

I certify that the above action item is recorded in the minutes of the Berlin Township Board of Education's meeting of April 12, 2001.

Gene Mercoli
Board Secretary

May 3 , 2001

IDEA PART B

Motion by Mrs. Robinson, seconded by Mrs. Alwan to accept the IDEA Part B Preschool 2000-01 grant for $2,392.00
Motion carried by roll call vote – 5 ayes.

LONGEVITY PAY
J. Wolffbrandt

Motion by Mrs. Alwan, seconded by Mrs. Almore to approve a longevity payment to Ms. Wolffbrandt in the amount of $1,500 For 25 years of service.
Motion carried by roll call vote – 5 ayes.

PUBLIC HEARING DATE
March 28, 2001

Motion by Mrs. Abdul-Hamid, seconded by Mrs. Robinson to set and advertise Wednesday, March 28, at 6:30 p.m. for the Public Hearing on the Budget.
Motion carried by roll call vote – 5 ayes.

ADJUSTED STATE AID FIGURES

Motion by Mrs. Abdul-Hamid, seconded by Mrs. Robinson to approve the 2000-01 adjusted state amounts as attached.
Total increased amount= $131,260.
Motion carried by roll call vote – 5 ayes.

GRUNNETT VS ET AL

Motion by Mrs. Abdul-Hamid, seconded by Mrs. Almore to approve settlement agreement Grimmett vs. et al.
Motion carried by roll call vote – 5 ayes.

HANNA VS ET AL.

Motion by Mrs. Abdul-Hamid, seconded by Mrs. Almore to approve Hanna vs et al.
Motion carried by roll call vote – 5 ayes.

MISSION STATEMENT

Motion by Mrs. Robinson, seconded by Mrs. Abdul-Hamid to adopt the district's Mission statement.
Motion carried by roll call vote – 5 ayes.

I certify this to be a true copy of the Minutes of February 13, 2001

Ella M. Brown
Administrative Secretary

4m

02/28/01 FROM: WARRANT $ 9,624.00
TO: PAYROLL AGENCY

4. Investment Report:
a. Certificate Of Deposit Activity:

C.D.#	DATE	AMOUNT	MATURITY DATE	INTEREST
2505020129	01/17/01	$242,298.49	02/22/01	$1,381.10

Withdrawn For Capital Expenses: $7,068.80

Reinvested:

C.D.#	DATE	AMOUNT	MATURITY DATE
250502426	02/22/01	$236,610.77	03/21/01

5. Leasing Partners, LLC to provide five (5) year lease-purchase financing at a rate of 5.45% for the Telephone/Communications Replacement Project. Cost of the project is $49,045.00. The Lease With Option To Purchase Agreement will be with Municipal Capital Corporation, Allentown, Pennsylvania.

6. Approve Resolution #0106 - Resolution For Automatic Increments Bill (A-1299/S-1153).

7. Approve Resolution #0107 - Resolution For Subcontracting Bill (A-2231/S-1126).

8. Approve Resolution #0108 - Resolution For Family Leave (A-3049/S-1923).

9. Gloucester County Special Services School District to provide home instruction for student #198 at a rate of $25.00 per hour, up to 10 hours per week.

10. Settlement agreement for Hanna v. Berlin Township Board of Education, et al. Docket No. EDUOA 04932-00 subject to the terms and conditions referenced therein.

11. Nickerson Corporation to provide 166 lockers and padlocks for the new addition at a cost $10,824.32, State Contract #84015.

12. Dell Computer Corporation to provide a server for the internet at a cost of $6,441.35. State Contract #A81247.

13. JP Asphalt Paving to repair the sink hole in the parking lot near the handicapped parking area, as per proposal, at a cost of $1,950.00.

14. School Business Administrator to attend the 39th Annual New Jersey School Business Administrators Conference, Atlantic City, New Jersey, from May 8, 2001 to May 11, 2001. Cost of registration and accommodations is $569.00.

MOVED BY: Mrs. Paranzino SECOND BY: Mr. Freiling
ON ROLL CALL VOTE: MOTION CARRIED: 8-0-0 on Items #1 through #10
7-1-0 on Items #11 (Mr. Wooster voted no)
8-0-0 on Items #12 through #14

hereby certify the foregoing to be a true copy of the minutes of the Clementon Board of Education meeting held on Tuesday, April 24, 2001.

Carol Anne Visalli

Carol Anne Visalli, School Business Administrator/Board Administrator

Seven voting yes and zero voting no. The motion carries.

C. Discussion on parent participation in the Urban Boards Conference on May 12, 2001. The Board decided to send notice home to the parents on the availability of some funds for limited parental attendance at the Urban Boards Conference.

Urban Boards Conference

D. Consideration to approve settlement re: Hanna v. Berlin Township Board of Education, et. al. 09472.33593.

Hanna v. Berlin Twp. Settlement

A motion was made by Mr. Dougherty, seconded by Mr. Geary, to approve item D., as listed in the Agenda under New Business.

Roll call vote: Mr. Dougherty - yes, Mr. Geary - yes, Mrs. Glover - yes, Miss Heins - yes, Ms. Hershman - yes, Mr. Smith - yes, and Mrs. Moncrief - yes.

Seven voting yes and zero voting no. The motion carries.

Board Member Issues, Concerns, Comments

Issues, Concerns, Comments

1. Mr. Dougherty said at the next meeting, he will bring along the information that he picked up in San Diego. He had copies made for everyone, and he will give a brief report on that.

2. Ms. Hershman said she attended a technology conference, and she will share that information tomorrow with Mr. Donatucci.

3. Mrs. Moncrief said the Special Education Committee had a meeting, and they will be asking members of the State Board to come to their June meeting to try to share with them some of the issues that they have. Chief among the issues are World Language concerns, and also, the aggregate sum that they talked about in this area. They will be addressing several issues.

4. Mrs. Glover said she was fortunate enough to attend "Parents Night Out." It was a huge success.

   Mrs. Moncrief said Mr. Wachter and Mr. Dougherty gave a very nice budget presentation. There were some questions, some concerns about curriculum as well as budget. It was valuable as we did get the word out a little bit more. One of the things that has amazed her is that no one has asked at any of the presentations why taxes are being raised. It's all

I hereby certify that this is a true copy of the Lindenwold Board of Education minutes.

Robert F. Wachter, Jr., School Business Administrator

Ms. Hershman and Mr. Smith were supposed to be working on something. What they are trying to do is to sell the apartment community on offering incentives to potential teachers and/or district employees overall. These incentives would include the opportunity to come move into their apartment complex with a three to six month waiver of rent, or what-have-you, whatever they are willing to give. Mr. Smith and Ms. Hershman were going to put together some bullet points, a nice little sales package that they could present to the apartment community. But that hasn't happened yet.

They are focusing on trying to put together an employee database that would track new hires, and people who are interested in working for the district. Currently, they don't have anything that really does the job of tracking resumes or candidates. Miko Pickett who works with systems offered her services to help Mr. Donatucci put something together. They will be following up with these things in the next month or so, and report back to the other Board members.

Old Business — Old Business

Nothing to report at this time.

New Business — New Business

A. Consideration to approve Resolution 2001-04 in support of the Atlantic City Board of Education. — Resolution 2001-04

Mr. Dougherty said he wasn't sure what form a resolution supporting another resolution needed to take, if indeed it needed to take a particular format at all. The Board put this on hold until more information is available on the format.

B. Discussion/consideration to send the Lindenwold Board of Education Resolutions 2001-01 and 2001-02 to all Boards of Education throughout the state asking for their support at a cost of $209.10. — Resolutions 2001-01 and 2001-02

A motion was made by Mr. Dougherty, seconded by Mr. Geary, to approve item B., as listed in the Agenda under New Business.

Roll call vote: Mr. Dougherty - yes, Mr. Geary - yes, Mrs. Glover - yes, Miss Heins - yes, Ms. Hershman - yes, Mr. Smith - yes, and Mrs. Moncrief - yes.

UPDATE OF LOWER CAMDEN COUNTY REGIONAL

Approval of Arrangement for Dr. Hanna

Motioned by Mr. Taylor, seconded by Mr. Gallagher to approve the arrangement for D Hanna. Roll call vote. All in favor: Ms. Narducci, Mrs. Parker, Mrs. Oehrl, Mrs. Thompson, Mrs. LaFountain, Mr. Taylor, Mr. Gallagher. Abstain: Ms. Madeza (7-0-1)

REPORT OF THE CLERK OF THE WORKS

Mr. O'Donnell reviewed the following:

Bean Annex

- We will go out to bid the end of March.
- Demo items and sidewalk work we will take care of ourselves.
- Alternate - stucco entire building or just the front.
- We are waiting for Mr. Garcia to give us State approval.
- Mr. Gallagher questioned stucco versus vinyl siding. Mr. O'Donnell stated he believes vinyl siding to be more cost effective.

Ms. Narducci advised she spoke with Mr. Hassett. A letter was sent to LCCR informing them to make repairs to the meter pit. She will check and make sure these repairs are taken care of.

Mrs. Thompson advised that LCCR still has 40 outstanding violations in the Fire Marshall's office. She wants them to be corrected before they are our responsibility.
Mrs. Thompson questioned the cafeteria floor bid. Ms. Mascioli stated that the bid was awarded and asked Mr. Sahli for advice. He stated that maybe we can postpone installation, meet with the vendor, and substitute the flooring for what we would want to see installed.

Middle School

- There is an average of 65 people a day working at the site.
- The color for the membrane has been picked.
- Steel is up on the gym.
- Veneer will be started next week.
- Sheet rock will begin on the second floor.

COMMITTEE REPORTS

Camden County Educational Services Commission

Mr. Taylor advised that Mr. Vanderslice will be attending our March 20th Worksession.

Home and School

Mrs. Thompson advised that the Read On, Sleep On will be held on March 16th for D Glenn School, and March 30th for the Bean School. A skating party will be held on March 18th, and a Math Magician will be held the month of March for all grades. The first Annual Demo Night will be held on March 9th from 7:00 to 9:00 PM.

I hereby certify that this is an exact copy of the February 20, 2001 minutes of the Pine Hill Board of Education.

Carol A. Mascioli

Ashley Rauenzahn, a sixth grader from Stone Harbor School, to read stories to Mrs. McDonald's first grade class on March 9, 2001 in the morning. Her mother, Nancy Rauenzahn, is a BSIP aide at the Atco Elementary School .

Dissolution

The Board was advised that the Hammonton Middle School has been sold to the Diocese of Camden to be used by St. Joseph's Parochial School for slightly over one million dollars.

A motion was made by Ralph Condo, seconded by Josephine Masso and carried by unanimous roll call vote to proceed to settle two litigation matters as discussed in Closed Session.

Board President

A motion was made by Linda Wilson, seconded by Ralph Condo and carried with an 8 'yes', 1 'no' roll call vote [William Richardson voting 'no'] to return one watercolor picture of "The Old Jug" to the family of the artist per their request.

Mr. Condo reported that he met with the Superintendent at Lower Camden County Regional to review fire exits at Edgewood Senior High School. It was determined that exits met the requirements for fire code safety and Winslow will monitor the hallway.

Closed Session #2

The Board advised that they will be going into Closed Session to discuss negotiations and will not be returning to public session. They will be adjourning from Closed Session.

A motion was made by Linda Wilson, seconded by William Richardson and carried by unanimous roll call vote to adopt the following resolution: Be it resolved that the Waterford Township Board of Education adjourn to Closed Session to discuss negotiations, the results of which will be made known when the reason for going into Closed Session is no longer viable.

Adjourned: 8:15 p.m.

Earl J. Vassallo
Assistant Superintendent for Business/Board Secretary

EJV:th
BMin2.21

I certify that this is a true copy of the minutes of the February 21, 2001 meeting of the Waterford Township Board of Education.

Earl J. Vassallo
Assistant Superintendent of Business/Board Secretary

4R

WINSLOW TOWNSHIP BOARD OF EDUCATION

JOHN C. OBERG • BUSINESS ADMINISTRATOR

113 CENTRAL AVENUE
BLUE ANCHOR, NEW JERSEY 08037-9554

PHONE: 609-561-4102 FAX: 609-561-6378

Motion made by Mrs. Smiley, seconded by Mrs. Hightower with a unanimous voice vote in favor to approve a business and operations addendum of the following items (12 through 15):

13a. *Settlement – Dr. Rita Hanna*

Approve settlement for Dr. Rita Hanna – Transition Team for 2001-2002 per the exhibit presented as discussed in executive session.

This is to certify that the above is a true copy of the motion adopted by the Board of Education of Winslow Township in regular session held on Wednesday, March 7, 2001.

John C. Oberg, Business Administrator/Board Secretary

OAL DKT. NO. EDU 4932-00
AGENCY DKT. NO. 211-6/00

RITA M. HANNA,	:	
PETITIONER,	:	
V.	:	
BOARDS OF EDUCATION OF: THE TOWNSHIP OF BERLIN, THE BOROUGH OF CHESILHURST, THE BOROUGH OF CLEMENTON, THE BOROUGH OF LINDENWOLD, THE BOROUGH OF PINE HILL, THE TOWNSHIP OF WATERFORD, AND THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENTS.	:	

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 assistant commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34, 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.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 7|2|01

Date of Mailing: 7|3|01

207-01

L.C.A., on behalf of minor children, C.A.L.A., D.S.L.A. AND B.A.L.A.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner challenged the Board's determination that his three nephews, who reside with him, are not entitled to a free education in the Fort Lee School District. Petitioner sought to admit his nephews pursuant to *N.J.S.A.* 18A:38-1(b) because of a family and economic hardship.

The ALJ determined that petitioner's nephews are entitled to a free education in the Fort Lee School District because of family and economic hardship. The ALJ concluded that both the parent's economic situation and the danger to the health and safety of petitioner's nephews if they continue to reside with their parents in Columbia compelled a determination that petitioner's nephews are entitled to a free education in the Fort Lee School District.

The Commissioner affirmed the determination of the ALJ, agreeing that the specific facts of this case demonstrate that petitioner's nephews reside with him because of family or economic hardship, and not solely for educational purposes.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9016-00
AGENCY DKT. NO. 312-9/00

L.C.A. on behalf of minor children,
C.A.L.A., D.S.L.A and B.A.L.A.,
Petitioners,
v.
FORT LEE BOARD OF EDUCATION,
Respondent.

Robert M. Schlanger, Esq., for petitioners

Robert T. Tessaro, Esq., for respondent

Record Closed: March 27, 2001 Decided: May 14, 2001

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal brought on behalf of three students seeking enrollment in the Fort Lee, New Jersey school system. They recently arrived from the South American country of Columbia and are now living with their uncle and his wife in Fort Lee. Their mother (the uncle's sister) sent them to the United States due to the general political climate and economic conditions in Columbia. Among other things, petitioners allege that drug cartels and paramilitary groups randomly kidnap children in Columbia to terrorize the local population. The controversy involves whether the children are entitled to a free public education under the so-called "affidavit-student" provision of

N.J.S.A. 18A:38-1(b), which applies to students living with relatives or friends who reside in the school district. Basically, the issue is whether petitioners satisfy the "hardship" test, namely, whether the children's parents are incapable of supporting or providing care for the children "due to a family or economic hardship."

Significantly, the Board of Education of Fort Lee ("Board") does not dispute that Columbia is an undesirable place for raising children or that economic conditions in that country are difficult. Further, the Board admits that the uncle is domiciled in Fort Lee and that he is supporting his nephews without financial help from their parents. Nonetheless, the Board argues that many places are undesirable environments for raising children, including some parts of the United States, and that something more must be proven to establish a genuine "economic or family hardship."

Procedural History

By letter dated August 20, 2000, the Board notified the uncle that his three nephews would not be allowed to enroll in the Fort Lee public schools. On September 6, 2000, the uncle filed a verified petition with the Commissioner of Education ("Commissioner"), appealing the Board's denial of enrollment. Respondent Board filed its answer and counterclaim on September 15, 2000. Pursuant to *N.J.S.A.* 18A:38-1(b), petitioners were admitted to school, provided that the uncle will be liable for tuition if the Board ultimately prevails in this litigation.

Subsequently, on September 22, 2000, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held a hearing on March 27, 2001. Witnesses and exhibits are listed in the appendix.

Findings of Fact

Many of the general background facts are uncontested. The uncle, age forty-five, is a naturalized American citizen. Born in Columbia, he entered the United States legally in 1980 and has lived here for twenty years. He works in New York City as a

store manager. As a member of the U.S. army reserves, he was called to active duty and served for six months during the Gulf War crisis. Married for eleven years, he and his wife have no children of their own. He settled in Fort Lee in 1985, first renting an apartment and later purchasing a two-bedroom condominium together with his wife. Included in the record is a copy of a certificate evidencing the uncle's interest as a joint tenant in a corporate entity owning residential property in Fort Lee. Since coming to the United States, the uncle has remained in touch with his sister, who lives in an apartment in Bogotá. Last year, the uncle traveled to Colombia to visit his sister and other relatives.

All three children entered the United States on December 16, 1999.[1] On or about January 5, 2000, the uncle submitted separate application packets for school admission of his three nephews on forms prepared by the district. Each packet included an affidavit signed by the uncle and aunt verifying that the child is living at their home in Fort Lee and that they intend "to keep and support the said child gratuitously as if he were our own child with no contribution or payment, either in money or in kind, for food, clothing, recreation, medical expenses, lodging or other costs and expenses[.]"[2] In addition, the packet included an affidavit signed by both parents reciting the reasons for sending their children to the United States:

> Columbia is a country that is bathed in violence. Guerilla killings occur all the time and it is no place to raise and educate children to be responsible adults. Both parents recognize the danger, and want what is best for their children.
>
> In the United States, they will have a chance to get a good education and live a decent life.

---

[1] Insofar as the record discloses, the children entered the country legally to live with their uncle and aunt. Even if they entered the country illegally, however, a school district cannot deny a free public education to children solely on the basis of illegal-alien status. *Plyer v. Doe,* 457 *U.S.* 202 (1982). *Antonio Indep. Sch. Dist. v. Rodriguez*, 411 *U.S.* 1 (1973).

[2] Both parents in Columbia have jointly executed a notarized power of attorney authorizing the aunt and uncle "to represent us in all necessary matters related to our sons."

On May 18, 2000, the District notified the uncle that the claim for admission had been denied for lack of sufficient evidence that the parents are incapable of supporting them "due to family or economic hardship." However, the letter invited the uncle to furnish additional documentation "that substantiates why the conditions in Columbia warrant a family or economic hardship for the parents of these children." After consulting with a school official, the uncle submitted an addendum to the application elaborating on the parents' economic plight. This addendum recites that the mother works seven days a week, that every Saturday and Sunday she travels one-hundred miles each way over mountain roads from their home in Bogotá to a small outlying village where she works, and that the children "must travel with her to work on the weekends." Their father is unable to take care of them on weekends because he works in the City of Cali, a distance of two hundred and thirty-five miles from Bogotá. Again, however, the District advised the uncle that review of the additional evidence submitted on behalf of the three students "does not support the validity of their claim for admission."

As required by law, the Board admitted the three students to its school system, subject to a counterclaim for reimbursement of tuition in the event that petitioners are unsuccessful on appeal.[3] Presently, therefore, B.A.L.A., age seventeen, is enrolled in the District's ninth grade. C.A.L.A., age fifteen, is enrolled in the District's eight grade. D.A.L.A., age twelve, is enrolled in the District's elementary school. They appear to have made a smooth transition to their new surroundings. B.A.L.A., the oldest child, made the honor roll during his first semester at Fort Lee High School.

Proofs at the hearing support the assertion that Columbia is one of the world's most dangerous places, especially for children. Having recently returned from a visit to Columbia, the uncle testified that violence on the streets is commonplace. Thus, the uncle commented that, "we couldn't go out at night," "couldn't use public transportation,"

[3] A local board of education must admit the child to its school system pending the outcome of a timely appeal to the Commissioner. If the Commissioner determines that the evidence does not support petitioner's claim, the Commissioner "shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district." *N.J.S.A.* 18A:38-1(b).

and couldn't travel "to some areas." Fearful for the safety of her children, his sister was "very demoralized." Because she is employed by the state-operated medical system, she is a government worker. Anti-government groups specifically target government workers for terrorist acts.[4] Despite his young age, B.A.L.A. described the violence he had encountered in Columbia on a daily basis. Someone regularly "gets robbed or raped," and there is "a lot of kidnapping." He remembered his mother as "very protective of us," and unwilling to let him go out alone.

Information from official government sources supports this dire assessment of the current situation in Columbia.[5] A travel warning posted on the website of the United States Department of State in February 2000 notes that "[v]iolence by nacrotraffickers, guerrillas, paramilitary groups and other criminal elements continues to affect all parts of the country, both urban and rural." http://travel.state.gov/Columbia.html According to this bulletin, "There is a greater risk of being kidnapped in Columbia than in any other country in the world." Particularly relevant (given the fact that the children had to accompany their mother on her long trip to the interior of Columbia on weekends) is the comment that "[t]ravel by road outside the major cities is especially dangerous because of guerrilla activity in rural areas."

Private watchdog groups such as Amnesty International paint an equally bleak picture of the situation in Columbia. In a report issued in 1998, Amnesty International estimates that "[h]undreds of people were killed by the security forces and paramilitary groups operating with their support or acquiesce," many of whom "were tortured before being killed." http://www.amnesty.org/ailib/aireport/ar98/amr23.htm "Death-squad style" killings of people regarded as "disposable" occurred in urban areas. Innocent civilians continue to be the principal victims of the spiraling conflict, "mostly peasant

[4] The mother would also make a tempting target for capture because rebel forces do not have adequate health facilities.

[5] Not only economically disadvantaged families are leaving Columbia to escape oppression. See Juan Forero, *Prosperous Columbians Flee, Many to U.S., to Escape War*, The New York Times, April 10, 2001 at 1A.

farmers living in areas whose control was disputed between the armed forces and their paramilitary allies, and armed opposition groups." A later report, dated June 1999, refers to the practice of taking civilian hostages, including women and children, to use as bargaining chips in negotiations between warring factions. http://www.web.amnesty.org/ai.nsf/index/AMR230431999 While the Board emphasizes that Amnesty International has also been critical of human rights violations occurring in the United States, the circumstances are simply not comparable. Review of Amnesty International's 2000 annual report on the United States reflects that organization's opposition to the death penalty and alludes to reported instances of police brutality. The only mention of harm to children refers to the possibility that a proposed federal juvenile justice bill might allow more children to be incarcerated with adult prisoners. http://www.web.amnesty.org/web/ar2000

Aside from the constant threat to their children's physical safety, the parents rely on "economic" hardship as another reason for sending the children to live with relatives in the United States. Trained as a dentist, the mother earns a salary equivalent to roughly $450 American dollars per month.[6] During the regular workweek, she works at a medical clinic located in Bogotá. Every weekend, she travels by bus on an eight-hour journey to an outlying village, where she provides dental services to the rural population. Afraid to leave her children alone at home, the mother would bring her three children with her on the long bus ride. Her husband, the father of her children, is an itinerant paint salesman, who works on commission and earns much less than the mother. Unable to find any work in Bogotá, the father relocated to Cali to help support his family. Although their marriage bonds remain strong, the parents live separately most of the time due to economic necessity.[7]

---

[6] Since petitioners did not present any data about the overall cost of living in Columbia, it is difficult to equate the mother's buying power to someone with a comparable income in the United States. Nonetheless, the uncle claimed that $450 is a "very small" amount to meet the expenses of a Columbian household with three children.

[7] On cross-examination, the Board attorney sought to show that the parents had misrepresented their living arrangements in the original affidavit. However, the father maintains his domicile in Bogotá, and the uncle volunteered the details of the parents' forced separation only after the District had invited him to supply additional information about the family's economic hardship.

I FIND that the parents sent their children to America primarily to protect them from dangerous conditions in Columbia, including atrocities committed against the civilian population and the widespread practice of kidnapping hostages to use as bargaining chips. These three children were particularly vulnerable because their mother works for the government and because they regularly accompanied her on trips by public transportation through areas inhabited by guerillas. Economic conditions necessitate that the father leave the home to find work and that the mother work seven days per week. Therefore, the parents were unable to provide adequate care and adult supervision for their adolescent sons. The uncle and aunt are willing to assume full financial responsibility for their three nephews and agree to pay all living expenses out of their own pocket. Availability of an education in Fort Lee was not a major factor in the parents' decision. Rather, the parents chose Fort Lee because that happened to be the place where the uncle and aunt live.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that petitioners satisfy the statutory criteria and are entitled to a free public education in the Fort Lee School District.

Art. VII, §4 ¶1 of the New Jersey State Constitution affords the right to free public school instruction to "all children in the State between the ages of five and eighteen years." *State ex. rel. G.S.*, 330 *N.J. Super.* 383, 392 (Ch. 2000). Similarly, *N.J.S.A.* 18A:38-1(a) declares that public schools in New Jersey shall be free to anyone over five and under twenty years of age "who is domiciled within the school district." Ordinarily, a child's domicile follows that of the custodial parent or legal guardian. *Mansfield Twp. v. State Bd. of Educ.*, 101 *N.J.L.* 474, 478n (Sup. Ct. 1925). Where, however, a child is kept in the home of another person domiciled within the school district who is providing full financial support, *N.J.S.A.* 18A:38-1(b) authorizes free school attendance upon satisfaction of certain statutory criteria, including the filing of a sworn statement by the child's parent or guardian verifying:

> . . . 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.

Without raising any other objections, the Board contends that petitioners failed to demonstrate sufficient "family or economic hardship" to justify admission to its school system. In reviewing the validity of this determination, the Commissioner is not limited to documentary submissions, but must consider the circumstances by which the children came to live with their uncle. *J.A. v. Board of Educ.*, 318 *N.J. Super.* 512 (App. Div. 1999).

Ever since the Pilgrims landed on our shores to escape religious persecution, the United States has traditionally been a refuge for those fleeing oppression at home. Ours is a nation of immigrants and their descendants. *Mojica v. Reno*, 970 *F. Supp.* 130, 143 (E.D.N.Y. 1997), *aff'd in part, dismissed in part sub nom. Henderson v. INS*, 157 F3d 106 (2d Cir. 1998), *cert.* den. *sub nom. Reno v. Navas*, 526 *U.S.* 1004 (1999). School law decisions regard substantial political unrest in a foreign land as enough of a "family hardship" for parents to send children to safety in the United States. Illustratively, in *D.K.S. ex rel. H.I.L. v. Fort Lee Bd. of Educ.*, EDU 3341-99, Initial Decision (July 8, 1999), adopted (Comm'r Aug. 25, 1999) http://lawlibrary.rutgers.edu/oal/h/initial/edu3341-99_1.html Christian missionaries residing in Uzbekistan sent their child to live with friends in Fort Lee because political instability and religious strife in that Moslem country "had reached the level of frequent threats to foreigners." (at 3). An official State Department report corroborated much of the parents' claim concerning human rights abuses in Uzbekistan and hostility toward Christian groups who openly tried to convert Muslims. Holding that Fort Lee must admit the child into its school system free of charge, the Commissioner adopted the finding that the friends "generously took H.I.L. into their home to provide the nurturing and stability his parents were unable to give him due to their difficult missionary assignment." (at 4).

Indeed, in one extreme example, "family hardship" is broadly interpreted to extend to a family's strong preference to raise their child with American values. In

R.C.P. ex rel. A.S.K., EDU 11001-99, Initial Decision (May 18, 2000), *adopted* (Comm'r Aug. 18, 2000), *aff'd* (St. Bd. Jan. 3, 2001) <http:lawlibrary.rutgers.edu/oal/html/initial/edu11002-99_1.html>, a one-year old child moved from the United States to Korea with his parents. By the time he had attained age fifteen, he wanted to live in the United States as an American citizen. Since the family could not afford relocating to this country, the parents sent him to stay with an uncle who was living in the Ramapo-Indian Hills School District. Adopting the view that the family hardship consisted of the parents' inability to provide their child with "the privileges of an American citizen including the intimate knowledge of American culture and heritage," the State Board upheld a determination that the local school district was responsible for providing a free public education. (at 6).

Apparently, the Board seeks to apply the immigration standard for political asylum and argues that the family cannot show a genuine hardship unless they can establish a likelihood of retaliation for their beliefs. In order to obtain asylum, a person must show that he or she has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. *See Ratnam v. Lewis*, 892 *F. Supp.* 619 (D.N.J. 1995). Unlike immigration law, however, the school law standard is much more general and covers a wider range of hardships, including economic as well as political. New Jersey law was never meant to penalize innocent parties, elevate form over substance or overlook the substantial state interest in ensuring the education of all its children. *Gunderson v. City of Brigantine Bd.* of Educ., 95 *N.J.A.R.*2d (EDU) 39, 42, *adopted* (Comm'r 1994), *aff'd* 95 N.*J.A.R.2d* 132 (St. Bd. 1995).

Other decisions treat poverty or poor living conditions abroad as satisfying the "economic hardship" requirement. For instance, in *E.M. ex rel. K.G. v. Lincoln Park Bd. of Educ.*, EDU 9186-97, Initial Decision (Feb. 11, 1999), adopted (Comm'r April 9, 1999) http://lawlibrary.rutgers.edu/oal/html/initial/edu9186-97.html, a seventeen-year old child born in Poland came to the United States to live with a family friend after her mother had died and her father exhausted most of his earnings on her brother's medical care. Agreeing that the credible evidence portrayed "a hardship which is

appropriately recognized in the statute," the Commissioner ruled that the child is entitled to a free public education financed by the Borough of Lincoln Park. (at 6). Likewise, in *M.H.R. ex. rel. L.C.G. v. Clifton Bd. of Educ.*, EDU 3005-96, Initial Decision (Feb. 27, 1998), http://lawlibrary.rutgers.edu/oal/html/initial/edu3005-96.html, *adopted* (Comm'r April 16, 1998) <http:www.state.nj.us/njded/legal/index.html>, the Commissioner held that a Mexican teenager from a large family, who came to live with a brother in Clifton because his parents "had no visible means of support due to their advanced age," was entitled to be educated by the local school district.

Like generations before them, the three children involved in this litigation fled to the United States to escape tyranny at home and to seek the opportunity for a better life. They did not come specifically to obtain an education and their living arrangement with their uncle is not a subterfuge to attend a particular school system. Now, the Board should get on with the important business of educating them.

Order

It is **ORDERED** that the three children on whose behalf this appeal is brought are eligible for a free public education in the Fort Lee 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 14, 2001
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

5-16-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 17 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

1. L.C.A., uncle of the three children
2. B.A.L.A.

List of Exhibits

No.		Description
J-1	(a)	Copy of Part I of affidavit for enrollment of nonresident student submitted on behalf of D.S.L.A., dated January 5, 2000
	(b)	Copy of Part II of affidavit for enrollment of nonresident student submitted on behalf of D.S.L.A., dated January 5, 2000
	(c)	Copy of Part III of affidavit for enrollment of nonresident student submitted on behalf of D.S.L.A., notarized on February 2, 2000
	(d)	Copy of letter to L.C.A. from the Fort Lee Board of Education, dated May 18, 2000
	(e)	Copy of addendum to affidavit of L.A., undated
	(f)	Copy of letter to L.C.A. from the Fort Lee Board of Education, dated August 29, 2000
J-2		Copy of Part I of affidavit for enrollment of nonresident student submitted on behalf of B.A.L.A., dated January 5, 2000

J-3		Copy of Part I of affidavit for enrollment of nonresident student submitted on behalf of C.A.L.A., dated January 5, 2000
P-1		Copy of document entitled "Travel Warnings & Consular Information Sheets," published by the United States Department of State, dated March 26, 2001
P-2		Copy of certificate of ownership of Stock in 2339 Hudson Terrace Corporation, dated January 9, 1998
P-3		Copy of statement of earnings of A.V.R.A. by the Social Security Institute, dated March 8, 2001
P-4	(a)	Copy of letter to B.L.A. from Robert L. Taglieri, dated February 16, 2001
	(b)	Copy of student report card of B.L.A., dated February 5, 2001
R-1		Copy of document entitled "Amnesty International Annual Report 2000 for the United States of America," dated March 22, 2001

OAL DKT. NO. EDU 9016-00
AGENCY DKT. NO. 312-9/00

L.C.A., on behalf of minor children, C.A.L.A., D.S.L.A. AND B.A.L.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions were timely filed in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in reaching his decision.

The Board excepts, *inter alia*, to the characterization of the father's employment as an itinerant paint salesman by the Administrative Law Judge (ALJ), arguing that petitioner's testimony clearly described the father's work as a regional salesman for a paint wholesaler whose job requires periodic absence from home like many other salesmen in other parts of the world. (Board's Exceptions at 2) The Board also argues that, while the mother's earnings were disclosed at hearing, there was no information provided on the father's earnings except testimony that he earns much less than the mother, and that there was no evidence presented showing the relationship between the parents' income and the standard of living in Columbia. (*Ibid.*)

Moreover, the Board objects to the ALJ's reliance on *D.K.S. and K.S.S., on behalf of minor child, H.I.L. v. Board of Education of the Borough of Fort Lee, Bergen County*, decided

by the Commissioner August 25, 1999, claiming that the instant matter is distinguishable from that case, which involved Christian missionaries assigned to Uzbekistan, where the family was the target of religious and physical persecution, including threats, in an Islamic country openly hostile to Christians and that the child was "overwhelmed physically and emotionally***." (Slip Op. at 3) The Board posits that petitioner in this matter offers only generalized statements with respect to conditions in the children's native country and that there is no evidence of personal hardship in the matter *sub judice* in contrast to *D.K.S., supra.*[1] (Board's Exceptions at 3)

Upon careful and independent review of the record in this matter, the Commissioner concurs that, under the particular circumstances of this case, petitioner has demonstrated that C.A.L.A., D.S.L.A. and B.A.L.A. are entitled to a free education in the Board's District pursuant to *N.J.S.A.* 18A:38-1(b)1. As observed by the ALJ, the children's mother works seven days a week, and the children must travel with her 100 miles each way on weekends to a small village through areas inhabited by guerrilla groups. Because the mother is a dentist and a government employee, she is particularly susceptible to kidnapping by guerrillas and paramilitary groups who do not have adequate health facilities, and who specifically target government employees. (Initial Decision at 5) The father is unable to care for his children on weekends because, unable to find work in Bogotá, he works in Cali, a distance of 235 miles from Bogotá, where the children resided prior to their move to Fort Lee.

[1] The Commissioner notes that, as in this instance, the Fort Lee School District was the respondent in *D.K.S., supra,* a matter in which the petitioners therein challenged the district's determination that the student in question was ineligible for a free public education in the district's schools as an affidavit student. The Commissioner in that matter determined that the student *was* entitled to attend school free of charge as an affidavit student due to family hardship.

The Commissioner, therefore, finds that C.A.L.A., D.S.L.A. and B.A.L.A. are residing with their uncle in Fort Lee because their parents are unable to care for them "due to family or economic hardship," and, not solely for educational purposes. *N.J.S.A.* 18A:38-1(b)1.

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

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 7|2|01

Date of Mailing: 7|3|01

[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.

208-01

AURELIA ZITMAN,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner challenged the Board's determination to transfer her from her position of elementary school teacher of the handicapped to middle school teacher of the handicapped after a reduction in force (RIF) of elementary teachers of the handicapped. Petitioner argued that her tenure and seniority rights were violated by the transfer because there were nontenured or less senior teachers retained as elementary school teachers of the handicapped after the RIF. The Board argued that its actions were a proper exercise of its managerial prerogative because petitioner suffered no reduction in salary or other employment benefits.

The ALJ, relying on the Appellate Division decision in *Carpenito*, determined that the transfer of petitioner was based on a valid RIF and did not violate her tenure or seniority rights. The ALJ thus recommended dismissal of the petition.

The Commissioner affirmed the decision of the ALJ. Because there was a valid RIF, and petitioner did not suffer a reduction in compensation or any tangible employment benefit, the Commissioner concluded that the Board's transfer of petitioner was within its managerial prerogative and petitioner's tenure and seniority rights were not violated.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9197-00
AGENCY DKT. NO. 302-8/00

AURELIA ZITMAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE HACKENSACK, BERGEN COUNTY,
Respondent.

Louis P. Bucceri, Esq., for petitioner
(Bucceri & Pincus, attorneys)

Lester Aron, Esq., for respondent
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: April 10, 2001 Decided: May 16, 2001

BEFORE **STEPHEN G. WEISS**, ALJ:

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law by the Department of Education in October 2000 following the filing of a petition by Aurelia Zitman alleging that her tenure and seniority rights had been violated by virtue of the respondent Board's transferring her to a position as a middle school Teacher of the Handicapped rather than the position she previously held, elementary school Teacher of the Handicapped. According to Zitman, since there were other non-tenured and/or less senior teachers retained as elementary school Teachers of the Handicapped for

the 2000-2001 school year, she should have been given preference over them in respect to the reduction in force which led to her transfer.

Thereafter, the respondent filed an answer essentially denying the allegations of illegal acts and maintaining that its conduct was in all respects a proper exercise of its managerial prerogatives following a reduction in force.

In January 2001, I conducted a telephone conference with counsel and a schedule was established for the filing of a motion by the Board to dismiss the petition. In the event that motion was denied, hearings were scheduled for June 4 and 5, 2001. Subsequent to that conference a motion to dismiss was made, accompanied by a brief and proposed form of order. A brief in opposition then was filed by the petitioner, as well as a Board reply to the opposition brief. Counsel also have filed a Joint Stipulation of Facts.

JOINT STIPULATION OF FACTS

The parties have agreed to the following facts:

1. Petitioner is a tenured teaching staff member employed by Respondent.

2. Up through the 1999-2000 academic year, Respondent served as Teacher of the Handicapped for elementary grades.

3. From January 12, 2000 through June 20, 2000 the petitioner was on an approved maternity/child rearing leave of absence.

4. By letter of March 15, 2000 (copy attached as Exh. J-1) petitioner was notified that her assignment for the 2000-20001 academic year would be changed from Special Education Teacher at Parker School to English as a Second Language teacher at the Middle School.

5. Subsequently, petitioner's assignment for 2000-20001 was changed again to a Teacher of the Handicapped at the district's Middle School.

Attached to the Joint Stipulation, was a letter, dated March 15, 2000, from Superintendent of Schools Montesano to Zitman advising of her transfer for the 2000-2001 school year from a special education teacher at an elementary school to an English as a Second Language teacher at a middle school.

DISCUSSION

The Board's position is that under the recent decision in *Carpenito v. Bd. of Educ. of Rumson*, 322 *N.J. Super.* 522 (App. Div. 1999) the action taken in the petitioner's case did not trigger a need to give such deference to her tenure and seniority rights as to prohibit her transfer to a middle school position. In *Carpenito*, a tenured teacher alleged that his tenure and seniority rights were violated when the Board abolished his position, transferred him to a different position within the scope of his certificate, then reinstated the original position but hired a non-tenured teacher to fill it. The Commissioner upheld the Board's action, the State Board reversed, and on appeal the Appellate Division held that absent allegations of bad faith or unlawful purpose a tenured teacher's seniority rights are not triggered when the board abolishes his or her position and transfers the teacher to teach different subjects so long as they are within his or her certification and the action did not result in a reduction of salary or other employment benefits. In its decision, the Appellate Division reviewed the case existing law concerning the transfer of a tenured teacher to a position within the scope of his or her certification and determined where no loss of salary or other reduction in employment was suffered, and the teacher was not "singled out for the transfer on a prohibited basis" an involuntary transfer is to be upheld. *See Carpenito, supra* at 529-530. As the court also noted, "a transfer is not a demotion or a dismissal under such circumstances. Indeed, transfers of teaching staff members are often advisable in the administration of schools for a variety of reasons." *Carpenito, supra* at 530. So too, as the court further observed, seniority is simply a "by-product of tenure" and comes into play only where tenure rights have been reduced in some meaningful way. *Carpenito,*

supra at 531. So long as the transfer is the consequence of a valid reduction in force the managerial prerogatives of the Board to make such transfers cannot successfully be challenged. *See, N.J.S.A.* 18A:28-9. *See also, Moore v. Cherry Hill Twp. Bd. of Educ.*, 92 *N.J.A.R.* 2d (EDU) 586, aff'd by Commissioner, 92 *N.J.A.R.* 2d (EDU) 588, *aff'd* by State Board, 93 *N.J.A.R.* 2d (EDU) 173; *Greenway v. Board of Education of Camden,* 129 *N.J.L.* 46 (N.J. Sup. 1942). Thus, according to the Board in this case, since Zitman was neither dismissed nor her salary reduced, nor any other adverse employment impact effectuated, her mere transfer from elementary school Teacher of the Handicapped to a middle school Teacher of the Handicapped, both within her certification, was perfectly appropriate. This being so, it is irrelevant whether the Board continued to employ other non-tenured and/or less senior teachers in the position which she previously held.

According to petitioner, the Board's argument totally ignores the provisions of N.J.A.C. 6:3-5.1(i) which requires that where, as here, a reduction in force occurs and a position is abolished, the Board is obligated to select persons to be reassigned out of a category of employment on the basis of seniority rules which distinguish between "elementary" and "secondary." Thus, since petitioner's transfer to a middle school was a change in "category," permitting teachers with less seniority to remain within Zitman's original elementary category cannot be tolerated. Moreover, according to petitioner, there were many elementary level positions requiring the services of someone with her certification and she could have been reassigned to any one of them rather than having them filled, as they were, by non-tenured employees who should be subordinate to her. Thus, petitioner argues that *Carpenito* is not pertinent because the teacher in that case was assigned within the same category (secondary to secondary) and when his original position was eliminated there was no one with less seniority than he had teaching the particular subject.

In reply, the Board points out that *Carpenito* expressly determined that seniority rights are not triggered where a position is abolished and a teacher is transferred to another position within his or her certification so long as there is no reduction in the

salary or benefits enjoyed. This is so even where there is a reduction in force. *See Carpenito, supra* at 533.

CONCLUSION AND ORDER

Based upon my review and consideration of the case law, I **CONCLUDE,** on the undisputed facts, that the Board's position is correct. Under *Carpenito*, Zitman's transfer from elementary to middle school Teacher of the Handicapped was the result of a valid reduction in force and did not violate either her tenure or her seniority rights. In particular, it did not trigger a right to claim a position at the elementary level (even though she was certified) given to less senior or non-tenured employees. The language of *Carpenito* amply supports the exercise of the Board's prerogatives in this case. Accordingly, the Board's Motion is **GRANTED** and the petition should 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.

May 16, 2001
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

5-18-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 21 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

al

OAL DKT. NO. EDU 9197-00
AGENCY DKT. NO. 302-8/00

AURELIA ZITMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in reaching his decision.[1]

Upon careful and independent review of the record in this matter, the Commissioner affirms the Initial Decision of the Administrative Law Judge (ALJ). In so doing, like the ALJ, the Commissioner finds the Appellate Division's decision in *Carpenito, supra*, to be controlling.

In *Carpenito*, petitioner's tenured position as a seventh grade social studies teacher was eliminated due to declining enrollment. As a result, although he was initially assigned to teach computer applications to seventh and eighth grade students, along with health and basic skills courses, Carpenito was subsequently assigned to teach computer applications to grades four through eight, as well as a basic skills course. *Carpenito* at 525-526. However, he

[1] Both the exceptions and reply essentially reiterate arguments that were presented in papers previously considered by the ALJ.

"suffered no loss of salary or reduction of tangible employment benefits as a result of the transfer." *Id.* at 526. When the board subsequently reinstated the seventh grade position, it chose to fill the position with a nontenured teacher. *Ibid.* Carpenito appealed, claiming that his tenure and seniority rights had been violated by the board's failure to assign him to the reinstated social studies position. *Ibid.* Additionally, like the petitioner herein, Carpenito claimed that the abolishment of his social studies position, which, for seniority purposes, was in a secondary category, resulted in his inappropriate assignment to an elementary category; *Carpenito v. Rumson Borough Board of Education,* 96 *N.J.A.R.*2d (EDU) 958 (1996) at 960-961. Although he argued that he was not properly certified to teach the computer applications course to the elementary grades, both the Commissioner and the Court found otherwise. *See, Carpenito*, 322 *N.J. Super.* at 531.

In the instant matter, there appears to be no dispute that "the number of Elementary Special Education teachers was reduced by two after the 1999-2000 school year." (Petitioner's Brief in Opposition to Respondent's Motion to Dismiss the Petition at 4) Subsequent to this reduction, petitioner was reassigned to teach English as a Second Language at the Middle School, thereby resulting in a change in category (from elementary to secondary). *Significantly, like Carpenito, petitioner did not suffer a reduction in compensation or a loss in any tangible employment benefit.* As the Commissioner has observed:

> [T]he [*Carpenito*] court's determination refined the concepts of transfer and reduction in force to hold that when a board of education acts to abolish a teaching staff member's position pursuant to *N.J.S.A.* 18A:28-9 and reassigns that individual to another position with no loss of tangible employment benefit, that action does *not* constitute a reduction in force, but is instead tantamount to a *transfer.* (emphasis in text) *Di Maggio v. Board of Education of the City of Trenton, Mercer County,* Commissioner's Decision, July 8, 1999, slip. op. at 19.

See, also, William Buckley v. Board of Education of the City of *Trenton, Mercer County,* Commissioner's Decision, July 30, 1999.

Therefore, in accordance with the paradigm applied by the Court in *Carpenito*, because ***petitioner's tenure rights were not reduced*** as a result of the Board's action, there is no "triggering event"; "***the triggering event for preference based on seniority is either a dismissal or transfer coupled with a loss of a tangible employment benefit." *Carpenito, supra,* 322 *N.J. Super.* at 533. Consequently, like the ALJ, the Commissioner finds that petitioner was not entitled to assert her preference, under these circumstances, as against less senior or nontenured employees.

Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed therein, and amplified above. The Petition of Appeal is dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 7|2|01

Date of Mailing: 7|3|01

[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.

208-01

EDU # 9197-00
C # 208-01
SB # 26-01

AURELIA ZITMAN,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 2, 2001

For the Petitioner-Appellant, Bucceri & Pincus (Mary J. Hammer, Esq., of Counsel)

For the Respondent-Respondent, Sills, Cummis, Radin, Tischman, Epstein & Gross, P.A. (Lester Aron, Esq., of Counsel)

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

November 7, 2001

Date of mailing NOV 09 2001

210-01

#210-01

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

July 6, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3214-00
AGENCY DKT. NO. 55-2/00

S.T. on Behalf of Minor Child, J.T.,

Petitioner,

v.

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

Respondent.

S. T., petitioner, *pro se*

Joseph M. Wenzel, Esq., for respondent
(McCormack & Matthews, attorneys)

Record Closed: May 10, 2001 Decided: May 17, 2001

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

On March 9, 2000, petitioner, S.T. on behalf of J.T., filed a petition of appeal with the Commissioner of Education, alleging that J.T. resides within the Union Township School District and was wrongfully removed from the district. Respondent filed an answer and counterclaim on March 7, 2000, contending that petitioner failed to satisfy the domicile provisions of *N.J.S.A.* 18A:38-1(a) and seeking dismissal of the petition. Respondent also counterclaimed for tuition reimbursement for the period of J.T.'s ineligible attendance in the district. On March 23, 2000, the Department of Education, Bureau of Controversies and Disputes transmitted this 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 matter was assigned to the undersigned judge on April 17, 2000, and a telephone prehearing conference scheduled for June 26, 2000. The prehearing conference was held on that date, at which time the issues were isolated, and the hearing scheduled for August 16, 2000 at the OAL. The hearing was adjourned at the request of counsel to December 27, 2000, adjourned from that date to January 16, 2001 for possible resolution of this matter, and again adjourned at the request of the parties to March 27, 20001. On that date, the parties appeared and settlement conferences were held. As a result of these settlement conferences, a settlement was reached, and the hearing was adjourned. The parties have agreed to settle this matter and have prepared the attached Stipulation of Settlement indicating 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.

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.

May 17, 2001
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

5/22/01
DATE

Debbie Anthanatos/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 24 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

MAY 10 1 33 PM '01

OAL DKT. NO. EDU 3214-00
AGENCY DKT. NO. 55-2/00

S.T. on behalf of minor
Child, J.T.,
Petitioner,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF UNION, UNION COUNTY,
Respondent.

BEFORE ELINOR R. REINER, ALJ:

AGREEMENT and stipulation made this 27th day of March 2001, between S.T. on behalf of minor child, J.T., 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,

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,** S.T. shall pay the Board of Education of the Township of Union the total cash sum of One Thousand Dollars ($1000,00), in full settlement of all claims and by and for tuition due and owing for educational services provided to J.T. for School Year 1999-2000. S.T. shall pay $200 within 15 days of the signing of this document (April 10, 2001) and $100 per month on or before the 10th of each month.

2. **General Release** by S.T., on her own behalf and on the behalf of their heirs, personal representatives, successors and assigns, including but not limited to J.T., 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, damage, costs, attorneys fees, interest, warranties, representations, claims and demands whatsoever, in law or equity, which S.T. 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 S.T. in that certain petition filed with the State of New Jersey Department of Education, Bureau of Controversies and Disputes, OAL Docket No. EDU 3214-00, captioned "S.T. on behalf of minor child, J.T., Petitioner vs. Board of Education of the Township of Union, Union County, Respondent, and hereby represent and acknowledge that this is a legally binding instrument, that there are no representations or promises made to them which are not contained in this instrument, and that the only obligation of S.T. shall be to pay the Board of Education of the Township of Union the said above-mentioned sum of $1000.00.

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 S.T. and her 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 S.T. 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 S.T., 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, OAL Docket No. EDU 3214-00, captioned "S.T. on behalf of minor child, J.T. 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 S.T. shall be to pay the Board of Education of the Township of Union the said above-mentioned sum of $1000.00.

4. **Dismissal**. The parties hereby agree and stipulate that this case is voluntarily dismissed with prejudice and without costs. Petitioner withdraws her appeal pending before the Office of Administrative Law.

IN WITNESS WHEREOF, the parties hereto have executed this stipulation as of the day and year first written above.

PETITIONER:

RESPONDENT:

By: _____

Title: S B A

ATTEST:

Joseph M. Wenzel

Joseph M. Wenzel, Esq.
Attorney for Respondent

OAL DKT. NO. EDU 3214-00
AGENCY DKT. NO. 55-2/00

S.T., on behalf of minor child, J.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION 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: JUL 06 2001

Date of Mailing: JUL 10 2001

* Attached to the Initial Decision was Respondent's Answer and Counterclaim in this matter, rather than the Stipulation of Settlement, which is appended to the Commissioner's decision herein.

#211-01

ROBERT NADASKY, PATRICIA WALDVOGEL AND JAMES DOUGHERTY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CLARK, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioners, retired employees of the Board, contended that they should have been reimbursed for unused accumulated sick leave upon their retirement in accordance with the provisions of the collective bargaining agreement that governed their employment in the former Union County Regional High School District No. 1. The Board contended that it properly paid for accumulated sick leave upon petitioners' retirement pursuant to their collective bargaining agreement with the Board.

The ALJ concluded that the 90 day limitations period for filing petitions was applicable in this case and, because the petition was filed more than six months after petitioners received payment vouchers for accumulated sick leave from the Board reflecting a lesser amount that that to which they believed they were entitled, the ALJ concluded that the petition should be dismissed. The ALJ further concluded that relaxation of the 90-day rule was not appropriate in this case.

The Commissioner affirmed the decision of the ALJ. Initially, the Commissioner rejected petitioners' argument that their claim was statutory, and thus rendered the 90-day limitations period inapplicable. The Commissioner also rejected petitioners' contention that the limitations period had not began to run because there was no final action by the Board to trigger the limitations period, concluding that the provision of the payment vouchers constituted adequate notice of the amount of sick leave to be paid petitioners.

Finally, the Commissioner rejected petitioners' assertion that their written notices of disagreement constituted the filing of a grievance that would toll the limitations period, determining that, even if a grievance were filed, the 90-day period for filing a petition with the Commissioner would not be altered.

July 9, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7375-99

AGENCY DKT. NO. 124-5/99

ROBERT NADASKY, PATRICIA WALDVOGEL AND JAMES DOUGHERTY,

Petitioners,

v.

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

Respondent.

Luanne M. Peterpaul, Esq., appearing for Petitioner
(Peterpaul & Corcoran, attorneys)

Mark S. Tabenskin, Esq., appearing for Respondent
(Kenney, Gross & Kovats, LLP, attorneys)

Record Closed: April 5, 2001 Decided: May 18, 2001

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

Petitioners contend they should have been paid for their unused accumulated sick leave in accordance with the provisions of the collective negotiations agreement

which had governed employment in the Regional High School District Union County No. 1 before its dissolution and Petitioners' employment by and retirement from the Clark public school district. The Department of Education transmitted the matter to the Office of Administrative Law (OAL) for a hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

FINDINGS OF FACT

The following **FACTS** were stipulated by the parties and are adopted as factual determinations in this matter.

1) Union County Regional High School District No. 1 (Regional District) was a limited purpose regional district as defined in *N.J.S.A.* 18A:13-2.b., and provided for the high school education of pupils from Berkeley Heights, Clark, Garwood, Kenilworth, Mountainside and Springfield. Before July 1, 1997, the Regional District operated regional high schools in Berkeley Heights, Clark and Springfield. In each of the six municipalities, there existed separate, local kindergarten through grade eight districts which were the "constituent districts" of the Regional District.

2) Petitioners were employed as tenured teachers by the Regional District until June 30, 1997.

3) While they were employed by the Regional District, Petitioners were members of a negotiations unit represented by the Union County Regional Federation of Teachers, Local 3417, AFT, AFL-CIO (the Federation).

4) Article 17 of the 1995-97 collective negotiations agreement between the Regional district and the Federation provided in relevant part as follows:

> O. Commencing with the 1988-1989 school year, any teacher who has served in the district for twenty-five (25) years or longer, who has reached age fifty (50) and has

> not reached age fifty-five (55) or any teacher who has served in the district for fifteen (15) years or longer at age fifty-five or older, shall be entitled to be paid for accumulated sick days within twelve (12) months from the date of leaving the district on the following basis:
>
> 1995-96 school year: $60 per day for up to 250 days
>
> 1996-97 school year: $65 per day for up to 250 days
>
> Joint Exhibit A

5) On May 14, 1996, voters in the six municipalities which comprised the Regional District approved the dissolution of the Regional District in a referendum. Thereafter, the Commissioner of Education determined that the dissolution of the Regional District would be effective July 1, 1997.

6) In approximately December 1996, Petitioners selected the Clark School District as their employer pursuant to the staff selection process which the Commissioner of Education, and subsequently, the State Board of Education, approved in *Stagaard v. Contini*, 97 *N.J.A.R.* 2d (EDU) 217, aff'd in relevant part State Board, S.B. #88-96 (State Board decision, 10/1/1997).

7) Petitioner were employed by the Clark Board as tenured teachers for the 1997-98 school year.

8) In June 1997, the Clark Education Association was decertified and the Clark Federation of School Employees was certified as the collective negotiating unit.

9) While they were employed by the Board during the 1997-98 school year, Petitioners were members of a negotiations unit represented by the successor Federation, the Clark Federation of School Employees, Local 3417, AFT, AFL-CIO.

10) Article XI of the collective negotiations agreement between the Board and the Clark Education Association for the 1996-97 school year provided in relevant part as follows:

> C. 1. Any employee who retires according to the Teacher Pension and Annuity Fund or the Public Employment Retirement System, in order to receive immediate benefits and not merely deferred retirement by submitting a letter of retirement after July 1, 1996 through June 30, 1997 shall receive twenty-five ($25) dollars per day for each unused accumulated sick day for up to and not to exceed 150 days and not be exceed $3750. Said payment shall be made in one (1) lump sum payment.
>
> Joint Exhibit B

This provision remained in full force and effect until a new agreement was reached with the successor Federation for the 1998-2001 school year with identical provisions under Article XI above, except for effective dates.

11) Petitioners retired from employment by the Board and under the Teachers Pension and Annuity Fund, effective June 30, 1998.

12) The records of the Board indicate that Petitioners had the following amounts of unused accumulated sick leave as of June 17, 1998:

a. Petitioner Nadasky had 315.0 days of unused accumulated sick leave. A copy of the Board's Attendance Summary for Petitioner Nadasky, dated June 17, 1998, is attached hereto as Joint Exhibit C.

b. Petitioner Waldvogel had 96.0 days of unused accumulated sick leave. A copy of the Board's Attendance Summary for Petitioner Waldvogel, dated June 17, 1998, is attached hereto as Joint Exhibit D.

c. Petitioner Dougherty had 203.5 days of unused accumulated sick leave. A copy of the Board's Attendance Summary for Petitioner Dougherty, dated June 17, 1998, is attached hereto as Joint Exhibit E.

13) All of the aforesaid amounts of unused accumulated sick leave included days accrued while Petitioners were employed by the Regional District as well as days accrued during he one year Petitioners were employed by the Board.

14) On September 21, 1998, the Board sent a payment voucher to Petitioner Nadasky for his unused accumulated sick leave as calculated by the Board. The voucher indicated that Petitioner Nadasky had 315.0 days of unused accumulated sick leave, for which he was due the sum of $3750. Petitioner Nadasky signed the payment voucher and returned it to the Board for payment. A copy of the Board's payment voucher issued to Petitioner Nadasky, and signed by him, is attached hereto as Joint Exhibit F.

15) On September 30, 1998, the Board issued a check in the amount of $3750 to Petitioner Nadasky for his unused accumulated sick leave as calculated by the Board. A true copy of the check issued to Petitioner Nadasky in the amount of $3750 (front and back) is attached hereto as Joint Exhibit G. Petitioner Nadasky cashed the check. On October 15, 1998, Nadasky submitted a letter to the Board indicating the he was accepting the check as partial payment and reserving his right to pursue additional payments based upon the expired Union County Regional contract. Joint Exhibit H.

16) On September 21, 1998, the Board sent a payment voucher to Petitioner Waldvogel for her unused accumulated sick leave as calculated by the Board. The voucher indicated that Petitioner Waldvogel had 96.0 days of unused accumulated sick leave, for which she was due the sum of $2400.

Petitioner Waldvogel signed the payment voucher and returned it to the Board for payment. A copy of the Board's payment voucher issued to Petitioner Waldvogel, and signed by her, is attached hereto as Joint Exhibit I.

17) On September 30, 1998, the Board issued a check in the amount of $2400 to Petitioner Waldvogel for her unused accumulated sick leave as calculated by the Board. A true copy of the check issued to Petitioner Waldvogel in the amount of $2400 (front and back) is attached hereto as Joint Exhibit J. Petitioner Waldvogel cashed the check under protest.

18) On September 21, 1998, the Board sent a payment voucher to Petitioner Dougherty for his unused accumulated sick leave as calculated by the Board. The voucher indicated that Petitioner Dougherty had 203.5 days of unused accumulated sick leave, for which he was due the sum of $3750. A copy of the Board's payment voucher sent to Petitioner Dougherty is attached hereto as Joint Exhibit K.

19) On September 30, 1998, the Board issued a check in the amount of $3750 to Petitioner Dougherty for his unused accumulated sick leave as calculated by the Board. However, the check was not mailed to Petitioner Dougherty because he had not returned the payment voucher to the Board for payment.

20) By letter dated February 25, 1999, the Board's Business Administrator, Florence Shukis, inquired whether Petitioner Dougherty intended to waive payment for his unused accumulated sick leave days. A copy of the letter dated February 25, 1999 from the Board's Business Administrator to Petitioner Dougherty is attached hereto as Joint Exhibit L. Petitioner Dougherty did not respond to this letter.

21) The Board has been holding the check in the amount of $3750 payable to Petitioner Dougherty since September 30, 1998.

22) The Petitioner of Appeal was filed on May 24, 1999.

The parties agree that the facts and exhibits constitute the complete record.

DISCUSSION AND CONCLUSION

This matter comes before me on cross applications for summary decision. When considering a motion for summary decision, this tribunal must determine whether, based on the proceedings, discovery and affidavits submitted, a genuine issue of material fact exists which must be decided by a full evidentiary hearing. In this case, the parties have agreed to the underlying factual predicate. Accordingly, I **FIND** that there is no genuine issue of material fact to be determined.

I **CONCLUDE**, therefore, that the resolution of the issue raised by these cross applications rests on analysis of legal principles.

Petitioners assert that they are seeking payment from the Clark School District for unused sick days which were accrued while they were employed as tenured teachers in the Regional District which was dissolved effective June 30, 1997.

Review of the facts, however, discloses that upon retirement, Petitioners were each sent a payment voucher for unused accumulated sick time. Moreover, Nadasky and Waldvogel cashed their checks, albeit with reservation; Dougherty has not returned the payment voucher to the District; consequently, the District has been holding his check since September 30,1998.

Based on these facts, I **FIND** that the issue to be determined is the rate at which Petitioners should be paid for the unused sick time accumulated during their employment with the dissolved Regional District.

Petitioners assert they have a statutory right to be paid at the contractual rate established by the collective bargaining agreement in effect at the time the days were accumulated, *i.e.,* when they were employed by the Regional District. This assertion is based on the reading, in *pari materia* of several statutory provisions which, when read together, either protect or preserve all rights to leave of absence, tenure, seniority, pension and accumulated sick leave. *N.J.S.A.* 18A:3-5; *N.J.S.A.* 18A:13-64.

Clearly, Respondent, Clark School District does not contest the entitlement of these tenured teachers to be paid for unused accumulated sick time, since payment has been tendered to each of them. Respondent asserts, however, that Petitioners fail to recognize the distinction between the statutory right to accumulate (and carry over to a new employing district in a situation such as this), sick days and the contractual benefits of payment, at retirement, for those days remaining unused.

Moreover, Respondent contends that because this matter pertains to a contractual benefit and not a statutory right, it was not brought in a timely fashion under the 90-day rule as provided in *N.J.A.C.* 6A:3-1.3(d), since it was filed more than six months after payment vouchers were received by the Petitioners. Because Petitioners assert the rights are statutory, they assert that the limitations period does not apply.

The limitations regulation requires a Petitioner aggrieved by a determination of a Board of Education (BOE) to file a petition no later then 90 days from the date of receipt of the final order, ruling or other action by the district board of education which is the subject of the requested contested hearing. *N.J.A.C.* 6A:3-1.3(d). In this case, Petitioners alleges statutory violations to which the 90-day limitation period is inapplicable, pursuant to the determination in *Lavin v. Hackensack BOE* 90 *N.J.* 145 (1984) and its progeny which established the principle that absolute statutory rights cannot be denied because of a limitation period.

There is no question that the right to accumulate sick leave is, as noted above, statutory in nature. The right of teachers who are employed by a new district to transfer

accumulated unused sick time to a new district when a regional district is dissolved is also protected by statute. It is clear from the facts to which both parties stipulated that neither of these rights has been violated by Respondent and I do so **FIND**.

I must decide, then, whether the determination of which rate the Petitioners should be paid for the accumulated unused sick time, either under the provisions of the 1995-97 collective negotiations agreement between the Regional District and the Union County Regional Federation of Teachers, Local 3417, AFT, AFL-CIO, which are more generous, or under the provisions of the collective negotiations agreement between Respondent and the Clark Education Association for the 1996-97 school year,[1] is a matter of statutory right or contractual benefit.

The Appellate Division has pointed out, as recently as 1998, that reimbursement for unused sick time is a matter which is not preempted by statute and may be negotiated as a term and condition of employment. *Alford v. BOE of Buena Regional School District*, 310 *N.J. Super.* 147, 155 (App. Div. 1998). Furthermore, as Respondent points out, the Commissioner has held that in *N.J.S.A.* 18A:13-64, providing that the rights of tenure, seniority and pension, for example, are transferable, there is no indication in the statute that its intent was to require the establishment of two levels of compensation and benefits for comparable levels of training and experience. *Board of Education of Central Regional High School District v. Board of Education of Lacey Twp., et als*; 1980 *S.L.D.* 553 (Commissioner decision, June 6, 1980). Clearly, to pay these three tenured teachers at a more generous rate than other tenured employees at the time of retirement would result in two levels of compensation for similarly situated employees. Finally, the very fact that there is a choice between provisions in two contracts is a clear indication that the nature of the issue to be determined is contractual.

[1] During 1997-98 Petitioners were members of the Clark Federation of School Employees, Local 3417 AFT, AFL-CIO, the successor to the Clark Education Association. The 1996-97 collective negotiations agreement remained in full force and effect until a new agreement was reached. (See Factual Findings #10).

Accordingly, I **CONCLUDE** that the matter at issue here is contractual in nature; I further **CONCLUDE**, therefore, that the 90-day limitation period does apply in this case.

The 90-day limitations period begins to run when the aggrieved individual has adequate notice, which has been defined as that notice which is sufficient to inform the person affected of something that he/she has the right to know and the other party has a duty to communicate. *Kaprow v. Board of Education of Berkeley Township*, 131 *N.J.* 572 (1992).

The facts are clear. On September 21, 1998, the Board sent a payment voucher to each of the Petitioners. The voucher indicated the number of unused accumulated sick leave and the sum due each Petitioner. I **FIND** that, upon receipt of the vouchers, Petitioners adequate notice of the District's action.

I **CONCLUDE**, based on the fact that the voucher contained all pertinent information regarding payment for accumulated sick time, *i.e.*, that adequate notice had been provided, that the receipt of the vouchers by Petitioners was the event which triggered the 90-day limitation rule.

Petitioners also assert that the dissolution of the Regional District and the subsequent election of a new collective bargaining unit as well as collective bargaining negotiations, resulted in such confusion as to warrant a relaxation of the 90-day limitation period. It has been held that the 90-day rule will only be relaxed when there is some compelling reason to do so, such as a constitutional or other issue of fundamental public interest beyond that of concern only to the parties. *Bogart v. Board of Education of City of East Orange, Essex County,* 1983 *S.L.D.*___ (Commissioner decision, March 14, 1983).

I **FIND** that No constitutional issue or issue of compelling fundamental public interest has been raised by this matter.

I **CONCLUDE**, therefore, that the 90-day limitation period should not be relaxed.

The vouchers were sent to Petitioners on September 21, 1998. Assuming *arguendo*, they were received by October 1, 1998, the 90-day period started to run at that time and the petition should have been filed no later than December 31, 1998. In fact, the petition was not filed until May 24, 1999, almost five months later.

I **CONCLUDE**, therefore, that his petition of appeal is barred by the limitations period as provided in the current regulations, *N.J.A.C.* 6A:3-1.3(d), which is identical to its predecessor, *N.J.A.C.* 6:24-1.21(c), in effect at the time this matter arose. I further **CONCLUDE** that this petition should be dismissed in its entirety.

Because I have determined that this petition should be dismissed in its entirety, I decline to address the issues raised by the Petitioners' application for summary decision.

ORDER

I hereby **ORDER** that this petition 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.

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 18, 2001
DATE

Maria M. LaFiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

5/25/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 30 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Joint Exhibit	A	Agreement Between Regional District and Union County Regional, September 1, 1995 to August 31, 1997
	B	Agreement Between Clark Board of Education and Clark Education Association, July 1, 1996 to June 30, 1997
	C	Nadasky Attendance Summary, June 17, 1998
	D	Waldvogel Attendance Summary, June 17, 1998
	E	Dougherty Attendance Summary, June 17, 1998
	F	Nadasky Payment Voucher, date issued September 21, 1998
	G	Nadasky Check, September 30, 1998
	H	Nadasky Letter, October 15, 1998
	I	Waldvogel Payment Voucher, date issued September 21, 1998
	J	Waldvogel Check, September 30, 1998
	K	Dougherty Payment Voucher, date issued September 21, 1998
	L	Letter, Business Administrator to Dougherty, February 25, 1999

OAL DKT. NO. EDU 7375-99
AGENCY DKT. NO. 124-5/99

ROBERT NADASKY, PATRICIA WALDVOGEL AND JAMES DOUGHERTY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CLARK, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and Initial Decision issued by the Office of Administrative Law have been reviewed. Petitioners' exceptions were timely filed pursuant to the provisions of *N.J.A.C.* 1:1-18.4.

Petitioners' exceptions aver that the Administrative Law Judge (ALJ) erred in determining that the matter should be dismissed because it was untimely filed as provided by *N.J.A.C.* 6A:3-1.3(d). In support of their position, petitioners reiterate their argument that the 90-day limitation period for filing a petition with the Commissioner is not applicable to the save harmless provisions of *N.J.S.A.* 18A:13-64. Of this, petitioners aver, *inter alia,* that:

> The legislative purpose of *N.J.S.A.* 18A:13-64 is to save teachers harmless from any loss they may incur as a result of dissolution. The protection afforded by the statute takes the form of preserving rights the teachers accrued. The triggering event for preservation of those rights is the dissolution – a unique circumstance functionally unrelated to the teachers' employment, and like the situation in *Lavin*, a circumstance unrelated to teacher performance. The statute has the effect of saving rights to which the transferred teacher is already entitled, from forfeiture occasioned by circumstances beyond the teacher's control. The statutory

> protection is not occasioned by services rendered or to be rendered for teaching as such. Rather, it was established by the Legislature to protect and preserve rights already accrued and threatened as a result of dissolution. As such, the limitation period is inapplicable. (Petitioners' Exceptions at 3)

Petitioners also argue that there is no evidence that the Clark Board took any action regarding their entitlement and that the only evidence is a voucher submitted to the petitioners. As such, it is petitioners' position that they did not receive timely notice of final Board action so as to invoke the 90-day limitation period. (*Id.* at 4) Citing *Kaprow, supra*, petitioners further aver that the failure of the Board to make a final decision, and to provide officially authorized notice, tolls the statute. (*Ibid.*) Moreover, petitioners contend that Article V of the contractual agreement, submitted as Exhibit B to the briefs of both the Board and petitioners,[1] has a grievance and arbitration clause which afforded aggrieved employees the opportunity to appeal from an administrative decision. Of this, petitioners argue that:

> There is no question that each Petitioner objected in writing to the administrative decisions affecting their rights to pay for unused sick days at the rate and up to the maximum specified in the Regional contract. (See par. 3). Article V sets forth elaborate procedures, which are to be followed after a grievance is submitted. Those procedures contemplate several steps requiring written responses from administrative personnel, and eventually, a written answer form the Board (Step 3. e., page 9). Administrators did not follow the steps, and no official Board action was communicated to Petitioners regarding their grievance. Consequently, there was no *final* Board action communicated to Petitioners, which had the effect of triggering the limitation period prescribed in *N.J.A.C.* 6A:3-1.3(d).
> (Petitioners' Exceptions at 4- 5)

Lastly, petitioners argue that relaxation of the 90-day limitation period is warranted based on the totality of the circumstances in this matter and because, at the date

[1] It is noted for the record that Exhibit B submitted by both parties does not include the entire contractual agreement, only pages 24-25.

petitioners retired, the terms and conditions of employment affecting them were being negotiated. (*Id.* at 6-7)

Upon review of the record, the Commissioner agrees with and adopts as his own the findings and legal conclusions of the ALJ that the instant petition was not filed within the 90-day limitation set forth in *N.J.A.C.* 6A:3-1.3(d). In so holding, the Commissioner finds meritless petitioners' argument that the 90-day time limitation is inapplicable because their claim is a statutory entitlement, unrelated to a teacher's employment or performance, within the intendment of the Court's determination in *Lavin, supra.* Rather, the Commissioner finds the circumstances in this matter analogous to those in *Balwierczak et al. v. Board of Education of the Township of Berkley Heights, Union County,* decided by the Commissioner December 8, 1999 (No. 407-99), *aff'd* State Board of Education May 3, 2000, a matter involving former employees of the Union County Regional High School District, who alleged that the Board of Education of Berkeley Heights, the district to which they transferred upon dissolution of the regional district, denied them their rights to the salary guide placement to which they were entitled pursuant to *N.J.S.A.* 18A:13-64. The holding in *Balwierczak* reads in pertinent part:

> The Commissioner concludes that, upon full consideration of the statute and its legislative intendment, it is undeniable that *N.J.S.A.* 18A: 13-64 was designed to operate, upon the dissolution of a regional district, as a "save harmless" provision to preserve and protect benefits earned by affected individuals by virtue of their service in such regional district. Absent rights and benefits accrued through their prior employment, *N.J.S.A.* 18A:13-64 does not operate to independently create a benefit for them. As such, petitioners' rights here are clearly distinguishable from the petitioner's right to military service credit in Lavin. They are not entitled to any right or benefit independent from the administration of a school system. Rather, any right or benefit to be afforded petitioners here is wholly predicated upon services they previously rendered as Regional District employees and, therefore, does not fall within the narrow prescriptions delineated in *Lavin* which might entitle them to a waiver of the mandatory filing timelines.

> Consequently, [the 90-day time limitation] applies here to time bar petitioners' within claims. (Slip Opinion at 24)

The Commissioner also finds meritless petitioners' argument that the 90-day time limit is not applicable in the instant matter because they did not have final action taken by the Board. Numerous decisions concerning the 90-day time limit have been litigated and the Courts have consistently held that the rule is mandatory and that the 90-day period begins to run on the date notice is received of the action taken. *See, Kaprow, supra*; *Riely v. Hunterdon Central High Bd. of Ed.*, 173 *N.J. Super.* 109 (App. Div. 1980); *Nissman v. Bd. of Educ. of the Twp. of Long Beach Island, Ocean County*, 272 *N.J. Super.* 373, 380 (App. Div. 1994), *certif. denied* 137 *N.J.* 315 (1994). As correctly determined by the ALJ in the present matter, "[t]he 90-day limitations period begins to run when the aggrieved individual has adequate notice, which has been defined as that notice which is sufficient to inform the person affected of something that he/she has the right to know and the other party has a duty to communicate. [*Kaprow, supra*]." (Initial Decision at 10) Moreover, formality of notice is irrelevant where the goals of notice are achieved. *See, Kaprow, supra* See also *Board of Education of the Gloucester County Institute of Technology, Gloucester County, v. Board of Education of the Lenape Regional High School District, Burlington County*, decided by the Commissioner December 16, 1999 (No. 416-99), *aff'd* State Board of Education August 2, 2000, wherein the Commissioner held that formal board of education action and direct notice from the board, as opposed to actions of its designated representatives taken at its behest, are not absolute prerequisites to trigger the 90-day timeline for filing a petition. (Slip Opinion at 11-12)

Upon review of the record herein, the Commissioner finds, as did the ALJ, that because the Clark Board of Education vouchers sent to petitioners contained all pertinent information regarding the payment of accumulative sick leave, *i.e.*, the number of unused

accumulated sick days and the amount of money owing and due to each petitioner, the vouchers constituted adequate and sufficient notice to petitioners at the time they received them to trigger the 90-day time limitation for filing a petition.

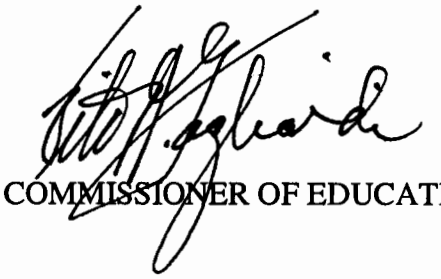
Moreover, given the factual circumstances in this matter, the Commissioner finds that the petition would be time-barred under the provisions of *N.J.A.C.* 6A:3-1.3(d) even if every inference in petitioners' favor were granted to the effect that their written notification of disagreement with the amount for payment of unused sick leave constituted the filing of a grievance under the contractual agreement between the Board and petitioners, which was ignored by the Board and its administrators. Such conclusion is reached because it is well established that the fact that other proceedings may have been initiated elsewhere, such as the filing of a grievance under a collective bargaining agreement or a claim with the Public Employment Relations Commission, does not alter the 90-day time period for filing a petition with the Commissioner. *See, Bd. of Education Bernards Tp. v. Bernards Tp. Educ. Ass'n*, 79 *N.J.* 311, 326-327, n.4 (1979); *Riely, supra* 173 *N.J. Super. at 113*; *American Federation of Teachers, Local 3417 v. Board of Education of the Township of Berkeley Heights*, decided by the Commissioner November 30, 1998 (No. 530-98).

Further, upon consideration of the parties' arguments regarding relaxation of the 90-day rule, the Commissioner concurs with the Board's position and the ALJ that there is nothing within this matter which justifies relaxation of the filing requirement set forth in *N.J.A.C.* 6A:3-1.3(d). As stated in *Portee v. Newark Bd. of Ed.*, 94 *N.J.A.R.*2d (EDU) 381 (1994), the 90-day filing requirement has been strictly construed by the Commissioner, the State Board of Education and the Courts and, while the rule gives the Commissioner broad discretion, relaxation is reserved for limited situations wherein a compelling reason can be demonstrated for expanding

the limitation period, such as the presence of a substantial constitutional or other issue of fundamental public interest beyond that of concern only to the parties. *See also, Kaprow, supra*; *Nissman, supra*; *Morris-Union Jointure Commission v. Board of Education of the Borough of South River*, 92 *N.J.A.R.*2d (EDU) 453 (1992); *Markulin & the Neptune Tp. Educ. Ass'n v. Board of Education of the Tp. of Neptune*, 92 *N.J.A.R.* 2d (EDU) 406 (1992). Upon review of the pleadings in this matter, the Commissioner does not find that the factual circumstances presented herein constitute such grounds for relaxation of the 90-day rule. *Kaprow, supra; Balwierczak, supra; American Federation of Teachers, supra; Pacio v. Bd. of Ed. of Lakeland Regional High School District*, 1989 *S.L.D.* 2060.

Accordingly, for the reasons stated in the Initial Decision and herein, the Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[2]



COMMISSIONER OF EDUCATION

Date of Decision: JUL 09 2001

Date of Mailing: JUL 10 2001

[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.

211-01

EDU # 7375-99
C # 211-01
SB # 28-01

ROBERT NADASKY, PATRICIA WALDVOGEL AND JAMES DOUGHERTY,

PETITIONERS-APPELLANTS,

V.

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

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 9, 2001

For the Petitioners-Appellants, Peterpaul, Clark & Corcoran (Luanne M. Peterpaul, Esq., of Counsel)

For the Respondent-Respondent, Kenney, Gross, Kovats & Campbell (Michael J. Gross, Esq., of Counsel)

The appellants, retired staff members of the Clark Township Board, filed a petition with the Commissioner of Education alleging that they should have been reimbursed for unused accumulated sick leave upon their retirement in accordance with the provisions of the collective bargaining agreement that had governed their employment in the Union County Regional High School District No. 1 prior to its dissolution. The Commissioner dismissed the petition, finding that the appellants had failed to file within the 90-day period set forth in N.J.A.C. 6A:3-1.3(d).

On August 13, 2001, the appellants filed the instant appeal to the State Board.

Pursuant to N.J.A.C. 6A:4-1.11(a), the appellants' brief in support of their appeal was due on September 4, 2001, 20 days after they filed their notice of appeal. The appellants, however, failed to file a brief by that date. By letter dated September 7, 2001, the Director of the State Board Appeals Office notified the appellants of their failure to file a brief and informed them that this matter was being referred to the Legal Committee of the State Board for consideration of their failure to perfect the appeal.

The appellants have still failed to file a brief in support of their appeal, a month after the filing deadline. Nor have the appellants 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 of Education, April 1, 1992, aff'd, Docket #A-4812-91-3 (App. Div. 1993).

October 3, 2001

Date of mailing OCT 05 2001

212-01

#212-01

IN THE MATTER OF THE TENURE	:	
HEARING OF MARGARET QUADRINI,	:	
NORTH HUNTERDON-VOORHEES	:	COMMISSIONER OF EDUCATION
REGIONAL HIGH SCHOOL DISTRICT,	:	DECISION
HUNTERDON COUNTY.	:	
_____	:	

July 9, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 00056-01S
AGENCY DKT. NO. 450-12/00

I/M/O THE TENURE HEARING OF
MARGARET QUADRINI,
NORTH HUNTERDON-VOORHEES
REGIONAL HIGH SCHOOL DISTRICT,
HUNTERDON COUNTY,

Beth Ann Stemmler, Esq., for petitioner (Riker, Danzig, Scherer, Hyland & Perretti, attorney)

Stephen E. Klausner, Esq., for respondent (Klausner, Hunter & Rosenberg, attorney)

Record Closed: March 13, 2001 Decided: May 22, 2001

BEFORE **JEFF S. MASIN**, ACTING CHIEF ALJ:

The North Hunterdon-Voorhees Regional High School District Board of Education filed a charge pursuant to the Tenure Act alleging that respondent Margaret Quadrini was incapacitated from performing the duties of her position as a teacher. The Teachers' Pension and Annuity Fund granted Ms. Quadrini a disability pension retroactive to October 1, 2000. Ms. Quadrini has retired effective as of that date. By letter of April 12, 2001, the Board of Education advised the administrative law judge that it was withdrawing its tenure charges without prejudice in view of Ms. Quadrini's retirement effective October 1, 2000. Since the disposition of tenure charges must generally be approved by the Commissioner, and since it appears that based on the information provided, there is no reason that these charges need be pursued and that in fact with

respect to the Board's attempt to removed Ms. Quadrini from her position the proceedings are moot, the contested case 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.

May 22, 2001
DATE

JEFF S. MASIN, ACTING CHIEF ALJ

Receipt Acknowledged:

5/24/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 25 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

RIKER, DANZIG, SCHERER, HYLAND & PERRETTI LLP

HEADQUARTERS PLAZA
ONE SPEEDWELL AVENUE
PO BOX 1981
MORRISTOWN, NEW JERSEY 07962-1981
(973) 538-0800
FAX (973) 538-1984

50 WEST STATE STREET
SUITE 1010
TRENTON, NEW JERSEY 08608-1220
(609) 396-2121
FAX (609) 396-4578

IRVING RIKER (1921-1969)
CHARLES DANZIG (1934-1992)

GERALD A. LILOIA
JOHN P. SHERIDAN, JR.
JAMES S. ROTHSCHILD, JR
VINCENT J. SHARKEY, JR.
DENNIS J. O'GRADY
MICHAEL K. FUREY
GARY E. WALSH
EDWARD K. DeHOPE
SHAWN L. KELLY
MARK S. RATTNER

DENNIS J. KRUMHOLZ
ALAN E. KRAUS
GLENN A. CLARK
ROBERT J. SCHOENBERG
MARYANN P. KICENUIK
SAMUEL P. MOULTHROP
VICTORIA A. MORRISON
ANDREW J. STAMELMAN
KENNETH M. VAN DEVENTER
JAN L. BERNSTEIN
SIGRID S. FRANZBLAU
ANNE M. PATTERSON
JOHN M. PELLECCHIA
ANTHONY J. SYLVESTER
PETER C. HARVEY
GLENN D. CURVING
ROBERT J. GILSON

JEFFREY B. WAGENBACH
WARREN J. MARTIN JR.
SANDRA BROWN SHERMAN
NICHOLAS RACIOPPI, JR.
ROBERT C. DALEO
JAMES C. MEYER
BRIAN E. O'DONNELL
JULIAN W. WELLS
STUART M. LEDERMAN
MARILYNN R. GREENBERG
MICHAEL R. O'DONNELL
ANTHONY J. ZARILLO, JR.
WILLIAM G. CONNOLLY
MARY KATHRYN ROBERTS
SCOTT A. OHNEGIAN
HAROLD S. ATLAS
JOSEPH L. SCHWARTZ

EVERETT M. SCHERER
WILLIAM F. HYLAND
PETER N. PERRETTI, JR.
WILLIAM C. CONNELLY
EDWARD A. ZUNZ, JR.
PETER L. BERKLEY
BENJAMIN P. MICHEL
SIDNEY M. SCHREIBER
STEWART G. POLLOCK
WILLIAM J. HUGHES
PETER F. ELD
OF COUNSEL

CHARLES F. WASKEVICH, JR.
LINDA H. PRENTISS
J. ALEX KRESS
DOUGLAS A. SATZGER*
JAMES A. RABORN
BRUCE A. HARRIS
JAMES L. LOTT, JR.
ROBERT I. PEARLMAN
COUNSEL

NANCY STEWART
STEPHANIE D. EDELSON
NANCY C. EBERHARDT
HAROLD L. KOFMAN
CATHLEEN H. GIULIANA
CRAIG L. STEINFELD
KEITH J. WEINGOLD
THOMAS J. PERRY
LARISA V.K. GJIVOJE
EDWIN F. CHOCIEY, JR.
KELLY STRANGE CRAWFORD
JACQUELINE F. McGOWAN
DAVID L. ISABEL
RONALD D. PUHALA
JEFFREY J. BROOKNER
RANDALL K. PACKER
LANCE J. KALIK
MARY ELLEN BURKE
LISA SANTAPIETRO
KATHERINE H. WIGNESS

MARC D'ANGIOLILLO
ANDREA J. GIANNETTA
MICHAEL J. LOESBERG
ALFRED J. SARGENTE
ALEXA RICHMAN-LA LONDE
BRETT M. REINA
CRAIG H. FELDMAN
RHONDA NESMITH CRICHLOW
SARAH L. KAMBOUR
R.N. TENDAI RICHARDS
STEVEN T. SENIOR
CHRISTOPHER C. ASH
JENNIFER L. SMILES
KEVIN J. O'CONNOR
TERRI JANE FREEDMAN
MICHAEL H. WILCK
BETH ANN STEMMLER
DEBRA D. TEDESCO
NINA G. KOGAN
DAVID R. HAUSMANN

RICHARD S. KOHN
KEENA M. MACKAY
MATTHEW H. LEWIS
CRAIG S. DEMARESKI
BRAD M. KAPLAN
DAHESH D. PATEL
BRIAN J. SLATTERY
ANDREW M. CONTRERAS
MAHA F. MUNAYYER
KEITH D. BARRACK
ERIC BLUMENFELD
KRIS ANN E. CAPPELLUTI
ROBERT L. LeHANE
THOMAS J. CASTANO
DAVID M. STEINER
KATHERINE INGRASSIA
JENNIFER LAZOR
HANY A. MAWLA
JEFFREY M. SPONDER
MICHAEL A. SCHMERLING
CAROLINE BRIZZOLARA

SCOTT M. CERNICH
SCOTT G. COLLINS
ANANYA DASH
JENNIFER GAETA
DAVID B. NOBLE
CURTIS M. PLAZA
JASON R. RITTIE
TERRI R. SOARIES
MARK E. HALL
CHELSIE KING
DAVID L. AROMANDO
ANTHONY J. BORRELLI
CHRISTINA L. DENEKA
JILL A. FARBMAN
CHRISTOPHER G. IZZO
KHALED JOHN KLELE
BENJAMIN D. LIGHT
THOMAS G. PHILLIPS
ANTHONY E. VALENTINO
MARY ELIZABETH WILLIAMS
BRADLEY J. FIORENZO

*NY BAR ONLY

April 12, 2001

RECEIVED
Apr 13 1 02 PM '01
STATE OF N.J.
OFFICE OF ADMINISTRATIVE LAW

The Honorable Jeff S. Masin, Chief A.L.J.
Office of Administrative Law
9 Quakerbridge Plaza
P.O. Box 049
Trenton, NJ 08625-049

Re: In the Matter of the Tenure Hearing of Margaret Quadrini
OAL Docket No.: EDU 0056-01
Agency Ref. No.: 450 12/00

Dear Judge Masin:

This firm represents Petitioner, the North Hunterdon–Voorhees Regional High School District Board of Education (the "Board"), Petitioner in the above referenced matter.

In light of Ms. Quadrini's retirement effective October 1, 2000, the Board hereby withdraws its tenure charges without prejudice.

Very truly yours,

Benjamin D. Light

cc: Stephen E. Klausner, Esq.

OAL DKT. NO. EDU 00056-01
AGENCY DKT. NO. 450-12/00

IN THE MATTER OF THE TENURE	:	
HEARING OF MARGARET QUADRINI,	:	
NORTH HUNTERDON-VOORHEES	:	COMMISSIONER OF EDUCATION
REGIONAL HIGH SCHOOL DISTRICT,	:	DECISION
HUNTERDON COUNTY.	:	
	:	

The Initial Decision issued by the Office of Administrative Law has been reviewed. Upon review, the Commissioner concurs that this matter may properly be dismissed as moot, in that respondent has retired, having been granted a disability pension retroactive to October 1, 2000, *prior* to the date when the charges herein were certified to the Commissioner. *See, In the Matter of the Tenure Hearing of Loretta Palumbo, School District of the Borough of Old Tappan, Bergen County,* Agency Dkt. No. 448-12/00, OAL Dkt. No. EDU 10327-00, Commissioner Decision No. 64-01L.

Accordingly, this matter is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: JUL 09 2001

Date of Mailing: JUL 10 2001

214-01

#214-01

JAMES MC CORMACK, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

STATE-OPERATED SCHOOL DISTRICT :
OF THE CITY OF JERSEY CITY, DECISION
HUDSON COUNTY, :

RESPONDENT. :

SYNOPSIS

Petitioner challenged the withholding of his salary increment for the 2000-2001 school year.

The ALJ concluded that respondent had demonstrated a reasonable basis for withholding petitioner's increment, and that petitioner had failed to demonstrate that the withholding of his increment was arbitrary, capricious or unreasonable.

The Commissioner affirmed the decision of the ALJ.

July 9, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9193-00
AGENCY DOCKET NO. 338-10/00

JAMES MCCORMACK,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

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

Charlotte Kitler, Esq., General Counsel, for respondent

Record Closed: April 3, 2001 Decided: May 18, 2001

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

STATEMENT OF THE CASE

Petitioner, a teacher employed by the State-Operated School District of the City of Jersey City (the District), appeals the District's decision to withhold his salary increment for the 2000-2001 school year pursuant to *N.J.S.A.* 18A:29-14.

PROCEDURAL HISTORY

On September 8, 2000, petitioner filed a Verified Petition. The District filed an Answer to Verified Petition on September 21, 2000. The Department of Education subsequently transmitted the matter to the Office of Administrative Law where, on October 6, 2000, it was filed for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14-1 to -13. On December 12, 2000 and February 26, 2001, a prehearing conference and status conference, respectively, were conducted with counsel. A hearing was held on April 3, 2001. Witnesses and exhibits are listed in the attached Appendix.

FINDINGS OF FACT

Based upon a consideration of the totality of the testimonial and documentary evidence presented, and having had the opportunity to observe the witnesses and evaluate their credibility, I **FIND** the following **FACTS**:

1. Petitioner has been employed as a high school teacher in the Jersey City School District for nineteen years. He holds a teaching certificate in English and has taught English at Lincoln High School in Jersey City for seventeen years.

2. During the 1999-2000 school year, petitioner was assigned to teach at Lincoln High School English 1R, a freshman class comprised of "repeater" students; 10th grade English 2; and Language Arts Literacy 2 (LAL2), a class of 11th and 12th grade students who had taken, but not yet successfully passed, either the reading or writing portion (or both) of the State High School Proficiency Test (HSPT).

3. Petitioner's teaching performance was formally evaluated on five separate occasions during the 1999-2000 school year. Four of these observations were the subject of the hearing. David Clauser, the then principal of Lincoln High School, observed petitioner's English 2 class on November 15, 1999 and LAL2

class on February 23, 2000. Ellen Ruane, the Language Arts Supervisor for the high schools, observed petitioner's English 1R and English 2 classes on October 13, 1999 and January 19, 2000, respectively. Both Mr. Clauser and Ms. Ruane found petitioner's teaching performance to be less than satisfactory during each of the four observations.

4. Petitioner's teaching performance was evaluated in relation to four performance factors or "domains." These factors (and the subcategories that comprise the factors) are listed on the District's Formative Observation Form. The factors include: (1) planning and preparation; (2) students and learning; (3) instruction; and (4) classroom environment. With respect to each of the observations conducted during the 1999-2000 school year, petitioner did not receive a "satisfactory" rating in any domain. His composite average for the year in each domain reflected petitioner's need for improvement (R-6). By letter dated July 1, 2000, petitioner was informed that his employment increment and adjustment increment were being withheld for the school year 2000-2001 because of "less than satisfactory performance" (R-7).

5. In accordance with the practice employed for all teachers, in September 1999, Mr. Clauser (principal), Ms. Ruane (Department Supervisor) and the vice principal in charge of the learning discipline met with petitioner. The purpose of this meeting was to establish clear expectations for teacher performance. Mr. Clauser provided petitioner with a copy of the Teacher Guidelines setting forth the District's expectations (R-1, p. 6).

6. Language Arts Supervisor Ellen Ruane has been employed by the District for twenty-seven years. She conducted two formal observations/evaluations of petitioner's teaching performance on October 13, 1999 and January 19, 2000. The conclusions reached by Ms. Ruane as a result of these observations are memorialized in the Formative Observation Forms prepared by her (R-1, R-3). On both occasions Ms. Ruane rated petitioner's teaching performance as less than satisfactory in all four performance factors.

7. On October 13, 1999, Ms. Ruane observed petitioner's English 1R class from 10:05 a.m. to 11:25 a.m. The class included 19 students. Prior to the observation, Ms. Ruane met with petitioner for a pre-observation conference, during which Ms. Ruane discussed her expectations in connection with the observation/evaluation including the documentation to be furnished. A Pre-Observation Conference Form was signed by Ms. Ruane and petitioner on October 1, 1999 (R-1, p. 5).

8. On October 13, 1999, Ms. Ruane arrived at petitioner's class before the start of instruction. A journal prompt was written on the board and the students were provided an allocated time to respond to the topic in their notebooks. After journal writing and sharing, petitioner directed the students to "participate in a group" and the students grouped themselves into groups of 2 - 4 students. Petitioner provided the students with newspapers. As memorialized, the assignment called for the students to read one or two articles and to tell petitioner "what they have in common in a real general sense" (R-1, p. 2). Every student was not involved in the activity and, at the end of a designated time period, petitioner asked for the groups to share their articles (R-1, p. 2). Petitioner then told the class "There is some confusion about the assignment." "It is my fault." He redirected the students to select two stories for purposes of ascertaining "what is common about the writers' style" and a discussion later ensued. A few questions were then asked about *The Interlopers* and the final assignment included writing a story (R-1, pp. 2-3).

9. During the October 13, 1999 observation, Ms. Ruane found petitioner needed improvement in planning and preparation. Petitioner had a limited and insufficient amount of materials available for the students. Five newspapers were spread among the students which did not provide each student with the opportunity to read their own newspaper article and become meaningfully engaged in the activity. Petitioner did not clearly communicate the newspaper assignment to the students. The students were unsure of what they were supposed to do, resulting in petitioner having to refocus his lesson midway. With

respect to petitioner's lesson plan, the planned activities were not congruent with, or working toward, the stated objectives. Lesson plans in the District must include an objective or "SWAT" (*i.e.,* Students Will be Able To) and a "BY" (*i.e.,* the activities that will be used for students to attain this objective) (see R-1, p. 10). At the end of the lesson, students did not appear to be able to accomplish petitioner's listed SWAT (*i.e.,* "interpret, apply and extend details from short story, write a news story") which Ms. Ruane attributed to petitioner's lack of detailed planning/preparation and unclear objectives that resulted in the lesson causing more confusion than learning. As reported, "[t]he limited materials used did not support the instructional goals or engaged students in meaningful learning" and "[t]he lesson did not have a structure which resulted in meaningful work" (R-1, p. 1).

10. Ms. Ruane rated petitioner in need of improvement in the area of students and learning. Petitioner did not demonstrate a knowledge of various approaches to learning during the observed lesson on October 13, 1999. His marking book reflected a limited amount of assessment pieces and limited approaches to assessment. As of October 13, 1999, there were approximately four marks in petitioner's marking book. A number of students did not have any marks next to their names. The students' folders indicated that petitioner was utilizing selection tests from the resource materials. Other kinds of assessments that could have been used include project based assessments, group projects or additional writing pieces on the part of the students. Pursuant to a District directive that was in effect during the 1999-2000 school year, teachers are required to use a holistic scoring rubric when grading papers. This type of assessment is used in connection with the HSPT and the upcoming High School Proficiency Assessment (HSPA). Teachers are encouraged to use this method of assessment so that students become comfortable with the assessment in preparation for the State tests. Teachers are also encouraged to provide sufficient comments on a student's work to enable the student to revise, edit and rewrite their work based on the teacher's comments and be judged again according to the rubric. Although petitioner assigned holistic grades, the

students' work did not include any comments. The students' journals further revealed that not all students were responding to the daily journal prompt and the journals contained no written comments by petitioner.

11. During her October 13, 1999 observation, Ms. Ruane found petitioner needed to improve in the area of instruction. As indicated above, petitioner did not clearly and accurately communicate the lesson's objectives to the students which caused students to be unsure of the assignment. Students were unable to be engaged in the activity because of the insufficient amount of materials. As indicated in Ms. Ruane's report, petitioner did not employ effective questioning and discussion techniques and discussion was not generated from the students because of the uncertainty regarding the assignment (R-1, p. 3).

12. Petitioner's performance was unsatisfactory in the area of classroom environment during the lesson observed by Ms. Ruane on October 13, 1999. Petitioner did not address inappropriate behaviors exhibited by students during the class. Certain students used profane language (as described in Ms. Ruane's report). As memorialized, petitioner did not appear to have much control over the students and, as a result, the students showed a limited amount of respect to him, including one student stating to petitioner "Shut up. I'm not talking to you" (R-1, p. 3). Throughout the lesson, students engaged in off-task conversations, two students were playing with dice and at different times petitioner asked for students to respond and they ignored his request (R-1, pp. 3-4). The expectation for student learning was not evident during Ms. Ruane's observation based on the lack of materials, the lack of preparation and the lack of engagement by the students which petitioner did not address. The classroom space was not effectively utilized (R-1, p. 4). Students were seated in a random, scattered fashion around the room, with most students clustered in the back and extreme right, which Ms. Ruane believed contributed to the lesson not being successful. In her report, Ms. Ruane noted that petitioner contributed to most students investing little or no time in the activities "by maintaining an environment that conveyed minimal expectations for student achievement" (R-1, p. 3). As

indicated by Ms. Ruane, petitioner did not circulate the room to observe whether students were engaging in the journal writing activity; the monitoring of student behavior was unsatisfactory; it did not appear that petitioner established any standards of conduct; and the District's Code of Conduct was neither adhered to by the students nor reinforced by petitioner (R-1, p. 3).

13. Ms. Ruane held a post-observation conference with petitioner on October 27, 1999. The meeting was cordial in nature and both Ms. Ruane and petitioner signed the Formative Observation Form relating to the October 13, 1999 observation (R-1). Ms. Ruane reviewed her evaluation and concerns and provided petitioner with materials to assist him in journal writing and controlling off-task behaviors.

14. Ms. Ruane conducted a second formal evaluation of petitioner's teaching performance on January 19, 2000. She observed petitioner's 10th grade English 2 class from 1:40 p.m. to 3:00 p.m. The class included 20 students. Prior to this observation, Ms. Ruane met with petitioner for a pre-observation conference, during which Ms. Ruane again detailed her expectations. Ms. Ruane and petitioner signed a Pre-Observation Conference Form on January 13, 2000 (R-3, p. 4).

15. The results of Ms. Ruane's second evaluation on January 19, 2000 reveal that petitioner's performance had decreased in certain areas from her first observation on October 13, 1999. Petitioner's performance was unsatisfactory in three of the four performance areas (*i.e.*, planning and preparation, instruction, classroom environment) and continued to be in need of improvement in the area of students and learning. The student activities during the January 19, 2000 observation included viewing "A Separate Peace," taking a timed test, returning to the viewing of the film and working in pairs to compare notes regarding the film needed to complete information on the sheets provided by petitioner (R-3, p. 1).

16. In the area of planning and preparation, Ms. Ruane rated petitioner's performance on January 19, 2000 as unsatisfactory. As noted in her report, petitioner's planbook "did not incorporate/document the New Jersey Core Curriculum Content Standards for Language Arts Literacy in his planning" (R-3, p. 1). Petitioner also did not provide the students with specific guidelines as to the information that they should retrieve from viewing the film. There was a lack of organization as to what the students should be focused on for purposes of the later discussion. Although petitioner had previously provided the students with sheets of papers on which to take notes (R-3, pp. 8-10), this information did not provide detailed direction concerning the specific areas that the students should be looking for during the viewing. Petitioner did not reiterate or reinforce any directions to the extent they had been given the previous day. He did not circulate throughout the room during the viewing of the movie to ensure that the students were in fact taking notes. Some of the students did not "opt" to view the movie. Petitioner's lesson plan lacked specificity in that the objective (*i.e.*, SWAT) that petitioner had hoped the students would accomplish as a result of watching the film (*i.e.*, the BY) did not occur because of the lack of clear direction.

17. Ms. Ruane found petitioner needed improvement in the area of students and learning. As an English 2 class, the class was engaged in a HSPA plan. The student folders did not include any essays toward, among other things, preparing for the State test. Petitioner's comments on the students' work continued to be "very limiting." Many of the students' papers were scored with a numerical grade (versus a holistic scoring rubric) and contained no comments. The students' work did not reveal that they were given the opportunity to rethink or rewrite their responses. Petitioner continued to demonstrate a lack of using varied approaches to learning based on the absence of projects or presentations evident from a review of the student folders.

18. Petitioner's performance was unsatisfactory in the area of instruction and in need of "immediate attention" (R-3, p. 2) during the January 19, 2000 observation.

Petitioner's implementation of Ms. Ruane's earlier suggestions (as reflected in the Formative Observation Form for the October 13, 1999 observation) was not apparent. As indicated above, petitioner did not specify the type of notes that the students should take during the viewing of the film. In directing students to compare notes in pairs, petitioner assumed the students had taken correct notes and were sharing accurate information. Because some students did not listen to the movie, they were unable to engage in the later discussion. Petitioner failed to set expectations for the students and address inappropriate behavior. Although petitioner communicated the lesson clearly and accurately in terms of presentation (*i.e.,* spoke articulately and used correct grammar), he did not employ effective questioning techniques which resulted in a lack of student engagement. As memorialized, many students "demonstrated a lack of engagement" and "[t]his lack of engagement resulted in inappropriate behavior" (R-3, p. 2). In addition, "very little conversation occurred" between petitioner and his students and the only feedback given was when he told one student "I am anxious to hear what you have to say" (R-3, p. 2).

19. Similar to the conclusion reached during Ms. Ruane's October 13, 1999 observation, petitioner continued to demonstrate unsatisfactory performance in the area of classroom environment. As memorialized, petitioner "has not created a classroom environment conducive to learning." He did "not appear to have established a rapport with his students" but "matter-of-factly assigns the work to be accomplished with little enthusiasm and/or interaction with his students" (R-3, p. 3). Petitioner did not exhibit high expectations for student learning and student behavior during the observation and there was a minimal "buy-in" by the students in the class (R-3, p. 3). Petitioner did not reinforce his expectations of students and did not address their inappropriate behaviors. These behaviors included students with their heads on the desks, students facing away from the television, students engaged in off-task conversation and a student sitting next to Ms. Ruane listening to headphones with her head on the desk. Although petitioner "told the class that they should be watching the video and taking notes, he did not circulate around the room" to ensure that "the students were

meaningfully engaged or to address inappropriate behavior" (R-3, p. 3). Most of the students were gathered around the front, back and both sides of the room. Petitioner could have more effectively utilized the classroom space (*i.e.,* rearranged the desks so students were not sitting in small groups around the room) which may have improved student behavior.

20. Ms. Ruane held a post-observation conference with petitioner on February 8, 2000. The conference was again cordial in nature and Ms. Ruane and petitioner signed the Formative Observation Form (R-3). Ms. Ruane inquired whether she could assist petitioner in any way based on her recommendations. Petitioner did not request any additional help during the conference or at any other time during the school year.

21. David Clauser, the then Principal of Lincoln High School, evaluated petitioner's teaching performance on two occasions during the 1999-2000 school year. Mr. Clauser served as the Lincoln High School Principal from August 1998 until August 2000.

22. On November 15, 1999, Mr. Clauser observed petitioner's 10th grade English 2 class from 2:00 p.m. to 3:00 p.m. Approximately one week before the observation, Mr. Clauser met with petitioner for a pre-observation conference. During the November 15, 1999 observation, the student activities included journal entries, reading and discussing an Emily Dickinson poem, certain grammar work and students beginning to compose an autobiography (R-2, p. 1).

23. Petitioner's performance was unsatisfactory in the area of planning and preparation during Mr. Clauser's November 15, 1999 observation. As memorialized, Mr. Clauser found that, although petitioner "is clearly knowledgeable in the subject," "the lesson plan, as it was designed and implemented failed to adequately utilize this knowledge" (R-2, p. 1). Petitioner's SWAT was too broad and lacked clarity and definition. The observed activities were not strongly connected to the SWAT. Petitioner did not explain to the

students that the posted SWAT was their objective for the day and how the class would reach it. Rather, after the SWAT was placed on the board, the lesson began. While petitioner made efforts to keep the students occupied and busy, Mr. Clauser noted the distinction between busy students and students busy with learning and instruction. Petitioner utilized approximately seven learning activities and strategies. His lesson moved from activity to activity in an attempt to make it appear as though the students were kept actively engaged. However, the majority of the students did not appear to be engaged in each of the learning activities and this lack of engagement was not addressed by petitioner. The lesson presented was not largely received by most of the students. Some students had their heads down and others were inattentive or engaged in conversations.

24. In the area of students and learning, Mr. Clauser found petitioner's performance on November 15, 1999 in need of improvement. It was not apparent from the observation that the students' learning characteristics were addressed by the lesson. Petitioner's grade book did not demonstrate a clear link between lesson planning, assessment and students achieving identified learning objectives. Petitioner should have made an assessment of the students' performance and progress as to the items contained in the SWAT to enable him to know whether the lesson was successfully leading students to the SWAT and to identify those students who could move on to new material the following day versus those who required that deficiencies be addressed. Petitioner's grade book did not clearly reveal daily assessments and tests. Mr. Clauser initially had difficulty making sense of the grade book due to the absence of a legend which petitioner offered at the post-observation conference. Even with the legend, petitioner's grade book included deficiencies such as the lack of continuity of grades for all students (*e.g.,* some student had many grades, others had no grades).

25. In connection with the November 15, 1999 observation, Mr. Clauser rated petitioner's performance unsatisfactory in the area of instruction. Although petitioner was an effective communicator in providing directions (*i.e.,* speaks

clearly, easily understood), petitioner's directives were not supported by actions and explanations to keep the students on task toward successfully completing each of the learning activities. As student unrest grew in each activity, petitioner's solution was not to address this unrest or to achieve a closure to each of the learning activities but to move on to the next activity. As memorialized, Mr. Clauser found petitioner unsatisfactory in employing effective questioning and discussion techniques, engaging students in learning, providing feedback to students and demonstrating flexibility and responsiveness, and noted deficiencies in petitioner's classroom management skills and actions toward establishing a classroom environment for learning (R-2, p. 2).

26. In the area of classroom environment, petitioner's performance was unsatisfactory on November 15, 1999. As indicated in Mr. Clauser's report, clear expectations for student and teacher conduct had not been established and boundaries for appropriate and unacceptable behavior were not defined (R-2, p. 3). Students had conversations, put their heads down and choose not to become involved in the learning process. As memorialized, "the spirit of the classroom is founded on the teacher requiring little from the students and students providing little attention to the tasks assigned." "A culture for learning does not exist." "Essential but elemental classroom procedures to create an orderly and effective environment have not been established" and "[w]hen student behavior had deteriorated beyond off task the solution was to introduce a new activity" (R-2, p. 3).

27. On December 3, 1999, Mr. Clauser had a post-observation conference with petitioner. During the conference they discussed petitioner's grade book legend. Mr. Clauser advised petitioner that he had been told of petitioner's reputation for being more than a competent teacher and that the observation in the classroom did not evidence this reputation. He informed petitioner of the need to raise the level of his efforts and offered assistance. Petitioner responded that he understood, there was no need for any involvement by Mr. Clauser and signed the Formative Observation Form (R-2).

28. Mr. Clauser evaluated petitioner's teaching performance for a second time on February 23, 2000. Prior to the observation, Mr. Clauser had a pre-observation conference with petitioner. Mr. Clauser observed petitioner's 11th and 12th grade LAL2 class from 8:50 a.m. to 9:50 a.m. Although Mr. Clauser found petitioner's performance had improved since his first observation, it continued to be less than satisfactory.

29. In the area of planning and preparation, Mr. Clauser rated petitioner's performance in need of improvement. While petitioner's lesson had improved, it still was not well planned. All of the activities during the class were not connected to the posted SWAT. As memorialized, while the "lesson plan crafted was sound," a "missing element seemed to be student motivation and interest. An urgency for learning and instruction was not apparent nor observed" (R-4, p. 1). Certain "students refused to share work, had not completed the work, or were asleep, not responding to the teacher's question. One student criticized the teacher's efforts" (R-4, p. 1).

30. Mr. Clauser also found petitioner's performance in need of improvement in the area of students and learning. Approximately one-third or more of the students appeared to lack any excitement or interest in the lesson. A daily pattern of an assessment of students performance and progress was lacking. Petitioner's grade/plan book lacked daily or regular assessments of student achievement of the daily SWATs. The grade book contained only three assessments in an approximate twelve day period. The Teacher Guidelines indicate that daily homework should be listed in the grade book which can be used to assess student attainment of lesson goals; the lesson plan should include how student success for reaching the SWAT will be measured; and weekly assessment/tests should be documented in the lesson plan/grade book (R-2, p. 5).

31. In the area of instruction, Mr. Clauser rated petitioner's performance on February 23, 2000 in need of improvement. Although petitioner was a satisfactory communicator, improvement continued to be needed in the areas of employing

effective questioning and discussion techniques, engaging students in learning, providing feedback to students and demonstrating flexibility and responsiveness. As memorialized, "[t]he dynamic in the class observed reflected" petitioner "attempting to engage students who were reluctant to participate in any of the activities" and petitioner "had to lead instruction as students did not willingly volunteer nor participate" (R-4, p. 2). While petitioner was willing to lead the instruction, his effort should have been directed toward cultivating a willingness on the part of the students to become engaged in the learning. Petitioner did not address nor establish classroom leadership. The "[c]lass ended when students stated, 'Your time is up buddy'" (R-4, p. 2). His questioning and discussion technique came from the Coach Book. Although the questions were good, petitioner's timing and posing of the questions were not done in a manner that supported student engagement.

32. Mr. Clauser also found petitioner needed improvement in the area of classroom environment. The students felt free to show disrespectful comments to petitioner and questionable student behavior was not corrected. The students did not evidence an expectation that the class was a learning environment. Petitioner could have improved the environment by establishing expectations that clearly outline acceptable and unacceptable behavior (*e.g.*, classroom rules posted on the board).

33. On March 3, 2000, Mr. Clauser had a post-observation conference with petitioner (R-3). Mr. Clauser noted the observed improvement in petitioner's performance from his first observation in November 1999 during which petitioner had received unsatisfactory ratings in three of the four performance areas.

34. In a memorandum dated March 27, 2000 (R-5), Mr. Clauser recommended to Michael Donohue, the Acting Executive Director of the Department of Human Resources, that petitioner's increment be withheld. This recommendation was based on Mr. Clauser's review of petitioner's five evaluations which indicated an overall rating of "needs improvement" in each of the four domains.

35. Mr. Clauser prepared a Summative Evaluation and Professional Improvement Plan (PIP) dated June 6, 2000 (R-6). Since petitioner was on sabbatical in 1998-1999, Mr. Clauser did not complete the section regarding whether petitioner had demonstrated progress in meeting the previous year's PIP. In the PIP, Mr. Clauser put an "X" next to "yes" in the area "recommended for increment." He did not take action, via a communication with the Department of Human Resources, to change his earlier recommendation on R-5 that petitioner's increment be withheld. Mr. Clauser met with petitioner and they both signed the forms on June 21, 2000. The Summative Evaluation form depicts petitioner's composite rating of "needs improvement" in each of the four performance factors evaluated during the observations. Mr. Clauser further rated petitioner's professional attitude and manner in need of improvement since, despite his ability and experience to deliver what was expected, petitioner's performance did not meet these expectations during the 1999-2000 school year.

DISCUSSION AND CONCLUSIONS OF LAW

N.J.S.A. 18A:29-14 provides that a board of education may withhold a teacher's salary increment "for inefficiency or other good cause." The purpose of this statute is "to reward only those who have contributed to the educational process thereby encouraging high standards of performance." *Bernards Twp. Bd. of Educ. v. Bernards Twp. Ed. Ass'n,* 79 *N.J.* 311, 321 (1979). In other words, an increment is not a statutory right but "a reward for meritorious service to the school district." *North Plainfield Educ. Ass'n v. North Plainfield Bd. of Educ.*, 96 *N.J.* 587, 593, 594 (1984). *See Probst v. Haddonfield Bd. of Educ.,* 127 *N.J.* 518 (1992). Toward that end, *N.J.S.A.* 18A:29-14 was intended to vest local school boards "with the ability to withhold increments from teachers who had not performed well during the previous year." *Id.* at 526. A decision to withhold an increment is a matter of essential managerial prerogative that the Legislature has delegated to the local school board. *Bernards Twp. Bd. of Educ., supra,* 79 *N.J.* at 321.

A teacher may appeal from the local board's action to the Commissioner of Education who shall either affirm the action or direct that the increment be paid. *N.J.S.A.* 18:29-14. In connection with this review, the Commissioner's role is not to substitute his judgment for that of the local board which made the evaluation. *Kopera v. West Orange Bd. of Ed.,* 60 *N.J. Super.* 288, 296 (App. Div. 1960). Rather, the scope of review on appeal is whether the local board had a reasonable basis for its conclusion. *Ibid.* Thus, the inquiries presented are limited to determining (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind their expertise. *Id.* at 296-297. A local board's exercise of its discretionary powers "may not be upset unless patently arbitrary, without rational basis or induced by improper motives." *Id.* at 294. And, the petitioner bears the burden of proving the unreasonableness of the local board's determination. *Id.* at 297.

Based upon the aforesaid facts and the applicable law, I **CONCLUDE** that the Board's discretionary exercise of its statutory authority to withhold petitioner's salary increment should not be overturned.

The crux of petitioner's position does not challenge the facts upon which the evaluators based their conclusions. Petitioner further does not allege that either Ms. Ruane or Mr. Clauser harbored any animosity or bias against him. Rather, the essential thrust of petitioner's argument focuses on a claimed lack of a district-wide standard *vis-à-vis* when an increment will or will not be given, petitioner's improvement from an "unsatisfactory" to a "needs improvement" rating and petitioner's asserted recollection of being told by Mr. Clauser on June 21, 2000 that an increment would be forthcoming. Succinctly stated, I have considered petitioner's contentions and conclude that the evidence does not support relief in petitioner's favor.

The evidence demonstrates that the District employed a reasonable evaluation procedure in assessing petitioner's performance. There are district-wide performance criteria that was utilized by the evaluators. The evaluators met with petitioner before each observation and the form executed by petitioner at that time unambiguously

delineates the performance factors that would be assessed. In connection with his March 27, 2000 recommendation that petitioner's increment be withheld, Mr. Clauser considered the cumulative assessment of petitioner's performance in the various factors resulting from the five formal evaluations. In other words, this procedure took into account that a teacher's performance on a given day may not necessarily be indicative of his/her teaching ability and a teacher's strengths and weaknesses may vary in different areas.

Although, petitioner's performance had improved as of the February 2000 observation, it continued to be less than satisfactory in the District's important measures of performance: planning and preparation, students and learning, instruction and classroom environment. Of significance, petitioner was evaluated by two independent and experienced evaluators who observed and assessed his teaching performance on two occasions each. The evaluators formally observed petitioner for a sufficient duration of time to enable them to make informed and reasonable decisions. The two qualified evaluators presented detailed and cogent reasons to support the conclusions reached by them, which were essentially undisputed by petitioner and, as detailed above and in their respective Formative Observation Forms, I accept as **FACT**. The record amply supports the conclusion that petitioner's teaching performance during each of the formal observations/evaluations was either unsatisfactory or in need of improvement in all performance areas. Notwithstanding the assistance and recommendations offered to petitioner, his shortcomings never progressed to a level during the school year that warranted a "satisfactory" rating in any performance factor. Some of the noted deficiencies continued to exist even though they had been previously brought to petitioner's attention and petitioner did not follow the District's guidelines and directives in certain areas. Simply put, petitioner was advised of what was expected of him, properly evaluated and his performance was less than satisfactory during each of the formal evaluations. The nature of the classes assigned to petitioner does not serve to mitigate his performance deficiencies. As evident from the record, behavioral issues interfering with the educational environment and the lack of student engagement were, at least in part, attributable to the apparent absence of clear rules in the classroom coupled with petitioner's failure to take measures that

addressed the inappropriate behavior and ensured that students were engaged in the learning activities. And, whether the students in petitioner's class were behaviorally challenging has no direct bearing on other areas of petitioner's performance that were found to be less than satisfactory (*e.g.*, lesson plan/grade book, planning issues, *etc.*).

In short, petitioner has failed to prove that it was unreasonable for the qualified evaluators to conclude that petitioner performed less than satisfactory during the 1999-2000 school year and, based on those evaluations, for the District to determine that petitioner's increment should be withheld. The totality of the evidence establishes a reasonable basis for the District's determination that petitioner did not deserve a reward for meritorious service. Plainly, it is reasonable for the District to require satisfactory reports by those charged with supervisory responsibility as a prerequisite to rewarding a teacher for his/her performance. Here, despite some improvement, petitioner's performance continued to be less than satisfactory throughout the school year in each of the four evaluation factors.

Finally, I do not find meaningful that petitioner's PIP depicts that he was recommended for an increment and do not place substantial weight on petitioner's testimony regarding Mr. Clauser's claimed advice that an increment would be forthcoming. Although Mr. Clauser was unable to explain the notation on the PIP, Mr. Clauser clearly indicated that he did not take action in furtherance of changing his earlier recommendation to Human Resources that petitioner's increment be denied. While petitioner testified as to the lack of advice during the school year that his increment was in "danger," the undisputed evidence reveals that petitioner was notified of his less than satisfactory performance after each of the observation reviews and the Summative Evaluation signed by petitioner at his annual review reiterated his need for improvement in every performance factor. Additionally, petitioner was advised shortly after the June 21, 2000 review that his employment increment and adjustment increments were being withheld. Suffice it to say, under the circumstances it cannot be said that petitioner had a reasonable foundation to expect that he would be receiving an increment and there can be no claim of detrimental reliance.

Based upon a careful review of the evidence, I **CONCLUDE** that the District had a reasonable basis to withhold petitioner's employment and adjustment increments for less than satisfactory performance during the 1999-2000 school year. I further **CONCLUDE** that petitioner has failed to meet his burden of proof, by a preponderance of the credible evidence, that the District's decision to withhold his increment was arbitrary, capricious or unreasonable. Accordingly, I **CONCLUDE** that the District's action should not be disturbed.

ORDER

It is hereby **ORDERED** that the determination of the State-Operated School District of the City of Jersey City to withhold petitioner's increment for the school year of 2000-2001 for less than satisfactory performance is **AFFIRMED**, the relief requested by petitioner is **DENIED** and petitioner's petition is **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (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 18, 2001
DATE

Margaret M Monaco
MARGARET M. MONACO, ALJ

Receipt Acknowledged:

5/25/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 30 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

pb

APPENDIX

List of Witnesses

For Petitioner:

James McCormack

For Respondent:

Ellen Mary Ruane
David Clauser

List of Exhibits

For Petitioner:

None

For Respondent:

R-1 Formative Observation Form for observation on October 13, 1999 (10 pp)
R-2 Formative Observation Form for observation on November 15, 1999 (3 pp)
R-3 Formative Observation Form for observation on January 19, 2000 (10 pp)
R-4 Formative Observation Form for observation on February 23, 2000 (6 pp)
R-5 Memorandum from D. Clauser, Principal, to Michael Donahue, Acting Executive Director, Department of Human Resources, dated March 27, 2000
R-6 Instructional Annual Written Performance Report dated June 6, 2000 (2 pp)
R-7 Letter from Michael A. Donahue, Executive Assistant/Human Resources, to James McCormack dated July 1, 2000

OAL DKT. NO. EDU 9193-00
AGENCY DKT. NO. 338-10/00

JAMES MC CORMACK, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

STATE-OPERATED SCHOOL DISTRICT :
OF THE CITY OF JERSEY CITY, DECISION
HUDSON 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, the Commissioner determines to affirm the Initial Decision. As noted therein, it is petitioner's burden to prove, by a preponderance of credible evidence, that the District's decision to withhold his increment was arbitrary, capricious or unreasonable. *See, Kopera, supra.* Finding no cause to disturb the findings of fact, credibility determinations and conclusions of the ALJ, the Commissioner concurs that petitioner has failed to meet his burden.

Accordingly, the within Petition of Appeal is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: JUL 09 2001

Date of Mailing: JUL 16 2001

---

* 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.

213-01

213-01R

ARLENE MILLER,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF NEW HANOVER, BURLINGTON COUNTY, LISA MULLIGAN AND THERAPEUTIC OUTREACH COMPANY OR CORPORATION,	:	COMMISSIONER OF EDUCATION
	:	DECISION ON REMAND
	:	
RESPONDENTS.	:	

July 9, 2001

OAL DKT. NOS. EDU 8825-00 AND EDU 6658-98 (ON REMAND)
AGENCY DKT. NO. 222-7/98

DANELLE CONNOLLY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOODBINE, CAPE MAY COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Based upon the ALJ's recitation of the procedural history herein, the Commissioner shall consider this matter withdrawn.

The Commissioner, therefore, approves the withdrawal and determines that this matter shall be dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: JUL 09 2001

Date of Mailing: JUL 16 2001

217-01

#217-01

MOUNTAIN LAKES EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

July 9, 2001

8. Pursuant to N.J.A.C. 6:11-4.8, the Board has submitted an application for the issuance of a conditional world language certificate to Mr. Velazquez permitting him to teach Spanish during the 2001-02 school year and is currently awaiting issuance of said conditional certification. A copy of the application and supporting documentation is attached as Exhibit A.

9. The Board agrees that it will not appoint to a teaching position, or utilize the services of, Federico Velazquez during the 2001-02 school year, or any subsequent school year, unless and until it ensures that he holds a valid Conditional World Language Certificate pursuant to N.J.A.C. 6:11-4.8.

10. At a meeting held on September 21, 1999, the Board also approved the appointment of Yewanda (Norma) Kelley-Johnson to provide dance instruction to students assigned to Wildwood, Briarcliff and Lake Drive Schools during the 1999-2000 school year.

11. Yewanda (Norma) Kelley-Johnson was also employed by the Board to provide dance instruction to students in its public schools during the 2000-01 school year. Her service in the district for this current school year was completed by the end of April 2001.

12. Ms. Kelley-Johnson does not hold a standard instructional certificate issued by the New Jersey State Board of Examiners. Thus, during these past two (2) school years, the Board has required that regular physical education teachers, who hold valid instructional certificates with physical education endorsements, remain in the classroom while Ms. Kelley-Johnson delivers dance instruction to their students.

ZAZZALI, FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

2C

OAL DKT. NO. EDU 9193-00
AGENCY DKT. NO. 338-10/00

JAMES MC CORMACK, :

PETITIONER, :

V. :

COMMISSIONER OF EDUCATION

STATE-OPERATED SCHOOL DISTRICT :
OF THE CITY OF JERSEY CITY, DECISION
HUDSON 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, the Commissioner determines to affirm the Initial Decision. As noted therein, it is petitioner's burden to prove, by a preponderance of credible evidence, that the District's decision to withhold his increment was arbitrary, capricious or unreasonable. *See, Kopera, supra.* Finding no cause to disturb the findings of fact, credibility determinations and conclusions of the ALJ, the Commissioner concurs that petitioner has failed to meet his burden.

Accordingly, the within Petition of Appeal is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: JUL 09 2001

Date of Mailing: JUL 16 2001

---

* 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.

213-01

213-01R

ARLENE MILLER,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF NEW HANOVER, BURLINGTON COUNTY, LISA MULLIGAN AND THERAPEUTIC OUTREACH COMPANY OR CORPORATION,	:	COMMISSIONER OF EDUCATION
	:	DECISION ON REMAND
	:	
RESPONDENTS.	:	

July 9, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 08847-00S
AGENCY DKT. NO. 389-9/96
(REMAND EDU 10766-96)

ARLENE MILLER,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH ANOVER, BURLINGTON COUNTY,

Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Zazzali, Fagella & Nowak, attorney)

Dennis C. Germano, Esq., for respondent (Hulse & Germano, attorney)

Record Closed: May 16, 2001 Decided: May 22, 2001

BEFORE **JEFF S. MASIN**, ACTING CHIEF ALJ:

The Commissioner by Order dated November 27, 2000 remanded this matter back to the Office of Administrative Law. The Commissioner ordered the matter be held in abeyance pending review of the terms of the settlement agreement by the Division of Pensions.

The parties have resubmitted the settlement agreement in this matter which is attached and fully incorporated herein. The contingency regarding the Division of Pensions incorporated in the previous settlement agreement that caused the Commissioner to remand the contested case

has been eliminated. The settlement now permits the Commissioner's approval to be deemed a final decision.

I have reviewed the record and terms of settlement 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.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** 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 22, 2001
DATE

JEFF S. MASIN, ACTING CHIEF ALJ

Receipt Acknowledged:

5/24/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 25 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

ZAZZALI, FAGELLA & NOWAK
150 West State Street
Trenton, NJ 08608
(609) 392-8172
Attorneys for Petitioner

ARLENE MILLER,	BEFORE THE OFFICE OF ADMINISTRATIVE LAW
Petitioner,	OAL DOCKET NO.: EDUOT 10766-96S
v	
BOARD OF EDUCATION OF NEW HANOVER TOWNSHIP IN BURLINGTON COUNTY, LISA Mulligan, and THERAPEUTIC OUTREACH COMPANY OR CORPORATION,	**SETTLEMENT AGREEMENT AND STIPULATION OF SETTLEMENT**
Respondent.	

The parties to the within matter hereby agree to settle and resolve the claims asserted by petitioner in the Petition of Appeal with the above docket number based upon the following terms:

1. The parties recognize that petitioner filed a Petition of Appeal with the Commissioner of Education which asserts that the termination of her employment at the end of the 1995-96 school year, and the retention, employment, or use of other persons or employees or of respondent Lisa Mulligan and/or of Therapeutic Outreach Corporation

3a

to provide child study team services violated her tenure, seniority, and other legal rights.

2. The parties recognize that this agreement resolves petitioner's claim for a remedy for the alleged violation of her rights for the 1996-97school year, and that the acceptance and implementation of all of the terms of this agreement shall result in the resolution of petitioner's claims that respondent violated petitioner's tenure, seniority, or other legal rights for the 1996-97 school year.

3. The parties recognize that the implementation and validity of this agreement is contingent upon the approval of this agreement in its entirety by the Commissioner of Education, and upon the effectuation of all of its terms, and that if the Commissioner of Education rejects this agreement or any term thereof, the matter shall be returned to the Office of Administrative Law as a contested case for further proceedings.

4. The parties recognize that petitioner has alleged that respondent acted unlawfully and violated her legal rights when it contracted with a private vendor for the provision of child study team services for the 1996-97 school year. The parties further recognize that respondent asserts that it relied upon a waiver granted by the Commissioner of Education, that petitioner appealed the validity of said waiver to the State Board of Education, and that by decision dated May 3, 2000, the State Board held that the Commissioner of Education lacked the authority to grant such a waiver, that such waiver was invalid, and that the services previously provided by petitioner could not be provided by subcontract with a private party or vendor.

5. As a result, the parties recognize that but for respondent board's contracting

to provide such salary with Lisa Mulligan and/or Therapeutic Outreach Company or Corporation, petitioner would have been retained in her employment as a school psychologist by respondent for the 1996-97 school year.

6. The parties recognize that for said school year, if petitioner was retained by respondent, petitioner would have earned approximately $10,000.00 in salary from respondent.

7. Petitioner has provided respondent with tax returns covering the 1996-97 school year, together with pay records from her other employer, the Florence Township Board of Education, and the parties have reached agreement as to petitioner's mitigation efforts and the amount due petitioner as backpay for the 1996-97 school year.

8. Respondent agrees to pay petitioner the lump sum of $10,000.00, which is essentially equivalent to petitioner's backpay entitlement after consideration of mitigation. The parties agree that from that $10,000.00 payment, no deductions shall be made, and that petitioner shall be responsible for any legally required deductions and shall execute an IRS form 1099 and any other appropriate form to assure that she will be responsible for payment of all taxes.

9. The parties agree that the payments required by this agreement shall be made within 30 days of the Commissioner of Education's approval of this agreement.

10. The parties acknowledge that because respondent contracted with the Burlington County Educational Services Unit for child study team services for the school years following the 1996-97 school year, petitioner has asserted no claim to backpay

or other benefits against respondent for any years subsequent to the 1996-97 school year, and agree that petitioner reserves and does not waive her claims against the Burlington County Educational Services Unit which are presently pending before the State Board of Education in the case of Arlene Miller v. Burlington County Educational Services Unit, Agency Docket No.: 9-99.

Arlene Miller
Petitioner

Dated April 30, 2001

ZAZZALI, FAGELLA & NOWAK
Attorneys for Petitioner

By: _____
Richard A. Friedman, Esq.

Dated: 4/23/01

Board of Education of
New Hanover Township

By: _____
Wayne Wharton
Board President

Dated: May 10, 2001

HULSE AND GERMANO
Attorneys for Respondent

By: _____
Denis C. Germano, Esq.

Dated: 5/10/01

OAL DKT. NOS. EDU 10766-96 AND EDU 8847-00 (ON REMAND)
AGENCY DKT. NO. 389-9/96

ARLENE MILLER,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF NEW HANOVER, BURLINGTON COUNTY, LISA MULLIGAN AND THERAPEUTIC OUTREACH COMPANY OR CORPORATION,	:	COMMISSIONER OF EDUCATION
	:	DECISION ON REMAND
	:	
RESPONDENTS.	:	

The record, Settlement Agreement and 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, which was revised consistent with the Commissioner's decision of November 27, 2000. The settlement is, therefore, adopted as the final decision in this matter and the matter is dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7|09|01

Date of Mailing: 7|23|01

215-01

#215-01R

DANELLE CONNOLLY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOODBINE, CAPE MAY COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

July 9, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8825-00
ON REMAND EDU 6658-98
AGENCY REF. NO. 222-7/98

DANELLE CONNELLY,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF WOODBINE, CAPE MAY,

Respondent.

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

Ronald Sahli, Esq., for respondent (Sahli & Padovani, attorneys)

Record Closed: May 14, 2001 Decided: May 23, 2001

BEFORE **LILLARD E. LAW** , ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter is on remand from the Commissioner of Education (Commissioner) to the Office of Administrative Law (OAL) subsequent to an agreed upon settlement to dispose of the

issues in controversy and as executed by the parties. The Commissioner observes, among other things, that the terms of the settlement were not appended to the Initial Decision nor were the terms included in the record. The Commissioner also observes that the Order included in the Initial Decision effectuated a term of the proposed settlement agreement prior to the Commissioner's approval, in violation of N.J.A.C. 1:1-19.1. The Commissioner, therefore, requires the specific terms of the settlement between the parties in order to permit his full review as required by N.J.A.C. 1:1-19.1.

Petitioner, Danelle Connolly, was subject to a reduction in force (RIF) by the Woodbine Board of Education (Board) effective the 1998-99 school year. The Board on May 11, 1997, acted to reduce petitioner's position as a tenured school social worker from a full-time (12 month) employment to a two (2) days per week (10 month) employment position for the 1998-99 school year.

On June 16, 1998, petitioner filed a Petition of Appeal with the Commissioner wherein she sought, among other things, reappointment and assignment to a full-time (12 month) school social worker position by the Board for the 1998-99 school year; retroactive compensation for all salary; and, seniority and economic benefits lost by the Board's failure to reappoint petitioner to a full-time position, with interest.

A Prehearing Conference was held on January 28, 1999, at which, among other things, the issues to be determined by this administrative tribunal were agreed upon by the parties and hearing dates were established for June 11, 17 and July 1, 1999. Subsequently, Substitution of Attorney was filed by both parties and noted for the record. The scheduled hearing dates were adjourned and, after a series of telephone conferences, ultimately rescheduled for March 2, 2000.

The scheduled hearing did not take place on March 2, 2000. Rather, the parties had been engaged in settlement discussions and negotiations and so advised this tribunal on March 2, 2000. The Board approved of the settlement, which provided, among other things, that the Board remit the amount of $5,000 to petitioner in a lump sum payment.

The parties did not, however, enter into a Stipulation of Settlement or a Consent Order to dispose of the issues in controversy. Rather, based upon petitioner's counsel's representations, this tribunal issued an Initial Decision-Settlement. The Commissioner rejected the Initial Decision and remanded the matter to the Office of Administrative Law.

This tribunal thereupon contacted the attorneys of record in order to resolve the issues raised by the Commissioner's remand. On March 6, 2001, the parties agreed that copies of the minutes of the Board's meetings would suffice to show that the settlement was approved by the Board.

On May 14, 2001, this tribunal was in receipt of Minutes of the Board of its closed session held on March 2, 2000, which states, in pertinent part, that:

> 4. Mr. Sahli reported to the Board that the case with Mrs.Danelle Connelly was settled today for $5,000. PERC Case in Trenton, N.J.

Subsequently, on June 22, 2000, at a regular meeting of the Board, its Minutes for that meeting reflect the following:

> Mr. Ronald Sahli, Solicitor, informed the Board of the following:
>
> 1. Danelle Connelly case settled. Court ordered: $5,000. with 30 days to pay. Will be paid from 2000-2001 school budget.

The Board minutes of June 22, 2000, continue to state as follows:

> **APPROVAL TO PAY SETTLEMENT:** The Board approved the settlement between the Woodbine Board of Education and Danelle Connolly as per the final decision of the Administrative Law Judge. Matter has been settle (sic) as agreed to by the Board of Education pursuant to documents on file with the Board of Education in Business Administrator's office as recommended by Solicitor. Motion by: M. Johnson, Second: J. Tirado. Carried on a roll call vote, all Members present voting yes.

The settlement was effectuated by the parties and the money dispersed without the consent of the Commissioner, in violation of N.J.A.C. 1:1-19.1. The Commissioner has consistently admonished boards of education to await his approval of matters duly transmitted to

the OAL for determination as contested cases. In the instant matter, neither the Board nor the ALJ heeded the Commissioner's caution.

The record shows that there is no longer an issued in controversy nor a justiciable question to be resolved. Accordingly, I **CONCLUDE** that the matter be considered closed.

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

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

23 May 2001
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

5/25/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 29 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

For Petitioner:

None

For Respondent:

None

DOCUMENTS IN EVIDENCE

For Petitioner:

None

For Respondent:

Minutes of the Closed Session – Regular Meeting of the Board, March 2, 2000

Minutes of the Closed Session – Regular Meeting of the Board, June 22, 2000

Minutes of the Regular Meeting of the Board, June 22, 2000.

OAL DKT. NOS. EDU 8825-00 AND EDU 6658-98 (ON REMAND)
AGENCY DKT. NO. 222-7/98

DANELLE CONNOLLY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOODBINE, CAPE MAY COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Based upon the ALJ's recitation of the procedural history herein, the Commissioner shall consider this matter withdrawn.

The Commissioner, therefore, approves the withdrawal and determines that this matter shall be dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: JUL 09 2001

Date of Mailing: JUL 16 2001

217-01

#217-01

MOUNTAIN LAKES EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

July 9, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1579-00

AGENCY DKT. NO. 386-12/99

MOUNTAIN LAKES EDUCATION ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY,

Respondent.

Kathleen A. Naprstek, Esq., for Petitioner
(Zazzali, Zazzali, Fagella & Nowak, attorneys)

Ellen S. Bass, Esq., for Respondent
(Rand, Algeier, Tosti & Woodruff, attorneys)

Record Closed: May 18, 2001 Decided: May 22, 2001

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on February 14, 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.

A hearing was scheduled for May 18, 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.* 52:14B-10.

May 22, 2001
DATE

Maria M. LaFiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

5/25/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 30 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

jb

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

MAY 18 4 20 PM '01

ZAZZALI, FAGELLA & NOWAK
One Riverfront Plaza
Newark, New Jersey 07102
(973) 623-1822
Attorneys for Petitioner

MOUNTAIN LAKES EDUCATION ASSOCIATION, Petitioner v. BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW Agency Ref. No. 386- 12/99 OAL Dkt. No. EDUOT 01579-00N **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 Mountain Lakes shall hereinafter be referred to as the Board, and Petitioner Mountain Lakes Education Association shall hereinafter be referred to as the Association.

2. The Association is the majority representative, pursuant to N.J.S.A.

ZAZZALI, FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

34:13A-1 et. seq., of all certified non-administrative staff employed by the Board, including but not limited to teachers of foreign languages and teachers of physical education and the arts.

3. The Board is responsible for the administration and operation of the public schools in the Borough of Mountain Lakes and is required to comply with all of the provisions of Title 18A of the revised statutes, and to not exceed its authority thereunder.

4. The Association filed the Petition of Appeal in this matter with the Commissioner of Education in response to the Board's employment of non-certified individuals to provide foreign language and dance instruction in the Board's elementary schools.

5. More specifically, on or about September 8, 1999, the Board executed a written agreement with Berlitz Jr. to provide Spanish instruction during the 1999-2000 school year to elementary students in the Mountain Lakes School District. That Spanish instruction was provided by Federico A. Velazquez, an employee of Berlitz Jr.

6. Federico A. Velazquez continues to provide Spanish instruction during the 2000-01 school year to elementary students in the Mountain Lakes School District via an agreement between the Board and Berlitz Jr.

7. Federico A. Velazquez does not hold a standard instructional certificate issued by the New Jersey State Board of Examiners. Thus, during these past two (2) school years the Board has required that the regular classroom teachers, who hold valid instructional certificates with elementary endorsements, remain in the classroom while Mr. Velazquez delivers Spanish instruction to their students.

ZAZZALI, FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

8. Pursuant to N.J.A.C. 6:11-4.8, the Board has submitted an application for the issuance of a conditional world language certificate to Mr. Velazquez permitting him to teach Spanish during the 2001-02 school year and is currently awaiting issuance of said conditional certification. A copy of the application and supporting documentation is attached as Exhibit A.

9. The Board agrees that it will not appoint to a teaching position, or utilize the services of, Federico Velazquez during the 2001-02 school year, or any subsequent school year, unless and until it ensures that he holds a valid Conditional World Language Certificate pursuant to N.J.A.C. 6:11-4.8.

10. At a meeting held on September 21, 1999, the Board also approved the appointment of Yewanda (Norma) Kelley-Johnson to provide dance instruction to students assigned to Wildwood, Briarcliff and Lake Drive Schools during the 1999-2000 school year.

11. Yewanda (Norma) Kelley-Johnson was also employed by the Board to provide dance instruction to students in its public schools during the 2000-01 school year. Her service in the district for this current school year was completed by the end of April 2001.

12. Ms. Kelley-Johnson does not hold a standard instructional certificate issued by the New Jersey State Board of Examiners. Thus, during these past two (2) school years, the Board has required that regular physical education teachers, who hold valid instructional certificates with physical education endorsements, remain in the classroom while Ms. Kelley-Johnson delivers dance instruction to their students.

ZAZZALI, FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

13. Yewanda (Norma) Kelley- Johnson was issued a Certificate of Eligibility as a Teacher of Vocational Arts/Dance by the New Jersey State Board of Examiners in October 2000, a copy of which is annexed hereto as Exhibit B. The Certificate of Eligibility merely renders her eligible to seek positions of employment requiring a Provisional Certificate in the area of vocational arts/dance instruction and qualifies her to obtain a Provisional Certificate in the event she is employed by a district which agrees to provide a state approved district training program, with required job support, performance evaluation and professional coursework pursuant to N.J.A.C. 6:11-5.1, et seq.

14. The Board agrees that it will not appoint to a teaching position, or utilize the services of, Ms. Kelley-Johnson during the 2001-02 school year, or any subsequent school year, unless and until it ensures that she obtains a Provisional Certificate pursuant to N.J.A.C. 6:11-5.1 and it enrolls her in a state-approved district training program pursuant to N.J.A.C. 6:11-5.3.

15. The Association 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. 386-12/99, and EDUOT 01579-00N.

16. The parties recognize and agree that this stipulation of settlement must be approved by the Commissioner of Education, and that should the Commissioner of Education reject any provision of this stipulation of settlement, all provisions therein shall be null, void and of no effect, and that in such event, the Petition of Appeal shall be immediately reinstated and the parties shall retain all legal rights which they had prior

ZAZZALI, FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

to execution of this stipulation of settlement.

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.

ZAZZALI, FAGELLA & NOWAK, P.C.
Attorneys for Petitioner

By: Kathleen A. Naprstek, Esq.
Dated: 5/15/01

RAND, ALGEIER, TOSTI & WOODRUFF, P.C.
Attorneys for Respondent,

By: Ellen S. Bass, Esq.
Dated: 5/16/01

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
Office of Licensing and Credentials
PO Box 500
Trenton, NJ 08625-0500

CONDITIONAL WORLD LANGUAGE CERTIFICATE APPLICATION FOR REVIEW OF INDIVIDUAL CASE

From: Mountain Lakes (District) 3460 (27) (District Code) March 21, 2001 (Date)

400 Boulevard (Address)

To County Superintendent of Schools, Morris County, New Jersey

Request is hereby made for issuance of a conditional certificate to Federico Velazquez 089-76-7006 (Name & Social Security #)

to teach Spanish (world language) for the school year 2001-2002

Date of initial employment in this position September, 1998

Reasons for request: State the circumstances that require the employment of a person with a conditional certificate to fill this position. The district must demonstrate the process used in attempting to secure the services of an individual with standard certification to fill the vacancy. Documentation must include communication notices and recruitment efforts to employ qualified individuals: _____

Identify below or on a separate sheet all appropriately certified individual(s) who applied for this position. Provide an explanation why an appropriately certified applicant was not hired for this position. _____

Verification of Candidate's Eligibility and Commitment to Completing Certification Requirements: Attach the original ACTFL Oral Proficiency certificate showing attainment of a minimum score of "Advanced Low Level" proficiency and a copy of the candidate's agreement to complete a three semester-hour course in world language methodology at a regionally accredited college/university within 12 months and complete the academic study and test requirements for the Certificate of Eligibility, Certificate of Eligibility with Advanced Standing or standard certificate in the specified world language within five years of obtaining the initial conditional certificate.

4/12/01 (Date) _____ (District Superintendent of Schools)

FOR COUNTY OFFICE USE ONLY

Applications approved by County Superintendents of Schools must be forwarded to the State Board of Examiners

To: Secretary, State Board of Examiners

Recommendation is hereby made for issuance of the conditional world language certificate based on documentation of the district's unsuccessful efforts to recruit qualified individuals with appropriate certification to fill the position.

(Date) _____ (County Superintendent of Schools) (County)

CONDITIONAL WORLD LANGUAGE CERTIFICATE

AGREEMENT TO COMPLETE REQUIREMENTS FOR STANDARD CERTIFICATION

1. I am an applicant for a conditional world language certificate and I submit this agreement in support of my application for conditional certification in the Spanish language. I understand that I may not be issued an initial conditional world language certificate unless I agree to fulfill the academic requirements set forth below.

2. In order to obtain the conditional world language certificate, I agree that I will successfully complete a three semester-hour course in world language methodology at a regionally accredited college or university within 12 months of the issuance of the conditional certificate.

3. I further agree that, as a condition for obtaining the conditional certificate, I will complete the academic study and test requirements for the Certificate of Eligibility, Certificate of Eligibility with Advanced Standing, or standard certificate in the Spanish language within five years of the issuance of the conditional certificate.

4. I understand that the conditional world language certificate may be renewed annually, for a maximum of four renewals. In order to obtain renewals, I agree to demonstrate on an annual basis progress toward meeting state requirements for certification.

(Applicant's Signature)

Sworn and subscribed before me this
22nd day of March, 2001.

(Notary Signature)

My commission expires

ANNA M. O'CONNELL
Notary Public of New Jersey
My Commission Expires 2/1/2004
(Notary Seal)

OLAC 101 Conditional Agreement form (02/01)

Mountain Lakes Public Schools

400 BOULEVARD
MOUNTAIN LAKES, NEW JERSEY 07046-1598
(973) 334-8280
Fax (973) 334-2316

JOHN H. SAKALA
SUPERINTENDENT OF SCHOOLS

April 12, 2001

Dr. Rene Rovtar
Morris County Superintendent
PO Box 900
Morristown, New Jersey 07963-0900

Dear Dr. Rovtar,

This is in reference to the certification status of Federico Velazquez who is employed in the Mountain Lakes Wildwood Elementary School as a teacher of Spanish. During the 1998-1999 school year, we initiated an elementary foreign language program using the services of Berlitz Junior. We selected Berlitz with the purpose of both using their excellent curriculum, and to engage a teacher who was a Berlitz trained native speaker.

Federico was selected both by the Berlitz staff and our administration as the teacher with the best qualifications. After the first year during which he was employed by Berlitz, we hired him as a regular teacher based on the excellent performance we witnessed during the first year. This is to verify that he was the best candidate available at the time we made the hire.

Thank you for assisting us to continue Federico as a certificated teacher.

Cordially,

John Sakala
Superintendent of Schools

"Only the educated are truly free."

Epictetus

LTI The ACTFL Language Testing Office

95 Church St. Suite 310, White Plains, NY 10601 • (voice) 914.948.5100 • (fax) 914 948 0794

TEST CONFIRMATION FORM

FAX TO: PAUL ODENWELDER

FAX#: 973-334-4905

FROM: WENDY MADDOX, Test Coordinator

DATE: 03/19/01

Dear PAUL

I have arranged for the following

Candidate: FEDERICO A. VELAZQUEZ
Date: Wednesday 03/21/01
Time: 12:40 PM EST
Tester: ENRIQUE TORNER
Tel# 507-345-1798

The candidate should arrive in your office shortly before the appointed time. PROMPTLY, at the appointed time, please call the tester, state your name, and introduce the candidate. The tester will then interview the candidate in SPANISH

If you need to reschedule this test for any reason or have difficulty reaching the tester at the appointed time, please contact me immediately at (914) 948-5100. Thank you for your assistance!

WINSTAR for EDUCATION

Folder: INBOX
Action: READ MESSAGE

From: Wendy Maddox <maddox@languagetesting.com>
ADD to ADDRESSES
To: velazque@win4edu.com
Date: Mon, 19 Mar 2001 14:14:42 -0800
Subject: OPI confirmationFederico A. Velazquez
Attachments:

Hello Federico,

Your opi has been scheduled for Wednesday 3/21 01 at 12:45pm EST. I have faxed a test confirmation form to your test administrator Paul Odenweller (confirm receipt). Please confirm this appointment by replying to this message

Thanks,

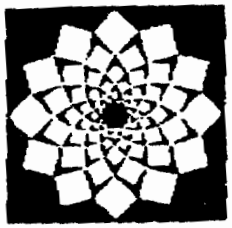
Wendy

CHANGE PROPERTIES

SHOW MESSAGE

Index | Compose | Address | Options | Folders | Help | Logout

WinStar for Education



ACTFL

American Council on the Teaching of Foreign Languages

certifies that

FEDERICO A. VELAZQUEZ

has successfully completed an ACTFL Oral Proficiency Interview (OPI) and has been rated, using ACTFL Proficiency Guidelines, as

SUPERIOR · SPANISH

Executive Director

03/21/01
01-0459

3K

216-78-3574 00306800

The State of New Jersey

Department of Education
State Board of Examiners

Certificate of Eligibility

This is to certify that

Issued	Expires		County	District
10/00		NORMA KELLEYJOHNSON	27	

Has completed certain requirements for certification and is eligible to seek employment in positions requiring the Provisional Certificate in the area(s) listed below. The Provisional Certificate will be issued contingent upon evidence of employment in a district that agrees to provide an approved induction program, including required job support, performance evaluation and professional coursework.

TEACHER OF VOCATIONAL ARTS/DANCE

OAL DKT. NO. EDU 1579-00
AGENCY DKT. NO. 386-12/99

MOUNTAIN LAKES EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Assistant Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34c, 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.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: JUL 09 2001

Date of Mailing: JUL 16 2001

219-01

P.H. AND P.H., on behalf of minor child, M.C.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,

RESPONDENT.

: COMMISSIONER OF EDUCATION

: DECISION

SYNOPSIS

High school student, M.C., who had a record of prior school suspensions for offenses, slashed another student's coat with a box-cutter razor. Police verified the existence of weapons in M.C.'s possession and charged him as a juvenile with aggravated assault. M.C. pled guilty and was placed on probation. The Board suspended M.C. and eventually expelled him from the Bergenfield public school system. Petitioning parents sought an order directing respondents to assess M.C.'s alternative education needs and directing respondents to provide an alternative education program by the beginning of the 2000-2001 academic year. On application for emergent relief, the Commissioner directed the Board to immediately place M.C. on a program of home instruction until this matter was fully litigated and decided.

Following four days of hearing, the ALJ concluded, *inter alia*, that 1) petitioners' appeal for a Declaratory Ruling that expulsion of M.C. violated M.C.'s constitutional right to a thorough and efficient education was denied for lack of jurisdiction; 2) petitioners' appeal for a Declaratory Ruling that denial of an alternative education program for M.C. violated M.C.'s constitutional right to a thorough and efficient education was denied for lack of jurisdiction; 3) the District's expulsion of M.C. was arbitrary, capricious and unreasonable; 4) the District's denial of an alternative education program for M.C. was not arbitrary, capricious and unreasonable; 5) petitioners' appeal for a Declaratory Ruling that expulsion of M.C. violated his constitutional right to equal protection was dismissed for lack of jurisdiction; 6) petitioners' appeal for an order setting aside the expulsion and requiring the Board to immediately assess M.C.'s alternative education needs and to identify an appropriate alternative education program that meets the Core Curriculum Content Standards was denied; 7) all evidence of M.C.'s expulsion be expunged from his school records; and that 8) the District should conduct an evaluation of M.C. consistent with the Individuals with Disabilities Education Act (IDEA), but that following evaluation, if it is determined that M.C. was not a child with a disability, the expulsion was not arbitrary, capricious and unreasonable.

The Commissioner affirmed the ALJ, with modification. The Commissioner concurred that the constitutional question of expulsion without provision of (post-expulsion) alternative education is appropriately addressed by the Courts. The Commissioner also concurred that the record before him did not support a conclusion that the Board acted unreasonably by failing to provide M.C. with an alternative education program in lieu of expulsion. However, the ALJ's recommended Orders with respect to evaluation of M.C. to determine his eligibility for special education services were set aside for lack of jurisdiction, and the Commissioner held, absent a determination in the appropriate forum that M.C. should have been evaluated and found eligible for special education services, that the District's expulsion of M.C. was not arbitrary, capricious or unreasonable, and thus not to be expunged from his record.

July 16, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7381-00
Agency Reference No. 222-6/00

M.C., A MINOR CHILD, BY HIS PARENT, P. H.,

Petitioners,

v.

BERGENFIELD BOARD OF EDUCATION,

Respondent.

Elizabeth Athos, Esq., for petitioner
(Education Law Center, attorneys)

Joanne L. Butler, Esq., for respondent Bergenfield Board of Education
(Schenck, Price, Smith & King, attorneys)

Record Closed: April 10, 2001 Decided: May 25, 2001

BEFORE **MICHAEL L. RAVIN,** ALJ:

STATEMENT OF THE CASE

M.C. (who may be referred to alternately as "M.C." or "petitioner") was permanently expelled, without the provision for an alternative education program, from the public schools of the Borough of Bergenfield ("district") as a result of assaulting another student with a weapon and possession of five (5) weapons. By doing so, argues P.H. (who may be referred to alternately as "P.H." or "petitioner"), the district violated M.C.'s right to a thorough and efficient education and his right to equal protection. Petitioner also challenges the district's action as arbitrary, capricious or unreasonable.

PROCEDURAL HISTORY

On January 26, 2000, fifteen year-old M.C., a sophomore attending Bergenfield High School, slashed at another student with a box-cutter razor, causing a large gash in the student's coat. Shortly after the slashing, he was found in possession of five weapons. A disciplinary process began which culminated on March 21, 2000 with the district's adoption, after a hearing, of a resolution permanently expelling M.C. from the district's public school system with no provision for any alternative education program.

On June 19, 2000, petitioner filed a Verified Petition of Appeal with the New Jersey Department of Education, naming as respondents the district, the Commissioner of Education and the New Jersey State Board of Education.

The relief originally sought in the Verified Petition of appeal was as follows:

A. A Declaratory Ruling that the Board's expulsion of M.C. violated M.C.' s right to a thorough and efficient education under Article VIII, Section IV of the New Jersey Constitution.

B. A Declaratory Ruling that the Board's denial of an alternative education program to M.C. violated M.C. 's right to a thorough and efficient education under Article VIII, Section IV of the New Jersey Constitution.

C. A Declaratory Ruling that the Board's expulsion of M.C. was arbitrary, capricious and unreasonable.

D. A Declaratory Ruling that the Board's denial of an alternative education program to M.C. was arbitrary, capricious and unreasonable.

E. A Declaratory Ruling that the Board's zero tolerance policy is over-broad and violated the right of M.C. and P.H. to procedural due process under the Fourteenth Amendment to the United States Constitution.

F. A Declaratory Ruling that the Board's zero tolerance policy violates the right of all its students to a thorough and efficient education under the New Jersey Constitution.

G. A Declaratory Ruling that the Board violated the right of M.C. and P.H. to procedural due process under the Fourteenth Amendment to the United States Constitution and to fundamental fairness by failing to provide written notification of its zero tolerance disciplinary policy, and by failing to provide written notification of the reasons for its expulsion decision on the charge and punishment and the means and time limit for appealing its decision.

H. A Declaratory Ruling that the Board's expulsion of M.C. violated his right to equal protection as guaranteed under the New Jersey Constitution.

I. A Declaratory Ruling that the Commission and State Board violated M.C.'s right to a thorough and efficient public education by failing to set any rules or standards governing the Board's expulsion of M.C. and its denial of alternative education to M.C.

J. A Declaratory Ruling that the Commissioner and State Board's failure to set any rules or standards governing the Board's expulsion of M.C. and its denial of alternative education to M.C. is arbitrary, capricious and unreasonable.

K. A Declaratory Ruling that the Commissioner and State Board violated the right of M.C. and all students in the State to a thorough and efficient public education by failing to set uniform standards to guide local school districts in imposing long-term suspension and expulsion and in providing alternative education programs.

L. A Declaratory Ruling that the Commissioner and State Board violated the right of M.C. and all students in the State to equal protection of law by failing to set uniform standards to guide local school districts in imposing long-term suspension and expulsion and in providing alternative education programs.

M. A Declaratory Ruling that the Commissioner and State Board violated the right of M.C. and P.H. to procedural due process and fundamental fairness by failing to set rules or standards governing procedural due process in M. C's expulsion hearing.

N. A Declaratory Ruling that the Commissioner and State Board violated the right of M.C. and all students in the State to procedural due process and fundamental fairness by failing to set uniform standards to guide local districts in affording procedural due process in long-term suspension and expulsion hearings.

O. An Order setting aside the expulsion of M.C. and requiring respondents to immediately assess M.C.'s alternative education needs and to identify an appropriate alternative education program for M.C. that meets the Core Curriculum Content Standards.

P. An Order expunging all record of M.C.'s expulsion from his school records.

Q. An Order requiring the Commissioner and State Board to promulgate regulations to guide local school districts in the imposition of long-term suspension and expulsion, in the provision of alternative education program, and in the provision of procedural due process in long-term suspension and expulsion hearings.

The Commissioner of Education ("Commissioner") declared the petition a contested case and transferred it to the Office of Administrative Law ("OAL") pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

On July 31, 2000, petitioner applied for emergent relief, which was assigned for disposition to the Honorable Ken R. Springer, Administrative Law Judge ("ALJ"). Prior to oral argument on August 10, 2000, the Commissioner of Education and the State Board of Education ("State respondents") filed a Cross-Motion to Dismiss the allegations in the Petition of Appeal which related to them.

On August 18, 2000, Judge Springer heard and granted the application for emergent relief. He entered an order directing the district to immediately assess M. C's alternative education needs, identify an appropriate alternative education program for M.C. and place M.C. in an alternative education program no later than the first day of the 2000-2001 school year. The Order provided that in the event no such alternative educational placement was available, the district was mandated to furnish home instruction to M.C. while continuing its best efforts to find a suitable alternate education placement. ALJ Springer declined to decide the State respondents' Cross-Motion.

On September 15, 2000, the Commissioner issued a Decision on Motion, modified the relief recommended by Judge Springer and directed the district to immediately place M.C. on home instruction until the matter was fully litigated and decided. The Commissioner concluded that placement in an alternative educational setting was not an appropriate grant of interim relief.

Subsequently, the Acting Director of the OAL assigned the matter to me for plenary disposition.

At an off-the-record Prehearing Conference which took place on December 14, 2000, petitioners withdrew their procedural due process and fundamental fairness claims specified in the Petition of Appeal.

On January 5, 2001, I decided to enter an Interlocutory Order granting the State respondents' Cross-Motion to Dismiss the Petition of Appeal as it related to them. The Commissioner affirmed that decision on January 22, 2001.

The plenary hearing took place over a period of four (4) days: January 30, 2001, January 31, 2001, February 14, 2001 and March 15, 2001. Testifying for petitioner were M.C., Michael B. Greene, John Galish and Katherine Crill. Testifying for respondent were N.S., Christopher Carter, Michael Kuchar, John Nowicky and John Galish. Various items, including Stipulations of Fact and documents more specifically described in the Appendix, were admitted into evidence.

After testimony concluded on March 15, 2001, the parties requested and I granted the opportunity to present their closing arguments in the form of written post-hearing submissions. I also allowed the parties to submit reply submissions, the last of which was received on April 10, 2001, after which the record closed.

Based on petitioner's Proposed Findings of Fact and Conclusions of Law as expressed in petitioner's initial post-hearing submission, petitioner requested relief which petitioner had not originally requested. The additional relief requested by petitioner was:

A.

1. An independent assessment of M.C. by a psychologist trained in adolescent development, mutually agreed to by the parties, and paid for by the Board, to determine: (a) whether M.C. poses a threat of harm to himself or others in a school setting; (b) M.C.'s willingness and motivation to participate in a traditional public high school setting; and (c) M.C.'s individual educational, psychological and social needs.

2. If this first assessment finds that M.C. does not pose a threat of harm and recommends M.C.'s return to a traditional public high school setting, then the Board shall pay for the same psychologist to conduct a second assessment with the Bergenfield High School Principal, M.C.'s parents, M.C., and any other high school staff or students chosen by the assessor, to determine: (a) whether any negative feelings relating to M.C.'s expulsion from or possible return to Bergenfield High School have been sufficiently mediated to allow M.C. to thrive in Bergenfield High School; and (b) whether M.C.'s return to Bergenfield High School or another traditional public high school should be conditioned on the provision of social services and supports to meet his individual educational, psychological and social needs.

3. If this second assessment recommends M.C.'s return to Bergenfield High School, then respondent is required to promptly reinstate M.C. to the appropriate grade level and academic program that meets the Core Curriculum Content Standards at Bergenfield High School.

4. If the second assessment does not recommend M.C.'s return to Bergenfield High School, then respondent is required to promptly locate, pay tuition for, and provide transportation to, a traditional public high school in another town where M.C. can be enrolled in the appropriate grade level and academic program that meets the Core Curriculum Content Standards.

5. If the second assessment recommends that M.C.'s return to Bergenfield High School or another traditional public high school be conditioned on the provision of social services and supports to M.C., then respondent Board shall provide services and supports appropriately provided within a second setting and refer M.C. to appropriate community-based providers for services that cannot be provided within the school.

6. If the first assessment does not recommend M.C.'s return to a traditional public high school, then respondent shall promptly comply with the Order set forth in paragraph C.

B. Alternatively, an Order setting side M.C.'s expulsion and requiring his placement in an appropriate alternative education program, mutually agreed upon by the parties, which meets his individual educational, social and psychological needs and meets the Core Curriculum Content Standards.

C. An Order requiring respondent Board to reinstate M.C. in a traditional public high school or enroll M.C. in an alternative education program, under paragraph B or C, as applicable, immediately.

D. An Order requiring respondent Board to assume all costs, including transportation, if needed, and responsibility for providing M. C. with a thorough and efficient public education as set forth above.

E. An Order requiring respondent Board to provide M.C. with home instruction pending his enrollment in a school program as set forth above, in an amount sufficiently to allow M. C. to satisfy credit-year curriculum requirements and to meet the requirements of the Core Curriculum Content Standards.

STIPULATIONS OF FACT

The parties entered into written stipulations of most of the facts in this matter. Those stipulations are reproduced *verbatim*, *post*:

1. M.C. is currently sixteen years old (DOB 7/19/84) and resides with his mother P.H., his stepfather and his siblings in Bergenfield, N.J.

2. During the 1999-2000 school year, M.C. was in the tenth grade at Bergenfield High School.

3. M.C. was never classified as eligible for special education and related services under the Individuals with Disabilities in Education Act and was never identified as a qualified individual with a disability under Section 504 of the Rehabilitation Act of 1973.

4. The incident which led to M.C.'s expulsion occurred on January 26, 2000.

5. The incident occurred in the commons area outside the school cafeteria. M.C. approached N.S., another student, from behind, and cut N.S.'s jacket across the back with a box cutter.

6. N.S. was not physically injured. After reporting to his classroom for his exam, N.S. reported the incident to John Nowicky, Assistant Principal.

7. M.C. was questioned by Bergenfield High School administrators and was found to have on his person three box cutters, one razor blade scraper, and a Swiss army knife. During questioning, M.C. admitted bringing the weapons to school and using the largest razor blade box cutter to cut the back of student N.S.'s jacket while

N.S. was wearing that jacket. The Bergenfield Police Department was notified.

8. Board Policy 5114, as contained in the Board's Policy Manual and in the 1999-2000 Parent/Guardian Student Handbook and Calendar, advised parents and students that the punishment for a weapons infraction is "[m]inimum 10 day HS [home suspension] with consideration for expulsion." The Handbook also defines expulsion as "permanent removal from school rolls."

9. M.C. was suspended from Bergenfield High School for ten days, pending further disciplinary action.

10. The Board held a discipline hearing on March 21, 2000. M.C. was represented by legal counsel. At the hearing, testimony was provided by Assistant Principal of Bergenfield High School John Nowicky, then Principal of Bergenfield High School Ross Medlar, Bergenfield Police Officer Christopher Carter, Superintendent Dr. John Galish, M.C., P. H., and M.C.'s stepfather J. H.

11. Superintendent Dr. John Galish recommended expulsion to the Board as the appropriate penalty for M.C. Dr. Galish's recommendation was based upon this belief that the offense was an egregious one which could result in someone being seriously injured or killed; his belief that M.C.'s action was premeditated and that he followed N.S. from one area to another; the fact that M.C. brought five weapons to school when he knew weapons were prohibited; and Dr. Galish's disbelief that M.C. intended to slash only at N.S.'s jacket, rather than at N.S. himself.

12. The Board adopted a resolution determining that M.C. "has engaged in conduct of a very serious nature (aggravated assault of a fellow student with weapons) which presents a danger to the safety and well-being of the entire school community," and that M.C. "has engaged in conduct which constitutes good cause for expulsion." The Board's resolution, dated March 21, 2000, expelled M.C. permanently from the Bergenfield Public Schools.

13. Board Policy No. 5114 requires, for every student who is suspended from the Board's schools, the provision of individual instruction commencing within two weeks of suspension or, in the discretion of the Superintendent, assignment to an alternate educational program. Under this policy, M.C. received approximately 23.75 hours of home instruction from the Board from February 16, 2000 through March 20, 2000 in the areas of English, Math, Science and Social Studies. M.C.'s home instruction was terminated by the Board upon his expulsion.

14. The Board has no policy which requires the provision of alternative education to any student following expulsion from the Bergenfield Public Schools. In addition, the Board does not operate a formal alternative education program.

15. As a result of the January 26, 2000 incident, juvenile charges were filed against M.C. for aggravated assault, third degree, and unlawful possession of weapons on school grounds, fourth degree. M.C. was adjudicated juvenile delinquent at a hearing on those charges, pleading guilty to a disorderly persons offense and to a fourth degree weapons charge. A thirty-day sentence in the Juvenile Detention Center was suspended and M.C. was sentenced to probation, to payment of court fines and $200 restitution to N.S., and to attendance and completion of the court's Service Learning Program. M.C. was also ordered to have no contact with N.S.

16. Prior to his expulsion, M.C. had been a student in the Bergenfield Public Schools since his seventh grade year. In seventh grade and eighth grade, M.C.'s final grades at the end of the year were as follows:

Seventh Grade		**Eighth Grade**	
English	D	English	E
Social Studies	C-	Social Studies	C-
Math	D	Math	E
Science	C	Science	E
Reading	D	Draw & Print	E
Writing Lab	B	Art	C+
Art	A	Computer	A-
Life Skills	B+	Study Skills	C
Tech	C-	Tech	C+
Music	B	Health	C-
Phys Ed	B-	Phys Ed	D
Health	B-	BSSP-Math	C+

M.C. was promoted to high school after retaking eighth grade English, Math, and Science in summer school and earning an A, B+, and A-1, respectively.

17. While a student at Bergenfield Middle School, M.C. was evaluated by the Board's Child Study Team to determine his eligibility for special education and related services. Upon completion of the evaluation, the Child Study Team conducted a meeting with M.C.'s stepfather on October 21, 1997 and concluded that M.C. was not eligible for special education and related services. According to the Eligibility/classification Conference Report prepared as a result of that meeting, the rationale for this decision was the Team's conclusion that M.C. was a student of Average to High Average intelligence. M.C.'s day to day functioning was not commensurate with his tested ability but appeared to be due to a lack of homework preparation and studying for tests. M.C. did not appear to have any learning disabilities or major emotional factors interfering with his ability to function in school at that time. The Child Study Team recognized the existence of past emotional factors which may have interfered with M.C.'s ability to perform, but there was no such interference at that time. M.C. did not exhibit any negative attention seeking or depression at the time of the evaluation. M.C.'s parents received their Parental Rights in Special Education.

18. M.C. entered Bergenfield High School in September 1998. In ninth grade, his midyear and final grades, with teacher comments, were as follows:

Midyear		**Teacher's Comments**
Writing Project Phase I	E	Missing Writing Project Work Grad off-track/Writ Proj
English	A	Good study/work habits Pleasure to have in class
Modern World History/Geo	C	Unprepared for class
Foundations of Algebra	C-	Inattentive in class
Lab Phys Science	C	Pleasure to have in class
Spanish	C-	
Artscope	D	
Phys Ed	B+	Absences may exceed limit

Final		**Teachers Comments**
Writing Project Phase I	E	
English	C-	Not working to capacity Inattentive in class
Modern World History/Geo	D	Not working to capacity Requirements not met
Foundations of Algebra	E	
Lab Phys Science	D	
Spanish	D	
Artscope	D	
Phys Ed	B+	
Health	C-	

19. M.C.'s ninth grade year included the following discipline history: two detentions for throwing Skittles candy in the cafeteria on 11/20/98: five day home suspension focusing profanity towards a teacher on 1/11/99; three day in-school suspension for inappropriate behavior on 3/10/99 (accused by female student of grabbing her crotch); one day in-school suspension for cutting class on 5/18/99; two one day in-school suspension in June 1999 for repeatedly missing detention; and five day home suspension for fighting with another male student by the railroad tracks.

20. During the first part of his tenth grade year, while still attending Bergenfield High School, M.C. was failing English, Algebra, and Computer Aided Drafting, and he received incompletes in U.S. History, Biology, and Spanish, and a C+ in Phys Ed. Tardiness,

absences, and possible yearly failure were noted under teacher comments on M.C.'s midyear report card.

21. Prior to the January 26, 2000 incident which led to his expulsion, M.C.'s tenth grade year included the following discipline history: detentions for cutting class on 9/28/99; one day in-school suspension on 10/13/99 for failing to report to detentions; two days in-school suspension for cutting classes on 11/5/99 and 11/9/99; four days in-school suspension for cutting classes, excessive tardiness, and inappropriate behavior in the cafeteria on 11/15/99; one day in-school suspension for cutting class on 11/29/99; four days in-school suspension for repeatedly cutting period six and cutting period 10 on 12/7/00; three days home suspension for possession of a stolen book bag on 1/4/00; and five days home suspension and police contact for breaking into another student's locker and taking his N.Y. Yankees hat on 1/11/00.

22. There was no referral (by M.C.'s parents or Board staff) to or consultation with the Child Study Team while M.C. was a student at Bergenfield High School. In December 1999, a letter was sent to the parents of M.C., [which read]:

> December, 1999
>
> To the Parents of [M.C.]
>
> The Bergenfield High School staff and administration is very concerned that your child has failed 3 or more classes.
>
> In the near future we will be referring your child to the Pupil Assistance Committee (P.A.C.). P.A.C. is comprised of teachers, administrators, guidance counselors and child study team personnel to serve as a resource to students and their families who are experiencing academic difficulty. Your presence at these meetings are essential to help remediate academic underachievement. Please call our Student Assistance counselor, Mr. Seamus Regan, at 387-3836 to arrange for a P.A.C. meeting appointment.
>
> We look forward to working closely with you.
>
> Sincerely,
>
> Ross. W. Medlar, Principal
> Michael D. Kuchar, Director of Guidance

In response to the letter, M.C.'s stepfather contacted Seamus Regan, Student Assistance counselor, regarding the scheduling of an appointment, and suggested to Mr. Regan that the meeting be scheduled after mid-term exams (January 24-26,2000), in order to

see how M.C. performed. Mr. Regan concurred with this suggestion.

23. The Board has never recommended that M.C. be placed in an alternative education program and the Board has never placed M.C. in an alternative education program.

24. As a result of a final decision by the Commissioner of Education awarding emergent relief to M.C., on September 26, 2000,the Board began providing M.C. with approximately eight and one half hours of home instruction per week at the public library. M.C. did not receive any credit for his tenth grade year as a result of his expulsion on March 21, 2000 and he is repeating tenth grade while on home instruction. M C. receives 1½ hours of instruction per subject per week in U.S. History, English and Basic Skills (English and Math) and 2 hours of instruction per subject per week in Foundations of Biology and Foundations of Algebra.

25. M.C. receives all of his home instruction from Naomi Ashner who holds a New Jersey State certification as a teacher of the handicapped.

26. Ms. Ashner reports that M.C. is very cooperative, working hard, completing all assignments, working independently, and participating in all discussions of material. Although M.C. was not issued a formal progress report, at the conclusion of the first marking period for this academlc year, Ms. Ashner awarded M.C. grades of Bs and B+s in all of his subjects.

27. The Board has provided payment for instruction for two students previously expelled by the Board who were subsequently placed in juvenile detention facilities. The decision to provide educational services to these students was made by the detention facility in consultation with the New Jersey Department of Education ("Department"). The Board initially rejected the Department's financial assignment of these two students to the Bergenfield school district, in light of their expulsions, and filed petitions of appeal with the Commissioner of Education. While pending before

the Office of Administrative Law, both appeals were withdrawn and the Board assumed obligation for these two students.

UNDISPUTED FACTS

While not stipulated, the parties do not appear to dispute the descriptions of the weapons M.C. brought to school on January 26, 2000. The photographs of their weapons are in evidence. These weapons were verbally described by Bergenfield Police Officer Christopher Carter. I **FIND** his testimony about these weapons as fact.

R-3 is a box cutter having a handle length of approximately five inches, and an extended razor blade length of approximately three inches. The box cutter includes buttons which enable the user to extend the blade out of the plastic sheath and to lock it in place.

R-4 is a box cutter approximately four to five inches in length, having a surgical steel razor blade which can be extended from the plastic sheath three quarters of an inch to one inch.

R-5 is a transparent plastic tombstone-shaped scraper having a razor blade inside, which can be released by a button which extends the blade out approximately one half of its length, exposing the entire sharp surface of the blade.

R-6 is a box cutter having an extremely sharp 1 to 1½ inches long stainless steel blade which extends at an angle from the plastic case.

R-7 is a Swiss Army knife having nine different tools, including a two inch blade, a two inch jagged teeth saw blade, a fish scaler blade, scissors, a screw driver/can opener to puncture holes, a one inch awe blade, a one inch nail file, a one inch long Phillips head screw driver and a one inch long fingernail cleaner.

Each weapon (R-3, R-4, R-5, R-6 and R-6), could be characterized as a deadly weapon capable of producing death or serious bodily injury.

Petitioner offered evidence as to M.C.'s behavior post-expulsion. I **CONCLUDE** that such evidence is immaterial. The issue presented is the legal propriety of the district's March 26, 2000 decision to permanently expel M. C. based on the information considered (or not considered) by the district at the time of the expulsion hearing.

It is undisputed and I **FIND** that for purposes of reporting to the New Jersey Department of Education, expulsion is defined as when a student was expelled from school and not recommended for placement in any other alternative program run by the district or other agency.

It is undisputed and I **FIND** that expulsion is an action which the Department of Education has recognized as available to local school districts.

It is undisputed and I **FIND** that Bergen County no longer operates an alternative education program and has not operated one since approximately 1997.

FACTUAL DISCUSSION AND ADDITIONAL FINDINGS OF FACT

Petitioner first contends that the record establishes that M.C. neither intended to harm N.S. or did harm N.S. As a result, argues petitioner, the punishment meted out by the district was unreasonably harsh. The district contends that the record does not establish that M.C. did not intend to harm N.S., but even if the record established that M.C.'s intent was only to damage N.S.'s property, the district's expulsion of M.C. was not unreasonably harsh. An analysis of the record as it bears on this subject follows.

M.C. testified in this connection that he was sitting in the lunch room at a table full of students, which included fellow student N.S. N.S. was asking him why he did not have a coat. M.C. told N S. he had no coat because he could not afford one. N.S., testified M.C., "was picking fun at me." According to the testimony of M.C., the other students at the table were laughing at M.C., which made M.C. feel humiliated and upset. Then the bell rang. Everyone left the lunch room. N.S. was wearing a South Pole down or "bubble" jacket, with an estimated value of $200. M.C. did not own a similar coat at that time. M.C. testified that N.S. could not see M.C. coming up behind him and could not defend himself. M.C. picked up the bottom of N.S.'s jacket with his left hand and slashed it. N.S. then turned around and asked him why he did that. M.C. testified that he did not respond and went to his next class.

When asked by his attorney when he decided to cut N.S.'s coat, M.C. testified at one point:

> It wasn't really a decision. It was sort of like, impulsive. It was - - I was right behind him - - I didn't follow him, we were going in the same direction and I just did it.

M.C. added that he was too upset and distraught to think about the consequences of his action at the time he cut N.S.'s jacket.

N.S. testified that he was not sitting with M.C. in the lunch room prior to the attack and made no remark to M.C. about his coat. He testified essentially that he did nothing to provoke the attack and did not know why M.C. slashed his coat.

According to N.S., he knew M.C. as an acquaintance and not as a friend. N.S. testified that he was walking from the commons to his next class. As he was walking, a person (not M.C.) came up to him and said "what's up fellows?", then N.S. felt something running from the middle of his back down. He turned around and he saw M.C.'s hand with something sharp in it. M.C.'s hand moved back. N.S. saw "little feathers." He took off one sleeve of the jacket and saw a five or six inch vertical gash. He turned to M.C. and said "you cut my coat. What the fuck, you cut my coat." According to the testimony of N.S., M.C. did not respond. Rather, M.C. walked away, "faster and faster."

N.S. testified that he got angry and put the coat in his locker. He then went to class. He was angry in his class and asked his teacher if he could be excused to go to the principal's office. N.S. retrieved his coat from his locker, went to the principal's office and told the principal what happened.

Police Officer Christopher Carter testified that he was called to the school on January 26, 2000 and was advised by Principal Medlar and Assistant Principal Nowicky that one student had his jacket cut by another student. Officer Carter testified he asked M.C. if he slashed N.S.'s coat. M.C. replied that he slashed N.S.'s coat in retaliation to comments that were said to him earlier about his clothing. M.C. did not describe to how N.S. had been wearing his coat. Officer Carter testified that he asked N.S. whether or not N.S. had said anything to M.C. about his coat and that N.S. stated that he did not. Furthermore, Officer Carter testified that N.S. told him that he was wearing his coat but it was not zipped up.

Asked about the condition of the coat when he saw it, Officer Carter testified that the cut in the jacket was in the outer layer of the jacket only. It did not penetrate through the inner layer.

M.C. admitted to Officer Carter having the weapons in his possession at school and to using the largest of the weapons, the box cutter with a handle length of approximately five inches and an extended razor blade length of approximately three inches, to slash at N.S.

Officer Carter testified that his mission was not to judge why the incident happened. He testified that he did not question any other students about the incident.

Officer Carter was confronted with an incident report he had prepared concerning the incident, which read in pertinent part:

> On January 26, 2000 (at 10:30 a.m.) I was assigned to the Bergenfield H.S. on the report of an assault that occurred. On arrival I spoke to principal Ross Medler, who stated that he had received information that M.C. had slashed a jacket belonging to N.S. He conferred with N.S. that his jacket was slashed while he was wearing it and walking in the Commons, the front hallway of the school, at approximately 9:50 a.m. . . . Mr. Medler asked (M.C.) about the incident. M.C. admitted slashing the jacket and told Mr. Medler he did so because earlier, the victim was making fun of him . . .
>
> At (1:30 p.m.), parent J. H. arrived at the scene. I gave M.C. his Miranda Warning in the written form which he and his father signed. M.C. stated early in the day, N.S. had made remarks about him which upset him. He stated when he saw N.S. at 9:50 a.m. in the Commons, he slashed the jacket attempting to damage the jacket and not to harm the victim. He stated he pulled the jacket away from the body of the victim. He did not want to answer why he had the box cutter and knife on him . . .
>
> I also interviewed N.S, age 15, and his mother . . . N.S. stated that while walking through the Commons, he felt M.C. pull at his jacket and discover the slash when he got to his class at which time he notified Mr. Medler immediately . . . N.S. stated that the slash did not penetrate the interior of the jacket . . .

Officer Carter was asked whether his usual practice would have been to include in his report that he had questioned N.S. about whether or not there was any interaction between him and M.C. earlier in the day before the incident. Officer Carter responded

that if N.S. had replied that there was not any interaction, he would not have felt it necessary to include that detail in his report.

Assistant Principal John Nowicky testified that N.S. had told him on January 26, 2000 that he was wearing his jacket when M.C. cut it. M.C. said nothing to Mr. Nowicky having to do with him making fun of M.C. about a coat. According to Mr. Nowicky, N.S. wrote a handwritten statement on January 26, 2000 which read:

> I got up from the cafeteria outside bench walked to class and (M.C.) slashed my coat and (student A, student B and student C) were there and saw it.

Mr. Nowicky testified that he asked N.S. why M.C. would have wanted to slash his jacket. N.S. told Mr. Nowicky that he did not know why.

When Mr. Nowicky asked M.C. what he had used to slash the jacket, M.C. reached into his pocket and pulled out a small razor knife. Subsequently, M.C. admitted that it was not the small razor knife he used but a sheetrock cutter with a long blade. Mr. Nowicky testified that M.C. told him that he came up from behind N.S. and just slashed the coat. M.C. did not tell Mr. Nowicky anything about N.S. wearing the coat over one shoulder and said nothing to him about lifting the bottom of the coat before slashing it.

Mr. Nowicky testified that he did not speak to any other students in the cafeteria or in the hallway about the incident or any remarks made before the incident. He testified that he interviewed the students that were identified by N.S. in N.S.'s January 26, 2000 statement. Those students said that they did not see anything and it gave Mr. Nowicky the impression that they just did not want to get involved.

Superintendent of Schools John Galish testified and I **FIND** that he has been the superintendent of the Bergenfield Board of Education since June 1992. He is responsible for the overall management and supervisor of the school district. For four years prior to June 1992, Dr. Galish was the superintendent of schools in another New York school district. He has been a superintendent of schools for 25 years and has been employed in the education field for 39 years. I found the testimony of Dr. Galish credible, due principally to his candor, straightforwardness and lack of evidence which contradicted his testimony.

Dr. Galish testified and I **FIND** that he had received interrogatories from petitioner. One of the interrogatories called for Dr. Galish to set forth the complete factual basis for denying the allegation in the petition that "M.C. did not intend to cause physical harm to N.S." Dr. Galish's answer to that interrogatory was:

> In the lunch room M.C. became upset and angry at another student who had made comments regarding M.C.'s coat. After they had left the lunch room while in the Commons, M.C. took out the largest weapon and slashed at the student because the student did not have the right to make fun of him.

Dr. Galish testified and I **FIND** that he never spoke with M.C. He also testified and I **FIND** that prior to M.C.'s expulsion, he did not receive a report from a school guidance counselor, school social worker, school psychologist or psychiatrist about M.C.'s intent or motivation at the time of the incident.

Michael Greene, PhD., is a developmental psychologist who was permitted to testify as an expert in the causes and prevention of school and youth violence. For almost thirty-five years, his work has involved research on the causes and correlates of youth violence, evaluations of intervention programs, writing in his field and contributions to policy discussions on school and youth violence. Since April 1998, he has served as the Executive Director of the Violence Institute of New Jersey at the University of Medicine and Dentistry of New Jersey. Through funding awarded by the United States Department of Education, Dr. Greene and the Violence Institute have been used as a technical assistance provider by the New Jersey Department of Education to develop strategies to address school violence within six school districts in the state of New Jersey. In addition, he has served as consultant to other school districts and has consulted with state government on policy initiatives in the areas of school and youth violence. Under his stewardship, the Violence Institute developed a tip sheet titled "Identifying and Responding to Adolescents Who May Harm Others," which they were asked to provide to the New Jersey Department of Education for distribution to every school in New Jersey.

While respondent attempted to discredit Dr. Greene's expertise in the area of courses and prevention of school and youth violence, I credited his testimony in these areas, but as I will explain, not others.

In Dr. Greene's opinion, M.C.'s intent was to damage N.S.'s jacket, but not to harm N.S. He testified that it would have been easy for M.C. to have injured N.S. had M.C. not exercised some restraint in using the largest of the box cutters to make the cut.

Dr. Greene testified that the most likely explanation for M.C.'s action was that he reacted out of feelings of anger or resentment or inadequacy of some kind to a perceived provocation, whether intended or unintended. He testified that when aggression or violence occurs between two adolescents, there is nearly always a precipitating event in a context that makes the behavior understandable, although not justifiable. Dr. Greene testified that this has been substantiated through micro-evolutionary studies of how fights and violent behaviors emerge.

Dr. Greene acknowledged that he never spoke with M.C. about the incident nor was there reference to any statement of M.C. utilized in reaching his conclusion. He admitted that his only communication with M.C. was a ten minute social conversation the morning of his testimony, and nothing in any of the materials he reviewed contained any information about the incident from M.C. himself.

In order to find as fact that M.C. only intended to damage N.S.'s coat, I would have to first credit M.C.'s testimony. Ample reason can be found to discredit that testimony. M.C. testified before me that the Swiss Army knife had been a gift from his father that he kept with him at all times. Yet, the issue of sentimental value was never raised to Board staff or before the Board in its hearing. Before me, M.C. testified that he had used the Swiss Army knife as a key ring, and that the police officer returned his keys when taking the knife into custody. However, Officer Carter and John Nowicky both testified credibly that there were no keys hanging from the Swiss Army knife. Dr. Galish testified that M.C. did not indicate to the Board that he was using the Swiss Army knife as a key chain. M.C. testified that N.S. had taunted him about his coat in the cafeteria in front of several other students, but M.C. presented no witnesses to this incident at his expulsion hearing. N.S. testified that he had not been in the cafeteria and had not spoken to M.C. M.C. demonstrated and testified that N.S. was wearing his jacket over one shoulder only. N.S. demonstrated and testified that he was wearing the jacket over both shoulders. M.C. testified he had met with Dr. Kuchar only twice. Dr. Kuchar testified credibly that he and M.C. had met numerous times during M.C.'s tenth grade year. Additionally, Dr. Galish testified credibly that at the Board hearing, M.C. initially testified that he had no discipline problems in school, then later in the hearing admitted that he had been disciplined for cutting class and stealing. Even then M.C.

was not being truthful. His disciplinary record was much more extensive than he admitted.

Those who have refuted M.C.'s testimony have not been demonstrated to have much to gain by their testimony. Petitioner has offered no reason for Officer Carter to fabricate that there were no keys on the Swiss Army knife. As to N.S., his tone and demeanor did not strike me as incredible and there is no evidence on the record to warrant more than speculation that his testimony was shaded by some possible fear of punishment for teasing M.C. about his coat.

I am not inclined to give much weight to Dr. Greene's opinion as to M.C.'s intent in attacking N.S. with a weapon. Dr. Greene's only personal contact with M.C. was in a ten minute social encounter between the two immediately before Dr. Greene took the witness stand. Additionally, none of the documents Dr. Greene reviewed contained a statement or affidavit from M.C. about the incident. Finally, Dr. Greene spoke to no school staff about the incident, nor did he speak to N.S.

I **FIND,** to the extent that such finding is material to the issues, that, at a minimum, M.C.'s slashing with the largest weapon he possessed was done with extreme indifference to the personal safety of N.S. For the reasons stated, I **FIND,** contrary to petitioner's suggestion, that the record does not establish that M.C. had no intent to injure N.S.

Petitioner appears to propose as fact that as of January 26, 2000 M.C. was without notice that school policy prohibited the possession of weapons at school and that expulsion could result for violation of that prohibition. The district counters that the evidence does not support such a finding.

It is important to note that petitioner does not claim that the disciplinary process employed by the district violated M.C.'s right to procedural due process or fundamental fairness. Therefore, the issue of what notice M.C. had that the possession of weapons was prohibited strikes me as largely immaterial.

For two reasons, I **FIND** that M.C. was aware as of January 26,2001 that weapons were prohibited at school and that expulsion could result from violation of the prohibition.

First, just a few days prior to January 26, 2001, the record establishes that on January 21, 2001, M.C. admitted to an incident in which one of his classmates brought a box cutter to school and used it to cut M.C.'s "super bouncer ball." Assistant Principal Nowicky took M.C.'s statement about the incident, which read:

> I and [named student] were hangin (sic) out yesterday and he I went to the dollar store in Foster Village. He stole a package of Box cutters. Then, Today (sic) He (sic) brought one out in study hall. I showed him my super bouncer, and he cut the ball, almost in half with the razor. Then, when he was about to start cutting my other one, Mrs. Schneider saw him and he gave it to me. I said it wasn't mine and gave it back to him. Mrs. Schneider said that one of us had to give it to Mr. Nowicky and I said I don't want to cause its not mine. So After (sic) She (sic) called Mr. Nowicky, [named student] said I'll take the blade out and put it under the desk and then we'll move seats so they don't check, and if they did they wouldn't find the blade. So I said O.K. and then he said let's get our stories straight so it doesn't look like we're lying. Then we said we "found" it in the Math hallway, without the blade so we wouldn't get in trouble. The only reason I went along with his story was because I didn't want to get in trouble, cause he said that it was mine, and it wasn't.

After this January 21st incident, Mr. Nowicky told M.C. that the possible penalties for having a weapon on school ground was "a ten day in-home suspension with a possible Board review."

Second, the record established that the district has developed a code of conduct through Policy 5114 and the Parent/Student Handbook. The handbook is mailed along with students' schedules shortly before each school year begins and the Assistant Principals speak with students at the beginning of each year regarding, *inter alia*, weapons and discipline. Although Mr. Nowicky could not say for sure whether or not M.C. was present for this address, M.C.'s name did not appear on the absentee list the day the address was apparently given.

The parties dispute the reason for M.C.'s possession of the Swiss Army knife (R-7). To recount, petitioner maintains that the knife had sentimental value to him as a gift from his father and that he was using it as a key chain. M.C. testified to that effect at the hearing before me. As noted, however, during his testimony before the Board, M.C. did not state that there was any sentimental value attached to the knife, nor did he say that he used it as a key chain. Furthermore, as noted, there was no evidence that when school officials confiscated the knife from M.C. that there were keys hanging from it or attached to it. As an aside, petitioner appropriately observes that it is misleading for respondent to note that M.C. did not tell Officer Carter that the knife had sentimental value as a gift from his father or that he was using it as a key chain. It is misleading in

light of Officer Carter's testimony that he asked M.C. "what he had (the weapons) for," and at that point, his father arrived and stated that he didn't want that question to be asked.

Mr. Nowicky testified that his understanding was that M.C. did not believe that a Swiss Army knife was prohibited in school, but there was no direct testimony in the hearing before me from M.C. that he believed that bringing a Swiss Army knife to school was not prohibited.

Based on all of the evidence, I **FIND** that M.C. was not using the knife as a key chain at the time he possessed it. Furthermore, even assuming that the Swiss Army knife was not a weapon, by his own admission, M.C. possessed four other weapons in school on January 26, 2000.

Another point of contention appears to be M.C.'s intent in possessing the 4 (four) box cutters.

M.C. testified that he brought the box cutters to school to show them off. He testified that he did not bring them to school thinking that he would use them on anybody and did not think that he would get expelled for just bringing them to school.

I disregard M.C.'s testimony because of inconsistencies with other evidence I find credible. I also disregard it because based on the statement he wrote in connection with the January 21, 2001 incident, it is obvious that he is quite capable of tailoring his accounts based on his perception of what negative consequences might result from the accounts he gives. To the extent the finding is material to the issues I must decide, I do not **FIND** as fact that petitioner's intent in possessing the weapons was to "show them off."

In addition to the reasons for the district's action in expelling petitioner found in the district's resolution (which is the subject of a stipulation), it is necessary to the proper disposition of this matter to flush out any and all other considerations taken or not taken into account by the district in reaching its decision.

I **FIND** that Dr. Galish had no first hand knowledge of the incident which occurred on January 26, 2000. He did not know what was going on in M.C.'s mind at the time of the incident. He was, however, aware that when the school bell rung, M.C. had to walk in the same direction of M.S. to get to his next class.

I **FIND** that Dr. Galish did not automatically consider expulsion when he heard about the incident. At the time, he considered discipline ranging from a suspension longer than ten days (which requires approval from the Board of Education) to expulsion.

I **FIND** that Dr. Galish's decision to expel M.C. was made by him as of February 8, 2000, at the point that he wrote to petitioner's parents informing them of the Board hearing. I further **FIND** that he made that decision prior to speaking with M.C. and without receiving reports or advice from anyone as to M.C.'s intent or motive or awareness of consequences of his actions.

I **FIND**, that in addition to testimony taken at the Board hearing, that the only documentary evidence which was introduced was a January 26, 2000 memorandum from Mr. Medlar to Dr. Galish and a January 26, 2000 "Discipline Incident Report." The memo from Mr. Medlar to Dr. Galish read:

> At approximately 9:55 a.m. on January 26, 2000, a student reported to Mr. Nowicky that his jacket had been slashed by M.C., grade 10, (DOB: 7/19/84) while going to period for exam.
>
> Mr. Nowicky notified me. After talking with the victim, Mr. Nowicky and I went to M's class and escorted him to my office. I informed him of the complaint. I searched him and Mr. Nowicky searched his book bag. I found three box cutters, one razor blade scraper, and one Swiss Army knife. (See photocopy).
>
> I called the police to report the incident and Mr. Nowicky called M's mother and step-father.
>
> The police arrived, read M's rights, took his statement, took possession of the weapons, and photographed the slashed jacket. I placed M. on a 10 day home suspension, 1/27/00 – 2/9/00.
>
> I request that you review this case for the possibility of additional penalty.

The "Discipline Incident Report," dated January 26, 2000, read, in part:

> (M.C.) slashed another boy's jacket, N.S., in the hallway in between exams. possession (sic) of a weapon, must make restitution plus Board review along with ten day H.S. starting 1/27, 28, 31, 2/1 through 2/8.

I **FIND** that no district guidance counselor, district social worker, district psychologist or district psychiatrist, testified at the Board hearing. I **FIND** that the

Board did not solicit nor did the Board receive any reports from such professionals prior to its decision to permanently expel petitioner without an alternative education program. I **FIND** that there was no evidence from any professional as to M.C.'s intent or motivations, his awareness of the consequences of his actions, or his potential for future dangerous behavior.

I **FIND** that the Board considered various terms of suspension but they were rejected by the Board as not severe enough. One of the trustees remarked that it was sad that expulsion would terminate M.C.'s educational opportunity. While there were discussions of other options available to an expelled student, such as changing residence and enrolling in another school district, Dr. Galish conceded that he was aware and I **FIND** that M.C. had lived in Bergenfield since seventh grade with his mother, stepfather and siblings and that M.C. had two younger siblings in the Bergenfield public schools.

I **FIND** that the Board did not consider an alternate education program for M.C. because, as Dr. Galish testified, it is "not a required option and because such programs can be very expensive." In light of the history of defeats of the school budget, Dr. Galish did not think an alternative education program was appropriate for an offense as egregious has having brought five weapons to school and using one of them to slash another student.

I **FIND** that the home instruction that M.C. presently receives does not include any instruction in world languages, any comprehensive health and physical education instruction nor any instruction in visual and performing arts. I **FIND** that those three areas are required as contained in New Jersey's Core Curriculum Content Standards.

I **FIND**, based on Dr. Greene's testimony, that expulsion without alternative education is at the far end of the punitive approach to school discipline, without consideration for psychological social or educational needs.

I further **FIND**, based on Dr. Greene's testimony, that expulsion without alternative education by a school district has many negative consequences for a student. These include: denial of educational opportunity; reduction of the chances that a youngster will lead a productive and fruitful life; denial of critical factors – attachment to school, attachment to caring adults, and engagement with positive peers – that protect against the youngster continuing to act in ways that are increasingly aggressive

or inappropriate, creation of resentment and stigma and deprivation of the opportunity to work on social development.

I further **FIND**, based on the testimony of Dr. Greene, that there are best practices recommended by experts in the field of school and youth violence for the handling by school administrators of incidents involving the possession and use of weapons in school. Those best practices include: removal of the weapon and removal of the student from the incident, analysis of the safety of the school community and risk of the youngster harming him or herself, non-judgmental psychological assessment of the context of the incident, the student's psychological background and the student's current psychological functioning, motivations, and intent with regard to possession of the weapons; inclusion of the student's parent and guardian and the analysis of the incident and assessment of the student, referral to the police for clear violations of the law, and providing the student with the opportunity to be in a structured educational setting which enables him or her to progress educationally and that addresses the particular behavioral deficits exhibited by the student.

I further **FIND**, based on the testimony of Dr. Greene, that home instruction is not an adequate substitute for placement in alternative school. Home instruction tends to be for fewer hours than an alternative school or regular school setting and, since violent behavior tends to occur when children are out of a structured situation, it increases the opportunity to engage in negative or violent behavior. Home instruction denies youngsters the critical opportunity to learn how to resolve conflict with other students in an appropriate way which can only be done *in vitro* with other people around getting into inevitable conflicts and learning how to resolve those conflicts. Finally, a student's interest and engagement in activities such as poetry or art can help reduce significantly the likelihood of further aggressive outing act behavior and these activities are typically not covered in home instruction, but are often promoted by alternative schools.

Petitioner proposed, as a finding of fact, that M.C. poses no danger to his school community and to himself. This proposed finding of fact is based principally on the testimony of Dr. Greene, who testified that he "could make a pretty good inference" based on the materials he had read. He also testified that the best general predictor of violent behavior is past aggressive and violent behavior. He testified that youngsters who are dangerous typically demonstrate a chronic pattern of hurting or attempting to hurt others.

I am not persuaded by Dr. Greene's testimony in this regard. He testified as to what "typically" occurs. He did not testify to that a dangerous youngster always has a chronic pattern of violence. I agree with the district that Dr. Greene incorrectly minimized M.C.'s history, which includes fighting with another student and grabbing the crotch of a female student. More important, no documents that Dr. Greene read contained any specific information from M.C. himself. Once again, it needs to be pointed out that Dr. Greene first met M.C. on the date of his testimony and engaged in only a ten minute social conversation. He never engaged in any therapeutic discussion with M.C.

Additionally, I reject Dr. Greene's testimony that there is absolutely no evidence that M.C. is a sociopath who is not bound by traditional psychological motivations. His opinion in that regard is not supportable. By his own admission, he never spoke to M.C. about anything more than basic social conversation shortly before he testified. There was no therapeutic relationship. He did not observe M.C. at any time. He did not observe him in a school setting. He did not speak with any school staff. He did not speak with any counselor seen by M.C. out of school. He read documents which contained nothing from M.C. about himself about his behaviors on January 26, 2000 or any other date.

Dr. Greene acknowledged that in the "extremely unlikely event" that the January 26, 2000 incident was not the result of an intended or unintended provocation, he would be "reluctant to make any predictions about what might happen in the future with regard to aggressive behavior."

Dr. Greene recommended that M.C. be provided with the opportunity to be in a structured educational setting which enables him to progress educationally and that M.C. be given help in resolving conflicts in a social setting. He testified that this "certainly can be done in an alternative school." If M.C. were to be considered for returning to Bergenfield High School in particular, Dr. Greene also recommended that a mental health professional conduct an assessment with the school principal, M.C.'s parents and M.C. as to whether any negative feeling that M.C. may have about being expelled, as well as any negative feelings school personnel may have about M.C., were sufficiently mediated so that M.C. could thrive in that environment. He admitted that in order for M.C. to return to Bergenfield High School, all parties (including school staff) would have to feel "it was feasible." However, it is clear and I **FIND** that at least up to the point of the hearing before me, the district is resolute in its belief that M.C. should not be in the schools of the district.

Dr. Greene clearly recommended that placing M.C. in an alternative school was "absolutely not" conditioned on his opinion that M.C. is not dangerous.

Dr. Greene does not rule out the possibility of M.C. "performing satisfactory, if not well, in a traditional or regular high school setting." He recommends, before return to a traditional high school, there be an independent assessment individually done, to determine M. C's willingness and motivation to participate in that kind of educational setting. I do not accept Dr. Greene's testimony as to the efficaciousness of his recommendations. In making his recommendations regarding M.C' need for alternative education, he did not speak to any Bergenfield High School staff member. He did not speak with any counselors M.C. may have consulted out of school, nor did he review any counseling records. Although testifying that counseling is an important component in dealing with violent youth, Dr. Greene admitted that he was not aware whether M.C. had been engaged in counseling since the time of his expulsion. The fact of the matter is that he has not been engaged in any counseling since that time.

Evidence was presented by the parties which addressed what, if any, counseling or other services were delivered to M.C. by the district prior to his expulsion. I **FIND,** based on the testimony, that he was not provided any psychological counseling while a student at Bergenfield High School. I further **FIND** that Bergenfield High School does not provide psychological counseling to its students.

Dr. Michael Kuchar (current Bergenfield High School principal) and M.C.'s guidance counselor during the 1999-200 school year testified credibly and I **FIND** that although M.C. did not have educational guidance counseling built into his schedule, Dr. Kuchar spoke with him numerous times regarding his grades and performance, including attending classes, not cutting classes while claiming to be meeting with Dr. Kuchar, devoting a certain amount of time to homework on a daily basis, taking advantage of the peer tutoring program, utilizing time management skills, seeking extra help from teachers, and assuming responsibility for his school performance before getting a job. Dr. Kuchar testified credibly and I **FIND** that he had eight to ten "informal" meetings with M.C., mostly occurring when M.C. would come to the guidance office to avoid being in a particular class he disliked. I **FIND** that Dr. Kuchar had no discussions with M.C. about any behavior issues that went on during his tenth grade year. I further **FIND** that Dr. Kuchar never met with or called M.C.'s parents, never recommended to M.C.'s parents that M.C. receive in-school or out-of-school counseling and never

discussed with M.C. or with his parents consideration of an alternative high school program while M.C. was student at Bergenfield High School.

Petitioner offered evidence, largely through the testimony of Acting Director Katherine Crill of the Department's Office of Special Support Services, that the New Jersey Department of Education published A Guide and Application for the Operation and Approval of High School Alternative Education Programs in November 1999 and Safe Schools Initiative in July 1994. It is without contradiction that both documents were distributed to all chief school administrators in the state of New Jersey. Both documents express the policies and positions of the New Jersey Department of Education. However, the guide does not suggest or mandate the creation of alternative education programs by local school districts in New Jersey and I so **FIND.** Furthermore, while the Department recognizes that, "for most districts," alternative education programs offer a viable option for destructive students, Dr. Galish testified that in his opinion, Bergenfield has successfully addressed the needs of students within its own high school, by providing individual support and has not found a need for alternative program.

With regard to the 1991 Safe Schools Initiative, the Department of Education recognized and I **FIND** that violent students and their families must be accountable for their behavior in the school environment and their rights must not supercede the rights of all students to a safe environment in schools.

Petitioner offered evidence concerning the number of alternative education programs run by local school districts. Evidence was also offered from which a fact finder could infer that students who attended county-based alternative education programs made significant academic and social gains in the alternative programs compared to their performances in their regular high schools. Additionally, petitioner produced statistical evidence from local districts on expulsion and removals to alternative education for reasons of violence (including weapons), vandalism, or substance abuse. In light of the conclusions of law I am reaching in this matter, I need not decide whether or not the statewide statistics are relevant to whether or not the district violated petitioner's right to equal protection or to a thorough and efficient education. The statewide statistics are not relevant to whether or not the district's actions with respect to petitioner were arbitrary, capricious or unreasonable. Disciplinary decisions are made by local school boards, not by the state. Local school boards have been vested with broad discretion in matters of pupil discipline, which will be discussed in the legal discussion portion of this Initial Decision. It is worthwhile to

note that the very statistics put forth by petitioner demonstrate, to the extent it is material, that less than half the high schools in the state have sent students into alternative education programs.

I agree with the district and **FIND** that M.C. brought five deadly weapons to school and that he knew that such action was against school policy. I **FIND** he clearly used the largest of these as a weapon to assault another student. I agree with the district and **FIND** that if M.C. did not intend to stab his classmate, his actions certainly could have resulted in injury. I further agree with the district and **FIND** that even if the fact is that the slashing by M.C. of the other student's coat was precipitated by a derogatory comment about his coat, such a violent response was excessive and unjustified. The situation which occurred, I agree with the district and **FIND,** was entirely avoidable.

LEGAL DISCUSSIONS AND CONCLUSIONS OF LAW

New Jersey's statutes governing discipline of pupils recite:

> Pupils in the public schools shall comply with the rules established in pursuance of law for the government of such schools, pursue the prescribed course of study and submit to the authority of the teachers and others in authority over them.
>
> [*N.J.S.A.* 18A:37-1.]

In 1995, the Legislature enacted *N.J.S.A.* 18A:37-2.2, which addressed assault with a weapon:

> Any pupil who commits an assault upon a teacher, administrator, board member, other employee of a school board or another student, with a weapon, on any school property, on a school bus, or at a school-sponsored function shall be immediately removed from the school's regular education program pending a hearing before the local board of education....
>
> Any student that is removed from the regular education program pursuant to this section shall be placed in an alternative education program. If placement is an alternative education program is not available, the pupil shall be provided home instruction or other suitable facilities and programs until placement is available. ... Nothing herein shall be construed as prohibiting the expulsion of a pupil.
>
> [Emphasis added].

The statute does not provide that there must be an alternative education program provided after the board hearing. In fact, the statute specifically allows a board to expel a pupil. New Jersey's current statutory and regulatory scheme does not explicitly address the provision of an alternative education following expulsion. In non-classified student discipline cases, the provision of alternative education is optional unless otherwise directed by the Commissioner of Education. *See Abbott v. Burke,* 153 *N.J.* 489 (1998), *opinion clarified* 164 *N.J.* 84 (2000) (Supreme Court would authorize state Commissioner of Education to implement alternative schools or comparable education programs aimed at reducing dropout rate, at request of individual schools or districts or as he himself might otherwise direct, in satisfaction of schools' constitutional obligation to provide thorough and efficient education). Respondent is not an "*Abbott*" school district.

Petitioner's first two arguments challenge the constitutionality of respondent's policy of permanent expulsion without the provision of alternative education. Such action, argues petitioner, violates petitioner's right to a thorough and efficient free public education by the education clause of the New Jersey Constitution of 1947 and the constitutional right to equal protection laws which has been recognized as included within the protection of Article 1, paragraph 1, of the New Jersey Constitution.

As a backdrop, normally in administrative proceedings, petitioners can attack the constitutionality of rules as applied, but they may not, as petitioner is attempting to do, mount facial attacks. *See* Lefelt, 37 *New Jersey Practice*, 107, § 3.8 (2000). Lefelt writes:

> Pure legal questions are exclusively reserved for the courts. Accordingly, an agency has no power to determine the constitutionality of a statute on its face. Agencies may not strike down statutes as being unconstitutional. Therefore, agencies are thought to be without jurisdiction to consider facial constitutional challenges to rules since these are also pure legal questions. . .
>
> [*Id.* at 108 (citation omitted).]
>
> When a facial challenge to a statute is begun before an administrative agency, the constitutionality of the statute cannot be decided. The agency may, however, either express its opinion on the constitutionality question or simply note its lack of jurisdiction to determine the matter. When a rule is facially challenged, by analogy the agency would similarly be precluded from declaring the rule unconstitutional. No administrative agency is authorized to decide pure legal questions.
>
> [*Id.* at 109.]

I am, of course, mindful of the New Jersey Supreme Court's decision in *Abbott v. Burke,* 100 *N.J.* 269, 299 (1985), in which it was noted:

> [in] previous education cases raising or implicating constitutional issues, [the New Jersey Supreme] Court has called for exhaustion of administrative remedies when this will serve to develop a fully informed factual record and maximize the soundness of determinations through the agency's expertise. [Citations omitted.]

The rationale underlying the rule was articulated in *City of Atlantic City v. Laezza,* 80 *N.J.* 255, 265 (1979), *quoted* in *Abbott, supra* at 297-298:

> (1) the rule ensures that claims will be heard, as a preliminary matter, by a body possessing expertise in the area; (2) administrative exhaustion allows the parties to create a factual record necessary for meaningful appellate review; and (3) the agency decision may satisfy the parties and thus obviate resort to the courts.

In *Abbott*, it was "apparent that the myriad, extraordinary and complex factual issues presented [would] cause the litigation to turn on the import of proofs that demand close and considered examination and evaluation." *Id.* at 300.

Such is not the case here. The issues presented, while undoubtedly of great importance, are neither myriad nor complex. The need for developing a fully informed and factual record which existed in *Abbott* and cases cited therein does not exist here given that most of the operative facts have been stipulated. Neither does the compelling need for agency expertise. I **CONCLUDE** that the issue of the constitutionality of the district's present exclusion from its disciplinary policy of an option for the provision of alternative education to permanently expelled students, whether described as an attack on the facial validity of the policy or as some mandamus-like demand for policy making, is a question for the courts and not the OAL to decide.

Alternatively, petitioner argues that respondent's action in expelling M.C. without the provision of alternative education was arbitrary, capricious or unreasonable.

Petitioner concedes that every board of education must be afforded the ability to maintain safety and order within the schools.

> There can be no doubt that the establishment of an educational program requires rules and regulations necessary for the maintenance of an orderly instructional program and the creation of an educational environment conducive to learning. Such rules and regulations are equally necessary for the protection of public school students, faculty and property. The power of public school officials to expel or suspend a student is a necessary corollary for the enforcement of such rules and the maintenance of a safe and orderly educational environment conducive to learning.
>
> *R.R. v. Shore Regional Board of Education*, 109 *N.J. Super.* 337, 343 (Ch. Div. 1987); *see also Goss v. Lopez*, 419 *U.S.* 565, 580 (1975) ("some modicum of discipline and order is essential if the educational function is to be performed").]

In this regard, petitioner bears the burden of proof and the standard is by a preponderance of the believable evidence. *Atkinson v. Parsekian,* 37 *N.J.* 143, 149 (1962).

As was said by the New Jersey Supreme Court:

> The test of whether agency action is arbitrary and capricious is essentially one of rational basis. Arbitrary and capricious action of administrative bodies means willful and unreasonable action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is [valid] when exercised honestly and upon due consideration even though it may be believed that an erroneous conclusion has been reached.
>
> Worthington v. Fauver, 88 N.J. 183, 204 (1982) quoting Bayshore Sewerage Co. v. Dep't of Environmental Protection, 122 N.J. Super. 184, 199 (Ch. Div. 1973.

The Appellate Division in *I.F.A. Ins. Co. v. Dep't of Insurance*, 195 *N.J. Super.* 200 (App. Div. 1984), at 208, expressed the test for arbitrary and capricious agency action thusly:

> If there is any fair argument in support of the agency's action or any reasonable grounds for difference of opinion among intelligent and conscientious officials, the decision is conclusively legislative, and will not be disturbed unless patently corrupt, arbitrary or illegal.

As one Commissioner of Education stated:

> [I]t is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner.

> *H.G. v. Monmouth Regional High School, Bd. of Educ.*, 91 *N.J.A.R.* 2d (EDU) 38, 42, *adopted in part, rejected in part*, State Bd. of Educ., 92 *N.J.A.R.* 2d (EDU) 364.

See also Kopera v. West Orange Bd. of Educ., 60 *N.J. Super.* 288, 296 (App. Div. 1960) and *L.B. v. Bd. of Educ. of the City of Elizabeth*, 95 *N.J.A.R.* 2d (EDU) 110, 114 (wherein the ALJ noted that "[a]ction of a local school board that lies with its discretionary power may not be upset [unless shown by a preponderance of credible evidence to be patently arbitrary, without rational basis or induced by improper motive]," citing *Kopera, supra* at 294).]

In *Thompson v. Morris Twp. Bd. of Ed.*, 89 *N.J. Super.* 327 (App. Div. 1965), at 332, the Appellate Division said:

> When such body acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable. The agency's factual determinations must be accepted if supported by substantial credible evidence.

In support of his position, petitioner cites several administrative decisions.

Petitioner cites *M.G. v. Washington Twp. Bd. of Educ.,* OAL DKT. EDU 6743-00 (Sept. 14, 2000), *adopted in part, rejected in part*, Comm'r (Nov. 6, 2000) (<http://lawlibrary.rutgers.edu/oal/search.html>). In that case, petitioner sought to overturn the expulsion without provision of alternative education of a 16-year-old student following two drug tests that showed he was under the influence of marijuana. Petitioner claimed the expulsion was arbitrary and capricious, in that reasonable suspicion did not exist to suspect he student was under the influence of drugs, the district had no parental consent to test him, and that the proceedings before the local board were procedurally deficient. The ALJ noted that "[e]xpulsion of a student is an extreme remedy and visits a most unfortunate penalty upon the student, and indeed, on his family." *Id.* at 2. The ALJ concluded that the board's action was not arbitrary and dismissed the challenge to the expulsion.

The Commissioner upheld portions of the Initial Decision as it related to reasonable suspicion and parental consent for drug testing, but reversed the ALJ's determination concerning the procedural fairness of certain aspects of the expulsion hearing. Specifically, the Commissioner was particularly concerned that:

> Notwithstanding the fundamental nature of an expulsion hearing, not only were petitioners dissuaded from attending the hearing and arguing on A.G.'s behalf, but there are also indications in the record that the Board may have deliberately failed to consider the viability of options other than expulsion, such as alternative educational programs, that might be suitable for him. (*See* Exhibit P-1, tape recording of Assistant Principal Spector's comments to A.G.'s parents, prior to the expulsion hearing, in response to their inquiries about what would happen at the hearing and various educational options for their son, including alternative program.) Thus, while the Commissioner is fully cognizant of his limited standard of review, *Thomas, supra, Kopera, supra,* he finds that, under these circumstances, the Board's decision to expel A.G. may not have been the result of sufficiently full deliberation, so as to warrant the extreme result of terminating his entitlement to a free public education in the district.
>
> [*Id.* at 23-24.]

Petitioner also relies on *C.S. v. Bd. of Educ. of the Twp. of Piscataway*, 97 *N.J.A.R.* 2d (EDU) 573, *affirmed*, State Bd., April 11, 1998, a case cited by the Commissioner in *M.G., supra*. *C.S.* involved the expulsion of a twelve-year-old student under that district's zero tolerance for drugs policy. The student, who was twelve years old and in the seventh grade and had no disciplinary record whatsoever, sold imitation LSD to a classmate. Following the incident, the district immediately suspended the student and put her on home instruction pending further disciplinary proceedings. Prior to those proceedings, the petitioner in that case requested an evaluation by the district's child study team, which conducted the evaluation and concluded that the incident was caused by a disability which would have made the student eligible for special education. Nevertheless, the district decided, after an expulsion hearing, to expel the student and consistent with district policy, provide alternative education which the district decided would take the form of home instruction.

Petitioner alleged that the expulsion was arbitrary, capricious or unreasonable, but the ALJ concluded otherwise. The Commissioner rejected that conclusion, concluding that the expulsion was unreasonable, citing several rationales. First, the student had no record of prior discipline. Second, the student was twelve years old and, according to the Commissioner, "a twelve-year-old cannot reasonably be expected to fully comprehend the implications of such a sanction. ..." *Id.* at 577. Third, "the Board failed to consider, investigate and effectively utilize the local and county-based alternative education programs that are available." *Id.*

The third case petitioner relies on is *Scher v. Bd. of Educ. of the Borough of West Orange, Essex County,* 1968 *S.L.D.* 92, which addressed the propriety of a

twelfth grader's expulsion as a result of his involvement "in an altercation with a teacher." *Id.* In *Scher*, the Commissioner was called upon to decide "whether a public school pupil whose expulsion is under consideration was entitled to a hearing, and if so, what form a hearing must take." *Id.* at 94. The Commissioner held that a hearing was required and proceeded to list the procedures which must be employed at the hearing. It was noted in *Scher* that prior to the expulsion, the district required that the student be re-examined by the child study team. The parents refused. The Commissioner held that "respondent's requirement of a mental health evaluation is a proper exercise of its statutory authority." *Id.* at 96. The Commissioner went on further to opine:

> Termination of a pupil's right to attend the public schools of a district is a drastic and desperate remedy which should be employed only when no other course is possible. It involves a momentous decision which members of a board of education, most of whom have had little specific training in education, psychology, or medicine are called upon to make. The board's decision should be grounded, therefore, on competent advice. Such advice can be obtained from its staff of educators, from its school physician and school nurse, from its psychologist, psychiatrist, and school social worker, from its counsel, and from other appropriate sources. The recommendations of such experts are an essential ingredient in any determination which has as significant and far-reaching effects on the welfare of a pupil as expulsion from school. It is obvious that a board of education cannot wash its hands of a problem by recourse to expulsion. While such an act may resolve an immediate problem for the school, it may likewise create a host of others involving not only the pupil but the community and society at large. The commissioner suggests, therefore, that boards of education who are forced to take expulsion action cannot shrug off responsibility but should make every effort to see that the child comes under the aegis of another agency able to deal with the problem. The Commissioner urges boards of education, therefore, to recognize expulsion as a negative and defeatist kind of last-ditch expedient resorted to only after and based upon competent professional evaluation and recommendation. In the case under review, the Commissioner calls attention to the fact that although the Board ordered an evaluation of petitioner by its mental health team, it made its determination with respect to his status <u>before</u> such an examination and the recommendations emanating therefrom could be accomplished. The Commissioner suggests that the decision should have been left open until after it had received the results of the examinations and the recommendations made by the examiners.
>
> [*Id.* at 96-97. Emphasis mine.]

The Commissioner upheld Scher's expulsion, noting that the procedures used to expel him were "consistent with the law." *Id.* at 97.

The State Board of Education remanded the proceeding to the Commissioner to enable petitioner to present evidence tending to disprove that the assault at issue occurred. The State Board was concerned with "ambiguities in the record" as to whether or not he had been allowed to present such evidence to the local Board or the Commissioner.

The district correctly notes that every board of education must be afforded the ability to maintain safety and order within the schools and the high burden petitioner bears in establishing arbitrary, capricious or unreasonable action. The district opines that the expulsion was certainly reasonable in light of M.C.'s behavior, his awareness of the prohibition against weapons in school and the possible penalties for such possession and assault. The district also notes that state law requires removal from school for assault with a weapon. *N.J.S.A.* 18A:37-2.2.

As observed by the district on page 15 of its April 3, 2001 post-hearing brief:

> Given M.C.'s self-admitted behavior, the Board was entirely justified in expelling him. The courts have routinely upheld expulsions that were warranted. See, *e.g., M.G. v. Washington Tp. Bd. of Educ.* OAL Dkt. No. EDU 6743-00S (September 19, 2000) (expulsion for being under the influence of marijuana); *K.W. v. Bd. of Educ. of the Lower Camden County Regional High School District No. 1*, OAL Dkt. No. EDU 6129-99 (February 4, 2000) (expulsion for telephoning a bomb threat to the school), adopted as modified by the Commissioner (March 20, 2000); *P.S. v. Bd. of Educ. of the City of Atlantic City*, OAL Dkt. No. 10886-98 (June 23, 1999) (expulsion for group fight with bricks and sticks), adopted by the Commissioner (August 4, 1999); *W. W. v. Bd. of Educ. of Penns Grove-Carneys Point Regional School Dist.*, OAL Dkt. No. EDU 2059-98 (April 8, 1998) (expulsion for profanity and for shoving two coaches), adopted by the Commissioner (May 22, 1998); *K.O.H. v. Bd. of Educ. of the Tp. of Edison*, 95 *N.J.A.R.* 2d (EDU) 27 (1995) (expulsion for assault on teacher), adopted by the Commissioner, affirmed by the State Board, 96 *N.J.A.R.* 2d (EDU) (1996). When viewed in light of the lesser actions that resulted in expulsion in the aforementioned cases, M.C.'s expulsion was justified . . .

Although not expressed in its post-hearing submissions, it is fair to say the district takes the position that to the extent it recognized a "duty to administer the procedures for diagnosis and classification of pupils who give evidence of emotional disturbance or social maladjustment" [*Scher, supra,* at 96], but for petitioner's suggestion (with which the District agreed) that the December 1999 referral to the P.A.C. be postponed pending M.C.'s performance on the mid-term examinations, the district would have complied with that duty.

I **CONCLUDE** that while the failure to provide M.C. with an alternative education following his permanent expulsion may be an open constitutional issue – and one that I am without jurisdiction to resolve – such failure was not arbitrary, capricious or unreasonable, given, among other facts, that alternative education following expulsion is not expressly mandated by statute or regulation. This district decided not to establish post-expulsion alternative education programs. The district advanced a rationale basis for this policy. Under the law, I may not substitute my judgment or the wisdom of this policy for the district's.

A more in-depth analysis is required when assessing petitioner's argument that the expulsion of M.C. in and of itself – without regard to the issue of the provision of an alternate education program – was arbitrary, capricious or unreasonable.

Only one month prior to the incident which led to M.C.'s expulsion, the district was undeniably and undisputedly "very concerned," (to quote its letter to petitioner of December 1999) about M.C. The district expressly believed it appropriate to refer him to a committee that included Child Study Team personnel.

Despite this concern, when it came time to deliberate cessation of all educational services to M.C., no resort whatsoever was made by the district to the Child Study Team and/or other appropriate professionals, who could have evaluated M.C. and could have advised the district as to their conclusions and recommendations.

Judging from the testimony of Dr. Galish, the prospect of soliciting advice from these professionals did not even occur to him or the Board. That M.C. was found ineligible for special education and related services two years prior to the incident does not dilute the strength of this point, in that the lack of eligibility in October 1997 did not stop the district from being "very concerned" about M.C. in December 1999. The district's apparent position that petitioner impeded the district in discharging its duty to refer M.C. for a Child Study Team evaluation, and the veiled insinuation that the district, therefore, could, in effect, wash their hands of him, is untenable. Given the obvious "red flags" exhibited by M.C. and the district's concern that he might be classifiable as of December 1999, prior to permanently expelling M.C., the district had a legal obligation to insist on evaluations. If the parent refused, the district could have filed for due process pursuant to *N.J.A.C.* 6A:14-2.7. Finally, that petitioner is not requesting evaluations for the express purpose of determining M.C.'s eligibility for special

education and related services does not relieve this tribunal of ordering these evaluations if the interest of justice so requires.

While the district may understandably have felt frustrated with M.C.'s history of disciplinary actions and suspensions, given the evidence possessed by the district that M.C. may have been disabled, given the utter absence of other appreciable attempts at intervention, I **CONCLUDE** that the district's failure to consult with appropriate sources before permanently expelling M.C. without an alternative education program was arbitrary, capricious and unreasonable.

In short, a black cloud looms over the decision of the district. Sufficient evidence exists to believe the district has illegally imposed the educational equivalent of capital punishment upon a child with disabilities whose behavior on January 26,2000 could have been a manifestation of those disabilities. Until that determination is made by those professionals competent to make it, the decision should not be allowed to stand. I **CONCLUDE** the presumption that the district acted correctly has been overcome and that petitioner met its burden of proof.

I **CONCLUDE** that in an expedited manner, the district should conduct evaluations consistent with *N.J.A.C.* 6A:14-1.1 *et seq.* to determine whether M.C. was a child with a disability before the behavior that precipitated the disciplinary action occurred. If the evaluators conclude that M.C. was a child with a disability, the district should follow the disciplinary procedures for classified students embodied in *N.J.A.C.* 6A:14-2.8, including a determination of whether the behavior precipitating his expulsion was a manifestation of a disability. I further **CONCLUDE** that the evaluations should include assessments by the appropriate mental health professionals as to whether or not M. C. presents a continuing danger to himself, others or to the orderly and safe operation of the school. Pending the evaluations, I **CONCLUDE** that the district should continue petitioner on home instruction in a manner consistent with the Commissioner's September 15, 2000 Decision on Motion. If the evaluators conclude that M. C. was not a child with a disability, I **CONCLUDE,** setting aside the constitutional issues as I must, that the expulsion is not arbitrary, capricious or unreasonable.

ORDER

1. Petitioner's appeal for a Declaratory Ruling that the district's expulsion of M.C. violated M.C.'s right to a thorough and efficient education under Article VIII, Section IV of the New Jersey Constitution is hereby **DENIED** for lack of jurisdiction.

2. Petitioner's appeal for a Declaratory ruling that the district's denial of an alternative education program to M.C. violated M.C.'s right to a thorough and efficient education under Article VIII, Section IV of the New Jersey Constitution is hereby **DENIED** for lack of jurisdiction.

3. Petitioner's appeal for a Declaratory Ruling that the district's expulsion of M.C. was arbitrary, capricious or unreasonable is **GRANTED.**

4. Petitioner's appeal for a Declaratory Ruling that the district's denial of an alternative education program to M.C. was arbitrary, capricious or unreasonable is **DENIED.**

5. Petitioner's appeal for a Declaratory Ruling that the district's expulsion of M.C. violated his right to equal protection as guaranteed under the New Jersey Constitution is hereby **DISMISSED** for lack of jurisdiction.

6. Petitioner's appeal for an Order setting aside the expulsion of M.C. and requiring respondents to immediately assess M.C.'s alternative education needs and to identify an appropriate alternative education program for M.C. that meets the Core Curriculum Content Standards is hereby **DENIED.**

7. Petitioner's appeal for an Order expunging all record of M.C.'s expulsion from his school records is hereby **GRANTED.**

8. In an expedited manner, the district shall conduct evaluations for the purpose of determining whether prior to January 26, 2000, M.C. was a child with a disability within the purview of the

Individuals with Disabilities Education Act (IDEA) and other applicable statutes and regulations.

9. The evaluations shall include an assessment(s) as to whether M.C. presents a continuing danger to himself, others or the safe and orderly operation of the school.

10. If the district concludes from the evaluations and recommendations that M.C. was classifiable, the district shall proceed in accordance with the IDEA and other applicable statutes and regulations and discipline M.C. in accordance with the special provisions governing the discipline of classified students.

11. Pending the above determinations, the district shall continue to provide M.C. with the quality and quantity of home instruction consistent with the Commissioner's September 15, 2000 Decision on Motion.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 25, 2001
DATE

Michael L. Ravin
MICHAEL L. RAVIN, ALJ

Receipt Acknowledged:

5/31/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

JUN - 4 2001
DATE

OFFICE OF ADMINISTRATIVE LAW

jrp

APPENDIX

LIST OF WITNESSES

For Petitioner:

M.C.
Michael B. Greene
John Galish
Katherine Crill

For Respondent:

N.S.
Christopher Carter
Michael Kuchar
John Nowicky
John Galish

LIST OF EXHIBITS

P-1	January 5, 2001 letter to Elizabeth Athos from Janice Conti
P-2 ev	Curriculum vitae of Michael B. Greene
P-3 ev	Discipline Incident Report, dated January 26, 2000
P-4 ev	November 1999 "A Guide and Application for the Operation and Approval of High School Alternative Educational Programs"
P-5 ev	July 19, 1994 "Safe Schools Initiative"
P-6 ev	June 2000 report on "Violence, Vandalism and Substance Abuse in New Jersey Schools 1998-1999"
P-7 ev	Table 6 "Actions Taken in Response to Incidents, 1998-1999"
P-8 ev	January 26, 2000 memo to J. Galish and R. Crill from R. Medlar
R-1 ev	January 23, 2000 handwritten statement to "To Whomever It May Concern" from M.C.

R-2 ev	January 31, 2000 supplemental statement by Officer Christopher Carter
R-3A ev	Polaroid photograph of box cutter
R-3B ev	Polaroid photograph of box cutter with blade extended
R-4A ev	Polaroid photograph of razor knife
R-5A ev	Polaroid photograph of scrapper with razor blade
R-6A ev	Polaroid photograph of box cutter
R-7A ev	Polaroid photograph of Swiss Army knife
R-8 ev	January 26, 2000 handwritten statement from N.S.

J-1 ev	Stipulations of Fact
J-2 ev	Stipulation of Fact No. 22
J-3 ev	Stipulation of Fact No. 27

OAL DKT. NO. EDU 07381
AGENCY DKT. NO. 222-6/00

P.H. AND P.H., on behalf of minor child, M.C.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Both parties submitted exception and reply arguments.

BOARD'S EXCEPTIONS/PETITIONERS' REPLIES

The Board initially contends that the Commissioner should disregard the additional requested relief set forth at pages 6 through 8 of the Initial Decision, in that these requests were never pled and petitioners never sought to amend their pleadings pursuant to *N.J.A.C.* 1:1-6.2. Rather, the relief sought by petitioners should, argues the Board, be limited to that which is pled in the Verified Petition of Appeal. Therein, petitioners do not seek to have M.C. evaluated by a psychologist but, rather, to assess his alternative education needs so as to identify an appropriate alternative education program. (Board's Exceptions at 2) The Board points out that the petition does not seek M.C.'s placement in a public school setting. Although the Board acknowledges that the rules of Superior Court allow judgments to include relief to which a party is entitled, even if not pled, such relief is granted only where the parties have an adequate opportunity to be heard as to the relief granted. Here, the Board contends:

> Petitioner[s were] given the opportunity to pursue issues regarding special education and specifically rejected that opportunity. Certainly, one opportunity available to the Petitioner[s] was a due process hearing seeking to have M.C. evaluated to determine whether he was eligible for special education and related services. That evaluation could have included a psychological evaluation. However, the Petitioner[s] chose not to pursue that avenue, and specifically rejected this avenue when questioned by the court. The Board could not have foreseen that the court *sua sponte* would have raised the issue previously rejected by the Petitioner[s]. If special education were an issue in this case, the Board would have put on different witnesses and addressed those issues. As it stands, the Board was not given that opportunity. (*Id.* at 2-3)

In reply, petitioners assert that, indeed, they put the Board on notice that they were seeking M.C.'s return to a traditional public school setting as an alternative form of relief. (Petitioners' Reply at 2) Specifically, in her opening statement at the plenary hearing, petitioners' counsel so requested. Although the Board emphatically objected to this alternative request being raised at the start of the hearing, the Administrative Law Judge (ALJ) overruled the objection, stating, *inter alia*, that the Board would be permitted more time, if necessary, for additional investigation so as to allow it to meet this claim. (*Ibid.*, *citing* to Tr. 1/30/01 at 18) Moreover, petitioners reason, that the OAL rules for amending pleadings are liberal, and since the Board was clearly put on notice of their alternative relief, yet did not make any requests for the additional time offered to it by the ALJ, it cannot claim to be prejudiced by this request. (*Id.* at 3) Moreover, petitioners argue that while they did not raise special education claims in this matter, they never waived their rights under the Individuals with Disabilities Education Act (IDEA). To the extent local boards have an affirmative "child find" obligation imposed by IDEA, the ALJ's identification of M.C. as potentially eligible for special education services obligates the Board to conduct such an evaluation. Further, petitioners add that since M.C. is still of an age eligible for special education services and is "still within the time period in which

he is subjected to expulsion" (*id.* at 4), the ALJ's recommendation for his evaluation constitutes a "request" under IDEA and, therefore:

> P.H. specifically authorizes and requests the Board to conduct a full and individual evaluation of M.C. to determine his eligibility for special education and related services, and asks that the Commissioner direct the Board to conduct such an evaluation as required by IDEA. Based on the request of the ALJ and P.H. for M.C.'s evaluation while he is subjected to expulsion, the Board and the Commissioner have no discretion but to provide such an evaluation. (*Id.* at 5)

The Board next reiterates its position that M.C.'s intent with respect to the slashing incident is irrelevant; "[t]he fact remains that N.S. could have been gravely injured as a result of M.C.'s actions." (Board's Exceptions at 3) Further, since the ALJ found that the record did not support the conclusion that M.C. did not intend to injure N.S., "whether Dr. Galish recommended expulsion without ascertaining M.C.'s intent is not relevant to the ultimate issue of discipline." (*Id.* at 5) Moreover, although the ALJ found that P-3 and P-9 were the only documents introduced at M.C.'s hearing prior to expulsion, the Board clarifies that the testimony reflects that these two documents were the only reports of the incident prepared for the hearing, but were not the only two documents. (*Id.*) Additionally, the Board underscores that there is no legal requirement that district guidance counselors, social workers or school psychologists testify at a board hearing. Neither are local districts required to perform child study team (CST) evaluations prior to expulsion of a noneducationally disabled pupil. (*Ibid.*)

To this, petitioners respond that although M.C.'s intent or motivation is immaterial to their claim that he is constitutionally entitled to alternative education after expulsion, they nevertheless maintain that the Board's knowledge of M.C.'s intent or motivation *is* relevant to their claim that the Board acted arbitrarily and capriciously. (Petitioners' Reply at 6) In this connection, petitioners contend that the Board's failure to solicit testimony or reports

from any district guidance counselor, social worker or school psychologist prior to resolving to permanently expel M.C. constitutes a substantive deficiency. (*Id.* at 8)

The Board next asserts that the ALJ placed undue weight on Dr. Greene's testimony, in that such testimony was "generalized and not at all specific to M.C." (Board's Exceptions at 7) Moreover, the "best practices" that Dr. Greene addressed in testimony, have not, according to the Board, been adopted by the Commissioner, State Board or New Jersey Courts. The Board underscores that it need only act in a manner which is not arbitrary or capricious. (*Id.* at 8)

In reply, petitioners urge that Dr. Greene's testimony regarding the ill effects of expulsion be credited, inasmuch as the Board has introduced no testimony or documentary evidence to support the proposition that expulsion has any deterrent effect on the behavior of other students. (Petitioners' Reply at 10) Petitioners reason that a failure to employ recognized "best practices" is arbitrary, capricious and unreasonable when that failure results in a student's permanent expulsion. (*Id.* at 11)

The Board's exceptions further assert that the ALJ ascribed to it a position which is not supported by the within record. Specifically, the ALJ concludes "that the Board implicitly argued that M.C.'s father's request to put off scheduling a Pupil Assistance Committee ("PAC") meeting until after mid-term exams was a means of circumventing District responsibility and washing the Board's hands of M.C." (Board's Exceptions at 8) However, the Board argues that the parties herein stipulated to the existence of a referral letter (J-2), as well as M.C.'s father's request to postpone action until after his exams. The PAC meeting did not take place because M.C. was suspended during the course of the mid-term exam period. (*Ibid.*) Moreover, the Board clarifies that the reason for the PAC referral was based on M.C.'s three failures for the

first marking period, and had nothing to do with his behavior in school or his potential for being classified. (*Id.* at 8-9) To the extent the ALJ concludes that the Board had an obligation to evaluate M.C. for special education services before it expelled him simply because he had been referred to the PAC for experiencing academic difficulties, the Board asserts that the ALJ's position is not supported by the law. (*Id.* at 9) Here, the Board underscores that the PAC is designed for regular education students who have not been determined eligible for special education services. While the Board acknowledges there may be instances where a PAC referral precedes a student's ultimate referral to the CST pursuant to a district's "child find" obligations, "there is no provision *** that suggests that a PAC referral requires a school district to make a determination of eligibility for special education services where there is a pending disciplinary hearing." (*Id.* at 9-10) Further, the Board argues:

> Under the IDEA, a regular education student facing disciplinary action is not entitled to the protections of the special education laws if the school district did not have knowledge that the child was a child with a disability. (citations omitted) *** (*Id.* at 11)

> In this case, there is no evidence to suggest that the Board had "knowledge" that M.C. may be a student with a disability un accordance with 34 C.F.R. § 300.527. Accordingly, M.C. was appropriately subjected to the same disciplinary measures applied to students without disabilities who engage in behaviors in violation of Board rules of conduct. *** (*Id.* at 13)

To buttress its claim to a lack of knowledge, the Board indicates that M.C. was not referred to the PAC for violent or disruptive behavior or a suspected disability. Additionally, pursuant to its "child find" obligations, M.C. had already been referred for an evaluation by the Board's CST two years before his expulsion and determined not eligible for special education services. Finally, the Board notes that M.C.'s parents never disputed or challenged the CST's determination that M.C. was not eligible for special education, never requested a due process

hearing, or additional evaluations. (*Id.* at 14) Thus, the Board concludes that it has been "profoundly prejudiced" by its lack of "opportunity to present testimony and documentation at the hearing to address this post-hearing issue." (*Id.* at 15)

Petitioners view the Board's argument in this regard as a concession that "it took no action whatsoever in response to M.C.'s increasingly inappropriate behavior in school, which culminated in his expulsion." (Petitioners' Reply at 11) Petitioners contend that the stipulated facts demonstrate that M.C. had a "troubled record" both at Bergenfield High School and Bergenfield Middle School; yet, M.C. did not receive any physiological counseling and his counselor did not discuss behavioral issues with him or recommend that his parents get counseling for him. Therefore, petitioners maintain that the Board's imposition of the harsh remedy of expulsion before attempting less drastic interventions, as well as its failure to refer M.C. to an alternative education program before he exhibited behavior which gave rise to his expulsion is arbitrary, capricious and unreasonable. (*Id.* at 12)

PETITIONERS' EXCEPTIONS/BOARD'S REPLIES

Petitioners take issue with the ALJ's finding that the Department of Education's publication, *A Guide and Application for the Operation and Approval of High School Alternative Education Programs (November 1999)* (*Guide*), '"does not ...mandate the creation of alternative education programs by local districts in New Jersey .'" (Petitioners' Exceptions at 3, citing to Initial Decision at 30) To the contrary, petitioners contend that Department policy supports and recommends the creation and use of alternative education programs for local districts. (*Id.*)

The Board counters that the *Guide* discusses the merits of alternative educational programming and provides necessary guidance for a local board's application for approval of

such a program, but does not suggest that all local districts in New Jersey create alternative education programs. (Board's Reply at 2)

Petitioners next except to the "ALJ's oversight in not making an explicit finding that Dr. Greene is an expert in the area of the causes and prevention of school and youth violence." (Petitioners' Exceptions at 6) They also object to the ALJ's rejection of Dr. Greene's opinion that: (1) M.C. poses no danger to his school community and to himself; (2) placement in alternative education would be appropriate for M.C.; and (3) M.C. most likely acted out of feelings of anger, resentment, inadequacy or perceived provocation. (*Id.* at 7-8)

To this, the Board counters that, indeed, the ALJ specifically noted that Dr. Greene was permitted to testify and as an expert in the causes and prevention of school violence. (Board's Reply at 3) Furthermore, since Dr. Greene admitted that he did not speak to M.C. until he had a 10-minute social conversation with him prior to his testimony, and that he never reviewed any documents about the incident in question, the ALJ properly credited his supposed "expert" opinions. (*Ibid.*)

Petitioners also take exception to the ALJ's failure to rule on any of their constitutional claims. Contrary to the ALJ's finding, petitioners maintain that the Commissioner has jurisdiction to decide these issues. Petitioners argue that the ALJ "is simply incorrect" in describing their constitutional claims "as either 'an attack on the facial validity of [the Board's disciplinary] policy or as some mandamus-like demand for policy making.'" (Petitioners' Exceptions at 10, citing to Initial Decision at 33) Petitioners herein clarify that their challenge is "clearly on the constitutionality of the Board's action *as applied* to M.C., [which] is inextricably linked to an examination of the legality of the Board's expulsion of M.C. without alternative education." (emphasis in text) (*Id.* at 10)

The Board, however, contends that petitioners' argument is a fallacy, in that their constitutional attacks are *not* unique to M.C. and could be applied to any student in New Jersey who is expelled without alternative education. (Board's Reply at 4) The Board reasons that petitioners have attacked the constitutionality of various State statutes, and the administrative courts are not the appropriate forum for determining the constitutionality of these State statutes.

Petitioners additionally claim that the ALJ applied the wrong standard of review for determining M.C.'s entitlement to an education. That is, petitioners assert that the "arbitrary, capricious and unreasonable" standard is not applicable herein, since a student's fundamental rights are at issue:

> Because a fundamental right is at issue, every instance of long-term suspension and expulsion must be examined under a fundamental rights analysis, requiring the weighing of the governmental and individual interests involved and a determination of the narrowest means to achieve the governmental interest.*** (Petitioners' Exceptions at 11)

The Board, however, argues that the arbitrary, capricious and unreasonable standard is routinely applied to expulsion cases, and case law holds that there is no need to explore constitutional issues when the *Kopera, supra,* standards are met. (Board's Reply at 5)

Petitioners next take exception to the ALJ's Interlocutory Order, dated January 5, 2001, (dismissing the Commissioner of Education and the State Board of Education as respondents) and to the ALJ's Interlocutory Order, dated January 9, 2001, (denying petitioners' request that he take judicial notice of a factual finding in *Abbott v. Burke*, 153 *N.J.* 480 (1998)), seeking the reversal of the respective Orders. (Petitioners' Exceptions at 11-13)

In reply, the Board argues that petitioners fail to note that both Orders were subject to interlocutory appeal, and both Orders were affirmed by the Commissioner on January 22, 2001 and January 26, 2001, respectively. Thus, the Board asserts, petitioners are

not entitled to "a second bite out of the apple" by appealing the Commissioner's decisions at this time. (Board's Reply at 6) The aforementioned Orders by the Commissioner are considered final orders as to separable issues. Since an appeal to the State Board of Education of a final order by the Commissioner must be made within 30 days for the filing date of the decision, the Board reasons that petitioners are clearly out of time to challenge these Orders. (*Id.*)

Petitioners further challenge the ALJ's conclusion that the Board's failure to provide M.C. with alternative education following his expulsion was not arbitrary, capricious and unreasonable. In support of their claim, they cite to the Commissioner's decisions in *C.S. v. Bd. of Education of the Tp. of Piscataway*, 97 *N.J.A.R.*2d (EDU) 573, *aff'd* State Board April 11, 1998, and *M.G. v. Bd. of Educ. of Twp. of Washington*, Commissioner Decision November 6, 2000. (Petitioners' Exceptions at 14) That the ALJ concluded the Board had a rational basis for denying post-expulsion alternative education to M.C. was, according to petitioners, erroneous:

> The Board does not need to establish its own alternative education program in order to provide alternative education to M.C.; it could enroll him in the program of another county or local school district. The Board produced no evidence that it would be very expensive to enroll M.C. in another district's program ***." (*Id.* at 14-15)

Similarly, petitioners object to the ALJ's conclusion that the Board's expulsion is not arbitrary, capricious and unreasonable if, upon evaluation, M.C. is determined not to be a child with a disability. (Petitioners' Exceptions at 15) Here, petitioners reason that the record establishes that, irrespective of the results of the evaluation, the Board's failure to assess M.C. and offer less drastic interventions renders its action arbitrary, capricious and unreasonable.

The Board counters that "[p]etitioners have lost sight of the very core of this dispute: there exists no legal obligation imposed upon local school districts in New Jersey to

afford students expelled in accordance with law the opportunity to attend an alternative education program." (Board's Reply at 7) Neither do the cases cited by petitioners create any obligation to provide such services. (*Id.* at 8)

As to the ALJ's Order that a determination be made whether M.C. was a child with a disability prior to January 26, 2001, petitioners argue that if M.C. was a child with a disability before that date, then he was entitled to the protections of IDEA which preclude expulsion for behavior related to a disability and which further require that, if a student is expelled for behavior which is not a manifestation of his disability, the student must still receive a free appropriate education. (Petitioners' Exceptions at 17) Petitioners add that "if M.C. is determined to be a child with a disability during any time that he is subject to disciplinary measures by the Board, such as during his period of expulsion" he must receive special education and related services under IDEA. (*Ibid.*)

The Board finds petitioners' challenge in this regard to be disingenuous at best. Where petitioners made it clear that this case did not concern an alleged denial of special education services or treatment inconsistent with IDEA, and the Board attests that petitioners' counsel specifically disclaimed any allegations of entitlement to special education services on behalf of M.C., they should not now be permitted to argue in favor of the very IDEA protections they rejected. (Board's Reply at 8-9)

Finally, as to the ALJ's Order that, pending the evaluations for special education, the Board must continue to provide M.C. with home instruction consistent with the Commissioner's Decision on Motion of September 15, 2000, petitioners argue that the Order is inconsistent with the ALJ's finding that home instruction is not an adequate substitute for placement in an alternative education program. (Petitioners' Exceptions at 17-18; citing to Initial

Decision at 27) Petitioners maintain that M.C.'s home instruction should include the areas required by New Jersey's Core Curriculum Content Standards.

The Board points out, in this connection, that M.C. is receiving instruction in English, Math, Science, and History, as well as Basic Skills instruction in English and Math, and neither the Commissioner's September 15, 2000 Order nor current statute, regulation or case law require more than that which is provided; similarly, compliance with the Core Curriculum Content Standards is not required. (Board's Reply at 9-10)

The balance of petitioners "exceptions" merely identify where the ALJ's findings were not as comprehensive as petitioners would like, but do not, in most instances, challenge those findings made by the ALJ as erroneous and/or not supported by the record in this matter.

COMMISSIONER'S DETERMINATION

Upon careful and independent review of the record in this matter, which included transcripts of the hearing conducted at the OAL on January 30, 2001, January 31, 2001, February 14, 2001 and March 15, 2001, the Commissioner determines to adopt the Initial Decision, with modification. The essential factual findings issued by the ALJ, the Commissioner notes are well-grounded in the record before him and, therefore, except as specifically noted herein, those findings are affirmed. In so affirming, the Commissioner accepts the ALJ's credibility determinations, finding that he carefully measured conflicts, inconsistencies and potential biases in deciding which testimony to credit in reaching his findings of fact. As the finder of fact, the ALJ had the greatest opportunity to observe the demeanor of the witnesses, and judge their credibility. *In the Matter of the Tenure Hearing of Frank Roberts*, 96 *N.J.A.R.*2d (EDU) 549, 550, *citing In the Matter of Tenure Hearing of Tyler*, 236 *N.J. Super.* 478, 485 (App. Div.), *certif. denied*, 121 N.J. 615 (1989). (*See, also, Whasun Lee v. Board of Education*

of the Township of Holmdel, New Jersey Appellate Division August 7, 2000, Docket No. A-5978-98T2 , slip. op. 14.)[1]

Initially, to the extent petitioners challenge the constitutionality of respondent's policy of expulsion without the provision of (post-expulsion) alternative education, as the ALJ correctly observes, neither statute nor regulation "explicitly address[es] the provision of an alternative education program *following expulsion.*" (emphasis added) (Initial Decision at 32) Indeed, the Board's policy appears to be grounded in the current statutory scheme. Thus, the Commissioner concurs with the ALJ that this issue of constitutional dimension is more appropriately addressed by the Courts.

In addition to their constitutional claims, petitioners contend that the Board's failure to provide M.C. with an alternative education *following* his permanent expulsion was arbitrary, capricious and unreasonable.[2] In support of this position, petitioners cite to *C.S., supra,* and *M.G., supra.* (Petitioners' Exceptions at 14) However, the Commissioner finds that since neither case addressed the issue of *post*-expulsion alternative education, petitioners' reliance on these cases is misplaced. Moreover, to the extent petitioners contend that the Board improperly failed to provide M.C. with an alternative education program *in lieu of,* or *prior to,* reaching the ultimate sanction of expulsion, the Commissioner cannot determine that the Board acted unreasonably where the ALJ found, and the record presents no basis to challenge, that:

---

[1] The Commissioner herein notes that although he recognizes Dr. Greene's testimony that experts in the field of school and youth violence have embraced "best practices" for handling incidents involving the possession and use of weapons in school (Initial Decision at 27), the acknowledgment of such testimony should not be read as diminishing the significance of the State Board of Education's recent adoption of School Safety regulations, *N.J.A.C.* 6A:16-5.

[2] Curiously, although the Petition of Appeal seeks, *inter alia*, a declaration that the Board's expulsion of M.C. was arbitrary, capricious and unreasonable (Initial Decision at 2), petitioners' exception arguments find such standard to be inappropriate. (Petitioners' Exceptions at 11) Notwithstanding this assertion, the Commissioner finds that the ALJ, indeed, applied the correct standard in reviewing this expulsion matter. *See, V.A., on behalf of minor child, K.M.A. v. Board of Education of the Borough of Collingswood, Camden County*, State Board of Education July 5, 2000.

> Dr. Galish did not think an alternative education program was appropriate for an offense as egregious [as] having brought five weapons to school and using one of them to slash another student. (Initial Decision at 26) .[3]

Finally, the Commissioner declines to adopt the ALJ's conclusion that the Board had sufficient basis to believe that M.C. may have been a student with a disability at the time of the incident underlying his expulsion so as to oblige it to conduct a child study team evaluation of M.C. prior to determining to expel him. Rather, the Commissioner finds that he has no jurisdiction to reach such a conclusion, and holds that any allegation by petitioners that M.C. should have been evaluated to determine his eligibility for special education services and the protections of the IDEA must be pursued in a forum of appropriate jurisdiction. That such allegations were not previously or concurrently made when the instant matter was filed does not preclude petitioners from pursuing them now.[4]

Therefore, the Commissioner concludes that, under these circumstances, he has no cause to substitute his judgment for that of the local Board. Based on the compelling facts presented to the Board in this matter,[5] and noting the weight ascribed by the ALJ to the testimony of Dr. Galish, who affirmed that he did not automatically consider expulsion when he learned of the incident herein, but considered discipline ranging from suspension for longer than 10 days to expulsion (Initial Decision at 19, 25), and further noting there are no surviving claims

---

[3] Note that recently adopted regulations by the State Board of Education include a provision for mandatory student placement in an alternative education program, under certain circumstances. *N.J.A.C.* 6A:16-8.3 The code specifically provides for such mandatory placement where "a student [is] removed from general education for an assault with weapons offense, pursuant to N.J.A.C. 6A:16-5.6." *N.J.A.C.* 6A:16-8.3(a)2; *see, also, N.J.A.C.* 6A:16-5.6(d). The code further provides that if such an alternative education program is not available, "the student shall be provided instruction at home or in another suitable facility until placement is available, pursuant to N.J.A.C. 6A:16-9." *N.J.A.C.* 6A:16-8.3(b); *see, also, N.J.A.C.* 6A:16-5.6(d)1.

[4] The Commissioner notes that allegations of this type were neither made in the initial pleadings nor raised before the ALJ until the time of the post-hearing submission. (Initial Decision at 6)

[5] With respect to the evidence before the Board at the time of M.C's expulsion hearing, the Commissioner accepts the Board's clarification, noted *supra,* that the record herein reflects that P-3 and P-9 were the only two incident reports relied upon by the Board in making its decision, Tr. 3/15/01 at 71, 72, but the record does not substantiate that these were the only two documents reviewed by the Board at the hearing.

of due process violations (Initial Decision at 5), and assuming M.C. is not subsequently found, upon appeal to an appropriate forum, to have required evaluation and that any required evaluation, once conducted, does not conclude that M.C. is eligible for special education services as to invoke the protections of the IDEA, the Commissioner hereby modifies the Orders set forth at page 41 of the Initial Decision and **DENIES** petitioners' appeal for a ruling that the District's expulsion of M.C. was arbitrary, capricious or unreasonable and, further **DENIES** petitioners' appeal for an Order expunging all evidence of M.C.'s expulsion from his school records. (*Id.*) Finally, the ALJ's recommended Orders with respect to an evaluation of M.C. to determine his eligibility for special education services are hereby set aside for lack of jurisdiction.

Accordingly, the Initial Decision of the ALJ is adopted in part, and modified in part, as set forth herein.[6] The Petition of Appeal is dismissed.

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: 7|16|01

Date of Mailing: 7|16|01

[6] The decision herein renders moot any discussion regarding the efficacy of either the Board's particular program of home instruction, or home instruction in general, vis-à-vis a program of alternative education. Consequently, the Commissioner does not herein reach the ALJ's findings and conclusions relative thereto, except to note that such programs are governed by *N.J.A.C.* 6A:16-9 for general education students

[7] 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.

219-01

EDU # 7381-00
C # 304-00
C # 219-01
SB # 60-00 and 27-01 (consolidated)

P.H. and P.H., on behalf of minor child, M.C., :

PETITIONERS-APPELLANTS, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH : DECISION ON MOTIONS
OF BERGENFIELD, BERGEN COUNTY,
DAVID C. HESPE, COMMISSIONER, AND :
NEW JERSEY STATE BOARD OF
EDUCATION, :

RESPONDENTS-RESPONDENTS, :

AND :

P.H. and P.H., on behalf of minor child, M.C., :

PETITIONERS-APPELLANTS, :

V. :

BOARD OF EDUCATION OF THE BOROUGH :
OF BERGENFIELD, BERGEN COUNTY,
:

RESPONDENT-RESPONDENT.
_____ :

Decided by the Commissioner of Education, September 15, 2000

Decision on motion by the Commissioner of Education, January 22, 2001

Decision on motion by the Commissioner of Education, January 26, 2001

Decided by the Commissioner of Education, July 16, 2001

Decision on motion by the State Board of Education, September 5, 2001

For the Petitioners-Appellants, Education Law Center (Elizabeth Athos, Esq., of Counsel)

For the Respondent-Respondent Board of Education of the Borough of Bergenfield, Schenck, Price, Smith & King, L.L.P. (Joanne Butler, Esq., of Counsel)

For the Respondent-Respondent David C. Hespe, Commissioner, and New Jersey State Boad of Education, Todd Schwartz, Deputy Attorney General (John J. Farmer, Jr., Attorney General of New Jersey)

On September 5, 2001, we directed that emergent relief pending our decision on the merits of the underlying case be afforded to M.C., a sophomore at Bergenfield High School who had been permanently expelled by the Bergenfield Board without any provision for an alternate education program. Specifically, we directed the Bergenfield Board to immediately assess M.C.'s alternative education needs and to effectuate M.C.'s placement in an appropriate alternative education program. Although the relief we directed was to be effective as of the first day of the 2001-02 school year, we directed that in the event that M.C.'s placement in an alternative program could not be effectuated by that date, the Bergenfield Board was to provide M.C. with home or out-of-school instruction until an appropriate placement could be arranged.

On September 10, 2001, the Bergenfield Board sought a stay of our decision and also moved for "leave to file an interlocutory appeal." In support of its motion, the Board argued that petitioners had not demonstrated any entitlement to interim relief and had not shown that there was a likelihood that they would prevail on the merits of the underlying case. It further argued that M.C. would not suffer any irreparable harm because he would be able to obtain a high school diploma by applying to another school

district, enrolling in an adult high school program or by being home-schooled. It also contended that on balance, the equities favored denying the relief because the Board would be harmed by "having to expend funds upon a former student who had forfeited his right to an education by committing a violent act toward another student."

On September 13, 2001, petitioners moved for enforcement of the State Board's decision of September 5, 2001. In support of their motion, petitioners submitted a certification executed by their counsel which indicated that the Bergenfield Board had not yet contacted petitioners concerning implementation of the State Board's decision, that no attempt had been made to assess M.C.'s alternative education needs, and that M.C. had neither been offered nor afforded home instruction.

Upon the request of the Director of the State Board Appeals Office, the Bergenfield Board clarified on September 18, 2001 that it sought reconsideration of our decision by its motion of September 10, rather than leave to appeal.

On September 27, 2001, petitioners filed their answer to that portion of the Board's motion seeking reconsideration. In their answer, petitioners advised us that the Bergenfield Board had commenced providing home instruction to M.C. on September 25, 2001, and had scheduled a meeting for September 28 to assess M.C.'s alternative education needs.

In considering the motions filed by the parties, we cannot ignore the fact that despite the clear directive in our decision of September 5, the Bergenfield Board did not begin to provide M.C. with <u>any</u> educational services until September 25. We are appalled at the Board's recalcitrance in the face of our decision. We are also taken aback by the fact that the Bergenfield Board of Education does not appear to grasp the

fact that any child suffers irreparable harm when deprived of an education for any prolonged period. Such an attitude flies in the face of the responsibility entrusted to district boards of education by the Legislature and the critical role played by a district board in insuring that each child domiciled in its district is provided with an education that will equip him or her to function as a productive worker and citizen in our democratic society. E.g. Abbott by Abbott v. Burke, 119 N.J. 287 (1990). Moreover, from an educational policy perspective, such an attitude is shortsighted.

Again, our decision of September 5 was clear. As set forth therein, we had no hesitation in affording interim relief to M.C. As we expressed it in our decision:

> ...we recognize our broad responsibilities for insuring the effectuation of the constitutional mandate for a thorough and efficient system of free public education "for the instruction of all children in the State between the age of five and eighteen years." New Jersey Constitution, Article VIII, Sec. IV, para. 1. See, e.g., In re Upper Freehold Reg'l School Dist., 86 N.J. 265, 273 (1981); Robinson v. Cahill, 62 N.J. 473, 509 n.9 (1973); Jenkins v. Morris Tp. School Dist., 58 N.J. 483, 494 (1971). It would be an abrogation of our responsibility were we to fail to insure that such instruction is provided to a child who is the subject of litigation before the State Board during the pendency of the matter. Furthermore, we find it obvious that a child such as M.C. suffers irreparable harm when he is deprived of an education for even a brief period of time. In fact, given M.C.'s academic record as stipulated by the parties, it is a certainty that he will suffer such harm if his education is disrupted at this point. The nature of the harm that M.C. would suffer were we to deny him relief far outweighs that which the Board may experience as the result of being required to provide him with an education during the pendency of the appeal in this case. In addition, it is clear from an educational policy perspective that the public interest is best served by continuing M.C.'s education during that period.

State Board's Decision, slip op. at 4-5.

Reconsideration of our decision reinforces our conclusion that the Bergenfield Board must provide M.C. with an alternative education placement during the pendency of the underlying case. Furthermore, the Board's failure to even begin the process of effectuating M.C.'s placement in an appropriate alternative education program until September 28 makes it imperative that the decision now be fully implemented immediately. We therefore deny the Board's motion for a stay and direct that the Commissioner of Education take all measures necessary to ensure that the Board of Education of the Borough of Bergenfield does in fact comply immediately with our decision of September 5.

October 3, 2001

Date of mailing OCT 05 2001

219-01

EDU # 7381-00
C # 219-01
SB # 27-01

P.H. AND P.H., on behalf of minor child, M.C., :

PETITIONERS-APPELLANTS, :

V. :

BOARD OF EDUCATION OF THE BOROUGH : OF BERGENFIELD, BERGEN COUNTY, :

RESPONDENT-RESPONDENT. :

STATE BOARD OF EDUCATION

DECISION ON MOTION

Decision on motion by the Commissioner of Education, January 22, 2001

Decision on motion by the Commissioner of Education, January 26, 2001

Decided by the Commissioner of Education, July 16, 2001

For the Petitioners-Appellants, Education Law Center (Elizabeth Athos, Esq., of Counsel)

For the Respondent-Respondent, Schenck, Price, Smith & King, L.L.P. (Joanne Butler, Esq., of Counsel)

This matter is before us pursuant to an application for emergent relief filed on behalf of M.C., a sophomore who was permanently expelled by the Bergenfield Board without any provision for an alternative education program for slashing at another student with a box-cutter, causing a gash in the student's coat, and for being in possession of four box-cutters and a Swiss army knife. Petitioners challenged M.C.'s expulsion by filing a petition of appeal with the Commissioner. The matter was then transmitted to the Office of Administrative Law for hearing.

Prior to the hearing, petitioners sought emergent relief, which the Administrative Law Judge ("ALJ") granted on August 18, 2000. The ALJ's order directed the Bergenfield Board to immediately assess M.C.'s alternative education needs, to identify an appropriate alternate education program for him, and to place him in such program no later than the first day of the 2000-2001 school year. On September 15, 2000, the Commissioner issued his determination, modifying the relief which the ALJ had directed. Concluding that placement in an alternative educational setting was not an appropriate grant of interim relief, the Commissioner directed that M.C. be placed on home instruction until the underlying case was decided.

On October 12, 2000, petitioners appealed to the State Board from the Commissioner's determination denying M.C.'s placement in an alternative education program while the underlying case was being decided. However, they then requested that their appeal be placed in abeyance pending the Commissioner's decision on the merits of that case.

On May 25, 2001, the ALJ issued his initial decision on petitioners' challenge to M.C.'s expulsion. Stressing that New Jersey's statutory and regulatory scheme does not explicitly address the provision of an alternative education following expulsion, the ALJ declined to address petitioners' claims that the Board's policy of permanent expulsion without the provision of alternative education violated M.C.'s right under the education clause of the New Jersey State Constitution to a thorough and efficient free public education and the equal protection guarantees of the State Constitution. However, the ALJ concluded that the school district's failure to consult with appropriate sources before permanently expelling M.C. without an alternative education program

was arbitrary, capricious and unreasonable. He further concluded that the District should conduct evaluations pursuant to N.J.A.C. 6A:14-1.1 on an expedited basis to determine whether M.C. was a child with a disability and, if he was, that the District should follow the disciplinary procedures for classified students. The ALJ also concluded that M.C. should remain on home instruction as the Commissioner had directed in his September 15, 2000 determination pending the outcome of the evaluations. However, he found that if the evaluators concluded that M.C. was not a child with a disability, the Board's action in expelling M.C. was not arbitrary, capricious or unreasonable.

The Commissioner concurred with the ALJ that petitioners' challenge to the constitutionality of the Board's policy was more appropriately addressed by the courts. He also rejected petitioners' contention that the Board's failure to provide alternative education following M.C.'s permanent expulsion was arbitrary, capricious or unreasonable. However, he rejected the ALJ's determination that the District should conduct evaluations to ascertain whether M.C. is a child with disabilities, finding that he did not have the jurisdiction to reach such a conclusion. Therefore, concluding that he had no cause to substitute his judgment for that of the Board, the Commissioner "denied petitioners' appeal for a ruling that the District's expulsion of M.C. was arbitrary, capricious or unreasonable." Commissioner's Decision, slip op. at 59.

Petitioners appealed to the State Board from the Commissioner's decision, requesting that this appeal be consolidated with their earlier appeal, which is currently pending before the State Board.

In addition, petitioners filed the motion for emergent relief that we are now considering. By their motion, petitioners seek emergency relief pending determination by the State Board of their appeals in the underlying case. Specifically, they seek a directive that the Bergenfield Board assess M.C.'s alternative education needs and identify an appropriate alternative education program that meets his needs and satisfies New Jersey's Core Curriculum Content Standards. They also seek to have the Bergenfield Board bear the expense of such program, including any necessary transportation.

The Bergenfield Board opposes any grant of interim relief.

In order for us to grant emergent relief in this case, we must be satisfied that: 1) absent such relief, M.C. 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.C. will suffer greater hardship if relief is denied him that 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).

After careful review of the papers submitted in the case, we conclude without hesitation that M.C. is entitled to emergency relief. Initially, we recognize our broad responsibilities for insuring the effectuation of the constitutional mandate for a thorough and efficient system of free public education "for the instruction of all children in the State between the age of five and eighteen years." New Jersey Constitution, Article VIII, Sec. IV, para. 1. See, e.g., In re Upper Freehold Reg'l School Dist., 86 N.J. 265,

273 (1981); Robinson v. Cahill, 62 N.J. 473, 509 n.9 (1973); Jenkins v. Morris Tp. School Dist., 58 N.J. 483, 494 (1971). It would be an abrogation of our responsibility were we to fail to insure that such instruction is provided to a child who is the subject of litigation before the State Board during the pendency of the matter. Furthermore, we find it obvious that a child such as M.C. suffers irreparable harm when he is deprived of an education for even a brief period of time. In fact, given M.C.'s academic record as stipulated by the parties, it is a certainty that he will suffer such harm if his education is disrupted at this point. The nature of the harm that M.C. would suffer were we to deny him relief far outweighs that which the Board may experience as the result of being required to provide him with an education during the pendency of the appeal in this case. In addition, it is clear from an educational policy perspective that the public interest is best served by continuing M.C.'s education during that period.

Accordingly, we grant petitioners' motion. The Board is directed to immediately assess M.C.'s alternative education needs and to identify and effectuate M.C.'s placement in an appropriate alternative education program. It is axiomatic that such program must satisfy New Jersey's Core Curriculum Content Standards. The Board is responsible for the costs of such program, including transportation costs.

The relief we are directing is effective as of the first day of the 2001-02 school year. In the event that M.C.'s placement in an alternative education program cannot be effectuated by that date, the Board must provide M.C. with home or out-of-school instruction until an appropriate placement can be arranged. Any such instruction must conform to the requirements of N.J.A.C. 6A:16-9.1 et seq., including the requirement that it meet the Core Curriculum Content Standards. N.J.A.C. 6A:16-9.2(b). We

emphasize that our directive that M.C. be placed in an appropriate alternative education program must be implemented immediately and that M.C. may receive home or out-of-school instruction only until such placement can be arranged.

September 5, 2001

Date of mailing SEP 07 2001

220-01

BOARD OF EDUCATION OF THE TOWNSHIP OF FAIRFIELD, CUMBERLAND COUNTY,

PETITIONER,

V.

ROBERT ENCH AND SANDERINA R. KASPER, EXECUTRIX OF THE ESTATE OF BENJAMIN KASPER, PARTNERS, TRADING AS BENCH REALITY, FREDRICK A. JACOB AND OLD REPUBLIC NATIONAL INSURANCE COMPANY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION ON REMAND

SYNOPSIS

This matter is on remand from the State Board of Education for a determination of whether the purchase of land by the Board with surplus was valid, in light of the State Board's determination that voter approval of the use of surplus to purchase land is required.

The ALJ determined, based on the testimony and evidence presented, that the voters were informed of the land purchase and the use of surplus to effectuate the same, and thus, that the purchase should not be disturbed. The ALJ concluded that the matter should be closed.

The Commissioner affirmed the decision of the ALJ, concluding that, based on the unique circumstances and sequence of events herein, the purchase of land should remain undisturbed.

July 16, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6586-00

ON REMAND EDU 10887-98

AGENCY REF. NO. 483-10/98

BOARD OF EDUCATION OF THE TOWNSHIP OF FAIRFIED, CUMBERLAND COUNTY,

Petitioner,

v.

ROBERT ENCH AND SANDRINA R. KASPER, EXECUTRIX OF THE ESTATE OF BENJAMIN KASPER, PARTNERS, TRADING AS BENCH REALTY; FREDRICK JACOB AND OLD REPUBLIC NATIONAL INSURANCE COMPANY,

Respondents.

Frank DiDomenico, Esq., for petitioner

David Eddowes, Esq., for respondents Robert Ench and Sanderina R. Kasper (Davidow, Sherman, Eddowes and Geiger, attorneys)

Frederick A. Jacob, Esq., respondent *pro se* (Jacob and Ferringo, attorneys)

No appearance by or for Old Republic National Insurance Company

Record Closed: April 30, 2001 Decided: May 30, 2001

BEFORE **LILLARD E. LAW** , ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter is on remand from the State Board of Education (State Board) to the Commissioner of Education (Commissioner) for a determination as to the validity of the purchase of vacant land by the Board of Education of Fairfield Township (Board) with surplus funds and where the Board failed to include the purchase price of the property within its advertised 1995-96 annual school budget.

Pursuant to the State Board's Decision to remand the instant matter to the Commissioner, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) to further develop a sufficient record upon which the State Board may base its final determination of the issue in controversy; *i.e.,* whether or not the public was provided the opportunity to assess the Board's use of surplus funds and evaluate the district's financial condition so as to make the necessary judgment concerning the Board's proposed budget. In conformity with the State Board's directive, a plenary hearing was held on March 19, 2001, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City New Jersey. The parties submitted post-hearing memoranda, the last of which was received by the undersigned on April 30, 2001. The hearing record, therefore, closed on April 30, 2001.

TESTIMONIAL AND DOCUMENTARY EVIDENCE

Daniel R. Mastrobuono, Ed.D., was the only witness to testify and testified on behalf of the Board. Dr. Mastrobuono asserted that he served as the Board's Superintendent of Schools from 1991 until January 1998. Thereafter, he served as the Camden County Superintendent of Schools for a period of three years.

Dr. Mastrobuono was involved with the land purchase in question. He asserted that Fairfield Township is divided into two distinct areas and the Board wished to purchase land in the center of the township for the new construction of a school building to accommodate both areas. The Board reviewed four building sites which were priced as much as $400,000 per acre.

One site was polluted while another site did not have access to sewer connections. The Board required a minimum of 40 acres and, he asserted, that the Ench site met the Board's and the Department of Education (DOE) criteria. The Ench site was accessible to public sewer and public water without any environmental restrictions. The owners of the property were Robert Ench and the Estate of Benjamin Kasper, partners trading as Bench Realty.

Dr. Mastrobuono testified that the public was involved with the proposed purchase from the very beginning of planning and negotiations. He asserted that the Board had formed a Community Task Force and referred to the Minutes of a Special Meeting of the Board held on February 7, 1995. Under the heading of PUBLIC DISCUSSION, the Board Minutes reflect the following:

> The meeting was opened to the public to discuss their feelings about the new school project.
>
> Some of the residents presenting comments and concerns were: Tom Munson, Margaret Bozearth, Nancy Burt, Joyce Taylor, Ruth Hands, Melissa Martinez, Cynthia Zirkle, Frank Goldsboro, Doris Pierce, Henry Bender, JoAnne Servais, Deborah Davis, Marg Broglin, Viola Thomas, Thomas Lane.
>
> Topics of discussion concerning the building were: cost of construction, current facility problems, recent repairs/upgrades, tax impact, property being considered, current status of state funding to the district, inability of residents to fund such a project. (Exhibit, BOE-1)

Dr. Mastrobuono testified that there were other meetings held with Parent-Teacher organizations as well as public announcements and publications by the Board. He then referred to the Board Minutes of its regular meeting held on March 15, 1995, at which the Board adopted a resolution which states, in part, as follows:

> NEW SCHOOL PROPERTY OPTION
> BE IT RESOLVED that a 40-acre site of ground on Buckshutem Road adjacent to the Federal Prison sewer line be optioned by the Board of Education up to a date not to go beyond July 15, 1995, at a fee not to exceed $200.
> (Exhibit, BOE-2)

Dr. Mastrobuono asserted that the option to purchase the property was for the benefit of the electorate, however, the annual school budget for the 1995-96 school year had already been published and, therefore, could not be included in the budget. The Board determined that it would use its surplus funds to purchase the property. Mr. Jacob, the Board's then attorney, was instructed to contact Mr. Ench with respect to the option. Subsequently, Mr. Jacob's law firm was in receipt of a letter from Bench Realty, dated May 31, 1995, rejecting the Board's offer of an option for the Ench property. (Exhibit, BOE-3). Dr. Mastrobuono testified that the Board had scheduled a special election at its regular meeting held on May 17. 1995. The special election was to be held on June 27, 1995, pursuant to the Board's Resolution for a Special Election (Exhibit, BOE-5)

On June 7, 1995, Mr. Jacob sent a letter to Dr. Mastrobuono where, among other things, he summarized the law regarding elections and offered the Board two options for its consideration. In his summary, Mr. Jacob stated:

> The law gives the Board the authority to enter into Option Agreements not exceeding one year in duration. However, an Option may be exercised by the Board only after authority to purchase the property has been given at an annual or special school election. N.J.S.A. 18A:20-4.1. The law authorizes the Board to call a special election whenever, in its judgment, the interests of the schools require it, as long as it is not within twenty (20) days of a primary or general election. There cannot be more than two special elections within six months on taxing or bonding issues for the same purpose, without approval from the Commissioner. N.J.S.A. 18A:14-3. The Board must give the public 10 days notice of the election. NJSA 18A: 14-19.
>
> Given these facts, two courses of action are open to the Board:
>
> **OPTION ONE**: Hold the election on the bonding for the school project only, and not the purchase of the land. A separate special election to approve the purchase of land would have to be held once a suitable site has been identified. Because only 10 days notice is required, we still have time to amend the notice and properly post it before the election.
>
> **OPTION TWO**: Postpone the election altogether until such time as a suitable site has been identified and new Option Agreement entered. Under this Option the voters would

> approve the funding and the site as a "package."
>
> My recommendation is that the Board adopt Option Two. Presenting the proposal to the public as a package should make the package more marketable. . . . .(Exhibit, BOE-4)

Dr. Mastrobuono testified that on June 8, 1995, at a special meeting, the Board postponed the special election by way of an unanimous roll call vote of the Board members present. (Exhibit, BOE-6) Dr. Mastrobuono asserted that the action was taken by the Board because it was believed that the Ench property was now a dead issue.

On October 18, 1995, the Board, at its regular monthly meeting, adopted a resolution to purchase a modification of the original site known as the Ench property. The resolution was adopted with six members in favor and two opposed. The resolution to purchase the land authorized the Board President, Christine Richardson, to enter into a contract for the purchase. The resolution stated that settlement would take place on or about January 15, 1996. The Board's Resolution also stated, among other things, that the purchase of the land would be funded out of its surplus funds. (Exhibit, BOE-7) Members of the public were present at the meeting. The executed Contract for Sale of Real Estate for the purchase price of $150,000 and which included the date of January 15, 1996, as the date of settlement is found in Exhibit, BOE-8.

At its regular monthly meeting held on October 21, 1995, the Board adopted a resolution to extend the settlement date from January 15, 1996, to a date not to exceed six months in which to finalize the purchase of the property. The settlement date was extended in order for the Board to acquire all of the necessary permits for sewer connections, among other things. (Exhibit, BOE-9) Dr. Mastrobuono testified that members of the public were present during the Board's discussion of the purchase of the property and its reasons for the extension for settlement.

Dr. Mastrobuono referred to the Board's tentative budget for the 1995-96 school year. Therein, under its Advertised Recapitulation of Balances, Budget Category 01640, Additional Balance Anticipated during FY94-95, it shows a balance of $150,000. The Superintendent asserted that because there was no purchase of land during the 1994-95 fiscal year, the $150,000 was returned to its surplus account in the 1995-96 budget. (Exhibit, BOE-10)

The Board's minutes of its regular meeting held on February 21, 1996, reflect that there was public involvement with respect to the purchase of the Ench property. Two members of the public addressed the Board with concerns about the site acquisition. The minutes of the February 21, 1996, meeting also shows that approximately 2.7 acres were added to the original contract, which increased the cost from $150,000 to $156,750. The Board adopted a resolution to transfer funds for the purchase of the property. The Superintendent testified that there were sufficient funds in the surplus account to pay the $156,750 for the property. (Exhibit, BOE-12)

On February 22, 1996, Board Attorney Frederick Jacob sent a letter to Mary Dean, Turner Dean Realty, advising the realtor that the Board had completed all of the necessary paperwork for submission to the New Jersey Department of Environmental Protection (DEP) and to request a six-month extension for the purchase of the property. The additional time was needed to acquire the necessary sewer approvals. The Board Attorney reminded Ms. Dean that the Board had sufficient funds to fulfill its obligation to Mr. Ench. (Exhibit, BOE-11)

On March 21, 1996, the Board's Secretary submitted a Statement of Appropriations for the period ending February 28, 1996 to the Board. Item 12-000-4XX-710, Land Improvements, shows an available balance of $156,750. (Exhibit, BOE-13) Dr. Mastrobuono testified that the Statement was discussed at a public meeting of the Board. He also asserted that at this juncture, the Board did not have a valid contract with Mr. Ench nor did it have an approved extension of time in which to consummate the purchase of the property.

On August 15, 1996, Board Attorney Jacob sent a letter to Ms. Dean to advise, among other things, that the purchase of the Ench property would be on the Board's Agenda at it regular monthly meeting scheduled for August 21, 1996. Mr. Jacob requested that Ms. Dean attend the August 21, 1996 Board meeting with a firm commitment that Mr. Ench would accept the Board's offer to purchase the property. (Exhibit, BOE-14)

Superintendent Mastrobuono testified that on August 21, 1996, at its regular monthly meeting, the Board ratified the contract, with modifications, for a purchase price of $156,750. The resolution passed with five members in favor and two opposed to the purchase the land. (Exhibits, BOE-15 and BOE-16) The public was represented at the meeting. The Superintendent

testified that it was his belief that the issue of the purchase of the land was an emergency. He asserted that, under such circumstances, it was his understanding that school law permitted the transfer of funds for the purchase the property.

Dr. Mastrobuono testified with respect to the Board's 1996-97 Budget, which included the amount of $156,750 in line item 01630 as a carryover from an appropriation for the fiscal year 1995-96. (Exhibit, BOE-17) He asserted that the document was available to the public for its review. He further asserted that the Board had no interest in keeping information about the purchase of the land from the public. In fact, he testified, the Board sent information to the parents and the general public concerning the purchase of the land for school purposes. He testified that there were publications concerning the purchase of the property as well as coffees, meetings with parent-teacher organizations and, meetings with the town fathers.

On August 22, 1996, Board Attorney Jacob sent a letter to Mr. Julius Lovell, Colonial Title Agency, advising, among other things, that he had an emergency settlement and enclosed the Contract of Sale of the property, dated October 30, 1995, together with the Board's ratification signed on August 21, 1996. Mr. Jacobs requested that a settlement be scheduled for August 27 or August 28, 1996. (Exhibit, BOE-19)

Dr. Mastrobuono testified about the audit of the Board's accounts, ending June 30, 1996, and referred to page 23, of the audit under the title of Contingent Liabilities. This section of the audit states, in part, as follows:

> .....
>
> During the 1995-96 year the Board entered into a contract of sale to purchase land. The purchase price in the Contract is $2,500/ acre. The purchase is contingent on the Board obtaining various federal and state approvals regarding the proposed use of the land as a school building site. As of June 30, 1996, the amount of $156,750. is reflected as a reserve for encumbrance in the general fund. (Exhibit, BOE-20)

Exhibit, BOE-21, shows the Settlement Statement for the property with the Contract sales price of $156, 750. Exhibit, BOE-22, reflects the Deed to the property.

FINDINGS OF FACT

Based upon the testimony and documentary evidence adduced at the hearing and having given fair weight thereto, I **FIND** the following **FACTS**.

The herein record clearly demonstrates that members of the public of the Board's school district were informed and involved with the proposition of the purchase of the Ench property for school purposes. There is sufficient documentary evidence to show that members of the public participated in the discussion of the acquisition of the property in question at the Board's public meetings. In addition, the public was kept informed of the Board's proposal to build a school on the site of the Ench property through publications and meetings throughout the school district.

I **FURTHER FIND** that while the land purchase is not specifically addressed in the Board's budget proposals, the amount of the proposed purchase price is reflected in its Budget Statement for the School Year 1995-96, transmitted to the Cumberland County Superintendent of Schools. (Exhibit, BOE-10) In addition, the amount of $156,750 is found in its Statement of Appropriations for the period ending February 28, 1996. (Exhibit, BOE-13). The Board's annual audit similarly reflects the Board's intent to purchase the property in question (Exhibit, BOE-20) All of these documents are public records and available to the public for their inspection and review.

I **FIND** Dr. Mastrobuono's testimony is credible where he asserts that the Board had no interest in keeping the information concerning the purchase of the property from the public. See In re Perrone, 5 N.J. 514, 521 (1950); Spagnuolo v. Bonnet, 16 N.J. 546, 555 (1954).

CONCLUSIONS

The legal considerations as set forth in the Initial Decision, dated November 10, 1999, nor those of the Commissioner or the State Board shall be repeated here. Rather, I **CONCLUDE** that the hearing record, as reported herein, is sufficient for the State Board to make its final determination concerning the issue as to whether or not the public had access to information concerning the Board's use of surplus funds with which to purchase the Ench property.

I **CONCLUDE**, therefore, that the matter should be considered closed.

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

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

30 May 2001
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

6/1/00
DATE

D Antanavitis (sb)
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 4 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESSES

For Petitioner:

Daniel Mastrobuono

For Respondents:

None

DOCUMENTS IN EVIDENCE

For Petitioner:

P-1 Minutes of Special BOE Meeting 2/7/95
P-2 Minutes of Regular BOE Meeting 3/15/95
P-3 Letter, 5/31/95 to Steven D. Elliott, Esq. from Robert Ench
P-4 Letter, 6/7/95 to Dr. Mastrobuono from Frederick A. Jacob, Esq.
P-5 Minutes of Regular BOE Meeting, 5/12/95
P-6 Minutes of Special BOE Meeting, 6/8/95
P-7 Minutes of Regular BOE Meeting, 10/18/95
P-8 Contract for Sale of Real Estate
P-9 Minutes of Regular BOE Meeting, 12/21/95
P-10 School District Budget Statement for School Year 1995-96
P-11 Letter, 2/22/96, to Mary Dean from Frederick A. Jacob, Esq.
P-12 Minutes of Regular BOE Meeting, 2/21/96
P-13 Report of the Secretary to the BOE General Fund – Fund 10
P-14 Letter, 8/16/96 to Mary Dean from Frederick A. Jacob, Esq.
P-15 Ratification of Previous Contract with Modifications
P-16 Minutes of Regular BOE Meeting, 8/21/96
P-17 School District Budget Statement for School Year 1996-97
P-18 (Withdrawn)
P-19 Letter, 8/22/96 to Julius Lovell from Frederick A. Jacob, Esq.
P-20 Comprehensive Annual Financial Report for Fiscal Year Ended 6/30/96
P-21 Colonial Title Agency, Inc.
P-22 Deed

For Respondent:

None

BOARD OF EDUCATION OF THE TOWNSHIP OF FAIRFIELD, CUMBERLAND COUNTY, PETITIONER, V. ROBERT ENCH AND SANDERINA R. KASPER, EXECUTRIX OF THE ESTATE OF BENJAMIN KASPER, PARTNERS, TRADING AS BENCH REALITY, FREDRICK A. JACOB AND OLD REPUBLIC NATIONAL INSURANCE COMPANY, RESPONDENTS.	COMMISSIONER OF EDUCATION DECISION ON REMAND

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

Upon careful and independent review, the Commissioner concurs with the findings and conclusion of the ALJ that, notwithstanding the Board's failure to specifically include the purchase of vacant land as a line item in its budget, in light of the unique circumstances and sequence of events which existed here, the purchase should remain undisturbed and this matter should be considered closed.

Accordingly, the recommended decision of the OAL is affirmed. The

Commissioner transmits this matter to the State Board of Education, which has retained jurisdiction.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7|16|01

Date of Mailing: 7|17|01

* 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.

221-01

ALLYSON KOHLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF TUCKERTON, OCEAN COUNTY,	:	
RESPONDENT.	:	

July 16, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 119-00

AGENCY DKT. NO. 366-12/99

ALLYSON KOHLER,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF TUCKERTON, OCEAN COUNTY,

Respondent.

James Blaney, Esq., for petitioner (Starkey, Kelly, Blaney & White, attorneys)

Louis Greco, Esq., for respondent

Record Closed: May 25, 2001 Decided: May 29, 2001

BEFORE **LILLARD E. LAW,** ALJ:

This matter was transmitted to the Office of Administrative Law on January 14, 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 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 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.

29 May 2001
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

5/31/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 31 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

FILED
MAY 25 11 57 AM '01
STATE OF NEW JERSEY
ADMIN
00 MAY 22 PM 2:53

STARKEY, KELLY, BLANEY & WHITE
Two Hooper Avenue
Toms River, New Jersey 08753
732-240-3600
Attorneys for Petitioner

ALLYSON KOHLER, Petitioner, vs. TUCKERTON BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY DOCKET NO. STIPULATION OF AGREEMENT

It is stipulated and agreed between the parties, specifically, Allyson Kohler, an employee of the Tuckerton Elementary School District, and the Tuckerton Board of Education as follows:

1. It is agreed between the parties that Allyson Kohler will be granted twenty (20) sick days from the beginning of September 1999. This would, in terms of days, be calculated from September 2, 1999, the first day school, through September 30, 1999. (This would exclude September 6, 1999 which would have been a holiday).

2. The parties agree that that period from September 2 through September 30, 1999 is to be treated as sick time as per Allyson Kohler's doctor's note of August 27, 1999 previously submitted to the Superintendent which indicates that Allyson Kohler was disabled from 9/1/99 to 10/1/99.

3. The parties agree that Allyson Kohler will be given eight (8) sick days for the 1999-2000 school year, instead of the

previously offered six (6) sick days as per the Superintendent's letter of July 1, 1999 to Allyson Kohler.

4. The parties agree that this agreement will not act as setting any precedent for future determinations concerning any of the issues that are treated in this Stipulation.

Dated: December 22, 1999

LOUIS J. GRECO, ESQ.
Attorney for Respondent

By: _____
LOUIS J. GRECO

STARKEY, KELLY, BLANEY & WHITE
Attorneys for the Petitioner

By: _____
JAMES M. BLANEY

OAL DKT. NO. EDU 119-00
AGENCY DKT. NO. 366-12/99

ALLYSON KOHLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF TUCKERTON, OCEAN COUNTY,	:	
RESPONDENT.	:	

The record, Stipulation of 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: 7|16|01

Date of Mailing: 7|17|01

222-01

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 EARLY CHILDHOOD AID APPLICATION)** RESPONDENT.	COMMISSIONER OF EDUCATION DECISION

July 20, 2001

OAL DKT. NO. EDU 4319-99S
AGENCY DKT. NO. 89-4/99

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH 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 of this matter and the September 6, 2000 letter of the Administrative Law Judge (ALJ) acknowledging the Asbury Park Board of Education's withdrawal of its petition, and dismissing the Education Law Center's request to intervene in the matter in light of the Board's decision to withdraw, have been reviewed. Notwithstanding the Education Law Center's disagreement with both the Board's assessment that the students of Asbury Park will receive a thorough and efficient education in light of the Court's determinations in *Abbott V* and its decision to withdraw its petition, the Commissioner concurs that it is appropriate to approve the Board's withdrawal of the petition for the reasons expressed by the ALJ.

Accordingly, the Commissioner approves the withdrawal, pursuant to *N.J.A.C.* 1:1-19.2. This matter is, therefore, no longer deemed to be a contested matter before the Commissioner and is dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7|20|01

Date of Mailing: 7|20|01

223-01

223-01R

IN THE MATTER OF THE TENURE	:	
HEARING OF CECILIA JAMES,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION ON REMAND
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	

July 20, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5611-99
AGENCY DKT. NO. 582-12/96
ON REMAND OAL DKT. NO. EDU 1664-97
AGENCY DKT. NO. 582-12/96

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK,
Petitioner,
v.
CECILIA JAMES,
Respondent.

Philip E. Stern, Esq., for petitioner (Sills, Cummis, Zuckerman, Tischman, Epstein & Gross, attorneys)

Eugene G. Liss, Esq., for respondent
(Murray, Murray & Corrigan, attorneys)

Record Closed: May 4, 2001 Decided: June 8, 2001

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

In October 1996, petitioner certified tenure charges against respondent, a tenured teacher employed in petitioner's district. Respondent filed an answer, and the Department of Education (DOE) transmitted the matter to the Office of Administrative Law (OAL) on February 6, 1997 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to 13.

On April 1, 1999, the presiding Administrative Law Judge (ALJ) issued an Initial Decision approving a settlement which had been reached by the parties. The Commissioner of the DOE (Commissioner) issued a decision on May 24, 1999, determining not to accept the settlement and remanding the matter to the OAL. The DOE transmitted the matter on remand to the OAL on June 4, 1999 for determination as a contested case, and it was assigned to this judge.

Conferences were conducted throughout the proceedings, and the parties attempted to resolve the matter. A hearing was subsequently scheduled for May 4, 2001. The parties appeared on that date and, subsequent to conferring, executed a Stipulation of Settlement. Attached herewith is a copy of the Stipulation. The record was closed on May 4, 2001.

The Stipulation of Settlement references, and is based on, a decision issued by the Commissioner on September 22, 2000 pertinent to respondent in another case (OAL Dkt. No. EDU 7958-97, Agency Dkt. No. 223-6/97). That matter involved allegations that respondent had intentionally participated in conduct intended to defraud the State Health Benefits Program and that such conduct constituted unbecoming conduct. The ALJ who presided over that matter issued an Initial Decision on November 8, 2000. Although observing that the issue of a termination was, at that time, moot because respondent had forfeited her position as part of a guilty plea to criminal charges, the ALJ concluded that respondent was unfit to remain a teacher and that action by petitioner suspending respondent was appropriate and should be affirmed. In his September 22, 2000 decision, the Commissioner affirmed the ALJ's Initial Decision, determined that respondent was not entitled to reimbursement of pay, and directed that the matter be transmitted to the State Board of Examiners for action against respondent's certificate, as it deemed appropriate. In the current matter, the parties state, in the pertinent Stipulation of Settlement, that all matters in dispute have been resolved by virtue of the Commissioner's decision and that they agree the matter is moot.

After considering the matter, I **CONCLUDE** that the current matter is moot in light of the Commissioner's decision of September 22, 2000 in OAL Dkt. No. EDU 7958-97.

Having reviewed the terms of the Settlement Agreement, I **FIND** the parties voluntarily have agreed to the terms and conditions of the settlement as evidenced by the signatures contained thereon and that the settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **ORDER** that the parties comply with the terms of the settlement 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.

June 8, 2001
DATE

DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

6/12/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUN 14 2001
DATE

OFFICE OF ADMINISTRATIVE LAW

\mvh

SILLS CUMMIS RADIN TISCHMAN
EPSTEIN & GROSS
One Riverfront Plaza
Newark, New Jersey 07102
(973)643-5688
Attorneys for State-Operated School
District of the City of Newark

IN THE MATTER OF THE TENURE	:	BEFORE THE COMMISSIONER OF EDUCATION
HEARING OF CECELIA JAMES,	:	
STATE-OPERATED SCHOOL DISTRICT	:	OAL DKT. NO. EDU 5611-99 AGENCY DKT. NO. 582-12-96
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY	:	

STIPULATION OF SETTLEMENT

WHEREAS, all matters in dispute in the above-captioned matter have been resolved by virtue of the decision of the Commissioner of Education, attached hereto, and made a part hereof;

NOW, THEREFORE, the parties to the above-captioned matter hereby agree that the matter is moot, and therefore, settled.

Cecelia A. James

CECELIA JAMES

Dated: May 4, 2001

FOR THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK

BY: PHILIP E. STERN

Dated: May 4, 2001

OAL DKT. NO. EDU 7958-97
AGENCY DKT. NO. 223-6/97

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

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

Upon careful and independent review of the record in this matter, which included a transcript of the hearing conducted at the OAL on March 24, 25 and 27, 1998, the Commissioner determines to affirm the Initial Decision of the Administrative Law Judge. Accordingly, for the reasons expressed in the Initial Decision, the District's charge is sustained and respondent, therefore, is not entitled to reimbursement of pay. *N.J.S.A.* 18A:6-14. This matter shall be transmitted to the State Board of Examiners for action against respondent's certificate as it deems appropriate.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: SEP 22 2000

Date of Mailing: SEP 22 2000

* 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.

OAL DKT. NOS. EDU 01664-97 AND EDU 05611-99 (On Remand)
AGENCY DKT. NO. 582-12/96

IN THE MATTER OF THE TENURE	:	
HEARING OF CECILIA JAMES,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION ON REMAND
OF THE CITY OF NEWARK, ESSEX	:	
COUNTY.	:	

The record, Stipulation of Settlement, and Initial Decision issued by the Office of Administrative Law have been reviewed.

In light of the fact that the present matter was rendered moot by virtue of the Commissioner's decision of December 22, 2000* in another tenure matter involving the same parties, wherein respondent was dismissed from her tenured teaching position and the case referred to the State Board of Examiners, the Commissioner approves the Stipulation of Settlement in the instant matter. Accordingly, the matter is hereby dismissed and shall be promptly transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7|20|01

Date of Mailing: 7|20|01

* It is noted for the record that the date of September 22, 2000 was erroneously listed on the referenced Commissioner's decision (C.D.No. 417-00). That decision was reissued with a corrected decision date of December 22, 2000.

224-01

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN WILSON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY.	:	
	:	

July 20, 2001

OAL DKT. NO. EDU 135-99
AGENCY DKT. NO. 16-1/97

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN WILSON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY.	:	
	:	

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. Based upon the representation of the Board that the respondent, a tenured custodian charged with unbecoming conduct due to excessive absenteeism, has resigned from his position, and that such resignation appears to be independent of any settlement with the Board, the Commissioner has no alternative other than to approve the withdrawal. However, in so doing, the Commissioner reiterates that the Board must *fully comply* with the requirements of Executive Order No. 11 (1974) in responding to any inquiries from prospective employers of respondent.

Accordingly, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 7|20|01

Date of Mailing: 7|20|01

225-01

S.D., on behalf of minor child, B.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

July 20, 2001

OAL DKT. NO. EDU 1818-01
AGENCY DKT. NO. 428-11/00

S.D., on behalf of minor child, B.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN 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 the notification sent to the petitioner by OAL on June 2, 2001, providing petitioner ten days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by petitioner, the petition is dismissed with prejudice due to petitioner's failure to appear at hearing or provide an explanation for her nonappearance.

The Board's counterclaim is, therefore, deemed to be admitted and petitioner is hereby ordered to pay tuition for the period of B.D.'s ineligible attendance in the District'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.*

COMMISSIONER OF EDUCATION

Date of Decision: 7|20|01

Date of Mailing: 7|20|01

* 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.

228-01

IN THE MATTER OF THE TENURE	:	
HEARING OF JEAN CINA, SCHOOL	:	
DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
ELIZABETH, UNION COUNTY.	:	DECISION
_____	:	

July 20, 2001

229-01

M.C., 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 determination that her daughter was not entitled to a free public education in its District. The Board denied that petitioner's daughter was entitled to a free education in its District and counterclaimed for tuition.

The ALJ determined, based on the testimony and evidence presented, that petitioner is not domiciled in Union Township, and that, although S.M. might be living in Union Township, she is not living there with a parent or guardian who is domiciled in the district. The ALJ rejected the testimony of both petitioner and A.B., a family friend who assists petitioner in caring for her children, that petitioner lives in Union Township with her daughter, and found credible the testimony of the Board's investigator that petitioner was not at her purported residence on the six days she visited and observed the residence. The ALJ determined that petitioner must reimburse the Board tuition.

The Commissioner affirmed the decision of the ALJ and ordered that petitioner reimburse the Board tuition for the period of ineligible attendance.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1822-01

AGENCY DKT. NO. 5-1/01

M.C., ON BEHALF OF MINOR CHILD, S.M.,

Petitioner,

v.

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

Resondent.

Richard J. Szemiot, Esq., for petitioner

Joseph M. Wenzel, Esq., for respondent
(Thomas McCormack, attorney)

Record Closed: May 18, 2001 Decided: June 1, 2001

BEFORE **EDITH KLINGER**, ALJ:

On January 5, 2001, petitioner, M.C., filed a petition before the Commissioner of Education to compel the respondent, Board of Education of the Township of Union (District), to provide her daughter, S.M., with a free public education in the Township schools pursuant to *N.J.S.A.* 18A:38-1b.

On January 25, 2001, the District filed its answer to the petition and, on March 12, 2001, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The hearing was held on May 18, 2001 and the record closed on that date.

In December 2000, Osborne F. Abbey, Jr., Assistant Superintendent of Schools for the Township of Union, notified M.C. that it had obtained information that her 16 year old daughter, S.M., lived in Union and attended the public high school there while her mother and guardian, M.C., was living in Newark. S.M. was to be removed from the Union school system as of December 19, 2000 unless M.C. agreed to pay tuition for her attendance there. The District also seeks reimbursement for tuition during S.M.'s alleged prior period of ineligible attendance. M.C. requested a hearing and S.M. was allowed to remain in Union High School pending the outcome of this appeal.

It is undisputed that M.C.'s son, R.M., also attended Union High School until he became the subject of a judicial restraining order preventing him from having any contact with a neighborhood girl in the Township of Union. In order to keep him from getting into further trouble, M.C. sent him to live with her mother, A.H., in Newark and attend Barringer High School there. There was no court order requiring this.

In support of R.M.'s attendance in the Newark school district without cost, M.C. induced A.H. to write a note (R-2) to Barringer to prove that both M.C. and R.M. were domiciled with A.H. in Newark. M.C. admits that she was fully aware of the content of the note and she presented it to Barringer along with her mother's PSE&G bill when she enrolled her son there. The note states:

> My name is [A.H.]. I am the owner of the house on 240 Summer Ave [Newark].
> My daughter [M.C.] and her son [R.M.] will be staying here.
> They will be living with me on the 3rd floor.
> They won't be paying any rent. I [A.H.] pay everything.
> I have other tenants living in the house.

The note is signed by A.H.

Schmidtberg continued her surveillance on April 25 and 27, 2001 with the usual results. A.B. and S.M. exited at about 7:30 a.m. She rang the doorbell several times on these days but no one answered. She then attempted to inquire about the family from the neighbors but they did not want to be involved and would not respond to her questions.

At no time during the six days of surveillance did Schmidtberg see any sign of M.C. in or near the apartment. Since the investigator was at the door by 6:00 a.m., she would certainly have observed M.C. who allegedly left at about 6:30 a.m.

N.J.S.A. 18A:38-1a provides public schooling shall be free to any person over five and under 20 years of age who is domiciled within the school district. If the district finds that the parent or guardian of a child who is attending school in the district is not domiciled within the district, the child may, after a hearing, be removed from the school system and the parent or guardian assessed for tuition for the period of ineligible attendance. *N.J.S.A.* 18A:38-b(2). The parent has the burden of proving domicile by a preponderance of the credible evidence. *N.J.S.A.* 18A:38-b(2).

M.C. produced documents which showed that she held a lease on an apartment on Morris Avenue in Union, at least until December 31, 2000. She can also demonstrate that she had accounts with PSE&G and Elizabethtown Gas to provide services to the apartment. However, in spite of these, there are other documents and there is testimony in the record which casts serious doubt on her assertion that she is domiciled in Union.

First, there is the letter presented to Barringer by M.C. stating that M.C. lived with her mother in Newark. Second, there is the fact that M.C. turned over all parental responsibility for S.M. to A.B. proving that she planned to be absent from the Morris Avenue apartment and out of touch with her daughter for extended periods of time. Third, there is the lack of any sighting of M.C. at the apartment at times when the testimony of A.B. shows that she should have been observed there.

Finally, much of the support for M.C.'s story rests upon the testimony of A.B. His relationship to this family is not clear but I **FIND** no doubt that he is extremely protective of M.C. and her children, enough so to distort the truth to help her in this situation. I **FIND** his testimony to be simply incredible. It is unbelievable that M.C. leaves home every morning at 6:30 a.m. burdening him with the full responsibility to parent her daughter and he does not know where she is going or where she might be during the day. M.C. does not even seem to be around in the evening when A.B. stays to help S.M. with her homework.

A.B. stated that he lives in Toms River and there is no evidence to the contrary so that he may not be living in the Morris Avenue apartment with S.M. However, I **FIND** that there is no credible evidence that M.C. lives there either. The documents she presented as proof of domicile show only that she used the Morris Avenue apartment as a mailing address. It appears from weighing the evidence that S.M. is living alone on Morris Avenue under the watchful eye of A.B. but no finding of fact will be made in this regard. There is only one clear thing in this strange situation. I **FIND** that S.M. is not living in Union Township with a parent or guardian domiciled within the District.

I further **FIND** that M.C. has not been domiciled in Union Township since she transferred her son to Barringer on or about November 28, 2000 when the transfer came to the attention of Schmidtberg. The exact date is not in the record. This finding is further supported by the date of the "Limited Power of Attorney" (P-13), which is November 20, 2000. This is when M.C. turned over parental control of S.M. to A.B. in preparation for leaving her in Union to move to Newark.

In the present case, I **CONCLUDE** that M.C. has failed to carry her burden of proving that she was domiciled in the District at all relevant times.

If the parent or guardian fails to carry the burden of proof, *N.J.S.A.* 18A:38-1(b)(2) provides that the district can remove the child from school and assess the resident tuition for the student prorated to the period of ineligible attendance in district schools. In this case the District will not allow S.M. to continue attending Union High

APPENDIX

Witnesses:

For Petitioner:

M.C.

S.M.

A.B.

For Respondent:

Maria Schmidtberg

Exhibits:

P-1 Apartment Lease
P-2 Lease Renewal Notice
P-3 Form 1040 2000 Cover Page
P-4 Driver's License
P-5 HDS Pay Stub
P-6 PSE&G Letter
P-7 PSE&G Payment Stub
P-8 NUI, Elizabethtown Gas Payment Stub
P-9 NJ KidCare Letter
P-10 Summit Savings Account Statement
P-11 Summit Account Statement
P-12 Summit Account Statements
P-13 Limited Power of Attorney
P-14 Attendance Record
P-15 Letter from Osborne

R-1 Fax Cover
R-2 Letter from A.H.

OAL DKT. NO. EDU 1822-01
AGENCY DKT. NO. 5-1/01

M.C., 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 (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 Union during the period from November 28, 2000 through the present time, so as to entitle her daughter, S.M. 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 documents and testimony brought to the record with respect to petitioner's claim of domicile. The Commissioner likewise concurs with the ALJ, for the reasons detailed on page 8 of the Initial Decision, that the testimony of petitioner's supporting witness is incredible.

Accordingly, the Initial Decision of the OAL is affirmed for the reasons expressed therein. Petitioner is directed to reimburse the Board for the period of S.M.'s ineligible attendance in its schools, at the rate, as calculated by the Board, of $740.90 a month.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7|20|01

Date of Mailing: 7|23|01

* 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.

230-01

BOARD OF EDUCATION OF THE TOWNSHIP OF BEDMINSTER, SOMERSET COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
L.R. AND Y.R.,	:	DECISION
RESPONDENTS.	:	

July 23 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8200-00
AGENCY DKT. NO. 353-10/00

BOARD OF EDUCATION OF TOWNSHIP OF BEDMINSTER, SOMERSET COUNTY,
Petitioner,
v.
L.R. AND Y.R.,
Respondent.

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

L.R. and Y.R., respondents, *pro se*

Record Closed: May 12, 2001 Decided: June 4, 2001

BEFORE **M. KATHLEEN DUNCAN**, 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 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 4, 2001
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

6/6/01
DATE

Robbi Intermaggio/pjs
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 7 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

SETTLEMENT AND RELEASE

This Settlement and Release is by and between:

Lawrence Reznik and **Yolanda Reznik**, ("the Rezniks")currently residing at 2 Sussex Court, Bedminster, New Jersey 07921,

-and-

The Bedminster Board of Education ("the Board"), with offices located at 234 Somerville Road, Bedminster, New Jersey 07921.

WITNESSETH:

Whereas, on or about September 22, 2000, the Board filed a Petition of Appeal with the New Jersey Commissioner of Education, seeking, among other things, a declaration of ineligible attendance in the Bedminster Public Schools by the Reznik's minor children, G.R. and V.R., and a concomitant award of tuition for the period of ineligibility; and

Whereas, the aforesaid Petition of Appeal was transmitted by the Commissioner to the Office of Administrative Law for a plenary hearing as a contested matter, docketed as OAL. No. EDU 8200-00, and is to commence on June 4, 2001; and

Whereas, discovery is ongoing in the subject matter and the Rezniks have been ordered by the Court to submit to sworn depositions; and

Whereas, the parties now wish to resolve the subject matter expeditiously;

Now, therefore, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the parties, they agree as follows:

1. The Rezniks represent that they currently are domiciled in Bedminster Township at the above listed address.

2. The Rezniks shall deliver to the Board, at the above listed address, a certified check in the amount of $3,000 U.S. (Three Thousand Dollars), within five calendar days of the execution of this Agreement by both parties. Failure to do so shall render this Agreement null and void, and the Petition and related discovery shall resume immediately.

3. The Board shall withdraw its above referenced Petition, within ten days of receipt of the above specified payment by the Rezniks, and shall forgive the balance of its remaining monetary claim against the Rezniks for the attendance of their children in the Bedminster Schools through the date of this Agreement.

4. The Rezniks' children, G.R. and V.R. shall be enrolled in the Bedminster Public Schools at the appropriate grade level, as determined by the Board, free of charge, subject to their ongoing domicile in Bedminster.

5. The Board reserves all rights to file another Petition, in the event that the Rezniks' children do not remain domiciled in Bedminster in the future and fail timely to withdraw from the Bedminster Public Schools.

6. Nothing contained in this Agreement shall be construed as an admission of wrongdoing by any party.

7. The Rezniks acknowledge that they have been apprised of their right to seek independent legal counsel in reviewing this Agreement and that they enter into it without duress, and of their own free will and volition.

8. This Agreement contains the entire agreement between the parties, and no other representations, whether verbal or in writing, shall be binding upon them.

WHEREUPON, the parties or their authorized representatives have set forth their respective hands and seals, on the date(s) indicated below:

5-12-01
LAWRENCE REZNIK (date)

5/12/01
YOLANDA REZNIK (date)

Sworn to and subscribed before me on this 12th day of 2001.

TRACEY F. EUTSEY GREGORY
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Dec. 23, 2003

5-2-01
, President (date)

Attest:

5-2-01
Debe Besold, Secretary (date)

00092073; 1

3b

OAL DKT. NO. EDU 8200-00
AGENCY DKT. NO. 353-10/00

BOARD OF EDUCATION OF THE TOWNSHIP OF BEDMINSTER, SOMERSET COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
L.R. AND Y.R.,	:	DECISION
RESPONDENTS.	:	

The record, Settlement 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. In so holding, however, the Commissioner observes that the settlement agreement sets forth terms that were to be effectuated prior to his approval of this agreement pursuant to *N.J.A.C.* 1:1-19.1. The parties are cautioned against effectuating terms of a settlement agreement in controverted matters that have been duly transmitted to the OAL 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: 7|23|01

Date of Mailing: 7|24|01

232-01

JOHN W. RICKERT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

July 23, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2715-00

AGENCY DKT. NO. 31-1/00

JOHN W. RICKERT,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,

Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Zazzali, Fagella and Nowak, attorneys)

Karl N. McConnell, Esq., for respondent (Greitzer and Locks, attorneys)

Record Closed: May 31, 2001 Decided: June 5, 2001

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

This matter was transmitted to the Office of Administrative Law (OAL) on April 25, 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 indicating the terms thereof, which is attached and fully incorporated herein.

The stipulation of settlement entered into by the parties is hereby adopted

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 settlement 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.

6/05/01
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

6/6/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 7 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

es

SENIORITY AND TENURE RIGHTS

SUMMARY OF COMMISSIONER'S DECISION

John W. Rickert v. Board of Education of the Township of Pennsauken, Camden County

Petitioner asserted that the Board should have appointed him Supervisor of Athletics.

The matter was settled.

KARL N. MCCONNELL, ESQUIRE
GREITZER AND LOCKS
Woodland Falls Corporate Park
220 Lake Drive East, Suite 220
Route 38 and Church Road
Cherry Hill, NJ 08002
(856) 779-8200
Attorneys for Respondent

JOHN W. RICKERT, Petitioner, v. BOARD OF EDUCATION OF THE PENNSAUKEN TOWNSHIP SCHOOL DISTRICT, CAMDEN COUNTY, Respondent.	NEW JERSEY STATE DEPARTMENT OF EDUCATION AGENCY REF NO.: 31-1/00 OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDUOA02715-00S **CONSENT ORDER OF VOLUNTARY DISMISSAL WITH PREJUDICE**

THIS MATTER having come before the Commissioner of Education upon the application of the petitioner, John W. Rickert, on an allegation of a violation of his tenure rights by his employer, the Pennsauken Township Board of Education in that petitioner claimed to have a right to an administrative position and tenure therein by virtue of the job duties performed by him,

And the respondent, Pennsauken Township Board of Education, Camden County, disputing any and all such claims of rights by the petitioner,

And the parties having amicably resolved the differences between them pending the approval of this dismissal by the Commissioner of Education and complete resolution of plaintiffs claims,

The parties hereby agree to a dismissal of all claims and any action in this matter with prejudice and without costs to any parties.

Richard A. Friedman, Esquire
Zazzalli Zazzalli Fagella & Nowak
Attorney for Petitioner
John W. Richert

DATED: 5-2-01

Karl N. McConnell, Esquire
Greitzer and Locks
Attorney for Respondent
Pennsauken Board of Education

DATED: 5-21-01

DATED: _____

Honorable Steven C. Rebacks, A.L.J.

Approved, Acknowledged and Ordered on this _____ by _____.

DATED: _____

State Commissioner of Education

M:\Susan's files\Pennsauken BOE\John Rickert\pleadings\consent order.wpd

RELEASE AND
SETTLEMENT AGREEMENT

1. **Parties**. The parties to this Agreement are: John W. Rickert (hereinafter Rickert), of 2400 McClellan Avenue, Apt. 508 East, Pennsauken, New Jersey 08109, and The Board of Education of Pennsauken Township School District, Camden County, New Jersey, its administrators and employees, (hereinafter BOE). John W. Rickert is party to an action before the State Commissioner of Education and against the Board of Education of Pennsauken Township School District in which Rickert is petitioner and the Board of Education, its administrators and employees are the respondents.

2. **Release**. These presents hereby document that in exchange for payment of compensation, to be paid in two parts, totaling thirty-six thousand dollars ($36,000.00) from the Board of Education, Rickert hereby releases, dismisses, discharges, waives and forever gives up and relinquishes any claims which he has or could have asserted against the Pennsauken Board of Education up to and including the date of this release for any kind of action, claim, conduct, or lack thereof, or wrong of any kind related to or having to do with his claim to any position requiring an administrator certification prior to the date of this document being executed by him.

3. **Who is Released**. Rickert agrees hereby to hold harmless, release, settle, and forever waive as to the Board of Education, it's individual board members, superintendents, administrators, employees, and ager. jointly, severally, partly or wholly responsible for any kind of action, damage, injury, prejudice, or negative effect or impact suffered by Rickert prior to this document's execution date relating to his employment, job assignment or compensation for same regarding the position of Athletic Director.

4. **Payment**. Payments shall be made in two (2) equal parts totaling thirty-six thousand dollars ($36,000.00). One payment of eighteen-thousand dollars ($18,000.00) within thirty (30) days of Commissioner's Decision and the second shall be made prior to November 15, 2001. Payment shall be made as soon as the Dismissal of the action and this settlement is approved by the Commissioner of Education.

5. **Contingency**. All payments and this release are contingent upon the approval of this settlement and its terms and dismissal of the pending action before the Commissioner of Education. Absent the approval of this Agreement by the Commissioner and the extinguishment of this action, no payment of any kind need be made and this agreement and release are in all ways null and void.

6. **Who is Bound**. John W. Rickert is bound by the release, as well as anyone who has a derivative claim, e.g. spouse, or anyone who succeeds to any rights of Rickert, such as heirs or the executor of his estate, is also bound. This release is made for Respondents for its benefit and all who succeed to the rights and responsibilities of the defendant, BOE.

7. **Signatures**. I understand and agree to the terms of this release. I acknowledge that I have had the benefit of the advice of my counsel in accepting its terms and executing this release for the dismissal and

permanent extinguishment of any claims against the Pennsauken Board of Education regarding a claim of tenure to a Administrator or Supervisor position.

Witness:

Carrie Jo R. Herbert

John W. Rickert

JOHN W. RICKERT

SOCIAL SECURITY NUMBER

2400 McCLELLAN AVE Apt 508 EAS

ADDRESS

PENNSAUKEN N.J. 08109

STATE OF NEW JERSEY :
: ss.
COUNTY OF Mercer :

I certify that on April 26, 2001, **John W. Rickert** personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

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

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

Carrie Jo R. Herbert

NOTARY PUBLIC
My Commission Expires:

CARRIE JO R. HERBERT
A Notary Public of New Jersey
My Commission Expires Dec. 5, 2003

M:\jo's files\misc\richert - release.wpd

OAL DKT. NO. EDU 2715-00
AGENCY DKT. NO. 31-1/00

JOHN W. RICKERT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Release and Settlement Agreement, Consent Order of Voluntary Dismissal With Prejudice 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|23|01

Date of Mailing: 7|24|01

237-01

IN THE MATTER OF THE TENURE HEARING OF DENNYCE NUTTER SCONIER, SCHOOL DISTRICT OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

July 25, 2001

AGENCY DOCKET NO. 206-6/01

IN THE MATTER OF THE TENURE :

HEARING OF DENNYCE NUTTER : COMMISSIONER OF EDUCATION

SCONIER, SCHOOL DISTRICT OF THE : DECISION

CITY OF PLEASANTVILLE, ATLANTIC :

COUNTY.

:

For the Board, Joan M. Damora, Esq. (Schwartz, Simon, Edelstein, Celso & Kessler)

This matter having been opened before the Commissioner of Education on June 15, 2001 by the Pleasantville Board of Education through the certification of tenure charges against respondent, a tenured teacher, for incapacity, unbecoming conduct, insubordination and other just cause; and

The respondent, having been served, via certified and regular mail, with a copy of the charges, the Board's resolution, the Statement of Evidence and the Certificate of Determination on June 14, 2001; and

The Commissioner having directed respondent, via both certified and regular mail on June 15, 2001, to file an Answer to the tenure charges against her; and

Whereas, such communications 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 from the date such charges are filed with the Commissioner to file a written response to the charges with the commissioner,*" and that failure to answer within the prescribed period will, absent granting of an extension for good cause shown, result in the charges being deemed admitted; and

In that the certified mail receipt signed by respondent on June 18, 2001 was returned to the Commissioner; and

In that no reply has been received from respondent in response to the Board'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 Board and the statement of evidence in support of those charges indicate

respondent was suspended with pay by the Board on October 3, 2000 until further notice and directed to undergo a psychiatric examination; and

Whereas, a psychiatric evaluation conducted on or about October 30, 2000 yielded, *inter alia,* various psychiatric diagnoses with psychotic features and R/O Schizophrenoform, including paranoia and delusions and limited intact judgment; and

Whereas, the psychiatric evaluation further indicated that respondent was "not threatening harming to self or others" and had no suicidal or homicidal tendencies but that she refused medication and did not plan to continue with psychiatric treatment "unless she is made to"; and

Whereas, on or about February 23, 2001, the psychiatrist who evaluated respondent advised the Board that respondent had not returned for treatment; and

Whereas, on March 6, 2001, the Board directed respondent to provide the name(s) and address(es) of psychologists or psychiatrists from whom she received treatment and the dates of such treatment, a directive to which respondent failed to respond, despite a warning that failure to do so would be deemed insubordination, which could result in disciplinary action; and

Whereas, the tenure charges and statement of evidence are replete with allegations of actions manifesting respondent's psychiatric diagnoses, which, according to the Board, "include delusions and paranoia as evidenced in disturbing comments made by Sconier regarding persons, situations, and objects; an inability to get along with peers; a heightened sense of racial animosity and hostile work environment; absenteeism and tardiness; aggravated physical disabilities; and an inability to adequately perform her teaching responsibilities. Such conduct became apparent during the course of the 1997/1998 school year and continued until [her] suspension on October 5, 2000, under the tutelage of three separate principals, increasing in number and seriousness of occurrences, finally necessitating her suspension. Sconier's illness, aggravated by her adamant refusal to comply with medical recommendations for treatment, renders her incapable of carrying our her duties." (Sworn Tenure Charges at 2); and

Deeming such charges to be admitted, and noting that respondent has not replied to the specific allegations contained therein, the Commissioner finds that respondent's actions constitute incapacity, excessive absenteeism, unbecoming conduct, insubordination and other just cause, as charged by the Board, which warrant dismissal from her tenured teaching position; now, therefore

IT IS SO ORDERED this 25th day of July 2001 that summary judgment shall be granted to the Board, and respondent shall be dismissed from her tenured position as teacher in the Board's employ as of the date of this order.* The matter shall be

* 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.

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: 7|25|01

Date of Mailing: 7|27|01

IN THE MATTER OF ROSEMARY JACKSON, :

BOARD OF EDUCATION OF THE CITY OF :

CAMDEN, CAMDEN COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The School Ethics Commission found probable cause to credit the allegation that Rosemary Jackson violated the School Ethics Act by voting to approve a bill list that contained a bill of her employer. The Commission and Jackson reached a settlement wherein they agreed that Jackson inadvertently violated the School Ethics Act, and that the Commission would recommend a penalty of reprimand to the Commissioner.

The Acting Commissioner issued a decision imposing a penalty of reprimand for the violation of the School Ethics Act.

July 27, 2001

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
ROSEMARY JACKSON,	:	
Respondent	:	**Docket No.: C11-01**
	:	
CAMDEN CITY BOARD OF EDUCATION, CAMDEN COUNTY	:	**AGREEMENT OF SETTLEMENT**
	:	

WHEREAS, complainant Jeffrey Fox initiated this action against the respondent, Rosemary Jackson and said respondent has answered thereto; and

WHEREAS, the Commission found no probable cause to credit the allegation that respondent violated the School Ethics Act by accepting employment with a vendor of the Camden Board of Education but found probable cause to credit the allegation that respondent violated N.J.S.A. 18A:12-24(c) by voting on a bill list that contained the bill of her employer, Respond, Inc.; and

WHEREAS, after a finding of probable cause, the School Ethics Commission becomes the complaining party; and

WHEREAS, the Commission and the respondent desire to resolve all disputes between them giving rise to the claims in this action; and

WHEREAS, the Commission and the respondent desire to set forth their agreement to settle their disputes here below;

NOW, THEREFORE BE IT RESOLVED that the Commission and the respondent agree to settle their disputes on the following terms:

1. Respondent admits to voting on a bill list containing a bill of her employer, Respond, Inc., although she did so inadvertently.

2. The School Ethics Commission, in consideration of the provisions hereof, recommends that the Commissioner of Education impose the sanction of reprimand for the violation of N.J.S.A. 18A:12-24(c) on which it found probable cause. Pursuant to N.J.A.C. 6A:28-1.2, a reprimand is a letter from the Commission rebuking a school official for having been found to have breached the standards of conduct prescribed by N.J.S.A. 18A:12-21 et seq.

3. Respondent agrees that this settlement agreement concludes this matter and no further appeals will be taken.

Rosemary Jackson, Respondent

DATED: 6/25/01

Harvey Johnson, Esquire
Attorney for the Respondent

DATED: 6-25-01

ACCEPTED AND AGREED TO BY

Paul C. Garbarini, Chairperson
School Ethics Commission

DATED: 6/26/01

1. Respondent admits to voting on a bill list containing a bill of her employer, Respond, Inc., although she did so inadvertently.

2. The School Ethics Commission, in consideration of the provisions hereof, recommends that the Commissioner of Education impose the sanction of reprimand for the violation of N.J.S.A. 18A:12-24(c) on which it found probable cause. Pursuant to N.J.A.C. 6A:28-1.2, a reprimand is a letter from the Commission rebuking a school official for having been found to have breached the standards of conduct prescribed by N.J.S.A. 18A:12-21 et seq.

3. Respondent agrees that this settlement agreement concludes this matter and no further appeals will be taken.

Rosemary Jackson, Respondent

DATED:

Harvey Johnson, Esquire
Attorney for the Respondent

DATED:

ACCEPTED AND AGREED TO BY

Paul C. Garbarini, Chairperson
School Ethics Commission

DATED: 6/26/01

Resolution Adopting Settlement -- C11-01

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof and has considered the testimony of the complainant, the respondent and the witness; and

Whereas, at its meeting of May 22, 2001, the Commission found no probable cause to credit the allegations that respondent violated the School Ethics Act, N.J.S.A. 18A:12-21 et seq. by accepting employment with a district vendor, but found probable cause to credit the allegation that respondent violated N.J.S.A. 18A:12-24(c) by voting on the bill list containing the bill of her employer; and

Whereas, the Commission requested that its staff offer a settlement of reprimand for the above violation upon which it found probable cause; and

Whereas, the Commission has reviewed the draft settlement agreement and agrees with the agreement;

Now Therefore Be It Resolved that the Commission hereby consents to the proposed settlement agreement recommending a penalty of reprimand to the Commissioner of Education.

Paul C. Garbarini, Chairperson

I hereby certify that the School Ethics Commission
consented to this settlement agreement
at its public meeting on June 26, 2001.

Lisa James-Beavers, Executive Director

AGENCY DKT. NO. 241-7/01

IN THE MATTER OF ROSEMARY JACKSON, :
BOARD OF EDUCATION OF THE CITY OF :
CAMDEN, CAMDEN COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

The record and Settlement Agreement containing the School Ethics Commission's recommendation that respondent be reprimanded for a violation of *N.J.S.A.* 18A:12-24(c), because she inadvertently voted on a bill list containing a bill of her employer, have been reviewed.

Upon such review, pursuant to the provisions of *N.J.S.A.* 18A:12-29c, the Commissioner hereby accepts the penalty recommended by the Commission.

Accordingly, IT IS ORDERED that Rosemary Jackson be reprimanded as a school official found to have violated *N.J.S.A.* 18A:12-24(c).

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7|27|01

Date of Mailing: 7|27|01

236-01

MARY TECKTONIUS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

July 27, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11814-99
AGENCY DKT. NO. 261-8/99

MARY TECKTONIUS,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,
Respondent.

Gregory T. Syrek, Esq., for petitioner
(Bucceri & Pincus, attorneys)

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

Record Closed: June 4, 2001 Decided: June 8, 2001

BEFORE **MICHAEL L. RAVIN**, ALJ:

This matter was transmitted to the Office of Administrative Law on November 18, 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 have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed 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.

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.

June 8, 2001
DATE

Michael L. Ravin
MICHAEL L. RAVIN, ALJ

Receipt Acknowledged:

6/12/01
DATE

Debbie Anastasio
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 14 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

AGREEMENT

On May 15 , 2001, **MARY TECKTONIUS** ("Tecktonius"), residing at 104 Lincoln Avenue, Avon-by-Sea, New Jersey 07717-1311, and the **HOBOKEN BOARD OF EDUCATION** ("Board"), with offices at 1115 Clinton Street, Hoboken, New Jersey 07030-3201, hereby agree as follows:

1. The Board has restored to Tecktonius' sick leave bank all sick days charged to her during the period of time from October 22, 1998 through October 21, 1999. As the result of the restoration of these sick days, Tecktonius has a total of 294 accumulated sick days as the result of her employment service with the Board. The restoration of these sick days is confirmed by the attached printout. (Exhibit A)

2. The Board agrees that, if necessary, it will issue appropriate amended W-2 statements for the period of time in question and comply with its obligations pursuant to N.J.S.A. 18A:66-32.1.

3. The petition in this matter, bearing O.A.L. Docket No. EDU 11814-99 and Agency Ref. No. 261-8/99, shall be dismissed with prejudice.

4. Tecktonius acknowledges that she has been advised of her right to consult with an attorney or representative of her own choosing prior to signing this Agreement, and has done so, and that she signs this Agreement as her own voluntary act and deed, and that she fully understands the duties and obligations enumerated herein.

5. The undersigned representatives of the Board hereby acknowledge that they agree to the terms and conditions of this Agreement and have the authority to bind the Board to its terms.

6. 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.

7. The parties agree that their respective covenants and entry into this Agreement does not constitute an admission of wrongdoing or guilt on the part of either party.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

~~WITNESS:~~

Gregory T. Syrek, Esq.

Mary Tecktonius

Mary Tecktonius

Dated:

WITNESS:

HOBOKEN BOARD OF EDUCATION

Patrick Gagliardi

Patrick Gagliardi,
Superintendent of Schools
Dated: May 15, 2001

By:

Board President

Board Secretary

3b

BUCCERI AND PINCUS
COUNSELORS AT LAW
1200 ROUTE 46
CLIFTON, NEW JERSEY 07013-2440

(973) 773-5665

FAX (973) 773-2170

SHELDON H. PINCUS
MEMBER N.J. & D.C. BARS
LOUIS P. BUCCERI
GREGORY T. SYREK

MARY J. HAMMER
MEMBER N.J. & N.Y. BARS

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
JUN 4 12 43 PM '01

June 1, 2001

Hon. Michael L. Ravin, A.L.J.
Office of Administrative Law
185 Washington Street
Newark, NJ 07102-3011

Re: Mary Tecktonius v. Hoboken Board of Education
Docket No. EDU 11814-99N

Dear Judge Ravin:

Enclosed please find a fully executed agreement between the parties in this matter.

Respectfully yours,
BUCCERI & PINCUS, ESQS.

By: _____
Gregory T. Syrek

/ls
cc: Karen A. Murray, Esq.
Mary Tecktonius

OAL DKT. NO. EDU 11814-99
AGENCY DKT. NO. 261-8/99

MARY TECKTONIUS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON 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: 7|27|01

Date of Mailing: 7|27|01

239-01

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN SHEFFIELD,	:	
NEW JERSEY DEPARTMENT OF HUMAN	:	COMMISSIONER OF EDUCATION
SERVICES, ANCORA PSYCHIATRIC	:	DECISION
HOSPITAL.	:	

August 2, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2047-00
AGENCY DKT. NO. 63-2/00

NEW JERSEY DEPARTMENT OF HUMAN SERVICES,
Petitioner,
v.
JOHN SHEFFIELD,
Respondent.

Douglas M. Alba, Deputy Attorney General, for petitioner (John J. Farmer, Jr., Attorney General of New Jersey, attorney)

Rosemarie Cipparulo, Esq., for respondent (Weissman & Mintz, attorneys)

Record Closed: June 5, 2001 Decided: June 14, 2001

BEFORE **ROBERT S. MILLER**, ALJ:

This matter was transmitted to the Office of Administrative Law on March 15, 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 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.

June 14, 2001
DATE

ROBERT S. MILLER, ALJ

Receipt Acknowledged:

6-18-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 19 2001
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: albadoug@law.dol.lps.state.nj.us
(609) 984-8466

DONALD T. DIFRANCESCO
Acting Governor

JOHN J. FARMER, JR.
Attorney General

JEFFREY J. MILLER
Assistant Attorney General
Director

June 4, 2001

JUN - 5 2001
WEISSMAN

Rosemarie Cipparulo, Esquire
WEISMAN & MINTZ
One Executive Drive, Suite 200
Somerset, New Jersey 08873

Re: NJ Department of Human Services, et al.
v. John Sheffield
OAL Docket No. EDU 2047-00

Dear Ms. Cipparulo:

Enclosed please find signed Settlement Agreement regarding the above-captioned matter.

Sincerely yours,

JOHN J. FARMER, JR.
ATTORNEY GENERAL OF NEW JERSEY

By: _____
Douglas M. Alba
Deputy Attorney General

DMA/jma
Enclosure
Sent by Overnight Delivery

Rosemarie Cipparulo, Esq.
Weissman & Mintz
Attorneys for Respondent
One Executive Drive, Suite 200
Somerset, New Jersey 08873
(732) 563-4565

NEW JERSEY DEPARTMENT OF HUMAN SERVICES, ANCORA PSYCHIATRIC HOSPITAL, Petitioner, v. JOHN SHEFFIELD, Respondent.	ADMINISTRATIVE ACTION OAL DKT. No. EDU 2047-00 AGENCY DKT. NO. 63-2/00 **Civil Action** SETTLEMENT AGREEMENT

PLEASE TAKE NOTICE that the parties to this appeal voluntarily reached a mutually satisfactory agreement as to its disposition. The terms of the final settlement are agreed to by the parties as follows:

1. The tenure charges against Respondent will be changed from Conduct Unbecoming a Tenured Teacher to a second Violation of a Rule, Regulation, Policy, Procedure, Order or Administrative Decision consistent with Administrative Order 4:08 E-1.

2. The penalty of suspension for 20 days, already served by Respondent will be changed to 15 days.

3. The Respondent will receive from the Department of Human Services ("the Department") 5 days salary, benefits and seniority.

4. By this agreement, Respondent John Sheffield withdraws his appeal, and both parties to this agreement agree that it is

fully dispositive of all issues in controversy between them.

5. The Petitioner will amend the Respondent's personnel file to conform to the terms of this agreement.

6. Except for the assessment of the Respondent's disciplinary record in any subsequent Education hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent for any other matter.

7. The Respondent waives all claims against the State of New Jersey with regard to this matter, including any award of counsel fees or other monetary relief.

8. Both parties agree to waive the right to file exceptions and cross-exceptions.

9. This agreement shall only be effective upon the approval by the Administrative Law Judge and the Commissioner of Education, and any disapproval by the Commissioner shall not interfere with the rights of either party to pursue this matter further.

This agreement constitutes a full and final disposition of this matter.

Dated: 5/31/01

Terry O'Lone
Department of Human Services
Petitioner

Dated: 5/3/01

JOHN J. FARMER, Jr.
ATTORNEY GENERAL OF NEW JERSEY

Douglas M. Alba
Deputy Attorney General

Dated: 04/28/01

John Sheffield
Respondent

Dated: 4/26/01

Rosemarie Cipparulo
Respondent's Representative
Rosemarie Cipparulo, Esq.

OAL DKT. NO. EDU 2047-00
AGENCY DKT. NO. 63-2/00

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN SHEFFIELD,	:	
NEW JERSEY DEPARTMENT OF HUMAN	:	COMMISSIONER OF EDUCATION
SERVICES, ANCORA PSYCHIATRIC	:	DECISION
HOSPITAL.	:	

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.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8|2|01

Date of Mailing: 8|3|01

240-01

FRANK KILLINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

August 6, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10341-98
AGENCY DKT. NO. 473-10/98

FRANK KILLINO,
Petitioner,
v.
BOARD OF EDUCATION OF TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY,
Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Fagella & Nowak, attorneys)

Frank P. Cavallo, Esq., for respondent (Parker, McKay & Criscuolo, attorneys)

Record Closed: June 11, 2001 Decided: June 15, 2001

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on November 20, 1998, 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. The Division of Pensions and Benefits has approved the settlement terms as indicated in the June 1, 2001 letter from Mindy Smith-Sopko, transmitted to the undersigned by counsel for petitioner under cover letter dated June 11, 2001, copies of both letters attached.

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 15, 2001
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

6/20/01
DATE

Debbie Asbenates/RP
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 21 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioner

FRANK KILLINO, Petitioner, v. BOARD OF EDUCATION OF THE CINNAMINSON TOWNSHIP SCHOOL, DISTRICT, BURLINGTON COUNTY, Respondent.	:	BEFORE THE OFFICE OF ADMINISTRATIVE LAW OAL Docket No.: EUDOR 10341-98S **SETTLEMENT AGREEMENT AND STIPULATION OF SETTLEMENT**

The parties to the within matter hereby agree to settle and resolve the claims which were asserted by petitioner in the Petition of Appeal bearing the above docket number, based upon the following terms:

1. The parties recognize that petitioner filed a Petition of Appeal with the Commissioner of Education which asserts that respondent's failure to assign counseling work which required that he hold a Student Personnel Services endorsement, and which work was required of certified counselors employed by respondent, violated petitioner's tenure and seniority rights to be assigned said work for several school years, and violated the requirements of the Superior Court, Appellate Division's decision in Killino v. Board of Education of the Township of Cinnaminson, Docket No. : A-2042-84T7, decided April 30, 1986, and subsequent decisions of the State Board of Education and the Appellate Division, Superior Court, for example Taxman v. Piscataway Township Board of Education decided September 1, 1993 by the State Board of Education. The parties also recognize that the

Board denied the allegations of the Petition of Appeal and filed an answer denying the allegations of the Petition of Appeal.

2. The parties agree that this settlement shall resolve petitioner's claims for a remedy for the asserted violations of his tenure and seniority rights, and that the acceptance and implementation of all of the terms of this settlement shall result in the amicable resolution of those rights, and shall control petitioner's tenure and seniority rights to future employment with respondent.

3. The parties agree that this settlement is contingent upon approval by the Commissioner of Education and its acceptance by the Teachers' Pension and Annuity Fund.

4. The parties agree that this settlement shall not apply to any claims that are based upon facts not presently known to petitioner. Nor shall it apply to any claims based upon any facts which may arise or occur after the date that petitioner signs this settlement. The parties also agree that any such claims are neither waived nor abandoned by this settlement, and that this settlement shall only extinguish those claims which petitioner is aware of as of the date of signing this settlement.

5. The parties agree that this settlement must be approved by the Commissioner of Education, and that if the Commissioner of Education rejects any provision of this settlement, if respondent does not fully implement the terms of this settlement, or if the Teachers' Pension and Annuity Fund does not accept and implement this settlement, all provisions of this settlement shall be deemed null, void, and of no effect, and that the Petition of Appeal, in its entirety, shall be deemed active and shall be remanded to the Administrative Law Judge for proceedings as a contested case, and that in such event, the parties shall retain all legal rights that they had prior to their entering into this settlement.

6. The parties agree that petitioner shall be restored to the status of supervisor effective July 1, 2001, and that because petitioner assumed the duties of the position of supervisor for the 2000-2001 school year, petitioner shall receive backpay in the amount of $4,500.00. The parties further agree that based upon petitioner's assumption of the duties of a supervisor and his status as a supervisor, petitioner's salary shall be increased in the amount of $4,500.00 for the 2001-2002 school year. Pension contributions shall be remitted for petitioner's position and salary as defined in this paragraph both for his backpay for the 2000-2001 school year and for the 2001-2002 school year, and that petitioner shall receive full pension credit for such salary, i.e., for the backpay that petitioner receives, and for petitioner's salary as a supervisor for the 2001-2002 school year. If the date of the Commissioner's approval is after the last school year paycheck, payment for the backpay shall be made within 15 days of the Commissioner's approval and shall be considered part of petitioner's 2000-2001 school year salary.

7. The parties agree that the duties petitioner shall be required to perform as a supervisor as required for respondent to fulfill its obligations to provide a thorough and efficient education.

8. The parties agree that the petitioner shall be assigned and compensated for a minimum of twelve additional days work for each year, to be performed satisfactorily during the 2000-01, 2001-02 and 2002-03 school years. The parties further agree that petitioner shall be assigned and compensated for no less work days than the amount of work days assigned to the senior certified counselor in the respondent school district. The parties also agree and understand that pension contributions shall be remitted for this work and that petitioner shall receive pension credit for this work, but that in accord with recent determinations of the

Board of Trustees of the Teachers' Pension and Annuity Fund, such credit shall be provided only prospectively, meaning for the 2001-02 and 2002-03 school years.

9. It is recognized that because this work is required and necessary, respondent shall make pension contributions and petitioner shall receive pension credit for all salary and compensation attributable to said work with all said pension credit to be provided. The parties further acknowledge and agree that the salary and compensation attributable to said work is apart and distinct from the payments referred to in paragraphs 6 and 7.

10. The parties agree that prior to the acceptance of this settlement agreement the parties shall seek recognition and approval of this agreement by the Commissioner of Education and the Division of Pensions.

11. The parties agree that when petitioner retires, petitioner shall be paid for all accumulated sick leave at the minimum rate of $100.00 per day.

[AGREEMENT CONTINUES ON PAGE 5]

Frank Killino
Petitioner

Dated: 5/16/01

ZAZZALI, ZAZZALI, FAGELLA & NOWAK
Attorneys for Petitioner

By: _____
Richard A. Friedman, Esq.

Dated: 5/16/01

Board of Education of the
Township of Cinnaminson

By: _____
Superintendent of Schools

Dated: 5-11-01

Parker, McCay & Criscuolo
Attorneys for Respondent

By: _____
Frank P. Cavallo, Jr., Esq.

Dated: 5/14/01

ZAZZALI, FAGELLA & NOWAK
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
150 WEST STATE STREET
TRENTON, N.J. 08608
(609) 392-8172
FACSIMILE: (609) 392-8933

NEWARK OFFICE
ONE RIVERFRONT PLAZA
NEWARK, N.J. 07102-5410
(973) 623-1822
FACSIMILE: (973) 623-2209

PLEASE REPLY TO TRENTON

ANDREW F. ZAZZALI (1925-1969)

ANDREW F. ZAZZALI, JR.
ROBERT A. FAGELLA**
KENNETH I. NOWAK***
RICHARD A. FRIEDMAN
PAUL L. KLEINBAUM*

KATHLEEN A. NAPRSTEK*
AILEEN M. O'DRISCOLL*
EDWARD H. O'HARE*
JASON E. SOKOLOWSKI
COLIN M. LYNCH
VINCENT J. NOLAN, III

SPECIAL COUNSEL
WILLIAM A. PASCARELL****

* (N.J. & PA. BAR)
** (N.J. & N.Y. BAR)
*** (N.J., N.Y. & D.C. BAR)
**** (N.Y. BAR ONLY)

June 11, 2001

Hon. M. Kathleen Duncan, ALJ
Office of Administrative Law
9 Quakerbridge Plaza
P.O. Box 049
Trenton, NJ 08625

Re: Frank Killino v. Board of Education of the Cinnaminson Township School District, Burlington County
OAL Docket No. EDU 10341-98

Dear Judge Duncan:

Enclosed please find copy of correspondence from Mindy Smith-Sopko of the Division of Pensions, which confirms that the Division of Pensions and Benefits has approved the settlement agreement. Accordingly, the parties request that you issue an initial decision approving the settlement agreement.

Thank you for your patience and cooperation in this matter.

Respectfully submitted,

ZAZZALI, FAGELLA & NOWAK

Richard A. Friedman

RAF/cgf
Enc.

cc: Frank Killino
Arlene Derrico
Frank P. Cavallo, Jr., Esq.

State of New Jersey
DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS AND BENEFITS
(609) 292-7524 TDD (609) 292-7718
www.state.nj.us/treasury/pensions

DONALD T. DIFRANCESCO
Acting Governor

Mailing Address:
PO Box 295
Trenton, NJ 08625-0295
Location:
50 West State Street
Trenton, New Jersey

PETER R. LAWRANCE
Acting State Treasurer

THOMAS P. BRYAN
Director

June 1, 2001

Richard A. Friedman
Zazzali, Fagella and Nowak
Attorneys at Law
150 West State Street
Trenton, NJ 08608

Re: Frank Killino

Dear Mr. Friedman:

This is in response to your letter, dated May 30, 2001, in which you requested the Division of Pensions and Benefits approval for pension purposes of the award of back salary in the settlement agreement between the above named member and his employer.

The settlement is acceptable for implementation by the Division. Once the Division receives the member's contributions for pension and contributory life insurance from the employer, the Division will retroactively increase the member's pensionable salary by $4,500 for the 2000-2001 school year.

Contributions for the member's increased salary as a supervisor in the 2001-2002 school year should be remitted to the Division as part of the member's regular pension contributions.

If you have any further questions, please contact me at (609) 292-3405.

Sincerely,

Mindy Smith-Sopko
Administrative Analyst II

C G. Hope

OAL DKT. NO. EDU 10341-98
AGENCY DKT. NO. 473-10/98

FRANK KILLINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Settlement Agreement and 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|6|01

Date of Mailing: 8|6|01

* It is noted that approval of the Division of Pensions and Benefits for pension purposes, as contemplated by the Settlement Agreement, was received and is appended to the parties' agreement.

241-01

M.G. AND M.G., on behalf of minor child, A.G., :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY, : DECISION

RESPONDENT. :

SYNOPSIS

Petitioners challenged the Board's determination to expel their son after he twice tested positive for marijuana, arguing that the Board failed to follow the Commissioner's directives when reaching its determination.

At the conclusion of the hearing, the ALJ held that the Board's determination to expel A.G. was not arbitrary, capricious or unreasonable. The ALJ determined that the testimony of the administrators from the district that placement of A.G. in the alternative school was considered and rejected as an option to expulsion because of A.G.'s failure to enroll in intensive drug treatment and based on his and his family's apparent absence of desire to combat his drug abuse was credible.

Having reviewed the record and the transcript of the hearing, the Commissioner affirmed the decision of the ALJ with modification. The Commissioner affirmed the ALJ's conclusion that petitioners failed to sustain their burden of establishing that the Board's decision to expel A.G. was arbitrary, capricious or otherwise contrary to law and that, consequently, such determination must be sustained. The Commissioner, however, rejected the ALJ's statement that "no legal support is cited by the Commissioner of Education for the proposition that a local board of education is required specifically to consider alternative educational options for a nonclassified student over sixteen years of age before expulsion can be ordered.***" Citing *Scher,* the Commissioner noted that it is well-established that "termination of a pupil's right to attend public schools of a district is a drastic and desperate remedy which should be employed only when no other course is possible." Consequently, in reviewing the propriety of such a decision, the Commissioner must be persuaded that expulsion is employed as the last ditch expedient. Petition was dismissed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 208-01

AGENCY DKT. NO. 20-1/01

M.G. AND M.G., ON BEHALF OF A.G.,

Petitioners,

v.

BOARD OF EDUCATION OF WASHINGTON TOWNSHIP,

Respondent.

Christopher M. Manganello, Esq., for petitioners

Joseph F. Betley, Esq., for respondent (Capehart & Scatchard, attorneys)

Record Closed: June 4, 2001 Decided: June 11, 2001

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

Appeal of the Washington Township Board of Education's second decision (decision on remand from the Commissioner of Education) to expel A.G. because A.G. twice tested positive for marijuana. The petitioners allege the Board failed to follow the Commissioner's directive when it considered the expulsion for the second time.

The petitioners filed a petition with the Commissioner of Education challenging the Board's expulsion. The petitioners also requested emergency relief, seeking immediate placement in the school district. On February 15, 2001, the Commissioner denied the petitioners' application for emergent relief, but directed the Board to provide home instruction to A.G. until determination of the matter on its merits.

On February 27, the Board filed an appeal with the State Board of Education, controverting that part of the Commissioner's decision ordering it to provide home instruction. On March 8, 2001, the Commissioner denied the Board's motion for reconsideration or clarification or stay.

On May 2, 2000, the State Board dismissed the Washington Township Board's appeal as to home instruction.

Further background includes the following: A.G. is a sixteen-year-old boy who has an accommodation plan under Section 504 of the Rehabilitation Act of 1973. A.G. was expelled from Washington Township High School effective August 15, 2000, following two positive drug tests. The petitioners had filed an appeal of the expulsion on July 7, 2000, before the Commissioner of Education. The Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case including a request for emergency relief, pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13.

The Honorable Jeff S. Masin, Acting Chief ALJ, after an emergent hearing, denied the petitioners' application for emergent relief on August 10, 2000. Judge Masin ordered the matter to plenary hearing as soon as possible. The plenary hearing was held on September 7, 8 and 13, 2000. As a result of the hearing and by two orders dated September 19, 2000, Judge Masin dismissed the special education portion of the case and dismissed the petitioners' challenges to A.G.'s expulsion.

The petitioners filed exceptions to Judge Masin's decision with the Commissioner on April 12, 2000. The Commissioner affirmed in part and reversed in part the initial decision. In his decision of November 6, 2000, the Commissioner directed the respondent Board to readmit

A.G. and to determine, after considering pertinent factors including available alternative educational options, whether expulsion should be the appropriate result under all of the circumstances present. On Wednesday, December 6, 2000, the Board conducted a hearing. The parties have markedly different views as to what occurred at hearing. A transcript is available to me. Exhibit E.

On December 15, 2000, the petitioners received the Board's decision dated December 13, 2000. A.G. was again expelled. At the hearing of December 6, the Board presented two witnesses, Rosemarie Farrow and Jack McGee. The petitioners produced testimony from Sally Anne Bickford, Ph.D. There was considerable disagreement as to what the scope of Bickford's testimony should be. The hearing ended abruptly, each side blaming the other for the breakdown.

On January 30, 2001, I heard arguments on the petitioners' motion for emergency relief. After considering the record and all arguments put forward, and balancing the equities, I **DENIED** the motion and suggested that the matter was appropriate for plenary hearing. The Commissioner of Education expeditiously reviewed the order. On February 15, 2001, the Commissioner affirmed the order denying the motion. The matter was returned to the Office of Administrative Law for plenary hearing and that hearing was held on March 22, 2001. Counsel made post-hearing submissions and provided me a transcript of the March 22, 2001 hearing. The record closed would have on April 24, 2001. One petitioners' exhibit was missing, however. Upon notification, the petitioners' counsel promptly supplied the document and the record closed on June 4, 2001.

The petitioners argue that the Commissioner's decision of November 6, 2000 was predicated on the idea that the Board's first decision to expel A.G. may not have been the result of sufficiently full deliberation. The Commissioner noted that the record demonstrated that the Board, in applying its policy to A.G. turned to the ultimate sanction of expulsion from the District, although its policy did not require expulsion for a second offense of this kind. The Board was, by its own policy, mandated to conduct an expulsion hearing. That hearing was the petitioners' opportunity to make a case for A.G.'s continued enrollment in the District, while also allowing the Board the opportunity to consider A.G.'s circumstances and other options short of

expulsion. The Commissioner expressed concern that the Board may have tried to dissuade the petitioners from attending the hearing and the Board may have failed to consider other options than expulsion.

According to the petitioners, A.G. was perfunctorily expelled a second time without consideration of the facts that his parents had tried to get him the intensive drug treatment the school recommended, but were unable to do so in a timely manner and the fact that immediately following the second drug test, A.G. did receive the intensive outpatient drug treatment the school recommended.

The petitioners also assert the Board failed to consider the fact that A.G. had not tested positive for drugs after the second positive drug test and, in fact, had tested negative for drugs approximately six to eight times between the second positive drug test and the second expulsion hearing. They further argue that the Board failed to consider any alternative educational options other than the Evening Program and the Alternative School, despite the Commissioner's directive to consider available alternative educational options. Finally, the petitioners assert Ms. Farrow wrongfully excluded the Gloucester County Alternative School from consideration simply because A.G. had had two positive drug tests.

Conversely, the Board argues that the sole issue is whether, in the context of the Commissioner's remand, the Board acted arbitrarily, capriciously or unreasonably by accepting the recommendation of the administration to expel A.G. from the District after he violated the Board's Substance Abuse Policy. In his November 6, 2000 decision, the Commissioner upheld the decision of Judge Masin that, in turn, affirmed the determination by the Board to expel A.G. for violation of the Substance Abuse Policy. The Commissioner also ordered a partial and limited remand based on a suspicion that there may not have been full deliberation by the Board in its original decision to expel. The Commissioner directed the Board to consider "available alternative educational options" in deciding whether it was appropriate to expel A.G. in light of his violation of the policy. The Commissioner identified two factors, a memorandum dated March 1, 2000 from Vice Principal Farrow to then Superintendent Kern that to the Commissioner implied perfunctory deliberation by the Board and unidentified statements made by Assistant Principal Spector to the G. family that were secretly tape recorded. The

Commissioner cited the latter as indications that the Board may have deliberately failed to consider the viability of other options.

Rather than appeal the order of remand, the Board agreed to hold a second expulsion hearing to address the specific questions the Commissioner raised. The petitioners had opportunity at the hearing on December 6, 2000 to present relevant evidence to the Board concerning A.G.'s conduct since the first expulsion hearing and any alternative educational options for the Board's consideration. Nothing was presented. The Board was presented only with the recommendation of administration that two alternative settings, although considered, should be rejected. These alternatives included the extended day program at Washington Township High School and the Gloucester County Alternative School in Glassboro. Rejection was based on A.G.'s failure to become involved in an intensive drug treatment program as recommended by professional drug counselors after the first positive test and also on the absence of any showing of desire on the part of A.G. and his family to work aggressively to combat A.G.'s drug abuse.

The Alternative School in Glassboro, which petitioners claim to be a perfect placement for A.G., was specifically considered by the administration and rejected because of A.G.'s lack of desire to embrace rehabilitative efforts. The efforts to enroll A.G. in a drug treatment program after the second positive test – with an expulsion hearing imminent – provided too little, too late.

The Vice Principal stated that expulsion was still recommended despite the family's late efforts to enroll A.G. in a treatment program because there was a sixty-three day period between the first positive drug test and the second. In that time, A.G. should have been getting an intensive counseling and therapy program, but was not. It was not until the second positive result that real efforts appeared to have been made. Even then, there was nothing of significant length or quality that had been accomplished. The Vice Principal believed that the school should have seen some attempt to alter behavior, but did not.

The testimony of the Vice Principal and Principal before the Board at the December 6, 2000 hearing illustrates their concern that substantial intervention did not take place until after the second positive result. The record shows no contrary evidence presented by the family. The

Board did consider alternative educational options and disagrees with the Commissioner's allegations of intentional failure to consider other remedies. The second hearing, however, erases all doubt. There is no evidence of any arbitrary, capricious or unreasonable conduct.

At the second hearing, the petitioners attempted to attack the integrity of the Vice Principal and gave excuses for nonenrollment in a drug treatment plan sooner. The Vice Principal's testimony was consistent with that of December 6, 2000. The petitioners clearly did not agree with the recommendation, but they are required to show more than mere disagreement.

Mrs. G. testified the same way before the Board and before Judge Masin. That A.G. finally received help is commendable. But there is no cogent explanation as to why treatment was received only after the second positive test. At neither Board hearing was there any suggestion of accountability or responsibility coming from the petitioners.

The Board has complied with the Commissioner's order of remand.

At hearing, the petitioners presented Michelle Woollen, a public school teacher who also works for a tutoring service. She has worked for the Washington Township Board of Education. She tutored A.G. from May through the end of June 2000 in mathematics, literature and history. From February 2001 to the date of hearing, she had tutored A.G. in mathematics, career education, history and applied biology. Instruction averages two-three hours per week. The average was slightly higher last year. A.G. does his work and cooperates with his instructor.

Rosemarie Farrow is executive assistant principal for ninth and tenth grades at the high school. She has been in education for twenty-nine years.

Concerning the second hearing on expulsion, Farrow reviewed the evening and day program and reviewed the Gloucester County Alternative Program. She reviewed all circumstances of the tests, interaction with the parents and discussions among administrative personnel. The evening-day program and the County Alternative Program were the only alternative placements considered. Other options would be home instruction and expulsion without instruction. The two placements, the evening-day program and the County program are

the usual resort for nonlearning disabled pupils. This is not a child study team matter, which would have opened many more options.

Farrow testified clearly that she was unaware of any pupil who twice tested positive, was not a classified pupil and who was not expelled. One positive test result triggers procedures that do not include appearing before the Board. Only if a second positive test occurs within the period is expulsion considered.

The witness considered A.G. against the criteria of the two possible programs. The costs associated with the programs were not included in her deliberations. Farrow testified forthrightly that she had never discussed program cost with any other employee. She also stated that after the second positive result, she learned that the G. family had made attempts after the first drug test to place A.G. in a program. This information came from the G. family.

The petitioners introduced an undated letter from Magellan Health Services stating that Mrs. G. did arrange for services for A.G. in January 2000 through Rainbow House, but because Rainbow House closed unexpectedly, no appointments after the first appointment were met. Without explanation, the letter states, "She did encounter significant problems in arranging other services." Farrow stated that this was not raised at the second hearing. Farrow recalled that, after the second positive result, the G. family represented that they could not get services. She has no knowledge of how hard the family tried to secure services. The one appointment A.G. did have at Rainbow House was over a month after his positive test result. Other places were recommended to the family and the need was great, yet there is no record of any treatment for more than a month.

At the second hearing, the staff made recommendations based on what occurred with the student in reference to the code of conduct. A second violation is the end point. What the student does after that may go to readmission, but does not go to expulsion.

A.G. was not a candidate for the Gloucester County Alternative School because that facility is not geared to drug problems. Support services that pupils with drug problems would require are not available. The program serves all districts in the County. Each district has two or

three places available to it. The usual pupil has disciplinary and academic problems. The program does accept some pupils with substance abuse problems. A.G. seems to fit, facially. A.G. is average or above average in ability. Both his academic records and his IQ were considered at the second hearing. That A.G. has now completed intensive out-patient treatment was not relevant to the issue of cause for expulsion. The Board says it invited input at the hearing and the petitioners say they were cut off.

Exhibit P-3, a letter from Kennedy Memorial Hospital to Mr. and Mrs. G. dated March 29, 2000 does not change the witness's mind. That letter addresses efforts undertaken after the second positive drug test. Farrow also testified that she consulted the child study team and whether they had recommendations as between the evening program and the Gloucester County Alternative Program. These talks did not change her mind about expulsion, but were directed only at the most appropriate placement for A.G.

She did not ask the child study team what their recommendations would be after the positive drug test results were received. The child study team cannot recommend for or against expulsion; that is an administrative decision. Only if the school had wrong drug test information could there have been no recommendation of expulsion.

The Board's decision was based in part on the fact that there was no indication of an effort to work through the drug issues. Until the second positive result was received, there was no evidence of any effort to get help. The parents said they tried to get help, but had had problems.

A.G.'s Section 504 accommodation plan was developed with the guidance counselors and parents (P-6). It was presented at the first expulsion hearing. The parents charge it relates because it was not implemented. The witness recalled that a manifestation hearing was held based on the fact that a Section 504 plan was in effect.

M.G., mother of A.G., testified that she learned of the first positive test result "just before winter break." She did not know until January 6, however, what she had to do, such as involve A.G. in counseling.

Mrs. G. was concerned. A.G. admitted smoking marijuana. The witness knew that A.G. had to complete certain requirements. She tried to contact her medical insurance company. She called providers on a computer generated list and asked if they were covered by her plan. Mrs. G. says she could not locate the Kennedy program and was not referred to Rainbow until about two weeks later. Four appointments were set up for the month of February. These appointments were never met. When she appeared with A.G. for the first appointment, the facility was closed. The next day she called her health maintenance organization and was quite angry. She asked why she was not told that Rainbow was closing. All she got was an apology.

Mrs. G. spoke with Spector on March 6. They discussed what the Board probably would not do and he suggested what they could do. Spector mentioned that the Board does not make allowances for costs. Mrs. G. thought he meant that the Board would not approve the alternative program because of cost.

After the attempts to secure services from Rainbow proved fruitless, Mrs. G. went into the network again and found the Kennedy Access Center. The second positive test result was then received. Mrs. G. took A.G. to a psychiatrist and went to Kennedy. He entered and completed the program there (P-3). If her Health Maintenance Organization had found the name in the network, A.G. could have been in the Kennedy program at least two weeks sooner.

Mrs. G. also testified that she did over-the-counter drug tests with A.G. at least six times and there were no positive results. Hospital tests were done at her attorney's suggestion.

Mrs. G. conceded that there was no mention of costs at either expulsion hearing. None of the school personnel or documents involved indicate any consideration of costs.

Mrs. G. stated she did not go to the Kennedy Center first because her Health Maintenance Organization could not find it via computer. Cost was a factor in her considerations because she wanted all insurance help possible. She would have cooperated with day or evening hours and inpatient or outpatient status. She called most facilities on a list the school gave her. She cannot remember which she did not call. She went to her own insurer to find agencies in their network.

Rainbow was the first name that her HMO suggested and it was near her. She therefore tried it first. In response to a question as to whether her conversation with Spector about drug abuse had been taken seriously in the family, Mrs. G. said she had no recall. However, she and her husband do not make light of marijuana use.

Mrs. G. did no follow up with the Alternative School after the second positive result.

The March 9, 2000 test was done while A.G. was in an intensive therapy program. The therapy program also tested A.G. and all results were negative. The therapy program involved eleven, twelve or thirteen sessions over four weeks. A.G. was evaluated in February and attended sessions throughout March. He has been involved in no other program, outpatient care or after-therapy program. Mrs. G. believes there was no need for further treatment because A.G. has changed his habits.

Mr. G. testified. Mr. G. describes himself as straightforward. It is not saying too much to observe that Mr. G. has a strong personality. He recited a series of medical problems he ascribes to A.G. He believes he has done all "a prudent parent" could do. His work requires that he leave home early on Monday morning and return late on Friday afternoon. All things considered, Mrs. G. has handled the situation well.

Mr. G. has smoked marijuana. He last used the drug in January 1999. He never advocated use to his son. He does not approve of the use of marijuana.

The first notice from the school was the first he had any inkling that A.G. might have a problem. He retained an expert first to assess A.G. and then to opine on the propriety of expulsion. The witness was not present at this hearing. Mr. G. says that is because his retainer was "used up."

Mr. G. believes the Board did not consider all relevant factors. Both hearings seemed unfair to him. He believes the baby is being thrown out with the wash water.

The family did all it could do as quickly as possible. He believes A.G. has cleaned up both literally and physically. Mr. G. states he is the ultimate authority in his family, yet the family makes decisions together. He did try to watch expenses within the choices available to him.

The Board should have considered that A.G. was not a disciplinary problem, that A.G. has attention deficit disorder, that A.G. succumbed to peer pressure and that A.G. straightened out since the incidents. Mr. G. stated that he would "kick his butt" if otherwise. His son is a good kid who wants to resume his education.

Based upon this testimony and the documents entered in evidence, I **CONCLUDE** for the following reasons that the Board's action was not arbitrary, capricious or unreasonable and that the petition must fail.

Preliminarily, it must be noted that no legal support is cited by the Commissioner of Education for the proposition that a local board of education is required specifically to consider alternative educational options for a nonclassified student over sixteen years of age before expulsion can be ordered. In fact, the assertion appears contrary to previous statements by the Commissioner that acknowledge the authority of a local school district to deny all educational services to an expelled student. *See Somerset County Educational Services Commission v. North Plainfield Board of Education*, EDU 2793-98, Final Decision (September 7, 1999) <http://lawlibrary.rutgers.edu/oal/search.html>. Importantly, there as here, the Commissioner ordered the board to continue educational services to a student while making clear that there is no general obligation on the part of a board of education to provide or pay for educational services for a student after it has lawfully expelled the student pursuant to *N.J.S.A.* 18A:37-1 through -12. Clearly, it is within the sound discretion of a board to continue to provide educational services to a student whom it has expelled.

Second, I respectfully disagree with the Commission where he deems the Board's deliberation to be perfunctory and where he finds unelaborated statements allegedly made by Assistant Principal Spector to the G. family that were surreptitiously tape recorded, to be indications that the Board may have deliberately failed to consider the viability of options other

than expulsion. A memorandum from Vice Principal Farrow to Superintendent Kern clearly recognizes the Board's Substance Abuse Policy requires that administration bring the student before the Board for an expulsion hearing on the second offense. The policy does not mandate expulsion as the sole and exclusive remedy. The Vice Principal recognized that the Board makes the ultimate decision when she noted that no recommendation becomes final until and unless approved by the Board of Education. Closely related to this, it must be observed that Judge Masin reviewed the tape in detail and found no evil intent on the part of Spector. And of overwhelming importance is Judge Masin's note that Spector stated "very clearly that in that meeting [with the G. family prior to the first expulsion hearing] he did not function as a spokesperson for the Board or an agent of the Board." And there is no showing that any Board member had any knowledge of what Spector may have said to the parents. Therefore, there is no basis for the conclusion that the Board's deliberations on the expulsion were tainted in any way by the opinions of Spector expressed to the family.

Third, on the question of the cause of termination of the Board hearing of Wednesday, December 6, 2000, after considering the parties' arguments, I ruled orally on March 22, 2001 as follows:

> Counsel have asked a ruling as to the cause of termination of the Board hearing of Wednesday, December 6, 2000. A transcript was provided some time ago and I have had the opportunity to read it several times.
>
> Referring particularly to pages 36 through 48, I **FIND** that the petitioners have attempted at the December 6 hearing to reach behind an earlier child study team (CST) determination that A.G. was not eligible for special education. That determination, it is noted, was not appealed.
>
> The testimony shows at pages 36 and 37 that the Board's counsel recommended that the Board take evidence of what A.G. had done since the first expulsion hearing. That evidence was not presented until today.
>
> When the hearing ended, Dr. Sally Bickford was responding to a series of questions about the CST decision from the petitioners' counsel and the Board's counsel was objecting, with particularly,

to the line. The last exchange followed an expression of opinion by Bickford that the CST determination was wrong:

> MR. MANGANELLO: Well now what –
>
> MR. BETLEY: Counsel, I will interrupt you. I will again instruct the witness—or instruct the board to disregard that testimony. That's not relevant to the proceedings of what this witness thinks that the expulsion was because of a disability. Counsel, you are not going to use these proceedings to revisit the issue of manifestation determinations or issues of eligibility and so forth. If you continue to do that, again, we will end the proceedings.
>
> MR. MANGANELLO: Well then let's end them because that's going to be the testimony and we will go on with a motion. Thank you.
>
> MR. BETLEY: Let the record reflect the testimony is over. The board will deliberate based upon the evidence presented. There will be a written decision given to the parents within, I don't want to put any time on it, but hopefully within a week. Counsel, I will give that decision to you.

There is no doubt that the Board's counsel was properly objecting to attempts to reach far behind the expulsion matter. It is equally clear that the petitioners' insistence on pursuing the line anyway led to the termination.

For today's purposes, I repeat to counsel that this hearing is to examine the Board's second action for arbitrariness, caprice and unreasonableness. In the Commissioner's words, the decision "may not have been the result of sufficiently full deliberation." Thus, today's hearing will consider what the Board had before it at the first expulsion hearing, any relevant happenings between the first and second expulsion hearings and what the Board considered at the second expulsion hearing. This will provide "all the circumstances of A.G.'s case."

The Board obviously heard little or nothing about A.G.'s conduct between the first expulsion hearing and the second. The Board had before it the recommendation of administration that two alternative educational settings were considered and rejected. These alternatives included the extended day program at the Board's own high school and the Gloucester County Alternative School in Glassboro. I **FIND** quite credible the administrators' testimony that, although the Alternative School does have some students with drug problems, the

rejection was based on A.G.'s apparent failure to enroll in an intensive drug treatment program as recommended by professional drug counselors after the first positive test and the apparent absence of any desire on the part of A.G. and his family to work aggressively to combat A.G.'s drug abuse. Most efforts seem to have occurred after, not before, the second positive result. As to the unavailability of services to the family after the first positive test results, there is nothing in the record that indicates the parents made aggressive efforts to find a program and/or services for A.G. For example, if suggested programs or facilities were not immediately available, there is nothing to indicate that they asked their own physician for recommendations or even consulted the classified advertisements in a telephone directory.

To the extent the Board suggests that M.G. and M.G. failed to suggest alternative educational options for the Board's consideration, I merely note that they were under no duty to do so. They could have provided recommendations to the Board that the Board would have been obligated to consider. They were not required to do so.

In summary, I **FIND** and **CONCLUDE** that the Board's actions were not arbitrary, capricious or unreasonable under the circumstances. That this Judge or even the Commissioner might have decided the matter differently is not relevant. The Commissioner has previously stated that:

> [I]t is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the Board members on matters which are by statute delegated to the local boards. *Boult and Harris v. Board of Education of Passaic*, 1939-49 *S.L.D.* 7, 13, aff'd State Board of Education 1938-49 *S.L.D.* 15, aff'd 135 *N.J.L.* 329 (Sup. Ct. 1947), 136 *N.J.L.* 521 (E. & A. 1948).

The Washington Township Board of Education had sufficient credible evidence before it upon which to base its decision. The petitioners have shown that they are dissatisfied with the

result, but have done nothing to show that the result was improper. 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.

JUN 1 1 2001

DATE

Bruce R. Campbell

BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

6/12/01

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 13 2001

DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

jh

WITNESSES

For the petitioners:

Michelle Woollen

Rosemarie Farrow

M.G. (Mrs.)

M.G. (Mr.)

For the respondent:

None

EXHIBITS

Petitioner's:

P-1 Letter, Magellen Health Services, to To Whom It May Concern, undated

P-2 Student Handbook, Gloucester County Alternative High School, 1999-2000, 7 pp.

P-3 Letter, Keller, Adolescent Clinician, to Mr. and Mrs. G., March 29, 2000, with one page enclosure, Discharge Instructions

P-4 Letter, Department of Student Personnel Services, Washington Township Public Schools, to Mrs. G., December 8, 1999, 2 pp.

P-5 Letter, Mericle, President, Washington Township Board of Education, to Manganello, December 13, 2000, 5 pp.

P-6 Accommodation Plan, A.G., November 1, 1999, 4 pp.

P-7 Laboratory Report, Kennedy Memorial Hospitals, re: A.G., March 9, 2000

P-8 Laboratory Report, Kennedy Memorial Hospitals, re: A.G., December 4, 2000

Respondent's:

None

OAL DKT. NO. EDU 208-01
AGENCY DKT. NO. 20-1/01

M.G. AND M.G., on behalf of minor child, A.G.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto were filed in accordance with the requirements of *N.J.A.C.* 1:1-18.4.

In that petitioners' exceptions are essentially a verbatim recitation of their post-hearing brief advanced before the Administrative Law Judge (ALJ), and that the Initial Decision fully considers and addresses all relevant arguments made therein, petitioners' reiterative exception submission will not be revisited here.

Upon careful and independent review of the record in this matter, which included a transcript of the hearing conducted at the OAL on March 22, 2001, the Commissioner affirms the ALJ's conclusion that petitioners have failed to sustain their burden of establishing that the Board's decision to expel A.G. was arbitrary, capricious or otherwise contrary to law and that, consequently, such determination must be sustained.

In so concluding, however, the Commissioner specifically rejects the ALJ's discussion on page 11 of the Initial Decision wherein he states:

> [I]t must be noted that no legal support is cited by the Commissioner of Education for the proposition that a local board of education is required specifically to consider alternative educational options for a nonclassified student over sixteen years of age before expulsion can be ordered.***

To the contrary, the Commissioner has long held that "[t]ermination of a pupil's right to attend 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 Board of Education,* 1968 *S.L.D.* 92, 96*; see, also, C.S. v. Township of Piscataway,* 97 *N.J.A.R.*2d (EDU) 573, *aff'd* State Board April 1, 1998, slip op. at 5. Consequently, in his review of such a determination, the Commissioner must be persuaded that expulsion is employed as the last ditch expedient which it is expected to be. *See Scher, supra.*

Implicit in such a determination is assurance that a board, in making its decision, considered the appropriateness of alternatives, short of expulsion, which would accomplish its objective of removing a child from a regular educational environment while still allowing him to continue his educational program in a public school setting. The Commissioner, similarly, does not concur with the ALJ's suggestion of apparent inconsistency between this matter and *Somerset County Educational Services Commission, supra,* a case with a wholly unique fact pattern.[1] Where, as in this matter, the "lawfulness" of the Board's expulsion is itself at issue, which it was not in *Somerset*, and the Commissioner's review leads him to believe that the Board *may* have taken such a drastic measure without the benefit of a sufficiently full deliberation of possible alternatives prior to permanently depriving a student of public education, it is entirely

[1] *Somerset* dealt with a board's refusal to pay for tuition and services rendered to a child, domiciled in the district, who was enrolled in the Alternative to Incarceration Program pursuant to order of the Superior Court, as that child had previously been expelled from its schools. There the Commissioner rejected arguments advanced by petitioner and alluded to by the ALJ which conveyed the impression that there was any obligation on the part of a board to provide or pay for educational services for a student after it has *lawfully* acted to expel a student pursuant to *N.J.S.A.* 18A:37-1 *et seq.*, except, as was the circumstance in that case, where a court of appropriate jurisdiction orders the student's school placement or where a statutory or regulatory provision imposes such an obligation.

appropriate, if not mandatory, that the Commissioner order a continuation of educational services to the child during the period while this concern is being addressed and resolved. Moreover, notwithstanding that the ALJ may not necessarily share the Commissioner's uneasiness with respect to this Board's initial deliberations in this regard, as the individual charged with the oversight of public schools and students in New Jersey, the Commissioner of Education must be satisfied in matters of this type that actions taken by school boards are not an abuse of their discretionary powers.

Finally, it must be emphasized that this decision does not in any way suggest that local boards of education cannot expel students from their schools. Rather, it once again emphasizes that before a board takes that dire step it must assure that less draconian courses of action were considered and found to be inappropriate under the particular circumstances of the case.

Accordingly, the Initial Decision of the OAL is adopted for the reasons stated therein, as modified above, and the Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 8|6|01

Date of Mailing: 8|6|01

[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.

244-01

RURAL TABERNACLE COALITION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Rural Tabernacle Coalition (RTC) alleged that the Board violated *N.J.A.C.* 6:22-2.1 and improperly spent public funds by engaging in campaign activities for the purpose of advancing its interest in proceeding with the construction of a new high school. All other issues, which had been the subject of a previous petition and amended petition, were no longer part of this contested case proceeding.

Following analysis of RTC's status as a jural entity and the finding that RTC failed to submit any evidence of impropriety concerning expenditure of public funds, the ALJ concluded that nothing RTC submitted suggested that there was a genuine issue that the Board's actions were arbitrary, capricious and unreasonable. The ALJ granted the Board's motion for summary decision.

The Commissioner, initially finding that RTC was an "interested person" pursuant to *N.J.A.C.* 6A:3-1.2, concluded that RTC failed to set forth facts showing that there was a genuine issue with respect to the Board's expenditure of bond and other public monies, which can only be determined in an evidentiary hearing. Petition was dismissed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING RESPONDENT'S MOTION
FOR SUMMARY JUDGMENT
OAL DKT. NO. EDU 4017-00
AGENCY DKT. NO. 220-8/99

RURAL TABERNACLE COALITION,

Petitioner,

v.

LENAPE REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, BURLINGTON COUNTY,

Respondent.

Elizabeth Zuckerman, Esq., for petitioner (Zuckerman & Fisher, attorneys)

Arthur F. Risden, Esq., and **John B. Comegno**, Esq., for respondent (Archer & Greiner, attorneys)

Record Closed: May 11, 2001 Decided: June 20, 2001

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

This is a ruling and order issued as a result of the motion instituted on behalf of respondent, Lenape Regional High School District Board of Education (hereinafter "Lenape") for summary decision and dismissal of the above-entitled appeal. For the following reasons the motion be and is hereby **GRANTED**.

I

On or about August 3, 1999 the petitioner, (RTC), commenced this action by a letter petition addressed to the Commissioner of Education. Several days thereafter respondent filed a motion to dismiss the petition. Because of a technical failure of the petition to comply with appropriate regulatory standards, RTC was permitted to amend its documents and did so within ten days thereafter. An answer to the amended petition was filed by Lenape on September 13, 1999 in addition to its amended motion to dismiss.

The genesis of the petition relates to the efforts of the petitioner to prevent Lenape from constructing a new regional high school at a location referred to as the "Carranza Road Site". The school district began developing plans for this new high school in or about 1996 as a result of what it perceived to be severe overcrowding within the district. After addressing and analyzing the potential of approximately 35 different sites, the Carranza Road Site was chosen as being most appropriate. For purposes of conducting a district wide referendum Lenape announced this site and the referendum was conducted December 19, 1997. It passed in all of Lenape sending districts including Tabernacle Township. [1] In late Spring or early Summer 1998 an environmental organization known as the Pinelands Preservation Alliance ("PPA") commenced a public relations campaign seeking to oppose the construction of the high school at the Carranza Road Site. In response, Lenape initiated an effort referred to as "Save Our Schools" which, pursuant to the representation of counsel for Lenape, was designed to inform the public of the factual circumstances surround the proposed construction.

[1] At footnote 5 of petitioner's earlier opposition papers to a motion for discovery Lenape notes that after the referendum Lenape was able to obtain either approvals or recommendations for approval from a variety of municipal and governmental agencies including the Tabernacle Township Land Development Board, the Tabernacle Township Committee, the Burlington County Agriculture Board, the New Jersey Pinelands Commission, the Governor of the State of New Jersey and the United States Department of the Interior. On September 14, 2000 Administrative Law Judge M. Kathleen Duncan issued an initial decision in Pinelands Preservation Alliance v. Lenape Regional High School District and Pinelands Commission and Tabernacle Township Planning Board OAL Dkt. EPC 8626-99. The decision essentially upholds the School District's rights under the Pinelands Comprehensive Management Plan to construct the high school at issue at the Carranza Road Site and is granted Lenape's motion to dismiss the appeal with prejudice. On October 13, 2000 the New Jersey Pinelands Commission issued a resolution which substantially adopted Judge Duncan's decision with some modifications which, in my view, do not negatively impact upon Lenape's rights to develop the Carranza Road Site, pursuant to thePinelands Commission Comprehensive Management Plan.

Petitioner's amended application to the Commissioner of Education sets forth a variety of claims and, by letter of April 3, 2000, the Commisioner of Education granted Lenape's motion to dismiss in part leaving only two of the petitioner's claims to be adjudicated in this proceedings. The Commissioner in his April 3, 2000 ruling noted:

> This matter shall be transmitted to the OAL for further proceedings solely to determine whether the Board [Lenape] has acted in violation [of] *N.J.A.C.* 6:22-2.1 and whether the Board has inappropriately spent bond and other public monies.

All other issues which had been the subject of the previous petition and amended petition are thus no longer part of this contested proceeding.

As an incident to this matter my office conducted on in-person conference with counsel and several telephone status conferences to determine the procedure to employ in disposing of this appeal. Following the in-person conference the respondent, as was indicated at the conference, submitted the motion *sub judice* for summary decision and dismissal on or about August 10, 2000. In its motion papers seeking dismissal and summary decision the school district *inter alia* argues that as a matter of fact, and law, the district did not contravene *N.J.A.C.* 6:22-2.1 in that it purchased options for the Carrenza Road Site and did not, as set forth at *N.J.A.C.* 6:22-2.1(a), acquire land which would require school site approval from the Department of Education as a prerequisite. The motion also argues that petitioner cannot provide any factual or legal proofs to demonstrate that the bond and public monies which are to be utilized in constructing the high school was, in any way, improperly spent. Lastly, and based upon our conversations in chambers, Lenape argues as well that the matter warrants dismissal in that RTC is not a jural entity and thus has not right to bring or maintain an action, pursuant to *N.J.S.A.* 2A:64.1.

On or about February 22, 2001 my office issued a six-page ruling and order denying petitioner's motion to compel further discovery and it was not until after that motion was decided upon that RTC submitted its responsive papers to the motion *sub judice*. Final submission of May 2, 2001 on behalf of Lenape was received by the Office of Administrative Law (OAL) on May 11, 2001, the date on which the record in these proceedings closed.

II

THE FACTS

Unless otherwise noted, the following is a substantially uncontradicted narrative of the facts in these proceedings. If a factual dispute is presented, and is material, then of course the motion would be denied.

Accordingly, I **FIND**:

Lenape High School District is experiencing overcrowding. This fact is not disputed by RTC. Every action over the past two years involving the Lenape Regional High School Board of Education ("Respondent" or "Lenape") has consistently acknowledged this fact. *See e.g., Pinelands Preservation Alliance v. Lenape Regional High School District*, EPC 8626-99, Initial Decision, (April 28, 2000) <http://lawlibrary.rutgers.edu/oal/search.html>; *Rural Tabernacle Coalition v. Land Development Bd. of Twp. of Tabernacle*, No. BUR-L-1355-99 (Law Div. Dec. 10, 1999).

Due to the overcrowding, in 1996, Respondent School District, which serves eight sending municipalities including Tabernacle, as part of a comprehensive plan to provide a safe, thorough and efficient education to its students, embarked on several measures to ease the overcrowding. Specific measures sought by Lenape included an addition to the Cherokee High School, renovations to the Lenape and Shawnee High Schools and the construction of a new high school. It is construction of the new high school that RTC objects to.

The various grounds for RTC's objection have been considered in several proceedings both in the administrative forum and superior Court. All environmental grounds for RTC's objection have been dismissed.[2] The only remaining substantive issue raised by RTC is whether Respondent improperly spent public funds by engaging in campaigning activities for the purpose of advancing its interest in proceeding with the school construction.

[2] The determination by the Pinelands Commission that Lenape's plans complied with the requirements of the Pinelands Comprehensive Management Plan is presently pending appeal. A 2283-99T2.

a. Prior Actions

In 1996, when it became clear that overcrowding was a problem, Respondent began developing plans for construction of a new high school. The plans involved extensive participation of the public. Respondent's Brief in Support of Motion for Summary Decision, dated August 9, 2000, at 3. A firm, hired to look for a site, conducted a blind study of potential sites to avoid outside influences. Daniel Hicks Affidavit., dated August 9, 2000, at ¶ 11. After months of searching, the pool of potential sites was narrowed to 35. *Id.* at ¶ 12. Respondent's engineers then studied these sites, taking educational and environmental factors into account. *Id.* at ¶ 13. In March of 1997, when Respondent's engineers met with the New Jersey Pinelands Commission, the Carranza Road site was deemed developable by the Pinelands Commission. *Id.* at ¶ 14.

Respondent then announced selection of the Carranza Road site to the public. Meetings and information sessions were held in order to involve the public and to prepare them for a public referendum. Respondent obtained the recommendation of the Tabernacle Township Land Development Board as well as the preliminary site approval from the New Jersey Department of Education. *Id.* at ¶ 18. The referendum was held on December 9, 1997, and passed in all eight sending districts, including Petitioner's.[3]

Prior to the instant action, Respondent' s efforts to proceed with the construction of the high school had been challenged in various actions by RTC and PPA. *See Pinelands Preservation Alliance, supra.* When the Executive Director of the Pinelands Commission determined that Respondent's development plans complied with the requirements of the Pinelands Comprehensive Management Plan, Petitioner sought review. While the issue of whether the Commission's determination was erroneous is still under review by the appellate division, another ALJ granted Respondent's summary decision on the following issues:

[3] After the referendum was passed, the Pinelands Preservation Alliance ("PPA"), which has several members in common with RTC, began to oppose the construction of the school. Respondent claims that in order to refute PPA's "numerous misstatements," Respondent formed the "Save Our Schools" campaign to impart to the public factual information concerning the proposed school construction. Respondent's Brief, at 5.

(1) *Adequate Grounds Management*: Contrary to the allegations that Respondent had not specified a satisfactory grounds management plan, it was found that Commission had granted approval on condition that Respondent meet a rigorous plan of monitoring the grounds frequently for various chemical levels. *Pinelands Preservation Alliance*, *supra*, at 7.

(2) *Wetlands Buffers*: Petitioner claimed that Respondent failed to justify the revised buffers. The regulations permit modification of the 300-foot buffer zone provided applicant can show that it will not create a significant adverse impact on the wetland. *N.J.A.C.* 7:50-6.1 to –6.14. The ALJ held that Respondent had followed proper procedure in seeking the modification, utilizing a model propounded by the Commission. *Id.* at 8.

(3) *Remediation of Historic Pesticides*: Petitioner asserted that respondent's studies of pesticides were flawed and that the soil contained a higher concentration of pesticide dialdrin than reported. Summary decision was granted on this issue because the level of dialdrin detected (0.042 ppm) was significantly lower than the level requiring remediation (50 ppm); moreover, Petitioner had voluntarily entered an agreement with the Tabernacle Township Planning Board to remove such soils in any case. *Id.* at 9.

(4) *Improvements to Hawkins Road*: Petitioner claimed that Respondent failed to specify the nature of improvements to Hawkins Road, which runs into the proposed site. However, the ALJ found that Petitioner offered no studies or certifications to suggest that improvements to Hawkins Road were necessitated; moreover, Respondent had conducted traffic studies that concluded that no modifications were necessary. *Id.* at 10.

Petitioner also filed a motion before the Law Division, Burlington County, to void the amended zoning ordinance adopted by the Tabernacle Land Development Council on April 19, 1999, which provided for construction of the school. *Rural Tabernacle Coalition v. Land Development,* No. BUR-L-1355-99 (Law Div. Dec. 10, 1999). More specifically, Petitioner

alleged that (1) the vote amending the ordinance included the vote of one who had been disqualified; (2) certain conflicts infected the vote; and (3) an agreement between Respondent and Tabernacle was impermissibly tainted. *Id.* at 5.

Judge Wells held that there was "nothing unlawful, arbitrary, capricious or unreasonable" in the procedural actions surrounding passage of the revised ordinance. *Id.* at 6. He also held that the disqualified vote did not taint later actions of the Township Committee. *Id.* at 8. Finally, J. Wells held that the agreement between Respondent and Tabernacle was lawful and did not taint the process surrounding passage of the revised ordinance. *Id.* at 13. The court held that Respondent's main purpose in entering the agreement was to spread the project development costs among all it sending districts. *Ibid.*

b. Instant Action

Petitioner commenced this action on or about August 3, 1999 by filing a letter petition with the Commissioner of Education. Respondent filed a motion a few days later to dismiss the petition. Due to a technical failure in the petition, RTC was permitted to file an amended petition within ten days. RTC alleged that the proposed Carranza Road site was inappropriate and that Lenape had failed to obtain proper review of its proposal. Lenape answered the amended petition on September 13, 1999 and moved to dismiss. On April 3, 2000, the Commissioner granted Lenape's Motion, in part, and transmitted Petitioner's claim to the OAL stating that there were only two claims to be resolved:

> This matter shall be transmitted to the OAL for further proceedings solely to determine whether the Board has acted in violation [of] N.J.A.C. 6:22-2.1 and whether the Board has inappropriately spent bond and other public monies.
>
> [Commissioner's Letter Decision, April 3, 2000, at 2.]

Therefore the only remaining justiciable issues are whether Respondent illegally purchased land and whether it misused public funds.

Following several telephone status conferences and one in- person conference to determine discovery schedule and resolution of this matter, Respondent filed a motion for summary decision on August 10, 2000. Meanwhile both parties proceeded with discovery. Sometime in August, 2000, Respondent received RTC's first set of interrogatories and requests for documents. On September 29, 2000, Respondent provided answers to those interrogatories and produced the requested documents. Almost four months after Respondent forwarded the answers to interrogatories and produced the requested documents, and five months after Respondent's motion for summary decision, Petitioner submitted its letter motion to compel discovery and to depose the Director of Public Information on January 12, 2001. On February 22, 2001, Petitioner's Motion to Compel further discovery was denied. As a result, on March 2, 2001, Petitioner filed a motion to reconsider the decision to deny additional discovery.

The Motion for Reconsideration was denied on March 16, 2001. In the decision it was noted that Petitioner had failed to establish good cause to depose the Director of Public Information and that the Respondent had already provided Petitioner with summaries of its expenditures. Thereupon, nine months after Respondent filed the Motion for Summary Decision, Petitioner submitted its response opposing that Motion. In its response, Petitioner elected not to pursue the first of the two issues referred to the OAL (whether Respondent had illegally purchased land); therefore, the only issue now at bar is whether Respondent improperly spent public funds.

III

ANALYSIS

a. Arguments of Parties

Respondent asserts that summary decision should be granted for two reasons: (a) Petitioner has not offered sufficient proof of its status as a jural entity; more specifically, Respondent challenges Petitioner's status as a jural entity on the grounds that Petitioner has not shown that it had the requisite number of members as of the filing date, owns no common property, and shares no common rights. (b) In addition, Respondent claims Petitioner has failed to submit any evidence of impropriety concerning expenditure of public funds.

Petitioner, on the other hand, asserts that it has the requisite number of members as well as rights in common to meet the requirements of *N.J.S.A.* 2A:64.1. Furthermore, Petitioner claims it has submitted sufficient evidence of Respondent's misuse of public funds to defeat summary judgment under *Brill*, *infra*.

b. Petitioner is a Jural Entity.

Petitioner is correct in noting that Respondent has erroneously relied on *New Jersey Bankers Ass'n v. Van Riper*, 1 *N.J.* 193 (1948), to support its motion for summary decision that Petitioner is not a jural entity. As Petitioner notes, *Van Riper*, *supra*, was expressly reversed by the New Jersey Supreme Court in *Crescent Park Tenants Ass'n v. Realty Equities Corp.*, 58 *N.J.* 98 (1971).

In *Van Riper*, the Court held that the petitioners in that case faced common questions of law and redress. *Van Riper*, *supra*, at 197. Yet, the Court noted that despite such "community of purpose and unity of legal question" Petitioner was not legally competent to maintain that action because it could not meet the "common property, rights and liabilities" requirement. *Ibid.* (citing *Farmers Co-op. Oil Co. v. Socony-Vacuum Oil Co.*, 133 F.2d 101, (8th Cir. 1942)).

The *Crescent Park* Court observed that New Jersey cases had taken a much more liberal approach to standing than had the federal cases. *Crescent Park*, *supra*, 58 *N.J.* at 101. The Court noted its desire to do away with "technisms" and procedural hurdles and permit suits where "the litigant's concern with the subject matter evidenced a sufficient stake and real adverseness." *Id*, at 107. It further noted that to permit such litigation would also serve the public interest. *Id.* at 109. In criticizing its decision in *Van Riper*, the Court noted:

> We fail to see how justice or its sound administration can be said to have been at all furthered by [Van Riper]. We have cited the subsequent rejections of the single federal case on which it relied and in Institute of Planners, supra, Justice Francis recently noted that it had been 'much criticized' in academic circles. 48 N.J. at 587, 227 A.2d 313. It is incompatible with our current procedural philosophies and with our justly liberal holdings in the field of standing; it has become a derelict in our law and is now expressly overruled.

[*Id.*, at 111.]

c. Standard of Review

Under *Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520 (1995), the motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *Id.* at 540.

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.* 4:46-2(c).]

Under the summary judgment rule, the judge is not required to evaluate the facts for their accuracy and truth. *Brill, supra*, 142 *N.J.* at 540. Rather, the judge is only asked to determine whether, as a matter of law, any trier of fact could decide for the non movant, even assuming all

the facts submitted were favorable to the nonmovant. The decision involves one of law, not one of facts.

It is well settled in New Jersey that decisions of local school boards of education are entitled to a presumption of correctness and are to stand undisturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives. *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 (citing *Kopera v. West Orange Bd. of Educ.*, 60 *N.J.Super.* 288 (App. Div. 1960). *See also R.A.M. and C.A.M. v. Board of Educ. of the Township of Tabernacle*, 94 *N.J.A.R.*2d (EDU) 573, 576; *Boult v. Board of Educ.*, 133 *N.J.L.* 15 (Sup. Ct. 1945); *Offhouse v. State Bd. of Educ.*, 131 *N.J.L.* 391 (Sup. Ct. 1944); *Greenway v. Board of Educ. of the City of Camden*, 129 *N.J.L.* 461 (E. & A. 1943).

In *J.M*, *supra*, a star athlete was not permitted to engage in athletics in his junior year of high school because of bad grades earned in his sophomore year. The student contested his Spanish grade and the matter was referred to the OAL. The ALJ denied the student's request and the Department of Education affirmed. The ALJ held that the student bore the burden of proving "by a preponderance of the competent and credible evidence that his failing grade in Spanish II was the result of respondent's arbitrary, capricious or unreasonable actions." *J.M.*, *supra*, 96 *N.J.A.R.*2d (EDU) at 419.

In *Kopera*, *supra*, a teacher was denied tenure by a school board of education based on unfavorable ratings given by the principal and another teacher. The denial was affirmed by the Commissioner and the State Board of Education. The teacher neither asserted that she had been the victim of any personal animosity, nor even that she disagreed "in any substantial measure [with] the facts upon which the evaluators based their conclusion that her performance was unsatisfactory"; she merely contended that these facts were not serious enough to warrant the unsatisfactory rating. *Kopera*, *supra*, 60 *N.J.Super.* at 292.

The Appellate Division held that there need be no inquiry into whether the evaluation was too severe. *Id.* at 294-95. Since there had been no allegation of bad faith or prejudice, the only question was whether the board had a right to require a rating system. *Ibid.* The court there

refused to evaluate or require a factual analysis of the evaluation. It defined its duty as limited to determining whether, as a matter of law, the board could utilize a rating system. Citing approvingly from the Commissioner's Opinion, the court noted:

> A board of education is certainly within its statutory authority if it establishes satisfactory performance as a criterion for advancement in salary. Indeed, a board is given specific authority to deny a statutory increment under the minimum salary laws . . . for inefficiency or other good cause.
>
> [*Id.*, at 295 (citing *N.J.S.A.* 18:13-13.7).]

In affirming the decision of the Commissioner, the court further emphasized that "local boards have the right to reward the capable and the efficient, provided they do it fairly, without bias, prejudice, favoritism or discrimination, and they have the right to adopt any reasonable means toward that end." *Id.*, at 298.

e. Standard Not met by Petitioner

Petitioner bears the burden of proving, by a preponderance of the evidence, that the Respondent's action was "arbitrary, capricious or unreasonable." *J.M.*, *supra*, 96 *N.J.A.R.*2d (EDU) at 419. The thrust of Petitioner's complaint is that Respondent misused public funds by using them to promote construction of the school. Petitioner cites *N.J.S.A.* 18A:24-47 in support of its claim that Respondent misused public funds. *N.J.S.A.* 18A:24-47 states:

> The proceeds of any bonds authorized and issued under this chapter shall be paid to the custodian of school moneys of the district, who shall, in no event, disburse them except to pay the expenses of issuing and selling the bonds and for the purposes for which the bonds were issued and for temporary investment as and in the manner prescribed by law, pending the carrying out of the purpose or purposes for which the bonds were issued and for such other purposes as are prescribed in this article.
>
> [*Ibid.*]

Although the bonds were issued and sold for the purpose of building the school, it is inconceivable that the legislature limited the nature of the expenditure so narrowly as to preclude literally all expenditure other than the cost of land, bricks and mortar, and their assembly. As seen in the instant case, there were numerous studies performed, permits obtained, professional

services engaged, and litigation costs incurred, all for the "purposes for which the bonds were issued." *Ibid.*

As the New Jersey Supreme Court noted in *Brill*, "[t]he thrust of today's decision is to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves." *Brill, supra*, 142 *N.J.* at 541. As that Court further observed, "[t]he 'judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 540, citing *Anderson v. Liberty Lobby, Inc.* 477 *U.S.* 242, 249, 106 *S. Ct.* 2505, 2511, 91 *L.Ed.*2d 202, 212 (1986).

IV

CONCLUSION

Nothing Petitioner has submitted suggests that there is a genuine issue that Respondent's actions were arbitrary, capricious or unreasonable. The motion for summary decision, therefore, should be granted.

Accordingly, and based upon the foregoing, it is **ORDERED** that the motion for dismissal and summary decision instituted on behalf of respondent, Lenape, be and 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.

June 20, 2001
DATE

STEVEN C. REBACK, ALJ

Receipt Acknowledged:

6/22/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 22 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

es

APPENDIX

No Witness and No Exhibits

OAL DKT. NO. EDU 4017-00
AGENCY DKT. NO. 220-8/99

RURAL TABERNACLE COALITION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Both parties submitted exception arguments and the Board submitted replies in accordance with *N.J.A.C.* 1:1-18.4 which were considered by the Commissioner in reaching his decision.

Upon careful and independent review of the record of this matter, and notwithstanding the Board's continued arguments to the contrary, the Commissioner initially finds that petitioner Rural Tabernacle Coalition (RTC) is an "interested person" pursuant to *N.J.A.C.* 6A:3-1.2 (formerly, *N.J.A.C.* 6:24-1.1) with "sufficient stake in the outcome of these proceedings so as to have the requisite standing to maintain this action." *West Village Civic Club, Inc. and Arthur Silverstein v. Board of Education of the Township of Manchester et al.*, State Board decision June 5, 1996, Slip Opinion at 6.

However, with respect to the Board's Motion to Dismiss this matter, the Commissioner finds that RTC has failed to "set forth specific facts showing that there is a genuine issue [with respect to the Board's expenditure of bond and other public monies] which can only be determined in an evidentiary proceeding." *N.J.A.C.* 1:1-12.5(b). Rather, as the

Board notes, the affidavits provided by RTC, as the nonmoving party, are insufficient to meet the legal standard necessary to defeat the Board's motion.

In this connection, the Commissioner observes that the affidavit provided by Frances Brooks, a resident of Tabernacle Township and a former member of the Township Committee and Land Development Board (LDB), predominantly speaks to Ms. Brooks' involvement with the district vis-à-vis its application for zoning changes before the LDB, and her subsequent "intense harassment by the SOS campaign" when she did not, as a member of the LDB, vote as the district wanted her to vote. (Certification of Frances Brooks at 1-2) Additionally, the affidavit of Raymond McCarty, a resident of Tabernacle Township and member of the RTC, underscores that the district was instrumental in supporting a change to Tabernacle's zoning ordinance, that key persons in the district, as well as district counsel, engineers, architects and consultants, attended those meetings, that district staff distributed SOS buttons and American flags at certain meetings, and did not attempt to distinguish "the Lenape District from the SOS campaign ***." (Certification of Raymond McCarty at 1-2)

Similarly, the lengthy affidavit of Edmund Hallowell, together with 50 exhibits, raises numerous issues that are not germane to the single issue remaining before the ALJ and the Commissioner. Neither does the Hallowell affidavit assert facts which specifically refute those offered by Superintendent Hicks regarding the Board's alleged improper spending of bond money (Board's Motion for Summary Decision; Hicks Affidavit at 6-7)[1] so as to raise a genuine issue which can only be determined in an evidentiary hearing.[2]

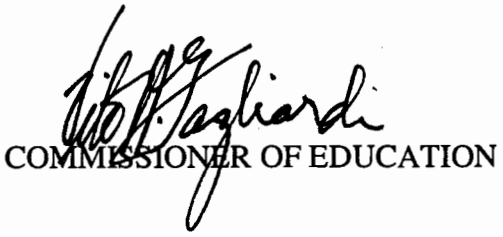
---

[1] Superintendent Hicks attested, in pertinent part:

> With respect to the accusation that the Lenape District is improperly spending bond money, the estimated budget for the various projects included in the referendum anticipated monies to obtain all of the necessary approvals and permits necessary to construct the additions, make the alterations, and construct the new high school.

Accordingly, the recommendation of the ALJ dismissing the Petition of Appeal is adopted for the reasons herein noted.

IT IS SO ORDERED.[3]



COMMISSIONER OF EDUCATION

Date of Decision: 8|6|01

Date of Mailing: 8|7|01

We have followed the dictates of the New Jersey Pinelands Commission insofar as the fourth high school is concerned, and are meeting the conditions of the New Jersey Pinelands Commission's various approvals.
The purchase of these development rights/credits does not involve the purchase of real estate, and is a condition to building the new high school.
One of the requirements is the purchase of development rights/credits which I understand are a part of the New Jersey Pinelands Commission Comprehensive Management Plan. (Board's Motion for Summary Decision; Hicks Affidavit at 6-7, paragraphs 36-39)

[2] Note, in this connection: "[D]isputes 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 *N.J.A.R.* 2d(EDU) 196, 215, *citing Lima & Sons, Inc. v. Borough of Ramsey*, 269 *N.J. Super.* 469, 478 (App. Div. 1994). *In the Matter of the Tenure Hearing of Andrew Phillips, School District of the Borough of Roselle, Union County*, Commissioner's Decision No. 129-97, decided March 20, 1997; *In the Matter of the Tenure Hearing of Neal A. Ercolano, Board of Education of Branchburg Township, Somerset County*, Commissioner's Decision No. 140-00, decided May 1, 2000.

[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.

243-01

MARILYN BROWN, PAULA DARBY, MARLENE ROTH, JUDY HAMILTON, AND NANCY BRAUNSTEIN,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WARREN, SOMERSET COUNTY,	:	PARTIAL SUMMARY DECISION
RESPONDENT.	:	

August 6, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

PARTIAL SUMMARY DECISION

PURSUANT TO N.J.A.C. 1:1-12.5(e)

OAL DKT. NO. EDU 6128-99

AGENCY DKT. NO. 172-6/99

MARILYN BROWN, PAULA DARBY, MARLENE ROTH, JUDY HAMILTON AND NANCY BRAUNSTEIN,

Petitioners,

v.

BOARD OF EDUCATION OF WARREN TOWNSHIP, SOMERSET COUNTY,

Respondent.

Richard A. Friedman, Esq., and **Kathleen A. Naprstek,** Esq., for petitioners (Zazzali, Fagella & Nowak, attorneys)

William S. Jeremiah, Esq., for respondent (Buttermore, Mullen, Jeremiah & Phillips, attorneys)

Record Closed: February 6, 2001 Decided: June 18, 2001*

---

* Extensions of time for issuing the decision on the parties' cross-motions for summary decision were requested and granted pursuant to *N.J.S.A.* 52:14B-10(c).

BEFORE **M. KATHLEEN DUNCAN,** ALJ:

This matter commenced on June 28 1999, when the five petitioners named hereinabove filed a petition of appeal with the Commissioner of Education seeking, *inter alia*, a determination that each petitioner either had achieved tenure status, or in the case of petitioner Braunstein would achieve tenure status, by virtue of employment as a teacher in the "Kaleidoscope Program" run by the district. An answer on behalf of respondent was filed on July 15, 1999, and on July 26, 1999, 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 November 29, 1999 and was continued on April 13, 2000. At that time a schedule for submission for cross-motions for summary decision was set. Hearing dates were scheduled for October 3 & 4, 2000, in the event that it was discovered there were material facts in dispute.

The hearing dates were adjourned at the joint request of the parties, and the schedule for submission of the cross-motions for summary decision was revised. A joint stipulation of facts and simultaneous briefs in support of cross-motions for summary decision were filed on November 17, 2000. Each party filed a brief in opposition to the other' s motion on December 1, 2000, and on January 23, 2001, oral argument was conducted by telephone conference call. By letter dated January 23, 2001, the undersigned wrote to the parties as follows:

> This will confirm, pursuant to our telephone conference call today, that you will be forwarding copies of the contracts between petitioners and respondent and any correspondence from the Department of Human Services or the Attorney General's office which may exist concerning the status of the program under *N.J.A.C.* 10:122-1.3. As we discussed, you may also wish to submit a supplemental memorandum concerning the legal status of *Capella* after *Spiewak*. Finally, if this matter is really a request for a Declaratory Ruling, which is what it appears to be, the format of the petition does not comply with *N.J.A.C.* 6A:3-2.2, and I question whether the Commissioner understood it to be such a request and actually made the discretionary determination to entertain the

petition as set forth in *N.J.A.C.* 6A:3-2.1. If you have suggestions concerning the method or necessity for correcting the procedural posture at this point in the proceedings, I would be happy to hear them. Please have whatever additional material you would like to have considered on my desk by 5 p.m. on February 6, 2001.

On February 6, 2001 each party filed a supplemental letter memorandum in response to the January 23, 2001 letter from the undersigned, whereupon the record closed.

FINDINGS OF FACT

The parties have entered into the following joint stipulation of facts:

1. The Warren Township Board of Education (hereinafter referred to as the "Board") approved the creation of an extended-day program for children attending the district's half-day kindergarten program on January 27, 1992, which commenced on or about September 1, 1992 and continues to date.

2. The extended day program was known as "Kaleidoscope Kids" (hereinafter referred to as "Program" or "Kaleidoscope"). The Program was a fee-based, first come first served program. No taxpayer funds are used to pay for the petitioner's salaries or to purchase program materials. The Program did not utilize existing basal kindergarten materials. The Board contends that the Program was and is limited to child care and not academically based. Letters sent to parents to describe the Program when it was created referred to the Program as child care. When the Program was being created, a committee was created by the Board, which consisted of Board members, teachers, administrators, and community members, and that committee directed the program staff to develop the curriculum which was used and was aware of and approved that curriculum. The committee did not exist after the Program was in place. Petitioners contend that the Program was academically and instructionally based, and that the Program entailed duties and activities which required Petitioners to hold instructional certification with elementary endorsements issued by the State Board of Examiners.

3. The Board advertised for teachers for the Program. The Board required teachers employed in the Program to hold certification issued by the State Board of Examiners as elementary teachers and advertised to that effect. When they were interviewed and hired, Petitioners were not told that they were being interviewed or hired for a childcare program, but rather that they were being interviewed and hired for the extended day Kindergarten program and that it was thematically based.

A. Activities of the Program and duties supervised and/or performed by Petitioners included supervised play, quiet time, arts and crafts, computers, music, movement, dramatics, read aloud and large group experience stores and those duties described more particularly in paragraph 3 B.

B. As part of their duties, Petitioners taught thematic units which included the following topics: Birds, Community, Dental Health, Dinosaurs, Ecology, Fairy Tales, Friendship, Frogs, Good Citizenship, Hawaii, Imaginarium, Keats, Jack Ezra, Likenesses and Differences – visual differences, people, animals, families, Manners, Measurements, Musical Instruments, Nature, Ocean, Pets, Popcorn (plant seeds), Puppetry, Safety, Space, The Post Office, Transportation, My Family, Solar System, passport Around the World – a brief study of Italy, Mexico, Africa and Russia, Signs of Spring – spiders, insects, the pond, pussy willows, Seasonal Holidays – Halloween, Columbus Day, Thanksgiving, December Celebrations, Martin Luther King's Birthday, President's Day, Mother's Day and Father's Day, Ports, Fitness, Olympics, Theater, Drama, Art Appreciation, Dance, Rhythm, Instruments, Geography, Countries, Nutrition and Health Building and Architecture.

The Program curriculum for the above units was theme based and incorporated the whole language philosophy. The curriculum was not formally approved by the Board of Education, but it is the curriculum determined as referred to in paragraph 2 above.

Petitioners contend that there was a writing component of the Program. The writing component of the Program involved creating books, which was a cooperative learning endeavor, whereby each child would be responsible for writing a page of a book. Other writing activities included individual books, thank you notes, letters and journals. Respondent does not stipulate to this writing component.

The reading component of the Program included teachers reading literature to students, such as stories, poems, books and audiotapes. The reading was intended to develop vocabulary, recall of detail (listening, audio and visual memory), ability to sequence events to improve attention span, development of print awareness and appreciation of the written word.

The speaking component of the Program was integrated into and encouraged the Program students to respond to questions regarding literature and to share facts and personal circumstances related to particular themes, and to share general news. The activities and lessons were intended to develop language skills and confidence. Petitioners contend that students also share their writings among their peers, and recited poems, songs, and finger plays in groups. Respondent does not stipulate to the above sentence.

Students were also taught and engaged in music, creative dramatics, and puppetry to provide the opportunity for team creative expression, large muscle development, listening skills, socialization, and music appreciation. This included teaching songs, reenactment of stories, and creative movement.

Students were also taught and engaged in art projects developing small motor skills to teach them to follow directions, to complete tasks independently, to develop manual dexterity, through the use of scissors, tracing, and art materials. These activities also encouraged self-esteem, creativity, and appreciation of art.

In the course of the Program, petitioners took students on field trips, and teachers were required by the Superintendent, but not by Board directive, to prepare daily lesson plans and monthly calendars, to coordinate their plans and ideas, to meet monthly in person and by phone, and to hold parent teacher conferences and to attend parent evenings. The parent conferences and parent evenings were separate from the parent conferences and parent evenings held by the Board of Education for the regular Kindergarten program.

4. Petitioners were always included on the Board's seniority list. The parties disagree as to the significance of such

inclusion, but attached for the Court's review are copies of relevant seniority lists. In addition, Petitioners were on the list as being tenured.

5. Petitioners were observed and evaluated by supervisors employed by the Board. Petitioner's observations and evaluations were based upon implementation of curriculum, instruction, and similar activities, and the attached observations and evaluations accurately set forth, memorialize, and evaluate the duties performed by Petitioners.

6. By letter dated April 19, 1999, Dr. Patrick Parenty, Superintendent of Schools, informed Petitioners that the Board's position was that teachers assigned at the Kaleidoscope Program did not and cannot acquire tenure or seniority credit for service to that Program.

7. Petitioner Marlene Roth (hereinafter "Roth") is presently employed by the Board as a half-time Kindergarten teacher.

A. Roth holds a Bachelor of Science in Elementary Education and a Masters of Business Administration.

B. Roth was issued an Instructional Certification with an Elementary Education endorsement by the State of New Jersey in May, 1976.

C. Roth's employment history with the Board is as follows:

1.	1991-93	Kaleidoscope (.5)
2.	1993-94	Kaleidoscope (.5)
3.	1994-95	Kaleidoscope (.5)
4.	1995-96	Kaleidoscope (.5)
5.	1996-97	Kaleidoscope (.5)
6.	1997-98	Kaleidoscope (.5)
7.	1998-99	Kindergarten Teacher (.5)
8.	1999-00	Kindergarten Teacher (.5)

8. Petitioner Paula Darby (hereinafter "Darby") is presently employed by the Board as a fourth grade teacher.

A. Darby holds a Bachelor of Science in Child Development and Elementary Education.

B. Darby was issued an Instructional Certificate with an Elementary Education endorsement by the State of New Jersey on July, 1992.

C. Darby's employment history with the Board is as follows:

1.	1992-93	Kaleidoscope (.6)
2.	1993-94	Kaleidoscope (.6)
3.	1994-95	Kaleidoscope (.6)
4.	1995-96	Kaleidoscope (.6)
5.	1996-97	Kaleidoscope (.6)
6.	1997-98	Kaleidoscope (.6)
7.	1998-99	Kaleidoscope (1.0)
8.	1999-00	Fourth Grade teacher (1.0)

D. During the time period that she was employed by the Board and assigned to the Kaleidoscope Program, Darby was employed in the position of "Head Teacher."

9. Petitioner Marilyn Brown (hereinafter "Brown") is presently employed by the Board as a tenured first grade teacher.

A. Brown holds a Bachelor of Arts and Master of Arts in Elementary Education.

B. Brown was issued an Instructional Certificate with an Elementary Education Endorsement by the State of New Jersey in February, 1990.

C. Brown's employment history with the Board is as follows:

1.	1992-93	Kaleidoscope (.5)
2.	1993-94	First Grade (1.0)
3.	1994-95	First Grade (1.0)
4.	1995-96	First Grade (1.0)
5.	1996-97	First Grade (1.0)
6.	1997-98	First Grade (1.0)
7.	1998-99	First Grade (1.0)
8.	1999-00	First Grade (1.0)

10. Petitioner Judy Hamilton (hereinafter "Hamilton") is presently employed by the Board as a Teacher.

A. Hamilton holds a Bachelor of Science in Psychology.

B. Hamilton was issued an Instructional Certificate with an Elementary Education Endorsement by the State Board of Examiners in January, 1975.

C. Hamilton's employment history with the Board is as follows:

1.	1992-93	Kaleidoscope (.5)
2.	1993-94	Kaleidoscope (.5)
3.	1994-95	Kaleidoscope (.5)
4.	1995-96	Kaleidoscope (1.0)
5.	1996-97	Kaleidoscope (1.0)
6.	1997-98	Kaleidoscope (1.0)
7.	1998-99	Kaleidoscope (1.0)
8.	1999-00	First Grade (1.0)

11. Petitioner Nancy Braunstein (hereinafter "Braunstein" is presently employed by the Board as a Program Teacher.

A. Braunstein holds a Bachelor of Arts in English and Journalism.

B. Braunstein was issued an Instructional Certificate with an Elementary endorsement by the State Board of Examiners in April, 1990.

C. Braunstein's employment history with the Board is as follows:

1.	1997-98	Substitute teacher & Kaleidoscope Aide
2.	9/98 – 12/98	Substitute teacher & Kaleidoscope Aide
3.	1/99 – 6/99	Kaleidoscope (1.0)
4.	1999-00	Kaleidoscope (1.0)

12. Petitioners were informed by the former Superintendent, Pamela Fiander, while she was the Superintendent, that they would acquire tenure and that service in the Program

was tenure eligible. Respondent admits that this statement was made, but denies that it was or is relevant.

13. Petitioners were enrolled in the Teachers' Pension and Annuity Fund (TPAF), and Respondent filed certifications with the TPAF to obtain Petitioners' enrollment in the TPAF. The parties dispute the significance of such certifications, but a copy of a sample certification is attached to this stipulation as Exhibit H. In addition, during all their employment with Respondent, Petitioners received pension credit in TPAF.

14. During their employment, Petitioners received reimbursement for tuition for college and/or graduate courses that they completed. Those courses were taken at colleges and universities, and were subject to reimbursement based upon the terms of Respondent's policies and the collective bargaining agreement applicable to teachers.

15. During their employment, Petitioners requested permission to and were granted staff development activities, which they completed. Those activities were subject to reimbursement based upon the terms of Respondent's policies and the collective bargaining agreement as applicable to teachers. The activities for which Petitioners sought and obtained professional development reimbursement involved instructional subject matter. Attached as Exhibit J are application forms filed by Petitioners seeking reimbursement and Respondent's approval of same for these charges. Those forms accurately set forth the nature of the activities for which Petitioners sought and were granted reimbursement.

Although the demand clause of the petition of appeal requests an order from the Commissioner "directing respondent to reinstate or assign petitioners to full-time positions immediately and retroactively, together with all back pay, benefits, and all other emoluments denied as the result of any action by respondent to terminate or reduce any petitioners' employment, if necessary or warranted," in fact, no petitioner has suffered any adverse employment action either reducing hours or salary. Petitioners' February 5, 2001 letter memorandum sets forth the following argument concerning the issue of the relief requested:

> As regards the issue of whether this matter should properly be viewed as a request for a Declaratory Judgment, it is the position of petitioners that this action was properly initiated with the filing of a Petition of Appeal in June of 1999 following the petitioners' receipt, a month earlier, of correspondence from the Superintendent of Schools notifying them that respondent had determined that they could not, and did not, acquire tenure as a teacher for the period of time in which they were employed as teachers in the "Kaleidoscope" program. This notice constituted an adverse action of the board of education against these teachers, which has as a practical matter resulted in the professional observation and evaluation of these petitioners as if they were non-tenured teaching staff members, and which clearly constitutes a controversy or dispute arising under the school laws. If however, this court finds that this matter necessitates a Declaratory Ruling, then petitioners should be permitted to amend their Petition of Appeal to conform with the requirements of *N.J.A.C.* 6A:3-2.1 *et seq.*

Respondent's February 6, 2001 letter memorandum addresses the issue as follows:

> It is our opinion that the action in this case is seeking declaratory relief. To the extent that it does so we have no objections to an amendment to the Petition of Appeal to conform to the requirements of *N.J.A.C.* 6A:3-2.1, but such an amendment would be required inasmuch as this case clearly is seeking declaratory relief.

APPLICABLE LAW AND DISCUSSION

N.J.A.C. 6A:3-2.1 sets forth the requirements for obtaining a declaratory ruling from the Commissioner of Education:

> (a) Pursuant to *N.J.S.A.* 52:14B-8, any interested person(s) 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 shall be within the sole discretion of the Commissioner. If such 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.
>
> 1. 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.
>
> (b) Except that the format of the petition shall be as set forth in this subchapter, the rules pertaining to filing, service and answer of petitions as set forth in this chapter shall apply to petitions for declaratory ruling. (Emphasis added.)

N.J.A.C. 6A:3-2.2 sets forth the required format for a petition for declaratory ruling. The petition of appeal in the within matter does not follow that format. The sole issue in dispute relates to whether petitioner's teaching positions in the Kaleidoscope extended-day program are tenure-eligible positions. This appears to present a request for a declaratory ruling. I **CONCLUDE** that whether or not petitioners are subject to the evaluation requirements of *N.J.S.A.* 18A:27-3.1 for non-tenured teaching staff is merely another way of stating the issue, rather than a sufficient consequence to create a case or controversy requiring a decision or consequential relief from the Commissioner. Although respondent has indicated that it has no objection to permitting petitioners to amend the petition of appeal to conform with the required format, because *N.J.A.C.* 6A:3-2.1 requires the Commissioner of Education to make a determination whether to entertain such a petition for declaratory ruling and because it is in the sole discretion of the Commissioner to make such a determination before transmitting the file to the Office of Administrative Law for processing as a petition of appeal, it occurred to me, after I realized that none of the petitioners had actually suffered any adverse employment action requiring affirmative relief from the Commissioner, that it would be presumptuous of me to issue an initial decision on the underlying issues without first submitting the declaratory ruling issue to the Commissioner for a determination.

Accordingly, I am hereby returning the petition of appeal to the Commissioner to determine whether this case is one which requires the format of the petition to comply with

N.J.A.C. 6A:3-2.2, and if so, whether the Commissioner wishes to entertain such a petition for a declaratory ruling.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 18, 2001
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

6/22/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 22 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

OAL DKT. NO. EDU 6128-99
AGENCY DKT. NO. 172-6/99

MARILYN BROWN, PAULA DARBY, MARLENE ROTH, JUDY HAMILTON, AND NANCY BRAUNSTEIN,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WARREN, SOMERSET COUNTY,	:	PARTIAL SUMMARY DECISION
RESPONDENT.	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) in the form of a partial summary decision, pursuant to *N.J.A.C.* 1:1-12.5, have been reviewed. Petitioners' exceptions were timely filed pursuant to the requirements of *N.J.A.C.* 1:1-18.4.

Petitioners' exceptions contend, *inter alia,* that although all but one of them have served the requisite period of time as a teacher in the Kaleidoscope Program to have attained tenure as teachers pursuant to *N.J.S.A.* 18A:28-5, respondent determined to treat them as if they were, and still are, nontenured teachers, including, but not limited to, altering the manner of their professional observation and evaluation, and to deny them various benefits of tenure. It is petitioners' position that this determination by the Board clearly constituted an adverse action against them which resulted in a controversy or dispute arising under the school laws, pursuant to *N.J.A.C.* 6A:3-1.1 *et seq.*; thus, they aver, the filing of a Petition of Appeal with the Commissioner was appropriate. Petitioners further assert that at no time during the course of litigation in this matter did the Board ever raise the argument that petitioners did not suffer any adverse employment action as a result of its determination as to their tenure status. Rather, it was only after the Administrative Law Judge (ALJ) questioned whether this matter could be viewed as a request for a declaratory judgment that the Board argued that the relief sought by petitioners was declaratory in nature.

Consequently, petitioners urge rejection of the Initial Decision wherein the ALJ concluded that their matter should be viewed as a request for a declaratory ruling and, instead, remand the matter to the ALJ for a determination on the merits.

Upon review of the record, the Commissioner agrees with the ALJ that, at this point in time, the instant matter is appropriate for declaratory ruling pursuant to *N.J.A.C.* 6A:3-2.1 *et seq.* In so holding, however, the Commissioner emphasizes that at the time the Petition of Appeal was filed on June 28, 1999, shortly after petitioners received notice from the superintendent of schools, on or about May 20, 1999, that their service in the Kaleidoscope Program was not tenure-eligible, the pleadings included a prayer for relief which included, *inter alia*, an order of the Commissioner:

> B. Directing respondent to reinstate or assign petitioners to full-time positions immediately and retroactively, together with all back pay, benefits, and all other emoluments denied as the result of any action by respondent to terminate or reduce any petitioners' employment, if necessary or warranted.
>
> C. Directing respondent to assure that each petitioner receives proper pension credit for all periods of any improper failure to provide same.
>
> D. Attaching interest, both pre and post decision, to any backpay awarded ***. (Petition of Appeal at 4)

Moreover, the Board's Answer raised an affirmative defense that:

> With the exception of Marilyn Brown, none of the Petitioners are tenured employees of the district and they are not entitled to reinstatement to any particular position and have no right to any back pay or other benefits or other emoluments and Respondent has the right to terminate or reduce a position at any time as all Petitioners except Brown are employees at will without any tenure rights. (Board's Answer at 2)

Given the pleadings at the time the Petition of Appeal was filed and answered, the matter did not appear to be one conducive to a declaratory judgment.[1] However, now that two years have transpired since petitioners were notified of their change of tenure status and the only apparent "adverse" employment action to which any of the petitioners has been subjected is

[1] The Commissioner notes for the record that in June 1999 when the petition was filed in this matter, the applicable regulation dealing with declaratory judgment was *N.J.A.C.* 6:24-2.1 through 2.3, which provides less guidance than the rule as amended and recodified in April 2000 at *N.J.A.C.* 6A:3-2.1 through 2.3.

observation and evaluation as nontenured staff, the Commissioner agrees with the ALJ that the issue to be decided in the instant matter, *i.e.*, whether employment as a teacher in the Board's Kaleidoscope Program constitutes tenure-eligible service, is one appropriate for declaratory judgment. Consequently, the Commissioner herein determines to exercise his discretion, pursuant to *N.J.A.C.* 6A:3-2.1, to entertain the matter as a declaratory judgment request and direct that the matter shall proceed at the OAL on that basis.

Accordingly, petitioners are directed to submit promptly an amended petition to the OAL, pursuant to the requirements of *N.J.A.C.* 1:1-6.2, such that the petition is in conformity with the format requirements of *N.J.A.C.* 6A:3-2.2. Given that more than two years have transpired since petitioners original filing in this matter, the Commissioner requests that the case proceed as expeditiously as possible so that final resolution may be reached forthwith as to petitioners' tenure status.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 8|6|01

Date of Mailing: 8|6|01

[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.

242-01

FRANCINE BARNDT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HIGHLAND PARK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

August 6, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4578-00

AGENCY DKT. NO. 147-5/00

FRANCINE BARNDT,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF HIGHLAND PARK,

Respondent.

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

James L. Plosia, Jr., Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: June 14, 2001 Decided: June 20, 2001

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

The petitioner, Francine Barndt, challenged a Highland Park Board of Education (respondent) resolution requiring that she undergo physical and psychological examinations. The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13.

On April 17, 2001, the date set for hearing, counsel reached an amicable resolution of all issues between them. The parties have prepared the attached settlement agreement 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 and is consistent with the law, and

3. The settlement is sensitive to the nature of the issues addressed.

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 further note that the parties have agreed to waive the right to file exceptions and cross-exceptions.

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

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

JUN 20 2001
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

6/22/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 22 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jh

SETTLEMENT AGREEMENT

Highland Park Board of Education ("Board") and Francine Barndt ("Barndt") hereby agrees as follows:

1. Ms. Barndt will be placed on an "administrative leave" by the Board from the date of this agreement through November 30, 2002. During this leave, Barndt will accrue sick leave consistent with the collective bargaining agreement between the Board and the Highland Park Education Association, and will also earn and receive whatever salary increases she is entitled to pursuant to that agreement. Barndt will be paid a payroll check during this period of leave, from which shall be deducted her share of the normal pension contributions, with the Board paying its share of the pension contributions.

2. Barndt shall submit a valid letter of resignation to the Board, stating that she is resigning her position in the Highland Park School District effective November 30, 2002. This resignation will be valid, binding, and effective when it is accepted by the Highland Park Board of Education.

3. Barndt agrees that at no time in the future will she apply for another position of employment with the Highland Park Board of Education.

4. At the time of her leaving the Highland Park School District (November 30, 2002), Barndt will be entitled to reimbursement for whatever accrued sick and personal time she has as of that date (again, pursuant to the collective bargaining agreement between the Board and the Highland Park Education Association).

5. The Board will bear the cost of Barndt's purchasing back up to two years of pension credit from the New Jersey Division on Pensions. The Board will "buy back" this time within 90 days of the date of this Agreement. The amount of time to be purchased shall

Law Offices
Apruzzese, McDermott,
Mastro & Murphy
A Professional Corporation
25 Independence Boulevard
P.O. Box 112
Liberty Corner, N.J. 07938
(908) 580-1770

not exceed the time necessary to get Barndt to 25 years of service as of 11/30/02. If TPAF rejects the purchase of this time, then this Agreement, as well as the attached Release, are null and void, and the parties have whatever rights they would have otherwise enjoyed but for this Agreement and Release.

6. Barndt will dismiss with prejudice her pending Petition of Appeal with the Department of Education.

7. The Board will withdraw its request for Barndt to go for a psychiatric and physical examination.

8. During the aforementioned administrative leave of absence, Barndt will not work in any capacity between 8:00 A.M. and 3:30 P.M. during days when school is in session, except that she may attend continuing education courses pursuant to the state continuing education obligation (100 hours in 5 years).

9. At no time in the future will Barndt be permitted on any property or grounds of the Board, except to attend non-school related functions in or on any school property. Other than Barndt's right to be on district property for a non-school function, Barndt agrees that she will not be present on any Board of Education property.

10. Barndt will provide a valid and binding General Release and Waiver to the Highland Park Board of Education, its servants, agents, employees, successors and assigns. Said Release will specifically include a waiver by Barndt of any right to recovery of legal fees she has incurred in the Department of Education matter, the criminal matter, or any other legal action involving the Board and/or the employees.

11. The Highland Park Education Association and Barndt will dismiss with prejudice its pending grievance concerning the contents of Barndt's personnel file. The Board

Law Offices
Apruzzese, McDermott,
Mastro & Murphy
A Professional Corporation
25 Independence Boulevard
P.O. Box 112
Liberty Corner, N.J. 07938
(908) 580-1776

will remove copies of all disputed documents from any of its files, and said disputed documents will be held in escrow by the Board's attorney, pursuant to a separate escrow agreement between Barndt and the Board.

12. Barndt will withdraw her pending Appellate Division Appeal in the Barndt/Barbosa case, and will dismiss all claims currently pending against Matthew Barbosa. The aforementioned Release that Barndt will provide to the Board will encompass a waiver of all claims Barndt has or may have had against Mr. Barbosa. Barbosa will supply Barndt with a General Release and Waiver releasing all claims that Barbosa had or may have had against Barndt.

13. The existence of this Agreement, the terms contained herein, any discussions concerning this Agreement, and any facts related to the aforementioned Petition of Appeal are to be treated as confidential by the parties, and shall not be disclosed by either party except as required by law. Notwithstanding this provision, Barndt may discuss these otherwise confidential matters only with her husband, her attorney, her adult children, and her brother (who is also an attorney). The parties agree that they will provide a simple "no comment" in response to any inquiries by reporters.

Highland Park Board of Education

By: Elaine Hergga

Dated: 5/7/01

Francine Barndt

Francine Barndt

Dated: 5/7/01

Law Offices
Apruzzese, McDermott,
Mastro & Murphy
A Professional Corporation
25 Independence Boulevard
P.O. Box 112
Liberty Corner, N.J. 07938
(908) 580-1776

OAL DKT. NO. EDU 4578-00
AGENCY DKT. NO. 147-5/00

FRANCINE BARNDT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HIGHLAND PARK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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 is compelled to remand the settlement agreement to the OAL. On its face, the agreement is expressly contingent upon the approval by the Teacher's Pension and Annuity Fund (TPAF), Division of Pensions and Benefits, of the purchase of "buy back" time by the Board on behalf of petitioner. The agreement provides that

> If TPAF rejects the purchase of this time, then this Agreement, as well as the attached Release, are (sic) null and void, and the parties have whatever rights they would have otherwise enjoyed but for this Agreement and Release. (Settlement Agreement at paragraph 5, p. 2)

The Commissioner recognizes that any settlement agreement effectuated by parties to a dispute shall, upon his approval, be deemed a final decision. *N.J.A.C.* 1:1-19.1(d). Therefore, although he does not find objectionable the terms of the agreement which are within his jurisdiction, the Commissioner cannot sanction a settlement which is clearly contingent upon the satisfaction of conditions *by another agency*, namely the Department of Treasury, Division of

Pensions and Benefits, and which further provides that if such conditions are not met, the agreement shall be deemed null and void.

Accordingly, the within settlement is rejected. The Commissioner directs that this matter be remanded to the OAL and held in abeyance, pending review by the Division of Pensions and Benefits of the parties' application to purchase the proposed pension credit for petitioner. If the parties obtain the necessary approval from the Division of Pensions and Benefits, the within agreement may be modified to so reflect that approval, and may be resubmitted to the Commissioner for review. If, however, the parties cannot obtain from the Division of Pensions and Benefits the outcome they seek, and they are unable to agree on revised settlement terms, this matter shall proceed to a determination on petitioner's claims.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8|6|01

Date of Mailing: 8|6|01

241-01

EDU #208-01
C #241-01
SB # 34-01

M.G. AND M.G., on behalf of minor child, A.G., :

PETITIONERS-APPELLANTS, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY, :

RESPONDENT-RESPONDENT. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 6, 2001

For the Petitioners-Appellants, Christopher M. Manganello, Esq.

For the Respondent-Respondent, Capehart & Scatchard, P.A. (Joseph F. Betley, Esq., of Counsel)

The petitioners filed a petition with the Commissioner of Education challenging the action by the Board of Education of the Township of Washington (hereinafter "Board") expelling their son, A.G., from school following two positive drug tests. On August 6, 2001, the Commissioner dismissed the petition.

On September 7, 2001, the petitioners filed the instant appeal to the State Board of Education.

Pursuant to N.J.A.C. 6A:4-1.11(a), the petitioners' brief in support of their appeal was due on September 27, 2001, 20 days after they filed their notice of appeal. The petitioners, however, failed to file a brief by that date. By letter dated October 1, 2001, the Director of the State Board Appeals Office ("Director") notified the petitioners of their

failure to file a brief and informed them that this matter was being referred to the Legal Committee of the State Board for consideration of their failure to perfect the appeal.

By letter dated October 30, 2001, the counsel for the petitioners indicated that:

> my office mistakenly failed to submit a brief in support of the appeal with regard to the above-referenced matter. Please be advised that I thought that the brief was submitted with the original notice of appeal; however, that was evidently not the case. I respectfully request that the State Board of Education permit me additional time to file said brief.

By letter dated November 2, 2001, the Director responded that:

> On Wednesday, October 24, 2001, your secretary called this office to say that a brief would be filed by Monday, October 29, 2001. She was advised that you would have to submit a certification explaining why the brief had not been timely filed and that it would be necessary to seek leave of the Legal Committee to file your brief. She was further advised that the brief should accompany this request and that it was necessary to file an original and seventeen (17) copies of all documents. There was no further contact from your office until we received your letter of October 30, 2001.
>
> If you wish to seek leave of the Legal Committee to file your appeal brief nunc pro tunc, you are required to file the original and seventeen copies of any such request along with the brief.

On November 13, 2001, the counsel for the petitioners called the State Board Appeals Office and indicated that he had just received the Director's letter of November 2. He further indicated that his secretary had not fully informed him of the details of her conversation of October 24 with the State Board Appeals Office. He gave his assurance that the brief would be filed by November 16.

However, no brief was filed by that date. In fact, counsel for the petitioners has still failed to file a brief in support of the appeal, more than two months after the filing deadline, despite repeated assurances from him and his office that the brief would be

filed. Nor has he communicated with the State Board Appeals Office since his telephone call of November 13, sought leave to file nunc pro tunc or offered any explanation for his ongoing failure to file a brief. 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).

December 5, 2001

Date of mailing DEC 07 2001

245-01

T.A., on behalf of minor child, C.K.,	:	
	:	
PETITIONER,		
	:	COMMISSIONER OF EDUCATION
V.		
	:	DECISION
BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY,	:	
	:	
RESPONDENT.		
	:	

August 6, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1231-01

AGENCY DKT. NO. 407-11/00

T.A. ON BEHALF OF MINOR CHILD, C.K.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY,

Respondent.

Kathleen M. Gialanella, Esq., for Petitioner

Richard J. Kaplow, Esq., for Respondent

Record Closed: June 19, 2001 Decided: June 19, 2001

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on January 17, 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 2 & 4, 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.* 52:14B-10.

June 19, 2001
DATE

Marcia M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

6/22/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 26 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

JUN 13 11 05 AM '01

RICHARD J. KAPLOW, P.A.
53 Elm Street
Westfield, New Jersey 07090
(908)232-8787
Attorney Respondent

T.A. ON BEHALF OF MINOR CHILD, C.K.	:	**BEFORE THE STATE OF NEW JERSEY DEPARTMENT OF EDUCATION**
Petitioner,	:	**AGENCY REF. NO. 407-11/00**
	:	**OAL DOCKET NO. EDUOS 01231-01N**
vs.	:	
BOARD OF EDUCATION OF THE TOWN OF WESTFIELD,	:	**STIPULATION OF SETTLEMENT**
Respondent.	:	

THE MATTER in dispute having been settled amicably by and between the parties,

IT IS on this ____ day of June, 2001,

STIPULATED AND AGREED as follows:

1. Petitioner T.A., on behalf of his minor child C.K., hereby withdraws the above docketed Petition of Appeal in its entirety, with prejudice.

2. Respondent Westfield Board of Education agrees to permit C.K. to remain enrolled as a pupil within the Westfield

School District, without any obligation of Petitioner to pay tuition for the 2000-2001 school year. This permission for C.K. to attend school within the Westfield School District shall continue into the 2001-02 school year, and as long as Petitioner T.A. continues to have temporary custody of C.K. pursuant to the Orders of the New Jersey Superior Court, and C.K. continues to otherwise remain eligible for tuition-free attendance within the School District under applicable state and federal law.

3. Petitioner shall have the obligation to immediately notify the Business Secretary for the Board of Education of any modification in the Order of Temporary Custody granted to T.A. by the Honorable Kathryn A. Brock, J.S.C. on or about February 15, 2001. The agreement of the parties herein is subject and subordinate to the right of either party herein to maintain any appropriate position consistent with prevailing state and federal law, based upon any future modification of Judge Brock's February 15, 2001 Order, or any change in the temporary or permanent custody status of C.K.

4. All claims for attorneys' fees and costs of any kind incurred in this matter are hereby waived by both parties.

Accepted and Agreed to
this 13th day of June, 2001

Robert A. Berman
Business Secretary

Todd Annis o/b/o C.K.

Richard J. Kaplow, Esq.

Kathleen M. Gialanella, Esq.

OAL DKT. NO. EDU 1231-01
AGENCY DKT. NO. 407-11/00

T.A., on behalf of minor child, C.K.,	:	
	:	
PETITIONER,		: COMMISSIONER OF EDUCATION
V.		
	:	DECISION
BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY,	:	
	:	
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|6|01

Date of Mailing: 8|7|01

247-01

IN THE MATTER OF THE SUSPENSION :
OF THE TEACHING CERTIFICATE OF :
KERRI BERNHARD, PASSAIC COUNTY :
EDUCATIONAL SERVICES COMMISSION, :
PASSAIC COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

August 8, 2001

OAL DKT. NO. EDU 9957-00
AGENCY DKT. NO. 385-10/00

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	COMMISSIONER OF EDUCATION
KERRI BERNHARD, PASSAIC COUNTY	:	DECISION
EDUCATIONAL SERVICES COMMISSION,	:	
PASSAIC COUNTY.	:	
	:	

The record of this matter and notice of failure to appear transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-14.4 have been reviewed. However, upon objection raised by counsel for respondent to this matter being so recorded,* the Assistant Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34c, instead, deems this matter withdrawn and, therefore, it is dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 8|8|01

Date of Mailing: 8|8|01

* Counsel for respondent affirmed that this matter was settled between the parties and it was, therefore, his expectation that this matter would be dismissed without the need for appearance by either party on the scheduled hearing date.

248-01

H.A. DEHART & SONS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SALEM COUNTY SPECIAL SERVICES SCHOOL DISTRICT, WOLFINGTON BODY COMPANY, AND SHEPPARD BUS SERVICE, INC.,	:	DECISION ON REMAND
RESPONDENTS.	:	

SYNOPSIS

Petitioner, unsuccessful bidder for a busing contract, claimed it was the lowest bidder and contended the District's awarding of the contract to Wolfington was illegal and in contravention of the Public Schools Contracts Law, *N.J.S.A.* 18A:18A-1 to –49.2. The Commissioner found that the central issue in the ALJ's determination as to whether the contract should be re-bid was his finding that petitioner's CAT 3126B engine was not equivalent to the DT 466 engine which the District preferred. Finding that the parties did not have the opportunity to brief or introduce technical evidence on the issue of whether the two engines were equivalent, the Commissioner remanded the matter for further proceedings as necessary so that the question of equivalency could be determined based on a complete record.

On remand, the ALJ granted respondents' Motion to Dismiss the petition and denied petitioner's cross-motion to hold the District and its business administrator in contempt for their failure to comply with a June 7, 2000 restraining order.

On remand, Commissioner agreed with the ALJ that the District's Motion to Dismiss was properly granted. In that the available grant expired in February 2001 and all four of the local school districts withdrew from the partnership which the grant supported and purchased the needed buses individually, there was no basis on which the relief petitioner sought in this litigation could be granted and the petition was dismissed as moot. Further, the Commissioner concurred with the ALJ that the cross-motion to hold the District and its business administrator in contempt must be denied as petitioner failed to demonstrate, and the record did not support, a finding that either the District or its business administrator willfully or purposely disobeyed such order. Petition was dismissed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8438-00

AGENCY DKT. NO. 156-5/00

H.A. DEHART & SONS,

Petitioner,

v.

SALEM COUNTY SPECIAL SERVICES SCHOOL DISTRICT, WOLFINGTON BODY COMPANY, AND SHEPPARD BUS SERVICE, INC.,

Respondents.

Thomas H. Ward, Esq., for petitioner

John D. Jordan, Esq., for respondent, Salem County Special Services School District

William Wilkins, Esq., for respondent, Wolfington Body Company

Samuel J. Serata, Esq., for respondent, Sheppard Bus Co.

Record Closed: May 31, 2001 Decided: June 21, 2000

BEFORE **ROBERT S. MILLER,** ALJ:

This will serve as my ruling on the motion dated April 10, 2001 by the Salem County Special Services School District ("the District") to dismiss the petition of H.A. DeHart & Son ("DeHart") and on the cross-motion dated April 12, 2001 of DeHart to hold in contempt both the District and its Business Administrator, Henry Bermann. It also constitutes an Initial Decision.

I note for the record that both counsel for the District and DeHart have submitted excellent briefs and reply briefs, supported by voluminous exhibits and, in the case of the District, a four-page detailed certification of Mr. Bermann. I commend counsel for their diligence and the high quality of their arguments.

For the reasons that follow, I have decided (1) to grant the District's motion to dismiss and (2) to deny DeHart's motion to hold the District and Mr. Bermann in contempt.

1.

Respecting the District's motion, DeHart agrees - - as per Mr. Ward's letter to me dated May 1, 2001 - - that "the issues to be decided have been rendered moot . . . [and that] the court has no relief to grant petitioner." Mr. Ward adds further: "The sole remaining issue before this court is whether or not [the District] violated the temporary restraining order of this court and what sanctions should be imposed." Mr. Ward's letter amounts to a withdrawal of the original petition for relief or, at least, to a concession that DeHart does not oppose the motion to dismiss.

2.

The essential facts underlying petitioner's contempt motion are not in dispute. They can be summarized as follows.

On or about September 1, 1999, the District received a Consolidation of Services grant from the State of New Jersey to sponsor and administer joint purchasing projects. The theory of the grant was that administrative and transactional costs normally incurred in the acquisition of products and materials could be reduced if school districts would join together to acquire them. In addition, the grant contemplated that the districts would incur lower per unit costs if larger quantities were purchased. The reduction in cost would benefit the participating districts and their taxpayers.

In accordance with the terms of the grant, the District offered to prepare specifications and advertise for bids for seven school buses that four local districts needed for the 2000-2001 school year. The districts were Cumberland Regional School District (1 bus), Millville City School District (1 bus), Oldmans Township School District (1 bus), and Pittsgrove Township School District (4 buses). None of the buses would be retained by the District.

Bids for the buses were received from four bidders on March 27, 2000. On April 25, 2000 the District awarded a contract for the purchase of the buses to Wolfington Body Company ("Wolfington"). Although DeHart appeared to be the low bidder, its bid was disqualified upon the recommendation of Henry Bermann, the Business Administrator for the District. Mr. Bermann advised the District that the "parent bore" engine offered by DeHart was not the equivalent of the "wet sleeve" engine desired by the four local school districts. Mr. Bermann also pointed out that Sheppard Bus Service ("Sheppard") offered the parent bore engine as an alternate and that if a parent bore engine were to be purchased, the contract should be awarded to Sheppard.

Shortly after the contract award to Wolfington, DeHart filed a petition seeking to void the award and applying for emergency relief to restrain the District and Wolfington from completing the purchase. On May 30, 2000, I heard from counsel by way of oral argument on the application and granted it. On June 7, 2000 I signed an Order temporarily restraining the District and Wolfington "from taking any further action pursuant to any award of the bid for school buses awarded April 25,2000 until there can be a plenary hearing . . . ."

At that point, the District modified and corrected the specifications previously issued and readvertised for bids. This was done because the four local districts needed the buses for the beginning of the 2000-2001 school year. However, to date no contract has been awarded by the District. During the summer of 2000 the four local districts advised the District, either verbally or in writing, that they were withdrawing from the program. Subsequently, the local districts individually issued specifications and advertised for bids for the buses they needed. Pittsgrove advertised for four buses. DeHart participated in the Pittsgrove bidding process but its bid was disqualified because it was not timely submitted.

Since June 10, 2000 all four local districts have purchased the buses which they desired through individual bidding processes conducted by each school district.

The grant program under which the disputed bids were advertised terminated on February 28, 2001, and at this moment the District has no legal authority or funds to purchase the 7 buses which are the subject of this litigation.

Henry Bermann has been the Business Administrator for the Pittsgrove Township School District for more than 12 years, as well as having served as the business administrator for the District at all times relevant to the instant litigation. Sometime during the summer of 2000 Mr. Bermann consulted the solicitor for the Pittsgrove Township Board of Education to ascertain if, in light of the outstanding restraining order, Pittsgrove could legally advertise for bids for the four buses it needed. The solicitor advised that this was permissible because the restraining order did not apply to Pittsgrove but only to the District and Wolfington.

DeHart's motion to hold the District and Mr. Bermann in contempt is based on its contention that Mr. Bermann "allowed" the four local districts to withdraw from the joint agreement. This argument, however, is not supported by the facts. Mr. Bermann's certification -- neither contradicted nor rebutted by petitioner - - declares:

> 5. "In order to ascertain the interest of local school districts in the purchase of new school buses, an announcement was made in December of 1999 at a joint meeting of business administrators for Salem and Cumberland counties. The business administrators were advised that, if there were enough interest in new buses, Salem County Special Services School District would advertise for bids. The participating districts would have the option to either accept the bid price or advertise individually for the bus or buses that district needed.
>
> 6. Four school districts indicated interest in the joint purchasing of buses: Pittsgrove Township, Oldmans Township, Millville City and Cumberland Regional. Pittsgrove wanted four buses. The other districts asked for one bus each. As a result of the expressions of interest by these school districts, the bid specifications which are the subject of the within litigation were prepared.

> 7. No formal agreements or contracts were signed by the participating school districts. The understanding of all parties was that the buses would be bid by Special Services, that each district could purchase the bus or buses in which it was interested and that there was no obligation to purchase anything if the district did not desire to do so."

In paragraph 10 of his certification, Mr. Bermann added: "Since the entry of the restraining order, Special Services has taken no action concerning the buses in dispute. I know of no legal right possessed by Special Services to prevent the other districts from purchasing the buses which they needed."

Mr. Bermann's certification is supported by an attached exhibit (Exhibit "A"). This is a sample "Joint Purchasing Agreement" which the Pittsgrove Board of Education has used for many years with other Salem County School District boards of education when the latter want to avail themselves of the efficiencies and economies of joint purchasing of natural gas, paper, materials and supplies. The agreement is binding on the other school districts in one respect only, viz., to pay Pittsgrove for those items which they decide to purchase. There is no obligation on the part of the other districts to purchase any item jointly. There is nothing precluding the other districts from purchasing any materials or supplies individually. And there is nothing in the agreement preventing the other districts from withdrawing from the purchasing arrangement any time they desire.

It is clear, as counsel for the District points out, that the District had no legal or equitable right to prevent the other districts from withdrawing from the informal purchasing partnership. There was no contract prohibiting the participating districts from acquiring the bus or buses separately and individually, nor was there any regulation or statute prohibiting it.

A party to a legal action cannot be held in contempt unless it is able to comply with an order of the court and willfully refuses to do so. Greer v. New Jersey Bureau of Securities, 288 N.J. Super. 69, 86 (App. Div. 1996). Before a party is held in contempt, there must be a showing that the party willfully and purposely disobeyed the order. Lusardi v. Curtis Point Property Owners' Association, 138 N.J. Super. 44 (App. Div. 1975).

In my opinion, petitioner has failed to show that Mr. Bermann and the District purposely and willfully disobeyed the restraining order of June 10, 2000. Indeed, the evidence indicates that both Bermann and the District have respected the order and acted in good faith.

Accordingly, I hereby **GRANT** respondent's motion to **DISMISS** the petition and **DENY** petitioner's motion to hold the District and Henry Bermann in contempt. 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.

June 21, 2001
DATE

ROBERT S. MILLER, ALJ

Receipt Acknowledged:

June 25, 2001
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 26 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

tmp

H.A. DEHART & SONS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SALEM COUNTY SPECIAL SERVICES SCHOOL DISTRICT, WOLFINGTON BODY COMPANY, AND SHEPPARD BUS SERVICE, INC.,	:	DECISION ON REMAND
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.

Upon his full and independent review, the Commissioner agrees with the Administrative Law Judge (ALJ) that the District's Motion to Dismiss the within petition is properly granted. As recognized by petitioner, in that the grant made available through the Consolidation of Services Grant Program expired on February 28, 2001, and since, prior to this time, all four of the local school districts had withdrawn from the partnership which the grant supported and subsequently individually issued specifications, advertised for bids, and ultimately purchased the buses they needed, there is no basis on which the relief petitioner sought in this litigation can be granted, and the instant petition must be dismissed as moot. The Commissioner, likewise, concurs with the ALJ that petitioner's cross-motion to hold the District and its business administrator in contempt for their failure to comply with the June 7, 2000 restraining order must

be denied as petitioner has failed to demonstrate, and the record does not support, a finding that either the District or its business administrator willfully and purposely disobeyed such order.

Accordingly, the Initial Decision of the OAL is affirmed for the reasons stated therein and the within Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8|8|01

Date of Mailing: 8|8|01

* 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.

249-01E

JOANNE CRAIG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

August 8, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

AMENDED ORDER
DENYING EMERGENT RELIEF
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)

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

On June 21, 2001 petitioner filed a verified petition with the Commissioner of Education of New Jersey requesting that the action of respondent terminating "Abbott Preschool Educational Program Contract dated July 27, 2000 between the Trenton Public School and First Step Academy and Community Development Center ("First Step") be stayed pending a final decision in this matter.

Petitioner's request with exhibits was transmitted to the Office of Administrative Law on June 22, 2001. Oral argument on petitioner's motion was scheduled for July 2, 2001. All parties appeared on that date at the Office of Administrative Law, however, because respondent had not responded to petitioner's moving papers the argument was continued to July 24, 2001. Prior to that date both parties filed letter briefs with exhibits. Oral arguments were completed on July 24, 2001.

The only disputed fact in this matter is the Abbott Preschool Educational Program Contract, dated July 27, 2000 ("Contract") and appended as Exhibit A to the submissions of each party. It appears that First Steps was closed to "Abbott" children on April 6 although funding was last paid by the BOE in March. Petitioner alleges she first received written notice of adverse action pursuant to the contract on April 18, 2001; respondent alleges the notification of termination of the contract because of a material breach was sent to First Steps on April 9.

Respondent further alleges that its action were necessitated by its finding that employees of First Step were arrested "for altering birth certificates and the removal of all Abbott records" from First Steps thus breaching the contract. Petitioner cites Section V, Paragraph B of the contract in her argument that respondent must give "no less than ten (10) business days" notice to comply with the terms of the contract before termination. This action is authorized as a request for a stay of the termination pending the outcome of an appeal to the Commissioner of Education.

> *N.J.A.C.* 1:1-12.6(a) states:
> Where authorized by law and where irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with a contested case, emergency relief pending a final decision on the whole contested case may be ordered upon the application of a party.

"Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages. In certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. "*Crowe v. DeGoia,* 90 N.J. 126, 132-133 (1982). Four "principles," "rules" or "tests" for authorizing preliminary relief are detailed in the *Crowe* decision. In addition to the prevention of "irreparable harm," *Crowe* holds, "a

preliminary injunction should not issue where all material facts are controverted" and the moving party "must make a preliminary showing of a reasonable probability of ultimate success on the merits." *Ibid.*

In this matter, because the term of the contract ended on June 30, 2001 and the respondent did not attempt to renew the contract, I **CONCLUDE** that petitioner's potential for recovery is limited to the contract term ending June 30, 2001. Therefore, a stay of the contract termination can only require respondent to pay money to petitioner for contracted services to June 30, 2001 – a date now past. Counsel for petitioner has more than adequately explained the depth of personal inconvenience to petitioner and the employees of First Step whose teacher certifications may be in jeopardy. However, I **CONCLUDE** that personal inconvenience results from the annual renewability of the contract, not from whether the respondent properly terminated the contract. Accordingly, it is **ORDERED** that petitioner's request for a stay of respondent's action terminating the contract is **DENIED.**

Petitioner requests that this matter be scheduled for plenary hearing of the issues raised in her original petition, the amended letter brief for emergent relief, and for such additional amended relief requests which may be made. It is therefore **ORDERED** that petitioner file any further amendments of the petition for relief within 20 days of the date of this Order. It is further **ORDERED** that respondent file its response to petitioner's amended petition within 20 days after it receives service of the amended petition. It is further **ORDERED** that all motions for summary disposition of this matter, with briefs and supporting affidavits, be filed within 30 days after respondent files its response.

It is finally **ORDERED** that the date of the plenary hearing is fixed at October 22, 2001.

This order on application for emergency relief shall remain in effect until issuance of the decision in the matter. The plenary hearing has been scheduled for October 22, 2001.

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.

August 1, 2001
AMENDED DATE

ANTHONY T. BRUNO, ALJ

tmp

OAL DKT. NO. EDU 4136-01
AGENCY DKT. NO. 215-6/01

JOANNE CRAIG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The decision and 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 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 shall move to plenary hearing on its merits, scheduled for October 22, 2001, as directed by the ALJ.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8|8|01

Date of Mailing: 8|8|01

* 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.

253-01

ROBERT GRANT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF GREEN BROOK, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Board member, against whom a private citizen filed a slander complaint, alleged the Board wrongfully refused to indemnify him pursuant to *N.J.S.A.* 18A:12-20.

The ALJ noted that board members are indemnified when civil actions are brought against them for any act or omission arising out of and in the course of the performance of duties as a member of a board of education. The ALJ emphasized that petitioner was a member of the Board when he defamed the private citizen; however, he was not acting in any official capacity when he made the comments, he was engaged in personal, political activity. Moreover, he was not sued for reports to the police or to the school administration, he was sued for "unthinking statements [made] to private citizens." The ALJ denied petitioner's request for legal fees and costs and dismissed the petition.

Having reviewed the record, including transcripts of the hearing, 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 2931-00

AGENCY DKT. NO. 101-3/00

ROBERT GRANT,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF GREEN BROOK,

Respondent.

Elias L. Schneider, Esq., for petitioner (Brigiani, Cohen and Schneider, P.A., attorneys)

Nicholas Celso, III, Esq., for the respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: May 17, 2001 Decided: June 29, 2001

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

Robert Grant (Grant or petitioner) appeals the decision of the Green Brook Board of Education (Board) not to indemnify him under the terms of *N.J.S.A.* 18A:12-20. The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13.

STIPULATED FACTS

The parties stipulate the following:

1. At all times relevant herein, the petitioner was an elected member of the Green Brook Board of Education, Green Brook, Somerset County, New Jersey, having been elected to the School Board on April 15, 1997. The petitioner's term expired in April 2000.

2. Pursuant to the provisions of *N.J.S.A.* 18A:11-1 through –10, respondent, Board, having administrative offices at 132 Jefferson Avenue, Green Brook Township, New Jersey, is a body corporate of the State of New Jersey and is charged with the administration of the public school system in Green Brook Township.

3. On or about January 22, 1999, a verified complaint was filed by Arthur Nelson against Robert Grant and unnamed John Does' in the Superior Court of New Jersey, Law Division, Somerset County, in the matter entitled *Arthur Nelson v. Robert Grant et al.*, Docket No. SOM-L-97-99. (Exhibit J-1).

4. On or about April 14, 1999, an answer was filed on Grant's behalf. (Exhibit J-2).

5. As part of the discovery in the Superior Court case, depositions were taken of the following individuals:

   a. Stanley Wainwright, May 6, 1999 (Exhibit J-3);
   b. Douglas Judge, May 6, 1999 (Exhibit J-4);
   c. Arthur Nelson, May 12, 1999 (Exhibit J-5) and
   d. Robert Grant, June 4, 1999 (Exhibit J-6).

6. On or about November 15, 1999, Grant and Nelson entered into a Stipulation of Dismissal. (Exhibit J-7).

7. On or about December 2, 1999, Grant and Nelson entered into a Settlement Agreement. (Exhibit J-8).

8. On or about December 2, 1999, Nelson executed a release in Grant's favor. (Exhibit J-9).

9. On or about February 14, 2000, Grant signed a Green Brook Board of Education voucher for $27,454.83, representing $19,454.83 in legal fees and $8,000 in settlement costs in *In the Matter of Nelson v. Grant.* (Exhibit J-10).

SUMMARY OF EVIDENCE

Grant was elected to the Board in April 1997 and served until his term expired in April 2000. In February 1998, Grant attended a meeting of approximately six private citizens at the home of Stanley Wainwright to put together a slate of potential candidates to run in the April 1998 school election. The group called itself "Partnership in Education for the New Millennium." Grant was the only board of education member at the meeting.

At the end of the meeting, Arthur Nelson, a private citizen, stated to Grant and Wainwright that he was going to "drag" three school administrators out of town. After Nelson left, the petitioner told Wainwright that Wainwright should disassociate himself from Nelson because he was associating with someone who was under investigation.

In March 1998, Grant told Douglas Judge, also a private citizen, that Nelson is a racist, an anti-Semite and a Nazi sympathizer and also that Nelson was under investigation by the Department of Justice. Grant states he told Judge to disassociate himself from Nelson because Judge was associating himself with someone who was under investigation. Grant testified, on cross examination, that he had no knowledge of Nelson being under investigation and the only person in town that was under investigation to his knowledge was a student named Ben Blackwelder who was accused of making racist statements and drawings.

Arthur Nelson filed a slander complaint against Grant in the Superior Court of New Jersey, Law Division, Somerset County, on January 22, 1999. The complaint names Grant alone, in his individual capacity, and alleges among other things that Grant falsely and maliciously told private citizens that Nelson was under investigation by the Department of Justice. When Grant was served with a copy of the complaint, he entered a closed Board meeting at which the Board was interviewing candidates for superintendent. Grant requested that the Board indemnify him in a law suit. This appears to the first knowledge the Board had of any matter involving Nelson. Grant had not mentioned or requested to be heard with respect to matters concerning Nelson. Grant never advised the Board that Grant believed Nelson was associated with or responsible for some incidences of bias that were occurring in the school.

There appears to have been no discussion of the matter from that time until January 2000. The Board was not supplied copies of the complaint. During the old business portion of the agenda at the Board meeting of January 17, 2000, Grant stated he had a letter he wanted to read into the minutes. The Board president objected, but Grant proceeded to read a letter of apology to Nelson. The Board did not discuss the matter after Grant read the letter. However, at the next Board meeting, seven of the nine Board members voted to have the letter stricken from the record because it was not a matter of Board business. The petitioner then demanded that the Board indemnify him for legal fees in the Nelson law suit. The Board declined.

In Grant's letter of apology to Nelson, he stated among other things that he knows of no instance in which Nelson demonstrated any attitude of racism, anti-Semitism or bigotry. (P-103). At hearing, Grant testified he was not directed by the Board to make the statements he did to Wainwright or to Judge.

The petitioner's view is different. He suggests there is something causative in the Nelson statement concerning dragging administrators out of town because two of those persons were Jewish. The threat was made at Wainwright's home and Wainwright was deeply involved in board of education matters. Nelson's complaint is "liberally sprinkled" with references to the Green Brook Board of Education. The individuals identified in the complaint are prominent in Green Brook Board of Education matters. Grant says his purpose in speaking to the three individuals identified in the complaint was to keep school board elections clean and free of bias.

Nelson's complaint refers to statements Grant made about an investigation by the Department of Justice concerning bias matters in the schools. Grant made a report to police related to bias incidents at the school and the threats made to three school administration persons and, he believed, himself.

Nelson's preferred candidate for the school board at the next election was a woman who had written, in Grant's opinion, inappropriate letters to the Board and Superintendent and whose son was the pupil referred to earlier as possessing a "notebook full of swastikas."

According to Grant, he followed the chain of command in reporting what he saw to be an incidence of bias. He believes he was directed by the Board president, Board vice-president, Board attorney and affirmative action officer to report the incident to the police. In addition, Board policy required Grant to report the incident to the police. Training as a new board member, required by law, included discussions of bias-related incidents. The president of the Green Brook Board had written a letter to Board members urging them to report incidents of bias to authorities. There was a memorandum of agreement between the Green Brook Board and law enforcement officials that also required Grant to report any incidents of bias that came to his attention to law enforcement authorities.

The petitioner produced Sergeant William C. Birath, Green Brook Police Department, who testified about complaints given to him by Grant. Birath's notes do reflect that Grant recorded the threat by Nelson to "drag" certain administrators out of town. Birath's notes also indicate that Grant provided him information regarding bias incidents at the schools that the Sergeant was not previously aware of.

The settlement agreement with Nelson required Grant to read a letter of apology at a Board of Education meeting and Grant did so. Elected officials, including board of education members, are required to take an oath of office and to speak out when confronted with racial or other bias statements and threats to employees. That statute is remedial in nature and must be liberally interpreted.

DETERMINATION

Even if every one of Grant's assertions is true, his petition must fail. The essence of the case is quite simple. Board members are indemnified when civil actions are brought against them for any act or omission arising out of and in the course of performance of duties as a member of board of education. Certainly Grant was a member of the Green Brook Board of Education when he defamed Nelson. However, he was not acting in any official capacity when he made the comments. In *Errington v. Mansfield Township Bd. of Ed.*, 100 *N.J. Super.* 130 (App. Div. 1968), the Appellate Division made it quite clear that a personal attack by a board member on another person cannot be authorized or ratified by a board of education. *Id.* at 134-135. See, also, *Dorrington v. North Bergen Board of Education*, 182 S.L.D. 247 and *Woodsom v. Pemberton Township*, 172 *N.J. Super.* 489 (Law Div. 1980).

A school board member acts in an official capacity when the board is in session or when the member has been delegated by an appropriate mechanism such as a board resolution to carry out a particular function. An example of this would be serving as a delegate to the New Jersey School Board's Association under *N.J.S.A.* 18A:6-46. Grant clearly was in neither circumstance. He was engaged in a political activity. Although school board elections are non-partisan, it is obvious that they constitute a political activity. Grant had a right, as a citizen, to engage himself with a group putting together a slate of candidates for a board election. The immutable fact is that he participated as a citizen and in no way as an official representative or emissary of the Green Brook Board of Education.

It is also evident that Grant was not sued in his capacity as a public official. His case seems to be based on the fact that he had a duty to report Nelson's alleged threats to administrators to the police and the school administration. This duty came about because of board policy, training he received as a new board member from the New Jersey School Boards Association, a memorandum of agreement between the schools and law enforcement officials, his oath of office as a board member and direction he received from the Board president, Board attorney and Board superintendent. The petitioner again misses the point. Nothing in that list required Grant to make allegations or statements to members of the general public. Grant was

not sued because of his reports to the police. He could not have been sued successfully because of his reports to the police. What caused his problem was unthinking statements to private citizens. Had he made his concerns known only to law enforcement officials and members of the school administration, it is unlikely that a successful defamation suit could have stood against him. It must be noted that the Nelson complaint does not refer to police reports or anything the petitioner said to the school administration.

The fact that the Nelson complaint was "liberally sprinkled with references to the Green Brook Board of Education" or that "individuals identified in the complaint were all prominent persons in Green Brook Board of Education matters" simply does not establish a nexus to Grant's official duties. No fair reading of the complaint can lead to a conclusion that Grant was sued in any capacity other than that of private individual.

Grant tried to make out a case that he was moving to counter anti-Semitism and racism in the community. The record tends to show that Grant attempted to latch on to an ongoing investigation concerning a student bias-related incident. Grant argues that there was some connection between his role as a board member, the student incident and his comments about Nelson. The suggestion of a connection is there, but there is no foundation of proofs. And, as stated above, even if Grant had an obligation to speak out, the fact remains that he should have done so through the appropriate channels.

Finally, the Board asks that the Commissioner of Education award legal fees and costs because this is a rare case and should be an exception to the rule. Grant engaged in defamatory conduct against Nelson. Grant conceded in testimony here that he is unaware of any facts that substantiate his statements about Nelson. The taxpayers of Green Brook should not be made to pay the petitioner's legal fees and costs in connection with the law suit. Similarly, they should not be made to pay the Board's costs in defending this case, given the admissions Grant has made about the reckless and willful nature of his statements concerning Nelson.

While the Board's argument has a great deal of appeal, it also has no basis in law. Unless shown an authority for such an action, I cannot commit to the Commissioner of Education to order reimbursement in circumstances such as these.

DISPOSITION

For the reasons stated above, the petition of Robert Grant is **DENIED**. Similarly, the request of the Green Brook Board of Education for costs in connection with this case is **DENIED**. 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.

JUN 2 9 2001
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

6/29/01
DATE

Debbie Antonatos /pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL - 2 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cad

WITNESSES

For petitioner:

Robert G. Grant
William C. Birath

For respondent:

Mary Ellen Koch
Sandra Kopec-Boub
Stephanie Bilenker

LIST OF EXHIBITS

For petitioner:

P-1 Green Brook Bd of Ed Minutes, p. 191, June 30, 1997
P-3 Handwritten Notes of Sgt. Birath, Green Brook Police Dept., redacted, See, P. 48 for unredacted copy
P-16 Letter dated September 8, 1997 to Board of Ed re: Ben Blackwelder incident
P-18 Policy of Green Brook Board of Ed #2224 "Nondiscrimination/Affirmative Action
P-24 Policy of Green Brook Board of Ed #5145.4 "Equal Educational Opportunity
P-31 Green Brook Bd of Ed Minutes p. 214, November 24, 1997
P-33 Letter from President of Board of Ed, Steven Pailla to Chief Ramussen, dated January 21, 1998
P-34 Deposition of Robert Grant
P-40 Police Investigation Report, dated February 26, 1998
P-42 Letter from Karyn Bigler regarding son Ben Blackwelder, dated June 17, 1997 addressed to Dr. Klein
P-46 Letter from Karyn Bigler regarding son Ben Blackwelder, dated June 17, 1997 addressed to Board of Ed
P-47 Letter from Dr. Klein to Karyn Bigler, dated July 2, 1997
P-48 Letter dated September 8, 1997 to Board of Ed re: Ben Blackwelder incident-same as redacted copy P-3
P-50 Police Investigation Report, dated November 4, 1997
P-54 Green Brook Bd of Ed Minutes page 201, dated September 15, 1997
P-56 Green Brook Bd of Ed Minutes page 212, dated November 17, 1997
P-57 Green Brook Bd of Ed Minutes page 214, dated November 24, 1997
P-59 Green Brook Bd of Ed Minutes page 217, dated December 15, 1997
P-61 Letter from Chief Rasmussen to Stephen Failla, dated January 5, 1998
P-62 Letter from President Failla to Karyn Bigler, dated September 17, 1997

P-63 Green Brook Bd of Ed Minutes page 231, dated February 23, 1998
P-64 Green Brook Bd of Ed Minutes page 232, dated March 9, 1998
P-65 Verified Complaint by Arthur Nelson v. Robert Grant
P-71 Letter from Nicholas Celso, III to Green Brook Bd of Ed, dated March 8, 1999
P-74 Answer to Complaint
P-78 Itemization of bills $27,454.83
P-79 Bills from Cooper, Rose & English
P-98 Settlement Agreement
P-101 Release
P-103 Letter to be read by Grant at Board of Ed meeting
P-104 Voucher for $27,454.83
P-105 NJSA 18A:12-20
P-3-1 Letter from Sinemus, Esq. forwarding discovery to Grant's Atty including notes of Sgt. Birath, and police dept. investigation reports
P-106 Green Brook Bd of Ed Policy #1312 "Public Complaints and Grievances"
P-108 Legal Representation Agreement
P-116 Memorandum of Law, dated September 14, 1999
P-118 Memorandum of Law, dated June 8, 1999
P-119 Memorandum of Law, dated June 29, 1999
P-123 Memorandum of Law, dated August 5, 1999
P-125 Memorandum of Law, dated September 14, 1999
P-126 Memorandum of Law, dated September 29, 1999
P-130 Transcript of Board of Ed Meeting, January 17, 2000, by court reporter (replacement for transcript prepared by Grant)
P-133 Green Brook Bd of Ed Committee Agenda Minutes, January 17, 2000
P-140 Settlement Check ($4,000)
P-141 Settlement Check ($4,000)
P-142 Draft of letter of apology by Grant, not read
P-145 Green Brook Bd of Ed Policy #1312 "Public Complaints and Grievances" Duplicate of p 106
P-147 A Uniform State Memorandum of Agreement Between Education and Law Enforcement Officials

For respondent:

R-1 Minutes, Green Brook BOE Meeting, February 28, 2000
R-2 Board Policy 9020
R-3 Board Policy 9200
R-4 Minutes, Green Brook BOE Exec. Session, September 15, 1997
R-5 Police Report, November 4, 1997
R-6 Minutes, Green Brook BOE Exec. Session, December 15, 1997
R-7 Police Report, February 26, 1998 (Harassing phone call from Nelson)
R-8 Police Report, March 4, 1998 (Incident at Wainwright Home)
R-9 Memo, Klein to BOE, May 27, 1998 (Report of sch. Bias inc. to police)

Joint Exhibits:

J-1 Verified Complaint: *Nelson v. Grant, et al.,* January 29, 1999
J-2 Answer: *Nelson v. Grant, et al.,* April 15, 1999
J-3 Deposition of Stanley J. Wainwright, May 6, 1999
J-4 Deposition of Douglas Judge, May 6, 1999
J-5 Deposition of Arthur Nelson, May 12, 1999
J-6 Deposition of Robert Grant, June 4, 1999
J-7 Stipulation of Dismissal, November 15, 1999
J-8 Settlement Agreement, December 2, 1999
J-9 Release, December 2, 1999

OAL DKT. NO. EDU. 2931-00
AGENCY DKT. NO. 101-3/00

ROBERT GRANT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF GREEN BROOK, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto and cross-exception were filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4 and were fully considered by the Commissioner in reaching his determination here.

Inasmuch as the Commissioner finds that the Administrative Law Judge (ALJ) considered and addressed all *relevant* arguments advanced in petitioner's exceptions in his Initial Decision, these and the remainder of petitioner's exception submission, rejected as meritless, will not be detailed here. Specifically rejected are petitioner's tendered arguments in support of his contentions that: 1) Although the caption of *N.J.S.A.* 18A:12-20 uses the word "indemnity," the content of this statute is devoted entirely to imposing a "duty to defend" on the board, which petitioner claims is broader than the duty to indemnify; 2) Whether or not an insurance carrier is required to pay an eventual award to the board is irrelevant to petitioner's right to a defense by the board; 3) Duties of a board member should be broadly interpreted; 4) The test which should be applied in order to determine whether a Board is required to defend pursuant to the statute

should be "[i]f the Board member has acted in good faith, however negligently, in discharging what he perceives as being the duties of his office," the board's obligation to defend attaches. (Petitioner's Exceptions at 31); and 5) petitioner's conduct does not satisfy the legal definition of slander per se in New Jersey. [1] [2]

By way of cross-exception, the Board urges that the ALJ should have granted its request for legal fees and costs. While recognizing that these are generally not recoverable in an action before the Commissioner of Education, the Board believes an exception should be made in this case where petitioner's "unauthorized acts have resulted not only in him being sued, but in the expenditure of substantial public funds in defense of the present matter." (Board's Reply Exceptions at 17) Moreover, such an exception would additionally serve to discourage frivolous litigation where, like here, the conduct at issue is so clearly outside the purview of the indemnification statute.

Upon careful and independent review of the record, which included transcripts of the three days of hearing conducted at the OAL,[3] the Commissioner concurs with the ALJ's determination that petitioner is not entitled to indemnification pursuant to *N.J.S.A.* 18A:12-20. He, likewise, agrees that the Board's request for legal fees and costs must be denied. In concluding that petitioner's claim must fail, the Commissioner is cognizant that petitioner

---

[1] This particular exception was raised in rebuttal to the ALJ's statement on page 6, first paragraph, that refers to petitioner defaming Nelson. It is noted that whether or not petitioner's conduct satisfies the legal standard of defamation or slander per se is unrelated to the question at issue herein. As such, the ALJ's statement in this regard can be viewed as no more than dicta and, consequently, is immaterial to resolution of this matter.

[2] Petitioner's exceptions also raise a procedural issue. He claims that the ALJ denied him the customary right in litigation of presenting his summation last, thereby depriving him of the ability to correct many factual inaccuracies advanced by the Board upon which the ALJ relied in his decision. Even accepting, *arguendo*, each of the factual inaccuracies detailed by petitioner, the result of the Commissioner's determination here would remain unaltered.

[3] Hearing dates were January 12, 17, and 30, 2001.

professes entitlement to reimbursement pursuant to *N.J.S.A.* 18A:12-20 which, in its entirety, reads:

> **18A:12-20. Indemnity of members of boards of education against cost of defense of civil and criminal action; insurance coverage.** Whenever a civil or a criminal action has been or shall be brought against any person for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education, and in the case of a criminal action such action results in final disposition in favor of such person, the board of education shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom. Any board of education may arrange for and maintain appropriate insurance to cover all such damages, losses and expenses.[4]

By its very terms, central to qualifying for protection under this statute, which is intended to provide for the legal defense of a member of the board who is sued for official acts taken or omitted by him while actively engaged in carrying out his prescribed responsibilities as a board member, is that *the alleged wrongdoing must arise out of and be in the course of the individual's duties as a board member.* Here, the Commissioner finds that no reasoned review of the record or petitioner's advanced proffers can serve to bring his admitted conduct under the ambit of this provision so as to impose a duty of indemnification upon the Board. Rather, the Commissioner fully concurs with the analysis of the ALJ on pages 6-7 of the Initial Decision, culminating in the conclusion that petitioner's uttering of knowingly false statements about a private citizen to three other private citizens was personal, political activity and the resultant civil suit was, similarly, personal unto him.

[4] It is noted that this provision was modified, effective July 27, 2001, to extend board member indemnification to administrative, quasi-criminal actions or other legal proceedings. It is further noted that such amendment has no bearing on the instant matter.

Turning to the Board's request for legal fees and costs, although recognizing the Board's legitimate concern with respect to the expenditure of a substantial amount of public funds to defend against an unwarranted claim, it is by now well-established that the Commissioner does not have plenary authority to award counsel fees in determining controversies and disputes presented under Education Law. *See Balsley v. North Hunterdon Bd. of Educ.*, 117 *N.J.* 434, 442, 443 (1990) where, in an education-discrimination matter, the Supreme Court found that, notwithstanding the Commissioner's "sweeping remedial powers for enforcing equal protection in the administration of the public education laws, ***the absence of express statutory authority is fatal to the claim for counsel fees," and *State, Dept. of Environ. Protect. v. Ventron Corp.*, 94 *N.J.* 473, 504 (1983), where the Court affirmed that legal expenses are not recoverable absent express authorization by statute, court rule or contract. Consequently, until such time as the Commissioner is granted statutory authority or the imprimatur of the Courts of New Jersey to do so, he must decline to award counsel fees.

Accordingly, the Initial Decision of the OAL is affirmed for the reasons clearly articulated therein. The within Petition of Appeal is hereby dismissed. The Board's request for attorney's fees and costs is denied.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8|13|01

Date of Mailing: 8|13|01

* 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.

252-01

S.S., on behalf of minor child, M.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF STERLING HIGH SCHOOL DISTRICT, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

August 10, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER AND
INITIAL DECISION
OAL DKT. NO. EDU 2858-01
AGENCY DKT.NO. 135-5/01

S.S. o/b/o M.S.,
Petitioner,
v.
BOARD OF EDUCATION OF
STERLING HIGH SCHOOL DISTRICT,
CAMDEN COUNTY,
Respondent.

S.S., petitioner, *pro se*
William D. Hogan, Esq., for respondent (Cozen and O'Connor, attorneys)

Record Closed: June 12, 2001 Decided: June 21, 2001

BEFORE **ROBERT S. MILLER,** ALJ:

On June 1, 2001, the instant matter was filed in the Office of Administrative Law for determination as a contested case pursuant to the New Jersey Administrative Procedure Act.

The petition and its accompanying motion for emergent relief sought to allow petitioner's son, M.S., to participate in graduation exercises with the rest of the Sterling High School Class of 2001 on June 20, 2001.

A hearing on the motion for emergency relief was scheduled and held on June 12, 2001. Prior thereto, I reviewed the petition itself, the motion, the answer to the petition, and the certification of Gary Kasprack, Superintendent of Schools.

On June 12, 2001, I heard the arguments of counsel and concluded, for the reasons set forth on the record, that the petitioner had failed to sustain her burden with respect to the standards for injunctive relief set forth in *Crowe v.DeGioia*, 90 N.J. 126 (1982), particularly, that she had not shown a likelihood of prevailing on the merits of the underlying claim, and therefore, that her application for emergency injunctive relief was denied. Petitioner was also advised on the record that she had the right to appeal this decision to the Commissioner of Education.

Accordingly, I hereby **ORDER** that petitioner's application for emergency relief be **DENIED.** Further, since the graduation exercises of June 20, 2001 have presumably already occurred, I **CONCLUDE** that this matter is now moot and that the petition should be **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.

June 21, 2001
DATE

ROBERT S. MILLER, ALJ

Receipt Acknowledged:

6/26/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 27 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

tmp

OAL DKT. NO. EDU. 2858-01
AGENCY DKT. NO. 135-5/01

S.S., on behalf of minor child, M.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF STERLING HIGH SCHOOL DISTRICT, CAMDEN 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 his full and independent review, the Commissioner concurs with the Administrative Law Judge's denial of emergent relief in this matter as petitioner has not satisfied her burden of demonstrating the requisite standards, pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), which would justify the granting of such extraordinary relief. The Commissioner, likewise, agrees that since M.S.'s participation in graduation exercises on June 20, 2001 was petitioner's sole requested relief, this matter must now be dismissed as moot.

Accordingly, the Initial 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: 8|10|01
Date of Mailing: 8|10|01

* 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.

253-0

EDU #2931-00
C # 253-01
SB # 30-01

ROBERT GRANT, :

PETITIONER-APPELLANT, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF GREEN BROOK, SOMERSET COUNTY, :

RESPONDENT-RESPONDENT. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 13, 2001

For the Petitioner-Appellant, Brigiani, Cohen & Schneider, P.A. (Elias L. Schneider, Esq., of Counsel)

For the Respondent-Respondent, Schwartz, Simon, Edelstein, Celso & Kessler (Nicholas Celso, III, Esq., of Counsel)

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

December 5, 2001

Date of mailing DEC 07 2001

254-01

K.L. AND C.L., on behalf of minor child, N.L.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioning parents challenged the Board's residency determination. The Board denied the allegations of the petition and sought reimbursement of tuition.

The ALJ determined that petitioners were not domiciled in the District and that the Board is entitled to reimbursement of $8,975.

The Commissioner affirmed the determination of the ALJ.

August 13, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 441-01

AGENCY DKT. NO. 404-11/00

K.L. AND C.L. ON BEHALF OF

MINOR N.L.,

Petitioners,

v.

BOARD OF EDUCATION OF FREEHOLD

REGIONAL HIGH SCHOOL DISTRICT,

MONMOUTH COUNTY,

Respondent.

C.L., petitioner, *pro se*

James E. Collins, Esq., for respondent (Cerrato, Dawes, Collins, Saker, Brown & Wilder, attorneys)

Record Closed: May 4, 2001 Decided: June 26, 2001

BEFORE **KATHRYN A. CLARK**, ALJ:

PROCEDURAL HISTORY

Petitioner challenged the Board of Education's determination of residency. The petitioner appealed to the Department of Education and on February 7, 2001, the Department of Education transmitted this matter to the Office of Administrative Law for hearing and 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. Accordingly, the matter was heard on April 30, 2001. The record closed on May 2, 2001, upon receipt of a submission from respondent's attorney of the cost of tuition.

STATEMENT OF THE CASE

Dorothy Prochnow, Attendance Officer, Freehold Regional High School, testified that K.L., mother of N.L., called her to notify her that N.L. would be absent from Freehold Regional High School on September 21 and 22, because of the difficulty in driving from Staten Island. On September 25, 2000, Ms. Prochnow received another telephone call from K.L., telling her that the family was living in New York because of construction problems with their new home, at 17 Helen Avenue, Howell, N.J.

In September 2000, Ms. Prochnow went to 17 Helen Avenue, and she said the front porch was not finished, there were no inner walls, the shell of the house was vacant and empty, and there was construction material on site. She returned to 17 Helen Avenue on April 16, 2001, and saw that the house now had an upper story, and now had windows, but the inner walls and roof were not completed. There was no sign of habitation, and there were still construction materials on site. On April 27, 2001 she called the Howell housing department, and found that there was no Certificate of Occupancy issued to 17 Helen Avenue.

N.L. attended Freehold Township High School for the 2000-2001 school year. The 2000-2001 school year ends July 21, 2001.

Petitioner said that their house at 17 Helen Avenue, Howell, N.J. is still under construction. Petitioners lived on Staten Island, N.Y.

In their appeal of November 14, 2000, petitioners said that they would be occupying the house within 30 days. But they said that they had problems with the local authorities in obtaining building permits. Petitioner said that they would be filing suit in civil court over this matter.

The Board wrote to petitioners on October 18, 2000, sympathizing with their building problems, but saying that, unless N.L. met the legal requirements, she could not continue to attend Freehold Regional High School.

When the Board made its decision on October 16, 2000, petitioners said that they were not being allowed to perform work on the house at 17 Helen Avenue, Howell, N.J. A Certificate of Continued Occupancy had been issued to the previous owners, T. and B. F., on May 6, 1999, but no Certificate of Occupancy has been issued to petitioners.

Petitioner filed an appeal, which stayed the Board's actions. N.L. will complete the school year in Freehold Township High School. Petitioner said that his two children probably would be enrolling in other schools in 2001-2002. Petitioner said that he pays property taxes in New Jersey. Petitioner said that he would be willing to pay tuition costs for N.L. Petitioner said he and his wife sleep overnight at 17 Helen Avenue, Howell, N.J., but that the house will not have a Certificate of Occupancy before the end of the school year.

Respondent stipulated that N.L. would not be removed from high school before the end of the school year.

FINDINGS OF FACT

Having had the opportunity to observe and to judge the demeanor and credibility of all witnesses in their testimony, and upon review of all the evidence and exhibits submitted, and drawing reasonable inferences therefrom, I **FIND** the following as **FACT** by a preponderance of the credible evidence:

1. Freehold Regional High School District is located in Englishtown. Freehold Township High School is in Freehold Regional High School District.

2. Petitioner's daughter, N.L., attended Freehold Township High School for school year 2000-2001.

3. Petitioners were not domiciliaries of Freehold Regional High School District during school year 2000-2001.

4. The tuition for Freehold Township High School in Freehold Regional High School District for school year 2000-2001 is $8,975.

DISCUSSION

The relevant statute, *N.J.S.A.* 18A:38-1, states that public schools shall be free to all domiciliaries of the school district. Because of unforeseen construction problems, petitioners have been unable to become domiciliaries of the school district. Their daughter, N.L., has been able to complete the school year in Freehold Township High School.

Petitioner is responsible for tuition for Freehold Township High School in Freehold Regional High School District for school year 2000-2001, in the amount of $8,975.

ORDER

It is therefore **ORDERED** that the residency determination of the Board of Education of Freehold Regional High School District be **AFFIRMED** and that the appeal be **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (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 26, 2001
DATE

Kathryn A. Clark
KATHRYN A. CLARK, ALJ

Receipt Acknowledged:

6/28/01
DATE

Debbie Antonitis/HP
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 29 2001
DATE

Jeff S. Masin
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

es

APPENDIX

WITNESSES

For Petitioner:

C.L., petitioner

For Respondent:

Dorothy Prochnow, Attendance Officer, Freehold Regional High School

OAL DKT. NO. EDU 441-01
AGENCY DKT. NO. 404-11/00

K.L. AND C.L., on behalf of minor child, N.L.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Petitioners' exceptions, which were submitted in accordance with *N.J.A.C.* 1:1-18.4, challenge the veracity of testimony presented by the Board, the amount of tuition charged by the Board, as well as the residency law itself, as applied in this matter.[1]

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioners have failed to prove that N.L. was entitled to a free public education in respondent's District for the 2000-2001 school year since they were not domiciliaries of the District at that time. *N.J.S.A.* 18A:38-1a. Accordingly, the Initial Decision of the ALJ is adopted for the reasons expressed

[1] Specifically, petitioners argue: "That all testimony offered on behalf of the Respondent was not truthful[.] That the amount trying to be charged for tuition, is well beyond the true cost of what a resident would pay through its tax burden charged based on property. That the residency law as it applies, is in itself illegal and [we] wish to appeal this decision based on that fact alone." (Petitioners' Exceptions)

therein. Pursuant to *N.J.S.A.* 18A:38-1b(2), the Commissioner directs that petitioners remit to the Board tuition for the 2000-2001 school year in the amount of $8,975.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 8|13|01

Date of Mailing: 8|13|01

[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.

#257-01

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

August 15, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3156-01
AGENCY DKT. NO. 70-3/01

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK, ESSEX COUNTY,
Petitioner,
v.
BESSIE HOLMAN,
Respondent.

Joseph Verga, Esq., associate counsel, for petitioner

Robert M. Tosti, Esq., for respondent
(Rand, Algeier, Tosti & Woodruff, attorneys)

Record Closed: June 20, 2001 Decided: June 28, 2001

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

On or about March 13, 2001, the State-Operated School District of the City of Newark certified charges of unbecoming conduct and corporal punishment against respondent, Bessie Holman, a tenured teacher. On March 23, 2001, respondent filed an answer denying the charges and asserting affirmative defenses.

On April 9, 2001, the Department of Education, Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law for hearing pursuant to *N.J.S.A.* 52:15B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13. The matter was assigned to

the undersigned judge on April 23, 2001, and a telephone prehearing conference scheduled for May 14, 2001. During the prehearing conference held on that date, the issues were isolated, timelines were established and a hearing scheduled for June 18 and 19, 2001 and July 23, 2001 at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey 07102. As a result of settlement conferences held between the parties on June 18, 2001, a settlement was reached and the hearing was adjourned.

The parties have agreed to a proposed settlement, subject to approval by the Commissioner. In accordance with the decision of the State Board of Education in *Cardonick v. Brooklawn Bd. of Educ.*, 193 *S.L.D.* __ (St. Bd. April 6, 1983), the record of any proposed settlement must include:

> . . . the nature of the charges, circumstances justifying the settlement, consent or authorization by the Board of Education and the teacher to the proposed agreement, the Administrative Law Judge's finding that the teacher entered into an agreement with a full understanding of his rights, and (a finding) that the agreement is consistent with the public interest.

On June 18, 2001, a record was established on the issue of whether or not the proposed settlement should be accepted. Counsel for both parties set forth on the record the reasons why settlement would be in the public interest. Ms. Holman testified that she fully understood and voluntarily agreed to the terms of settlement. In addition, the parties have prepared a Stipulation of Settlement, which is attached and fully incorporated in this decision. The State District Superintendent approved the settlement terms on June 18, 2001.

Based on my review of the record, I **FIND** that the proposed settlement is consistent with the public interest for the following reasons:

1. It is anticipated that the hearing in this matter would be protracted and costly. Board counsel estimates that he would call approximately twelve fact witnesses to prove the charges.

2. A number of the district's intended witnesses are children approximately nine years old.

3. Under the proposed terms of settlement, Ms. Holman will resign her position effective December 31, 2001.

4. An essential provision of the agreement required Ms. Holman to acknowledge that she had been advised of the duty of the Commissioner of Education pursuant to *N.J.A.C.* 6:11-3.6 and *In re Cardonick*, concerning referral to the State Board of Examiners for possible action regarding her teaching certificate. She is aware that the Commissioner of Education may refer this matter to the State Board of Examiners for any action, which he may deem appropriate.

5. Before entering into this agreement, Ms. Holman fully understood her rights and had an adequate opportunity to consult with legal counsel.

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

7. The settlement agreement complies with the requirements of *In re Cardonick, supra.*

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

I **CONCLUDE** that the terms of this agreement are in the public interest. I further **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 28, 2001
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

7/3/01
DATE

Debbie Antanaitis /bp
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 5 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

NEWARK PUBLIC SCHOOLS
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102
(973) 733-8358

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

JUN 20 1 52 PM '01

In the Matter of the Tenure Hearing of	:	
	:	**BEFORE THE COMMISSIONER OF EDUCATION**
BESSIE HOLMAN	:	**OFFICE OF ADMINISTRATIVE LAW**
	:	
v.	:	**AGENCY REF. NO. 70-3/01**
	:	**Docket No. EDUTH 03156-01N**
	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK	:	**STIPULATION OF SETTLEMENT**

WHEREAS, the parties, State-Operated School District of the City of Newark ("District"), and Bessie Holman, a tenured teacher, residing at 15 Rolling Hill Drive, Morristown, New Jersey 07960, hereby stipulate and agree as follows:

1. Ms. Holman hereby agrees to irrevocably resign her tenured teaching position, effective December 31, 2001, and to relinquish any rights to such position under *N.J.S.A.* 18A:28-5. Attached is a copy of the signed Letter of Resignation (Exhibit A). Upon the final approval of the signed Stipulation, the District shall and hereby does withdraw the Tenure Charges of Conduct Unbecoming certified on March 12, 2001.

2. Ms. Holman will receive her salary and benefits as an employee from July 12, 2001 through December 31, 2001.

3. Upon the final approval of the Commissioner of Education of the signed Stipulation, Ms. Holman will receive a lump sum payment for the

equivalent of sixty days pay, minus proper deductions. Ms. Holman will not be compensated for the balance of her 120 day unpaid suspension running from March 12, 2001 to July 12, 2001.

4. As of December 31, 2001, all of Ms. Holman's employment rights, including, but not limited to salary, insurance coverage, tenure and seniority, will permanently end. Ms. Holman expressly waives and gives up any rights to tenure in the District and agrees not to seek employment with the District in the future.

5. As of December 31, 2001, Ms. Holman will receive compensation for all sick, personal and/or vacation days accrued as per the terms of the Collective Bargaining Agreement between the State Operated School District of the City of Newark and the Newark Teachers Union.

6. The District will not pursue tenure charges against Ms. Holman as long as this Stipulation remains in effect and is not voided by any court of competent jurisdiction or agency with jurisdiction over this matter. However, if the Stipulation is voided, the District retains the right to file and consider for certification tenure charges against Ms. Holman, including such charges that have previously been filed by the District against Ms. Holman.

7. Ms. Holman specifically acknowledges that she has been advised of the duty of the Commissioner of Education pursuant to *N.J.A.C.* 6:11-3.6 and *In re Cardonick* concerning referral to the State Board of Examiners for possible action regarding her teaching certification. The parties agree that

settlement of this matter will be in the public's best interest. In addition, settlement of this matter will avoid the necessity of student testimony.

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

9. This Stipulation constitutes the full agreement between the parties.

10. The undersigned representatives of the parties hereby acknowledge that they have been duly authorized by the respective parties to sign this Stipulation and bind their principals to its terms.

11. Except as noted above, Ms. Holman waives all claims of any nature in any forum against the State Operated School District of the City of Newark with regard to this matter, including fees, or other monetary relief. This agreement includes, without limitation, any and all claims directly or indirectly related to or arising out of his employment by the District. This release specifically includes, but is not limited to, claims Appellant may have in connection with his employment with Respondent under the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, the Age Discrimination in Employment Act, the New Jersey Law Against Discrimination, the Older Workers Benefit Protection Act, the Conscientious Employees Protection Act, and any other federal or state civil rights laws, wrongful discharge claims, or grievances under collective bargaining agreement.

12. This Stipulation is subject to approval by the State District Superintendent and the Commissioner of Education.

Dated: 6-18-01

Bessie Holman

Dated: 6-18-01

Robert M. Tosti, Esq.
Attorney for Ms. Holman

Dated: 6/18/2001

Marion Bolden
State District Superintendent

Dated: 6/18/01

Joseph Verga, Esq.
Associate Counsel
Newark Public Schools

Exhibit A

June 18, 2001

Ms. Marion Bolden
State District Superintendent
Newark Public Schools
2 Cedar Street
Newark, New Jersey 07102

Dear Ms. Bolden:

I hereby resign my tenured teaching position with the State Operated School District of the City of Newark effective December 31, 2001.

Very truly yours,

Bessie Holman

Bessie Holman

CERTIFICATION

I, BESSIE HOLMAN, being the Respondent in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

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

Bessie Holman
BESSIE HOLMAN

6/18/01
DATE

OAL DKT. NO. EDU 3156-01
AGENCY DKT. NO. 70-3/01

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

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*, 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. This matter is being forwarded to the State Board of Examiners for action as that body deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: AUG 15 2001

Date of Mailing: AUG 15 2001

* In so approving, the Commissioner specifically construes and accepts provision No. 2. of the parties' agreement as providing that, although Ms. Holman will receive her salary and benefits for the period July 12, 2001 through December 31, 2001, she will not be assigned duties which would require her to work with students during this period.

258-01

PASSAIC EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	
	:	COMMISSIONER OF EDUCATION
RESPONDENT,	:	DECISION
AND	:	
EDWARD ROWBATHAM, MARYALLYN FISHER, MINNIE HILLER AND SHERRI GRIER,	:	
	:	
INTERVENORS.	:	

SYNOPSIS

Petitioning Association sought a determination that the Board violated the tenure and seniority rights of the Association's members by not filling certain positions, newly created by statute, with staff members holding appropriate certification from the State Board of Examiners.

The ALJ determined that the Passaic positions of dropout prevention officer and health and social services coordinator did not require certification since, in promulgating the *Abbott* regulations, the *Abbott* positions were not included within the certification and endorsement sections of Title 6, nor was any language included within Title 6A requiring certification and endorsement for these positions. Moreover, the ALJ found that the legislative history underlying the *Abbott* regulations directly addresses the issue of certification stating that the Department will provide guidance but it is a local district decision to determine job qualifications because the individuality of the *Abbott* districts must be preserved. Petition was dismissed.

The Commissioner set aside the Initial Decision of the ALJ. The Commissioner concluded that although this Board and other *Abbott* districts may structure the positions of dropout prevention coordinator and coordinator of health and social services, as authorized by *N.J.A.C.* 6A:24-1.4(h), in accordance with local need, they must nonetheless, when establishing the duties assigned to the positions, be mindful that the duties may be of such a character as to require the individual assigned to the position to hold certification. Thus, in the absence of a revision to the within job descriptions that would eliminate need for certification, the Board was directed to submit within 20 days of the date of this decision, the job descriptions for the positions in dispute to the County Superintendent for review pursuant to *N.J.A.C.* 6:11-3.3(b) and this decision.

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

SUMMARY DECISION

OAL DKT. NO. EDU 12133-99

Agency Dkt. No. 317-10/99

PASSAIC EDUCATION ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF PASSAIC CITY, PASSAIC COUNTY,

Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Fagella & Nowak, attorneys)

Cherie Maxwell, Esq., for respondent and for intervenors **Edward Rowbatham**, **Maryallyn Fisher**, **Minnie Hiller** and **Sherri Grier** (Sills, Cummis, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: May 14, 2001 Decided: May 27, 2001

BEFORE **EDITH KLINGER**, ALJ:

PROCEDURAL HISTORY

On October 7, 1999, petitioner, Education Association of Passaic (Association), filed a Verified Petition (Petition) with the Commissioner of Education (Commissioner) seeking a determination that the Passaic County Board of Education (Board) violated the tenure and seniority rights of the Association's members by not filling certain

positions, newly-created by statute, with staff members holding appropriate certifications issued by the State Board of Examiners. Respondent filed its answer to the Petition on November 24, 1999. On December 30, 1999, 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.

All affected parties were given notice of this appeal and the opportunity to intervene. Only Edward Rowbatham, Maryallan Fisher, Minnie Hiller and Sherri Grier elected to do so.

Following a series of telephone conferences, it was determined that the material facts in this matter were not in dispute and could be stipulated by the parties. It was agreed at that time that a Joint Stipulation of Facts would be submitted by the parties followed by cross-motions for summary decision. The record closed on April 20, 2001, when the last briefs were received, but was reopened on May 14, 2001, when it was discovered that additional documents, which were necessary for decision, were not previously submitted.

THE STIPULATED FACTS

1. Petitioner is the majority representative under the New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-1 *et seq.*, for those employees working in the Passaic School District as set forth in the recognition clause of the collective bargaining agreement between the parties.

2. Respondent is a body corporate and politic of the State of New Jersey.

3. Attendant to the New Jersey Supreme Court's decision in *Abbott v. Burke*, 153 *N.J.* 480 (1998), the New Jersey Legislature promulgated certain regulations codified at *N.J.A.C.* 6A:24-1.1 *et seq.*

4. Pursuant to *N.J.A.C.* 6A:24-1.4, those districts deemed Abbott districts, as set forth in *N.J.A.C.* 6:19-1.2, were required to create certain positions including school technology coordinator, dropout prevention officer, and coordinator of health and social services.

5. Prior to May 1999, Derlys Gutierrez, human resources specialist for the Passaic School District, spoke to the County Superintendent of Education's Office to discuss the aforementioned positions. The County Superintendent's Office informed Ms. Gutierrez that the District did not need to hire certified people to fill the positions of dropout prevention officer and coordinator of health and social services.

6. On September 29, 2000, the New Jersey Department of Education issued a Memorandum to all Abbott district superintendents that confirms the oral advice given to Ms. Gutierrez by the County Superintendent's Office. This Memorandum explicitly states that "[d]istricts may use certified or uncertified staff" to fill the position of health and social services coordinator. With respect to dropout prevention officers, the Memorandum provides that districts are free "to determine the job description for this position and determine certification requirements," and, if a district chooses to create a position that does not require certification, approval from the county office is not required.

7. On May 21, 1999, the Board posted vacancies for the positions at issue pending Board approval and funding.

8. On May 24, 1999, the Board resolved to create the positions mandated by the Abbott regulations.

9. The Board subsequently accepted applications and interviewed several candidates for each position. Interested applicants deemed qualified by the Board were interviewed by the respective building principals.

10. On August 5, 1999, the Board appointed successful applicants to each position. Edward Rowbatham was appointed as health and social services coordinator at Passaic High School and Maryallyn Fisher was appointed as health and social services coordinator at Lincoln Middle School. Regina Reilley was appointed school technology coordinator at Passaic High School, Peter Tumminelli was appointed school technology coordinator at Lincoln Middle School, and Richard Bossard was appointed school technology coordinator at the #8 School. Minnie Hiller was appointed dropout prevention officer at Passaic High School and Barbara Taylor was appointed dropout prevention officer at Lincoln Middle School. Ms. Taylor was eventually replaced by Sherri Grier.

11. All the candidates appointed to the position of school technology coordinator hold New Jersey standard teacher certificates. While several of the candidates appointed to the positions of dropout prevention officer and health and social services coordinator do hold various certificates, certification is not required for these positions.

12. The successful candidates appointed to the positions at issue started in these positions effective September 1999.

13. On October 6, 1999, the petitioner filed the within Petition.

The parties have also agreed that the position of technology coordinator is not in issue here.

THE APPLICABLE REGULATIONS

Pursuant to *N.J.A.C.* 6A:24-2.1(a), Abbott districts are to establish a School Management Team (SMT) in each school.

> The purpose of the SMT is to ensure participation of staff, parents and the community in the school level decision making and to develop a culture of cooperation, accountability and commitment, all with a focus on improving student achievement.

The boards of education in the local Abbott districts are further responsible for implementing new, required programs and services by, among other things, the creation of certain staff positions explicitly described in the regulations. The positions relevant to the present appeal are the following:

> (h) The board shall provide for a full-time dropout prevention officer and a full-time staff member responsible for the coordination of health and social services and the referral of students to such services for each secondary school within the district. These staff members shall, in addition to such other duties as they may be assigned, provide assistance to the SMT as needed.
>
> [*N.J.A.C.* 6A:24-1.4(h).]

There is no specific requirement to be found in any of the statutes or regulations mandating that the two positions be filled by certificated employees.

THE POSITIONS IN DISPUTE

A Memorandum dated September 29, 2000 (Memorandum), from Barbara Anderson, Ed.D., assistant commissioner of student services, New Jersey Department of Education (Department), and John Sherry, Ed.D., assistant commissioner of field services, in the Department, was sent to all Abbott district superintendents. The subject of this Memorandum was "Positions Required by the Urban Education Reform Code, *N.J.A.C.* 6A:24." Its purpose was to "provide further clarification and assistance to districts and to eliminate the use of unrecognized titles," and to "assist districts to comply with code requirements for these positions."

Draft job descriptions for three of the five newly-created positions were attached. It should be noted that two of the positions specifically require appropriate certifications and another may require them:

> 1. Media Specialist, already a recognized title, requires the appropriate certification.
>
> 2. School-Based Technology Coordinator requires a "valid New Jersey Teacher Certification" unless "the position is not responsible for developing and/or delivering curriculum." This is left to the needs of the individual school districts.

The third attached job description is for health and social services coordinator. The Memorandum makes the following comment with respect to the job description attached:

> 3. Health and Social Service Coordinators: The attached draft job description defines the primary functions for this position. Schools can develop their own job descriptions and integrate the functions mentioned in this draft document and also specify certification if they choose. Districts may use certified or uncertified staff. An individual with a social worker certificate may serve in this role. If a social worker certificate is required, the position should be filed as Social Worker/Health and Social Service Coordinator and would, therefore, be a recognized title and no county office approval would be necessary.

With respect to the position of dropout prevention officer, the Memorandum states:

> 4. Dropout Prevention Officer: No job description has been formulated for this position beyond what is in code. The code only requires that the staff in this position provide assistance to the School Management Team. The code does not define or mandate any function for this position. It is left up to the districts to determine the job description for this position and determine certification requirements. If the district chooses to create a position requiring a certified staff person, an appropriate title would be Guidance Counselor/Dropout Prevention Officer, which is a recognized title. If the district chooses to create a position without required certification, such as a truant officer, it is not necessary to obtain approval from the county office.

Although there is no attached draft job description for the position of WSR school facilitator, the Memorandum states that the position requires teacher certification and should be titled "teacher/WSR school facilitator," which is a recognized title and does not need county office approval.

CERTIFICATION REQUIREMENTS

Teaching staff members employed in a public school by a board of education must hold "a valid certificate to teach, administer, direct or supervise the teaching, instruction, or educational guidance of [students]." *N.J.S.A.* 18A:26-2. In furtherance of this objective, the State Board of Examiners is charged with the responsibility of issuing three types of educational certificates: the Instructional Certificate, the Administrative Certificate, and the Educational Services Certificate. *N.J.S.A.* 18A:6-38; *N.J.A.C.* 6:11-2.3. The Board may issue for each teaching, administrative or service position a special endorsement under the appropriate certificates. *N.J.A.C.* 6:11-2.3.

N.J.A.C. 6:11-3.1(a) states that "the requirement of certification applies to any person who is employed by a district board of education to perform duties that are regulated through certification rules pursuant to this chapter." [Emphasis added.] The question in this matter then becomes whether the certification rules of Title 6 apply to titles created under other titles of the Administrative Code, specifically Title 6A.

ABBOTT DISTRICTS

Pursuant to statute, the State Board of Education was directed to adopt regulations to implement the order of the New Jersey Supreme Court in *Abbott v. Burke*, 153 *N.J.* 480 (1998) (hereinafter "*Abbott* Court"). *N.J.S.A.* 18A:7F-36. Specifically, the *Abbott* Court mandated the creation of certain staff positions in the Abbott districts relevant to health and social service programs, school security programs, technology programs, and programs aimed at reducing dropout rates. *Abbott, supra*, 153 *N.J.* at 512-16.

The rules of Title 6A, Chapter 24, of the New Jersey Administrative Code were promulgated in order to "implement educational programs necessary to provide urban education reform initiatives that ensure that public school children, including students with disabilities and limited English proficient students, from the poorer urban districts receive the educational entitlements guaranteed them." *N.J.A.C.* 6A:24-1.1. These rules target the urban districts, including Passaic, now commonly referred to as "Abbott districts," pursuant to their identification in *Abbott v. Burke*, 119 *N.J.* 287, 394 (1990). These rules are:

> adopted to ensure the provision of a thorough and efficient system of education (T & E), as defined by the Core Curriculum Content Standards, to the students attending the public schools of those districts. The rules apply to Abbott districts, in addition to the requirements of the Comprehensive Educational Improvement and Financing Act and rules otherwise promulgated to implement that act; except that where differences in rules occur, the rules herein shall take precedence.
>
> [*N.J.A.C.* 6A:24-1.1.]

N.J.A.C. 6A:24-1.4(h), the specific regulation creating the positions of dropout prevention officer and health and social services coordinator, is set forth in full above.

Language regarding the requirements of certification or endorsement for these positions is absent from the regulations creating the relevant staff positions and no reference is made to the applicable regulatory provisions governing certification and endorsements of Title 6. The Department of Education is charged with the responsibility of working with the Abbott districts to implement the requirements of the Abbott regulations. *N.J.A.C.* 6A:24-1.6.

ABBOTT IMPLEMENTATIONS IN PASSAIC

In the matter herein, prior to May 1999, Derlys Gutierrez, human resources specialist for the Passaic School District, spoke to personnel from the County Superintendent of Education's Office (hereinafter "Office") to discuss the positions of dropout prevention officer and health and social services coordinator. The Office

informed Ms. Gutierrez that the District did not have to hire certified people to fill the positions at issue. Thereafter, petitioner advertised and subsequently filled the positions. What, if any, certifications the hired individuals hold was not disclosed in the Joint Stipulation of Facts, which merely states that "[w]hile several of the candidates appointed to the positions of Dropout Prevention Officer and Health and Social Services Coordinator do hold various certificates, certification is not required for these positions."

As stated previously, attached to the Abbott Memorandum was a draft job description for the health and social services coordinator. In pertinent part, the job description states, "the coordinator will be responsible for assessment of needs, developing linkages with and making referrals to resources in and outside of the community and follow-up with students, their families, and school personnel to assure the satisfactory provision of services." Those services may include "access to primary and preventive health care, dental services, mental health services, . . . familiarity with crisis management, communication and problem solving, child development and parenting skills programs."

When respondent posted the vacancy for the health and social services coordinator position, the job posting stated that the person hired must meet numerous requirements. For example, the applicant is required to hold a bachelor of arts degree in "Psychology, Social Work, Sociology, Public Administration, Guidance or any related health field," possess "demonstrated, extensive knowledge of health and social services agencies available for students in the Passaic City area and in Passaic County," and possess "demonstrated, extensive experience in working with children and adolescents." Passaic Coordinator of Health and Social Services Job Description.

In regard to the posted vacancy of dropout prevention officer, the job posting stated that the person hired for that position:

> works with staff, parents, and students to identify those students who are at-risk of dropping out of school and to intervene by referring students to appropriate services to prevent their dropping out of school. The job requires active participation and interaction with students and their families, including home visits and

> referrals to appropriate government and local agencies when necessary.

The dropout prevention officer must also meet certain qualifications, including: hold a bachelor of arts degree in "Psychology, Social Work, Sociology, Public Administration, Guidance or any related health field," possess "demonstrated, extensive knowledge of health and social services agencies available for students in Passaic City area and in Passaic County," possess "demonstrated, extensive experience in working with children and adolescents," and "exhibit a personality that demonstrates interpersonal skills to relate well with students, staff, administration, parents, and agencies and resources within the community." Passaic Dropout Prevention Officer Job Description.

THE ARGUMENTS OF THE PARTIES

Petitioner argues that the positions of dropout prevention officer and health and social services coordinator must be appropriately certified. It reasons that, since the duties of the position of dropout prevention officer correspond to the duties of a guidance counselor and the duties of the position of health and social services coordinator correspond to the duties of a school nurse and/or guidance counselor, these positions require certification.

Petitioner refers to the District's written job description of the health and social services coordinator position, which states that the duties and responsibilities of this position include maintaining health records, sending students for health screenings, developing protocols for when a student becomes ill or injured at school, instructing students in sound health practices, and coordinating the health management of all students referred for health and social services.

Petitioner also argues that the District's job description for the position of dropout prevention officer is similar to that of a guidance counselor because the person filling the position is "assigned to work with staff, parents and students to identify those

students who are at risk of dropping out of school and to prevent such an event from occurring."

Respondent asserts that it has not violated any certification requirement since it has complied with the relevant regulatory provisions applicable to these positions. It argues that the Abbott regulations allow a district to hire non-certified persons for the positions in question, while the other positions do or may require some kind of certification. In addition, it argues that, since school boards have broad discretion to establish certification requirements for positions within the district, petitioner must show by a preponderance of the evidence that respondent's actions were unlawful, arbitrary, capricious, or unreasonable.

With respect to petitioner's claim that the Abbott positions of health and social services coordinator and dropout prevention officer are similar to school nurse and guidance counselor, respectively, respondent asserts that the regulatory authorities clearly provide that certification is not required and the argument that certification should be required because the Abbott positions are similar to that of nurse and counselor is unsupported and without merit. It argues that nurses and guidance counselors are in every district, while the positions at issue here are only in Abbott districts to combat specific problems.

Respondent further argues that the duties of the District positions are distinct from those enumerated within the certification provisions. For example, while nurses directly provide health care and guidance counselors work directly with students to provide guidance services and intervention, the positions at issue here identify students needing services and refer them to the proper source to obtain these services. In essence then, the persons in these Abbott positions serve as a referral network, they do not directly offer health or guidance services.

Finally, respondent argues that the regulations governing school nurses and guidance counselors explicitly require certification, as evidenced in *N.J.A.C.* 6:11-11.7 and -11.11. Therefore, if the Department wanted the disputed positions to be filled with

certified personnel, it would have stated its requirements in the text of *N.J.A.C.* 6A:24-1.4. Instead, the Department has left this decision up to each district.

As to the position of school nurse, the District's job description states that the applicant must hold an educational certificate and be a licensed registered nurse. In addition, the applicant must "show evidence of successful health care experience and experience in working with children and adolescents, including teaching" and "demonstrate knowledge and understanding of child growth and development, wellness education, community health and social service resources, and current health issues." As to job functions and responsibilities, a school nurse must work "in concert with the school administration, school physician and other medical personnel . . . completing appropriate records and carrying out medical orders that may be issued," "plan and conduct screening examinations, health appraisals and surveys," "complete and submit . . . all medical forms and reports," "carry out state requirements and district policies for communicable disease control and the exclusion and readmission of pupils for reasons of health," and administer medication to students. A school nurse must also "assume a leadership role in identifying students with health problems that may interfere with effective learning," "work with community health agencies and resource persons to provide a comprehensive and coordinated health services program for the school and its students," "consult with the Child Study Team, Attendance Officer, and other school personnel regarding the health of a child and the home situation," "counsel students, staff, and parents concerning health conditions, care, treatment, and other community health issues," and "teach classes in health as assigned." Passaic School Nurse Job Description.

A District high school guidance counselor must hold an educational services certificate, have excellent experience in teaching and working with adolescents, and "demonstrate knowledge and understanding of the components of a comprehensive developmental guidance program, child growth and development, strategies for effective career and educational planning, learning assessment and diagnosis, research related to learning, and the resources available in the school and community to assist secondary students." In regard to job functions and responsibilities, a high

school guidance counselor must "establish high standards and expectations for all students for academic performance and responsibility for behavior," "develop with the student post-high school plans, using interest and aptitude inventories, and providing career and educational opportunity information and resources available, including scholarships and financial aid," "assist students with developing a student portfolio, including a resume, employment and college applications," "counsel individual students on a regular basis to resolve educational, personal, emotional, and social needs and other areas of concern as identified by the counselor, student, parents, teachers, administrators, child study teams members, or others associated with the student," "provide counseling services" and "work closely with other school personnel to prevent students from dropping out of school." Passaic High School Guidance Counselor Job Description.

Similarly, a District elementary school guidance counselor must also hold an educational services certificate. In regard to job duties and responsibilities, an elementary school guidance counselor must "assist teachers with planning and implementing guidance interventions for children to promote positive concepts in self esteem," "teach developmental guidance lessons to address the Core Curriculum Content Standards, using a variety of instructional strategies and materials," "assist with creating healthy class environments by providing teachers with developmental guidance concepts to support the teaching of Core Curriculum Content Standards," "teach individual and group counseling and problem solving skills in a non-threatening atmosphere of privacy, warmth, and acceptance," and "work cooperatively with the Substance Abuse Counselor." Passaic Elementary School Guidance Counselor.

I **FIND** that a comparison of the three titles discussed above with the two Abbott positions at issue herein reveals that, although some similarities in job qualifications and responsibilities exist, the compared positions are very different.

For example, a school nurse is primarily responsible for providing medical and health care for the students. The nurse must also provide counsel and guidance to them. However, a District health and social services coordinator does not directly

provide medical or health services to the students, although the person must possess knowledge of medical issues and treatment facilities in order to refer students appropriately. In addition, while the health and social services coordinator must, to some extent, work with students to guide them to services, his or her responsibility is to make the appropriate referrals and to coordinate, rather than directly participate in, their implementation.

The District's job description for guidance counselor is very different from the job description for dropout prevention officer. A high school guidance counselor must work directly with students and staff members to ensure that the students' learning needs are met, as well as prepare them for a future after high school (some type of continuing education or employment); an elementary school guidance counselor deals more with maintaining and creating the social and mental well-being of students. In contrast, the District's dropout prevention officer specifically identifies students at risk of dropping out of school, refers them to the appropriate agency and follows up as necessary.

Consequently, I **FIND** that analogizing the disputed positions to existing positions, as suggested by petitioner, provides no guidance in making the determinations of certification requirements.

ARE THE ABBOTT POSITIONS RECOGNIZED TITLES?

In the matter herein, it is not stated that any certification requirements apply to the disputed positions as they were created by the *Abbott* Court. The Abbott Memorandum leaves this decision to the Abbott districts and the regulations implementing the relevant part of the *Abbott* opinion, specifically *N.J.A.C.* 6A:24-1.4(h), do not mandate that these positions be certified.

The Abbott positions at issue are recognized within Title 6A of the Administrative Code and not in the certification and endorsement provisions of Title 6. This renders the present matter very different than prior cases, decided before the existence of Title 6A, involving a district's creation of its own titles.

Specifically, the Abbott Memorandum indicates that, in regard to the dropout prevention officer and health and social services coordinator positions, if a district chooses to require certification for the positions, then the appropriate title would be "guidance counselor/dropout prevention officer" or "social worker/health and social services coordinator." Such titles do not need the approval of the county superintendent because they are existing recognized titles and the required certifications have already been determined. If the District does not attach a necessary certification for its dropout prevention officer, none is required and there is no reason to obtain the approval of the county superintendent.

In fact, the actions of the Passaic County Superintendent's Office were in agreement with the Department's subsequent Abbott Memorandum. When respondent informally discussed the two positions with the County superintendent prior to the issuance of the Abbott Memorandum, the District was advised that no certifications were required and it filled the positions accordingly.

THE ABBOTT DISTRICTS' DISCRETION IN IMPLEMENTING THE ABBOTT POSITIONS

The rules of construction applicable to interpreting statutes apply to administrative regulations as well. *State Dep't of Health v. Tegnazian*, 205 *N.J. Super.* 160, 174 (App. Div. 1985) (stating that regulations "are subject to the same rules of construction and the same constitutional standards as a statute"). In addition, an agency's interpretation of its own rule is owed considerable deference since the agency that drafted and promulgated the rule should know the meaning of that rule. 37 *New Jersey Practice, Administrative Law and Practice* § 3.25, at 156 (Steven L. Lefelt, Anthony Miragliotta, & Patricia Prunty) (rev. 2d ed. 2000) (citing *In re Revision in Rates Filed by Plainfield-Union Water Co.*, 57 *N.J. Super.* 158 [App. Div. 1959]). Furthermore, it is necessary to foster the legislative or agency intent when interpreting statutes and regulations:

> . . . In searching for a rule's meaning, a court is not confined to its specific terms but may look to the policy sought to be achieved. Thus, the obligation of the rule interpreter is to ascertain that intent, to disregard a literal reading leading to an absurd result, and to even furnish omitted words when doing so will promote the agency will. . . .
>
> When interpreting rules, the legislative history of the rule may be used to ascertain the true sense and meaning of the language used. The regulation should be construed in accordance with the plain meaning of its language and in a manner that makes sense when read in the context of the entire regulation. Thus, you may use as interpretative aids . . . the summary of the agency's responses to public comment. In addition, the rule headings may be used to interpret a rule. . . .
>
> . . . If the Legislature wished to change the way an agency was implementing a statute, it could pass a law clarifying its will. The Legislature's failure to act is interpreted as an affirmance of the agency's construction. Therefore, under these circumstances, Courts will give great weight to the agency's interpretation. . . .
>
> A court, however, will not overturn an agency's choice among reasonable interpretations of statutes that delegate rulemaking powers. Under the arbitrary and capricious review standards, the range of tolerance is great. A state agency's interpretation of its own regulations is entitled to considerable deference, but a court need not accept the agency's interpretation if it is plainly erroneous or inconsistent with the regulation. An agency may not interpret its rules in such a way as to amend those rules without complying with the Administrative Procedure Act. A court will reverse only when "there is no room for agency interpretation: the act can have only one meaning, and the agency's reading is just plain wrong." Therefore, an ambiguous rule or an interpretation which is inconsistent with the plain reading of the rule will be construed against the agency.
>
> [37 *New Jersey Practice, Administrative Law and Practice* § 3.25, at 156-58 (footnotes and citations omitted).]

These principles indicate that, when construing regulations and statutes, their language as a whole must be considered, as well as the intent in promulgation. At the same time, however, deference should be given to the agency's interpretation of its own regulations as long as that interpretation is not plainly erroneous or inconsistent with the regulation.

Furthermore, in matters involving school law:

> [t]he Legislature clearly and pointedly has vested responsibility in the State Board to fashion standards and promulgate guidelines concerning the qualification and certification of public educators within the State. The Legislature intended that the State Board "promulgate specifications concerning the categories of 'certification'" and that courts not intervene "unless the State Board's decision is palpably arbitrary." Agency regulations are accorded substantial deference based on the recognition that "certain subjects are within the peculiar competence of the agency." . . . Our courts have long recognized the importance of allowing the State Board to devise requirements governing both students and teaching staff.
>
> [*Dennery v. Board of Educ. of the Passaic County Reg'l High Sch.*, 131 *N.J.* 626, 637 (1993) (citations omitted).]

The Abbott regulations must be considered with this framework in mind.

In its decision, the *Abbott* Court stressed the importance of the individuality of each Abbott school district. In this regard the Court stated:

> . . . we have stressed the importance of having the particularized needs of these children drive the determination of what programs should be developed. . . .
>
> . . . The particularized needs of an individual school will inform the decision of what type of program is necessary; different schools will have different health and social service needs depending on their student population and their location. . . . As the Commissioner recognized, adopting and ordering one uniform approach for every school to follow would not be educationally sound.
>
> [*Abbott, supra*, 153 *N.J.* at 511-12 (emphasis added).]

Accordingly, as indicated by the Court, the varying needs of Abbott district students must be considered.

The concept of individuality established in *Abbott* is mirrored in the Abbott Memorandum, in which the Department provided the Abbott districts with the discretion to use certified or non-certified personnel to fill these positions based upon the needs of their students.

The Passaic positions of dropout prevention officer and health and social services coordinator do not require certification. In promulgating the Abbott regulations, the Abbott positions were not included within the certification and endorsement sections of Title 6, nor was any language included within Title 6A requiring certification and endorsement for these positions. This indicates that the positions are to be considered as distinct from those requiring certification.

Furthermore, the legislative history underlying the Abbott regulations directly addresses the issue of certification. As noted by respondent, in adopting the Abbott regulations, some commentators to the proposed regulations suggested that the regulations should be revised to state the required training experience and qualifications for the Abbott positions. The Department's response rejected this proposal, stating, "It is a local district decision to determine job qualifications. While the Department will provide guidance, this is a policy issue for the local board of education." 31 *N.J.R.* 2926 (Oct. 4, 1999), cmt. 3. This statement echoes the determination of the *Abbott* Court, that the individuality of the Abbott districts must be preserved.

CONCLUSION

Based upon the principles of statutory construction and the nature of the Abbott regulations, I **CONCLUDE** that the Administrative Code's failure to attach any certification requirements to the disputed Abbott positions was purposeful and must be interpreted as such. Considering the importance the *Abbott* Court placed upon the individuality of the Abbott districts and the absence of language requiring certification for these positions within the applicable regulation and its interpretation by the Department, I **CONCLUDE** that the certification requirements of Title 6 should not automatically attach to the disputed Abbott positions. To do so would effectively prevent an Abbott district from exercising its specifically delegated discretion to determine the necessary job duties, and from them the necessary certifications, for dropout prevention officers and health and social service coordinators in order to

implement the educational mandates to which the individual districts are subject. *N.J.A.C.* 6A:24-1.1.

I further **CONCLUDE** that neither the title of nurse nor the title of guidance counselor, nor any other titles established under Title 6, are similar enough to the Passaic District's positions of dropout prevention officer and health and social services coordinator to require certification.

Since there are no material facts in dispute in this matter, based upon the arguments and the affidavits and documents submitted by the parties, I **CONCLUDE** that the District is entitled to summary decision dismissing this appeal as a matter of law. I further **CONCLUDE** that petitioner is entitled to no relief in this forum.

ORDER

It is **ORDERED** that summary decision is hereby **GRANTED** to respondent 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, 225 East State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 27, 2001
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

7/3/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 5 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

cb

OAL DKT. NO. EDU 12133-99
AGENCY DKT. NO. 317-10/99

PASSAIC EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	
	:	COMMISSIONER OF EDUCATION
RESPONDENT,	:	DECISION
AND	:	
EDWARD ROWBATHAM, MARYALLYN FISHER, MINNIE HILLER AND SHERRI GRIER,	:	
	:	
INTERVENORS.	:	

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.

Petitioner's exceptions reiterate its argument, as presented before the OAL, that the Board is required to fill both positions in question with individuals holding appropriate certification from the New Jersey State Board of Examiners because the job duties "clearly demand" appropriate certification. (Petitioner's Exceptions at 2) Notwithstanding that both positions focus solely upon an at-risk student population rather than the general student population, petitioner underscores that the duties assigned to the dropout prevention coordinator are the same as those performed by individuals working as guidance counselors, and the duties assigned to the coordinator of health and social services are the same as those performed by

individuals working as school nurses. (*Id.* at 5-6) Furthermore, the petitioner argues, the absence of certification language in the authorizing regulation is not determinative, since *N.J.A.C.* 6A:24-1.4(g) is similarly silent with respect to certification requirements for the full-time technology coordinator; yet, it is undisputed that certification is required for that position. (*Id.* at 7-8) The petitioner urges the Commissioner to abide by this State's public policy respecting certification as an essential, minimal criterion for employment as a teaching staff member, and recognize that there is a compelling need for this standard in urban districts with serious educational deficiencies. (*Id.* at 9)

Upon careful and independent review of the record in this matter, the Commissioner determines to set aside the Initial Decision of the Administrative Law Judge (ALJ), for the reasons set forth below.

The Board correctly argues that the resolution to the dispute herein rests on an analysis of the duties assigned to the positions of coordinator of health and social services and dropout prevention officer. That analysis, however, need not proceed, as the parties suggest and the Initial Decision recommends, with a comparison of the duties of the new positions vis-à-vis the duties of existing positions in the District, in order to determine whether the new positions "correspond" with these existing positions so as to require certification (Petitioner's Exceptions at 5-7), or whether the new positions are sufficiently "separate and distinct" to avoid the certification requirements imposed upon existing positions. (Board's Letter Brief in Opposition to Cross-Motion for Summary Decision at 2-3)

Rather, as the State Board of Education has directed:

> Whether or not an *** assignment is a teaching staff assignment requiring an [appropriate] certificate turns upon the specific duties to be performed in that particular assignment, requiring assessment of whether the employment is of such character as to require that

> the individual assigned thereto hold appropriate certification in order to perform such functions.***" *David Dowding v. Board of Education of the Township of Monroe, Middlesex County*, 1990 *S.L.D.* 1711, 1712. *See also, Guttenberg Education Association v. Leo Klagholz, Commissioner of Education and Board of Education of the Borough of Guttenberg, Hudson County*, State Board decision March 3, 1999, slip. op. at 6.

Additionally, "[p]ursuant to *N.J.S.A.* 18A:26-2, the requirement of certification applies to any person who is employed by a district board of education to perform duties that are regulated through certification rules pursuant to this chapter.***" *N.J.A.C.* 6:11-3.1(a). (*See, also, Edison Township Education Association v. Edison Township Board of Education*, 94 *N.J.A.R.*2d (EDU) 592, 594, wherein the State Board finds, "Whether or not the duties performed by individuals providing services in a school district are of such character as to require certification issued by the State Board of Examiners is determined by the rules that have been adopted by the State Board of Education.")

The Board acknowledges that "[t]he primary function of the Dropout Prevention Officer is to work with staff, parents, and students to identify those students who are at risk of dropping out of school and to intervene by referring students to appropriate services to prevent their dropping out of school." (Board's Letter Brief in Opposition to Cross-Motion for Summary Decision at 7) The position is described in nature and scope as one requiring "active participation and interaction with students and their families, including home visits and referrals to appropriate government and local agencies when necessary." (*Id.* at Exhibit B, p. 1) Indeed, despite the Board's claim that the dropout prevention officer is "not directly offering health or guidance services" *id.* at 3, among the functions and responsibilities noted in the job description, the dropout prevention officer is expected to "[c]ounsel students regarding attendance, seeking cooperation, building trust, and identifying any problems that may require intervention by other

school personnel and community agencies." (*Id.* at Exhibit B, p. 2) The dropout prevention officer is also required, *inter alia*, to:

> 6. Conduct in-home visits to follow up with individual student progress.
> 7. Meet with and work with student's parents/guardians/family to discuss attendance/school problems and seek assistance from community providers.
> 8. Refer students and family members to appropriate service agencies to help to keep student in school.
> ***
> 12. Maintain contact with parents/guardians/family to follow up with students' progress. (*Ibid.*)

The Commissioner recognizes that the State Board of Education requires an educational services certificate for persons who counsel "teachers, students, and parents regarding personal, social, educational and vocational plans and programs; and [who develop] cooperative relationships with community agencies in assisting children and families," *N.J.A.C.* 6:11-11.11(a), as well as for persons fulfilling social service functions in the district, *N.J.A.C.* 6:11-11.8. Thus, notwithstanding that there may be no comparable position in the District, the Commissioner concludes that, based on the job description on record, the duties of the dropout prevention officer are of "such character" as to require that the individual assigned thereto hold an appropriate educational services certificate in order to perform such functions. *Dowding, supra,* at 1712; *Guttenberg, supra,* slip. op. at 6.

Employing a similar analysis, the Board contends that the primary function of the coordinator of health and social services is to ensure "that students are afforded the health and social services that they need in order to benefit from instruction in the Core Curriculum Content Standards and to succeed in school." (Board's Letter Brief in Opposition to Cross-Motion for Summary Decision at 7) The nature and scope of the position establish that the coordinator

> serves as an advocate for students' health and well-being and interacts with other staff members and with community providers of health and social services to provide students with access to such services. Inherent in the position are the responsibilities for planning, sending students for health screenings, maintenance of health records, protocols for the ill and injured while in school, instruction in sound health practices, coordination of services, program evaluation, personnel management, and financial management. *** (*Id.* at Exhibit A, p. 1)

Again, notwithstanding the Board's claim that the coordinator of health and social services is not directly providing health or guidance services, *id.* at 3, among the functions and responsibilities noted in the job description, the coordinator:

> 1. Provide[s] programs for student intervention and support services.
> 2. Refers students to local providers for health and social services.
> 3. Coordinates the case management of all students referred for health and social services.
> 4. Visits the students' home(s) when necessary and appropriate to provide the optimum services to the students.
> 5. Plans and coordinates activities that will increase parental participation in student's lives.
> 6. At the high school, functions as the high school's liaison for the School Based Youth Services Program. (Board's Letter Brief in Opposition to Cross-Motion for Summary Decision, Exhibit A, p. 2)

The Commissioner recognizes that the State Board of Education requires an educational services certificate for those persons teaching in areas related to health, *N.J.A.C.* 6:11-11.7, performing functions identified in *N.J.A.C.* 6A:16-2.1(e)1[1], and fulfilling social service functions in the district, *N.J.A.C.* 6:11-11.8. Thus, the Commissioner concludes that, based on the job description on record, the duties of the coordinator of health and social services are of such character as to require that the individual assigned thereto hold an appropriate educational services certificate in order to perform such functions. *Dowding, supra*, at 1712; *Guttenberg, supra,* slip. op. at 6.

[1] With exception as noted in *N.J.A.C.* 6A:16-2.1(f).

The Commissioner does not, however, determine herein which is the *appropriate endorsement* on the educational services certificate to require of the candidates holding either the position of dropout officer or coordinator of health and social services. Rather, under these particular circumstances, where newly-authorized positions are at issue and where the record before him was developed pursuant to cross-motions for summary decision, the Commissioner finds that such a determination is better made by the County Superintendent of Schools pursuant to *N.J.A.C.* 6:11-3.3(b).

Finally, the Commissioner notes that, in deciding the within matter, he rejects the importance placed by the ALJ on the fact that these "*Abbott* positions" were not included within the rules for Professional Licensure and Standards. (Initial Decision at 18) The Commissioner further rejects the Board's contention that the State Board of Education's apparent deference to local district need when establishing these positions, or the Department of Education's guidance relative thereto, is plausibly read as an *unqualified exemption* from certification rules. (Board's Brief in Support of Cross-Motion for Summary Decision at 7-9; Board's Letter Brief in Opposition to Cross-Motion for Summary Decision at 5) Such a position, the Commissioner finds, would be inconsistent with the State Board of Education's steadfast view that:

> Certification requirements establish the threshold qualifications for teaching staff members employed in the public school system throughout the state. *N.J.S.A.* 18A:1-1; *N.J.S.A.* 18A:26-2. *As such, and under the current statutory framework embodied in Title 18A, the certification process is critical to assuring the provision of a thorough and efficient education.* *** Since certification requirements are at the core of the current structure governing the delivery of all education programs under our jurisdiction, setting aside the standards embodied in our certification rules necessarily risks [the compromise of a thorough and efficient education]. (emphasis added) *Phillipsburg Education Association v. Board of Education of Phillipsburg, Warren County et al.,* State Board

> decision August 1, 2001, slip. op. at 6, *quoting Guttenburg, supra,* slip. op. at 7, *citing In the Matter of the Waiver Granted to the Board of Education of the Township of Middletown,* State Board of Education decision May 3, 2000, slip. op. at 4)

Neither is the Commissioner persuaded that the decision issued by the *Abbott* Court compels the result urged by the Board and recommended by the ALJ in this matter, particularly where the State Board of Education recently found, in a case involving an *Abbott* district, albeit within the context of an equivalency determination, that the above-cited certification policy of this State

> *is no less true for positions involving the provision of educational support services than for instructional positions. Not only is the character of positions that involve the provision of educational services such that appropriate certification is required in order to be qualified to provide these services, N.J.S.A. 18A:1-1, but such services are essential to the success of the education programs provided by our public schools. See Abbott v. Burke*, 119 *N.J.* 287 (1990) (subsequent history omitted) (emphasis added) (*Phillipsburg , supra*, slip. op.at 6)

The Commissioner therefore concludes that although this Board and other "*Abbott* districts" may structure the positions of dropout prevention coordinator and coordinator of health and social services, as authorized by *N.J.A.C.* 6A:24-1.4(h), in accordance with local need, they must nonetheless, *when establishing the duties assigned to the positions*, be mindful that the duties may be of such character as to require the individual assigned to the position to hold certification.

Accordingly, the Initial Decision of the ALJ is set aside. In the absence of a revision to the within job descriptions that would eliminate the need for certification, the Board is directed to submit, within 20 days of the date of this decision, the job descriptions for the positions in dispute to the County Superintendent of Schools for review pursuant to *N.J.A.C.* 6:11-3.3(b), consistent with the parameters of this decision. Subsequent to the County

Superintendent's determination as to the appropriate endorsements, the Board is reminded that these are teaching staff positions that are subject to all laws applicable to such positions. A copy of this decision shall be forwarded to the Passaic County Superintendent of Schools.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 8|16|01

Date of Mailing: 8/16|01

[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.

258-01

EDU #12133-99
C # 258-01
SB # 33-01

PASSAIC EDUCATION ASSOCIATION, :

PETITIONER-RESPONDENT, :

V. :

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

RESPONDENT-APPELLANT, :

AND :

EDWARD ROWBATHAM, MARYALLYN FISHER, MINNIE HILLER AND SHERRI GRIER, :

INTERVENORS. :

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 16, 2001

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

For the Petitioner-Respondent, Zazzali, Fagella, Nowak, Kleinbaum & Friedman (Richard A. Friedman, Esq. and Kathleen A. Naprstek, Esq., of Counsel)

The State Board of Education affirms the decision of the Commissioner of Education substantially for the reasons expressed in his decision. In doing so, we stress, as did the Commissioner, that pursuant to the statutory framework, an individual must hold appropriate certification issued by the State Board of Examiners in order to

be employed by a school district as a teaching staff member. As the Commissioner recognized in his decision, whether or not a given assignment constitutes employment as a teaching staff member requires an assessment of whether the employment is of such character that appropriate certification is required in order to be qualified. Such an assessment necessarily dictates an examination of the functions of the position, including the specific duties attached to the assignment.

We find that the Commissioner's decision in this case is grounded in such an assessment, and we fully concur with the conclusions he reached on the basis of his examination of both the function of the assignments at issue and the specific duties attached to them. As set forth in the Commissioner's decision, the functions to be served by these assignments and the duties attached to them are such that there is no question but that the positions at issue are of such character as to require the individuals serving in them to possess appropriate certification in order to be qualified.

We stress that our affirmance of the Commissioner's decision is based on his findings with respect to the job descriptions as they were developed and submitted by the Board of Education of the City of Passaic. That being the case, we decline to speculate as to whether the Board could have developed job descriptions for assignments that would adequately fulfill the functions of the positions at issue here but which would not be of such character as to require certification. We therefore modify the Commissioner's decision to eliminate any suggestion that the Board could now avoid the certification requirements established by the Commissioner's decision merely by revising the job descriptions that were the basis for that decision. Accordingly, as the Commissioner directed and as required by N.J.A.C. 6:11-3.6(b), the Board must submit

the job descriptions that were at issue in this case to the Passaic County Superintendent for determination of the appropriate certification and position titles.

In view of our determination today, we need not pass upon the motion for a stay that was filed in this matter by counsel for the appellant and the intervenors.

December 5, 2001

Date of mailing DEC 07 2001

#259-01

IN THE MATTER OF THE TENURE	:	
HEARING OF JOSEPH PRINZO,	:	COMMISSIONER OF EDUCATION
PASSAIC COUNTY TECHNICAL	:	DECISION
INSTITUTE, PASSAIC COUNTY.	:	

SYNOPSIS

The Board certified tenure charges of unbecoming conduct against respondent, T.V. Production Instructor, for allegedly allowing his summer program students to watch an inappropriate and unacceptable videotape. The Board charged him with failing to follow proper procedure governing the use of a videotape in his classroom, not properly supervising the students in his charge and allowing students to view a sexually explicit videotape.

The ALJ concluded that respondent engaged in conduct unbecoming a teacher warranting disciplinary action. Even though the ALJ did not find sufficient credible evidence to support a conclusion that respondent either gave the students express permission to watch the offensive videotape or, with knowledge of the activity, permitted it to continue, the ALJ determined that the Board had proven, by a preponderance of credible evidence, that respondent did leave three students essentially unattended for approximately 20 to 30 minutes and failed to properly supervise the students which, in turn, led to their viewing of an inappropriate movie during classroom time. However, in light of mitigating factors in this case including the findings that the students switched the videotape without respondent's knowledge; that respondent was engaged in conducting a tour of the rooms comprising the t.v. production studio for a prospective student, her parent and the guidance counselor during a portion of the unsupervised time; and that participants on the tour failed to make their observations that the videotape contained adult nudity and sex known to respondent so that the viewing could be ceased sooner, the ALJ determined that the penalty of dismissal was not warranted. Thus, the ALJ concluded that a loss of salary for a period of 30 days was reasonable discipline regarding this charge. (*In re Sammons*; *In re Fulcomer*)

Having reviewed the record, including the hearing transcripts and the parties' arguments, the Commissioner concurred with the ALJ that the Board sustained its burden of proving that respondent was guilty of conduct unbecoming a teacher for failure to properly supervise his students. Moreover, the Commissioner agreed with the ALJ that, in view of the circumstances of this matter, the extreme penalty of dismissal was not warranted. The Commissioner concurred with the penalty of 30 days loss of pay.

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 20, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10324-00
AGENCY DOCKET NO. 424-11/00

IN THE MATTER OF THE TENURE HEARING OF JOSEPH PRINZO, PASSAIC COUNTY TECHNICAL INSTITUTE, PASSAIC COUNTY

Steven Gerber, Esq. and **Michelle N. Johnson**, Esq., for petitioner (Gerber & Samson, attorneys)

Sheldon H. Pincus, Esq., for respondent (Bucceri and Pincus, attorneys)

Record Closed: May 15, 2001 Decided: June 29, 2001

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

STATEMENT OF THE CASE

This matter involves tenure charges of conduct unbecoming a teacher certified by the Passaic County Technical Institute Board of Education (the Board) against the respondent, Joseph Prinzo (Prinzo), a tenured T.V. Production instructor at Passaic County Technical Institute (PCTI), pursuant to the provisions of the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10, *et seq.*

PROCEDURAL HISTORY

On or about September 28, 2000, the Superintendent of Schools of PCTI filed tenure charges against Prinzo (J-1 at ¶4; P-18). In pertinent part the charges allege:

1. On August 2, 2000, Respondent, Joseph Prinzo was a tenured teacher at Passaic County Technical Institute.

2. On that date, Respondent, Joseph Prinzo was the T.V. Production Instructor in the Workforce Investment Board Summer Program. Betty Schulte, Guidance Counselor was taking a prospective 10th grade female student and her mother on a tour of the school. The student wanted to view the T.V. studio. When Ms. Schulte, the parent and child walked through the classroom into the studio, the studio lights were off, it was dark and the students were watching a film.

3. The segment of the film observed by the counselor, parent and child was sexual in nature showing naked breasts and buttocks of a man and woman who were involved in sexual activity in bed.

4. Three students were seated in front of the large screen T.V. watching the film. All three students were part of Respondent, Joseph Prinzo's class.

5. Members of the school administration conducted an investigation of the incident with the three students from the T.V. production class. The students admitted to viewing the film "Belly," that contained nudity and sexual activity. . . .

6. The students said that another student had brought the film to class.

7. The students said Respondent, Joseph Prinzo had given them permission to watch a film. The Administration viewed the video in its entirety and deemed it highly inappropriate and unacceptable in the educational setting. The video contained graphic violence, adult nudity, explicit sex and profanity.

Based on these allegations, Prinzo was charged with "conduct unbecoming a teacher in that he failed to follow proper procedure" governing the use of a video in a classroom. He was further charged with "conduct unbecoming a teacher in that he did not properly supervise the students in his charge" and "[i]n failing to maintain proper supervision, Respondent, Joseph Prinzo allowed the students to view a sexually explicit video."

The charges were accompanied by a supporting sworn statement of evidence and timely served upon Prinzo under letter of the Board secretary dated September 29, 2000 (P-18). *N.J.S.A.* 18A:6-11; *N.J.A.C.* 6A:3-5.1(b) 1 and 2. In that letter, Prinzo was advised of his right to submit a written statement of position and a written statement of evidence, under oath, within fifteen days of receipt of the tenure charges. *N.J.S.A.* 18A:6-11; *N.J.A.C.* 6A:3-5.1(b)3. Prinzo filed a written statement of position, under oath, dated October 13, 2000 (P-31).

On November 28, 2000, the Board determined, by a majority vote of its full membership, that there was probable cause in support of the charges and voted to certify the tenure charges to the Commissioner of Education for a hearing. *N.J.S.A.* 18A:6-11; *N.J.A.C.* 6A:3-5.1(b)4. The Board further resolved to suspend Prinzo from his teaching position, without pay, pursuant to *N.J.S.A.* 18A:6-14 (J-1 at ¶5; P-19).

By letter dated November 29, 2000, the Board filed the tenure charges, statement of evidence and certification of determination with the Commissioner of the Department of Education (Department) together with proof of service upon Prinzo (P-19). *N.J.S.A.* 18A:6-11; *N.J.A.C.* 6A:3-5.1(b) 5 and 6; *N.J.A.C.* 6A:3-5.2. Prinzo filed an Answer and Affirmative Defenses which the Department received on December 14, 2000. *N.J.S.A.* 18A:6-16; *N.J.A.C.* 6A:3-5.3. The Department subsequently notified the parties, by letter dated December 15, 2000, of its referral of the matter to the Office of Administrative Law (OAL) where, on December 29, 2000, it was filed for hearing pursuant to *N.J.S.A.* 18A:6-16. *See N.J.A.C.* 1:6B-4.1; *N.J.A.C.* 6A:3-5.5(a).

A prehearing conference was held on January 10, 2001. *N.J.S.A.* 52:14B-10.1; *N.J.A.C.* 1:6B-13.1. A Prehearing Order was thereafter entered on January 11, 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 March 27, 2001. *N.J.S.A.* 14B-10.1; *N.J.A.C.* 1:6B-9.1; *N.J.A.C.* 1:6B-10.1.

A hearing was held on March 27, 2001 and continued on March 28, 29 and 30, 2001. At the conclusion of testimony on March 30, 2001, the parties were granted leave to file post-hearing submissions. The respective briefs of the parties (including proposed findings of fact encompassed in respondent's brief) were received on May 11, 2001 and, following the undersigned's receipt of the transcripts on May 15, 2001, the hearing record was closed.

FACTUAL DISCUSSION

STIPULATED FACTS

The parties submitted a Joint Stipulation of Facts (J-1) addressing certain background facts. As embodied therein, I **FIND** the following stipulated **FACTS**:

1. At all times relevant herein, Prinzo was employed as a T.V. Production teacher at PCTI, and was so employed as a teacher in the Telecommunications Department since his date of hire in September 1991.

2. On August 2, 2000, the Superintendent of Schools suspended Prinzo from his position as a teacher at PCTI, with pay, pursuant to *N.J.S.A.* 18A:25-6.

3. At its Regular Meeting of May 23, 2000, the Board appointed Prinzo to the position of T.V. Productions instructor in the Workforce Investment Board Summer Program for the period of July 5 to August 11, 2000 at a rate of $27.83/hour, 6-½ hours/day (R-3).

4. The tenure charges in this matter were filed against Prinzo on September 28, 2000 (P-18).

5. On November 28, 2000, the Board resolved to certify the tenure charges against Prinzo and further resolved, pursuant to *N.J.S.A.* 18A:6-14, to suspend Prinzo from his teaching duties without pay (P-19).[1]

6. On July 18, 2000, the Board approved for the 2000-2001 school year that Prinzo was to be paid (prorated) on step 12F of the salary guide ($72,134) and further approved that he was due a longevity increment of 3% ($2,164) for a total (non-prorated) salary of $74,298 (R-2).

7. At all relevant times herein, in connection with the charges instituting this procedure, PCTI has complied with all necessary procedures regarding the filing of tenure charges set forth in Title 18A of *N.J.S.A.* and *N.J.A.C.* including, but not limited to, notice and service requirements.

FINDINGS OF FACT

In support of the charges against Prinzo, the Board presented eight witnesses: Diana C. Lobosco, Superintendent of Schools and Principal of PCTI; Assistant Principal Joseph M. DiGise; Kent Bania, the supervisor of the PCTI Summer Workforce Program; Elizabeth Schulte, a PCTI guidance counselor; Mark O'Neill, a PCTI mathematics teacher; T.J., a student who was in Prinzo's summer T.V. Production class; Ms. C., a parent of a prospective student who was touring Prinzo's classroom on the date in question; and Prinzo. Testifying on behalf of Prinzo was William Easton, a PCTI guidance counselor.

Although a majority of the facts surrounding this matter were not significantly disputed, the inferences drawn from those facts are hotly contested. In addition, divergent testimony was elicited, principally from the Board's own witnesses, with

[1] The parties' Stipulation refers to this action being taken on November 29, 2000. The documentary evidence reveals, however, that the Board voted to certify the tenure charges at its meeting on November 28, 2000 (P-19).

respect to certain operative facts. Plainly, such evidence requires that I make credibility determinations.

Where facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings as to the disputed facts. Credibility is the value that a finder of the facts gives to a witness' testimony. It requires an overall assessment of the witness' story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. *Carbo v. United States*, 314 *F.2d* 718, 749, (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself" in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." *In re Perrone,* 5 *N.J.* 514, 522 (1950). A fact finder "is free weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." *Id.* at 521-522. *See D'Amato by McPherson v. D'Amato*, 305 *N.J. Super.* 109, 115 (App. Div. 1997). In other words, a trier of fact may reject testimony as "inherently incredible" and may also reject testimony when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. *Congleton v. Pura-Tex Stone Corp.*, 53 *N.J. Super.* 282, 287 (App. Div. 1958). Similarly, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the . . . [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" *State v. Salimone*, 19 *N.J. Super.* 600, 608 (App. Div. 1952), *certif. den.* 10 *N.J.* 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. *Renan Realty Corp. v. Community Affairs Department,* 182 *N.J. Super.* 415, 421 (App. Div. 1981).

Overall I found much of the testimony presented by the Board's witnesses to be somewhat contradictory of one another and lacking a clear recollection of specific events (or the time of events) that transpired on August 2, 2000. A canvass of the testimony as a whole casts a shadow of doubt on the accuracy of certain witnesses'

recollection and rendition of the circumstances surrounding the tenure charges. For example, although Ms. Schulte presented detailed credible testimony as to the timeline with respect to the tour in Prinzo's classroom and her observation at that time, she was unable to recall various details of the tour (*e.g.,* discussions during the tour, exactly at what point she viewed the video) and initially identified the wrong door from which she had exited (*see e.g.,* Schulte at TI 77, 103, 105, 141, 148, 155-157, 160-161, 170, 172, 192-193, 198-199). Similarly, Ms. C. could not identify Prinzo, expressed her inability to recall the tour with specificity (*e.g.,* discussions, time periods) and candidly testified "[m]y memory is so bad" (*see e.g.,* Ms. C. TII 136, 144, 146, 148, 151-152, 155).

With respect to the subsequent investigation, Dr. Bania indicated his failure to recall many facts relating to his involvement in the investigation (*e.g.,* meeting with Prinzo at the cafeteria area at 11:30 a.m., the names of the students taken by him to Mr. DiGise's office, whether other students remained in the classroom, the circumstances with respect to requesting and obtaining Prinzo's statement, and his request that Prinzo see Ms. Lobosco), as well as the timeframe when other occurrences transpired (*e.g.,* when Mr. DiGise contacted him, when he went to Prinzo's classroom to retrieve the students, the film and Prinzo's statement) (*see e.g.,* Bania at TI 211, 218, 222; TII 6, 55-60, 63, 68, 72-73, 76). Although Dr. Bania testified that Prinzo was by his desk near the doorway to the "blue classroom" when he initially went to secure the students in the classroom and Prinzo was still at his desk when Dr. Bania later returned to retrieve the videotape, he corrected this account during the second day of his testimony. Dr. Bania then candidly acknowledged that Mr. O'Neill had been present on the second occasion and noted his uncertainty as to Prinzo's presence in the classroom at that time (Bania at TI 213, 215, 221-223, TII 7, 67-68, 72). This testimony as to Prinzo's presence on either occasion was refuted and overborne by the testimony of Mr. O'Neill. I found the testimony of Mr. O'Neill, a witness who has no apparent interest in the outcome of this proceeding, to be clear, specific, persuasive and believable. As corroborated by the Summer Workforce Program Master Schedule (R-6) and the testimony of Prinzo, Mr. O'Neill presented unequivocal and credible testimony that he (not Prinzo) was in the classroom when Dr. Bania arrived to obtain the students and he accompanied Dr. Bania and the students to Mr. DiGise's office.

The Board's proofs included testimony by one student (T.J.). T.J. had brought the videotape into Prinzo's class on August 2, 2000. In evaluating T.J.'s testimony, I am guided by the caution that must be employed in examining such testimony:

> '***It is the opinion of the Commissioner that testimony of children, especially of those ten years of age, against a teacher, whose duty it is to discipline them, must be examined with extreme care. It is dangerous to use such testimony against a teacher; it is likewise dangerous not to use it. The necessities of the situation sometimes make it necessary to use the testimony of school children. If such testimony were not admissible, the children would be at a teacher's mercy because there is no way to prove certain charges except by the testimony of children.'
>
> [*In the Matter of the Tenure Hearing of Joseph N. Cortese,* 1972 *S.L.D.* 109, 118-119 (quoting *Palmer v. Board of Education of Audubon,* 1939-49 *S.L.D.* 183, 188)].

See In re Wolf, 231 *N.J. Super.* 365, 370-371 (App. Div. 1989), *certif. den.* 117 *N.J.* 138 (1989).

I place limited weight on T.J.'s ability to accurately perceive, remember and relate certain details surrounding the August 2, 2000 incident (*e.g.,* the number of students in the class that day, Mr. O'Neill's arrival when T.J. was leaving with another teacher, his observation of Prinzo approximately 5 minutes later in the locker room) (*see* e.g., T.J. at TII 103, 106, 112-113, 115-116, 121, 123). This testimony was at odds with other evidence in the record, which is essentially undisputed, including the timeline of events that morning (*e.g.,* the time of Ms. Schulte's tour, Mr. O'Neill's arrival). The ability of a student to recall such specifics with precision was not, in my view, unreasonable and did not distract from the truthfulness of T.J.'s testimony as to the critical facts; namely, T.J. did not show the videotape to Prinzo and did not secure Prinzo's permission to watch it during the class. Although Ms. Lobosco testified that, on or about August 3, 2000, T.J. orally told her that he had brought the videotape to class and Prinzo allowed him to watch the film (Lobosco at TIII 206, TIV 12-14, 27-28), the absence of corroborating evidence regarding this alleged statement by T.J., including

the lack of reference to any such advice in the discovery responses certified by Lobosco in February 2001 (R-87 to R-90; see Lobosco at TIV 13-20, 23-25), significantly impairs the weight to be given to such testimony. I further found this testimony materially less persuasive than T.J.'s unequivocal and credible sworn testimony at the hearing.

In judging the credibility of the witnesses, I found Prinzo's testimony as to the events that transpired on August 2, 2000 to be extremely detailed, cogent and having a "ring of truth." Prinzo did not attempt to sidestep the fact that the "Belly" videotape apparently had been viewed by the students during his class and the inappropriateness of the movie in an educational environment.

Based upon a consideration of the totality of the testimonial and documentary evidence presented, and having had the opportunity to observe and assess the credibility of the witnesses who testified, I **FIND** the following **FACTS**:

1. PCTI is the vocational high school of Passaic County. Beyond its technology/vocational component, PCTI also provides a rigorous academic curriculum for approximately 2000 day students and an adult and evening program servicing approximately 3000 additional students (Lobosco at TIII 156-157; DiGise at TII 159).[2]

2. The PCTI Summer Workforce Program is a six-week program sponsored by the Workforce Investment Board that is made available to approximately 120-130 PCTI students. During the summer of 2000, the program ran from July 5 to August 11, 2000. Students must meet certain financial criteria to participate in the Program and be in need of academic remediation. Those who do participate receive a minimum wage salary for the school day. Students spend half the day

[2] The references designate the respective witness, day of the hearing (*e.g.,* I, II, III or IV) and transcript page.

involved in a technical/vocational area and the other half in academic courses (Bania at TII 84; Lobosco at TIII 179-181).

3. Diana C. Lobosco (Lobosco) is the Superintendent of Schools and Principal of PCTI. She has served as the Superintendent for five years and as Principal for an additional four years (Lobosco at TIII 154-155).

4. Joseph M. DiGise (DiGise) has been employed at PCTI for twenty-nine years, seven years of which have been in his current Assistant Principal position. DiGise's responsibilities as Assistant Principal include, among others, overseeing the daily operation of the school, implementing curriculum and discipline issues that arise and evaluating instructional staff (DiGise at TII 158-159).

5. Dr. Kent Bania (Bania), employed at PCTI for twenty-eight years, is the Supervisor of Adult Continuing and Apprentice Education. During the summer of 2000, he also supervised the Summer Workforce Program and had the responsibility for issues relating to the instructional content of the Program (Bania at TI 203; Lobosco at TIII 171; Prinzo at TIII 86; Easton at TIV 73).

6. Elizabeth Schulte (Schulte), a PCTI employee for twenty-three years, has served in her current position as a guidance counselor for approximately fifteen years (Schulte at TI 27-28).

7. Mark O'Neill (O'Neill) has been a mathematics teacher at PCTI for approximately four years and taught this subject in connection with the 2000 Summer Workforce Program (O'Neill at TIII 116, 118-119).

8. William Easton, employed at PCTI for seven years, is a guidance counselor and served in this capacity during the 2000 Summer Workforce Program (Easton at TIV 47-48).

9. Ms. C., a parent of a prospective student, toured Prinzo's T.V. Production class on August 2, 2000.

10. T.J., who is seventeen years of age, was a student in Prinzo's T.V. Production class during the 2000 Summer Workforce Program. T.J. brought the "Belly" videotape to class on August 2, 2000 (T.J. at TII 97, 99, 101).

11. On August 2, 2000, at approximately 9:30 a.m., Schulte interviewed a prospective female student and her mother (Ms. C.) in Schulte's PCTI office (Schulte at TI 36-38; Ms. C. at TII 133-134). Schulte's duties as guidance counselor entail, among others, evaluating applications of prospective students. Schulte had been charged by her supervisor, William Betar (Betar), the director of student personnel services, with the responsibility of providing tours of the PCTI facility, when requested, in connection with the admission process (Schulte at TI 29-31).

12. The district has no policy that restricts tours by potential students, parents and the like to periods when the instructional process is not underway in the classroom (Lobosco at TIV 25-26). Teachers at PCTI are not required to be given advance notice that a tour will take place in their classroom and, according to Lobosco, teachers are well aware of the fact that on any given day such tours or other visitors may come through their classroom (Lobosco at TIV 28-29).

13. The prospective student and parent met in Schulte's office for approximately ten minutes during which they discussed, among other things, the student's interest and experience in the T.V. Production field (Schulte at TI 40, 174; Ms. C. at TII 134, 142-143). The parent requested to see the T.V. Production studio (Ms. C. at TII 135). Schulte brought the student and parent to the T.V. Production classroom where they arrived at approximately 9:40 a.m. (Schulte at TI 41-43, 173-175; Prinzo at TIII 18-19, 56; P-1; P-21).

14. The T.V. Production classroom, known as Room B-206, includes two adjacent editing rooms (P-5, P-8 to P-11), designated on the floor plan as offices of 87 square feet each and denoted, for purposes of the hearing, as the "yellow" and "blue" offices (P-2). Each editing room is situated within a larger classroom. These adjacent larger rooms were similarly referred to and designated for purposes of the hearing as the "yellow" and "blue" classrooms. The "yellow"

classroom (P-6; P-8) is approximately 654 square feet and the "blue" classroom (P-13 to P-15) is approximately 1112 square feet (P-2). There is a doorway between the "yellow" and "blue" offices (P-5), a doorway between the "yellow" and "blue" classrooms near a platform area located within the outer "blue classroom" (P-12; P-15) and a doorway leading from the "blue office" into the main "blue classroom" (P-7).

15. The time of Schulte's arrival (approximately 9:40 a.m.) fell within Period 2 of the 2000 Summer Workforce Program Master Schedule (R-6). Prinzo was assigned to teach T.V. Production during Period 1 (8:00 a.m. to 8:55 a.m.), Period 2 (9:00 a.m. - 9:55 a.m.) and Periods 4-6 (11:35 a.m. to 2:30 p.m.). The Summer Workforce Master Schedule provided for Prinzo to be relieved of his duties by O'Neill during Period 3 (10:00 a.m. to 10:55 a.m.).

16. Schulte, the parent and the prospective student entered the T.V. Production studio through the door leading into the "yellow classroom" (Schulte at TI 51-52, 65; P-2; P-3). Upon entering the classroom, they walked down a corridor (P-4) to the doorway of the "yellow office" (P-5) where they were met by Prinzo who came from within the "yellow office." Prinzo, Schulte, the prospective student and her mother engaged in a discussion while in the "yellow" corridor area (P-4) outside the "yellow office." That discussion generally included introductions, the student's prior experience and the availability (or lack thereof) of a space in Prinzo's T.V. Production class for the Fall semester and lasted for approximately five minutes (Schulte at TI 55-57, 67-69, 162-164; Prinzo at TIII 21, 44-47).

17. Although Schulte testified that, during the course of this dialogue, Prinzo told the student "honey, if you want to come to Passaic County Tech and you want to major in this shop, I'll throw one of my bums out" (Schulte at TI 70), I **FIND** the strength of this testimony significantly overborne by the credible testimony of the student's parent and Prinzo, and the persuasiveness of such testimony impaired by the absence of any reference to this alleged statement in the report prepared by Schulte (P-1) within hours of the incident. In this regard, the student's parent testified that she would have been surprised if the words were spoken and

opined that she would have remembered them (Ms. C. at TII 146), and Prinzo unequivocally denied uttering the remark (Prinzo at TIII 47).

18. Following the approximate five-minute discussion in the corridor, the parties proceeded into the "yellow office" (P-5; P-8). In the "yellow office," Prinzo engaged in a discussion regarding the program including the equipment used, and showed or demonstrated to the prospective student the different types of equipment located in that editing room (Schulte at TI 72, 160-161; Prinzo at TIII 47-48). The participants remained in the "yellow office" for approximately two minutes (Schulte at TI 162, 164).

19. The parties then proceeded through the doorway (P-7) leading into the "blue office" (Schulte at TI 79, 86-87; Prinzo at TIII 50). The "blue office" includes glass panels which enable one to see out into the outer "blue classroom" where a platform area is located (P-10 to P-11). A large screen television was situated on or in front of the platform area within the "blue classroom" (P-13 to P-15) facing toward the direction of the "blue office" windows (Schulte at TI 168-169; T.J. at TII 129-130; Prinzo at TIII 23, 57).

20. From the "yellow office" Prinzo backed his way into the "blue office." The student, who was engaged in discussion with Prinzo, followed him into the "blue office" and was, in turn, followed by the parent and Schulte. The parent and Schulte observed Prinzo's discussion and/or were engaged in separate conversation between themselves (Prinzo at TIII 50-51, 99). At the time, the lights were on in the "blue office" and were off in the outer "blue classroom" area (Schulte at TI 87).

21. While in the "blue office" Prinzo, who according to Schulte was facing sideways in front of her, continued to engage in dialogue and show or demonstrate the different types of equipment located throughout the "blue office" (Schulte at TI 87, 144-145, 147-148, 160-161; Prinzo at TIII 51, 99-102). Prinzo engaged in this activity of showing the equipment in the "blue office" for approximately three minutes (Schulte at TI 148, 157-158, 164).

22. While in the "blue office" Schulte observed through the glass panel facing the outer darkened "blue classroom" a segment of a movie (later identified as "Belly") on the large screen television (Schulte at TI 87, 89-90, 101, 114-115, 139-140, 192-194). At the hearing, Schulte identified the brief scene observed by her which, based on the parent's testimony, was also witnessed by the parent and the prospective student. The scene can generally be described as depicting a male and female engaged in sexual activity on a bed and includes views of their naked buttocks and the female's partially naked breasts (Schulte at TI 90, 97, 101, 114-115, 190; Ms. C. at TII 137, 153, 155; P-16) (the "bedroom scene"). This scene is at a point that is 12 minutes and 25 seconds from the beginning of the movie (TI 190; P-16).

23. Although Schulte testified as to Prinzo's presence at the time of her observation (Schulte at TI 194), Schulte did not know whether Prinzo had looked out the glass window and was able to observe the movie (Schulte at TI 91). Consistent with her report (P-1), Schulte testified, and I **FIND,** that Prinzo at one point advised that the students were "watching a film" (Schulte at TI 90, 199). Prinzo did not tell Schulte, nor did Schulte hear Prinzo tell the parent or the prospective student, that the students were watching the film "Belly" (Schulte at TI 165-166, 200).

24. At no time during the tour did Schulte, the parent or the prospective student advise Prinzo, either by word or by gesture, that they had observed anything on the large screen television or had seen something that made them uncomfortable or they found inappropriate (Schulte at TI 90, 159-160; Ms. C. at TII 138, 145; Prinzo at TIII 56). During the tour, neither Schulte nor the parent observed Prinzo engage in any discussion with the students (Schulte at TI 170; Ms. C. at TII 152). Prinzo testified, and I **FIND**, that none of the students watching the large screen television in the "blue classroom" directed any comments or questions to him when he was giving the tour, during which Prinzo was engaged in discussion and/or demonstration of the equipment with the student, the parent and Schulte (Prinzo at TIII 56).

25. At one point Prinzo exited the "blue office" through the doorway into the outer "blue classroom." He walked around the corner of a smaller office in the "blue classroom" into the corridor of the "blue" area (away from the platform area) for purposes of turning on the lights in the outer "blue classroom" (Schulte at TI 92, 141-144; Prinzo at TIII 51-52). Although Schulte testified that Prinzo turned on the lights after she had observed the "bedroom scene" (Schulte at TI 90, 102), Schulte subsequently acknowledged her inability to state the exact point at which she observed the movie (*e.g.*, when being shown the equipment, when exiting the "blue office") (Schulte at TI 192-193,198-199). Schulte recalled exiting the "blue office" into the "blue classroom " area and that she did not enter the "blue classroom" as far as the platform area (Schulte at TI 104, 108-109, 141, 158, 164, 199). Similarly, neither the student nor the parent walked over to the area of the platform or television (Prinzo at TIII 54). It was Prinzo's recollection that, at the time he turned on the light switch, Schulte and the parent were in the doorway of the "blue office" and the prospective student had taken "a step or two out into the area in front of that office" where he and the student then continued their conversation (Prinzo at TIII 55).

26. It was when the lights were turned on by Prinzo that Schulte first observed students in the darkened "blue classroom" area. Schulte observed the upper portion of the bodies of between 3-6 students "come up" from a "lounging position" on a couch in the "blue classroom." The students looked toward Schulte and started laughing (Schulte at TI 103, 166-169).

27. After Prinzo's return from turning on the lights and short discussion with the student (Prinzo at TIII 55), and following Schulte's observation of the students, Schulte excused herself and the parties then began the process of exiting the "blue office" through the "yellow office" and into the "yellow" corridor outside the "yellow office" (Prinzo at TIII 54-55; Schulte at TI 103-104).

28. As the parties proceeded back through the "yellow office," Schulte observed Prinzo take a "Blockbuster" videocassette box from a shelf in the "yellow office" (Schulte at TI 155-156). Schulte's subsequent report of the incident recites that

"[w]e exited the class and Mr. Prinzo took out a 'Blockbuster' tape case" (P-1). Prinzo testified, and I **FIND**, that he did not take the "Blockbuster" videocassette box for purposes of placing the "Belly" tape in the box but, instead, the box was for another videotape that Prinzo had viewed at the request of a colleague (Prinzo at TIII 78-81; TIV 98; R-7; R-8).

29. In the "yellow" corridor, the parties exchanged greetings and the parent, student and Schulte exited through the "yellow" door (Prinzo at TIII 55).

30. The portion of the tour, beginning from when the parties left the "blue office" area after being shown the equipment to the point at the doorway in the "yellow" corridor, lasted approximately 3 to 6 minutes (Schulte at TI 159, 164).

31. The entire tour, beginning from when the parties first met Prinzo to when they left his presence, transpired over a period of approximately 13-16 minutes (per Schulte) or 15 minutes (per Prinzo) (Schulte at TI 165, 182; Prinzo at TIII 81). Utilizing the approximate 9:40 a.m. arrival time, the tour ended at approximately 9:55 a.m.

32. After leaving the T.V. Production classroom, Schulte, the parent and the prospective student returned to Schulte's office. They summarized the interview for approximately 5-10 minutes without any discussion as to what had been seen on the large screen television (Schulte at TI 111-112; Ms. C. at TII 138-139). Although the prospective student ultimately did not attend PCTI in the 2000 Fall semester, the basis for that decision was unrelated to the incident (Ms. C. at TII 140-142).

33. After the parent and the student left PCTI, Schulte had a conversation with her supervisor, Betar, in the secretarial area of the guidance office where Schulte had been talking to a secretary. Schulte told Betar that when she went into Prinzo's classroom "the students were watching a porno film." Schulte advised Betar that she "personally have [sic] not seen porno films, however, this must be one of them" (Schulte at TI, 112, 114-116, 177).

34. The "Belly" movie can be generally described as an R-rated movie concerning urban youths involved in the drug culture and the efforts of some of the youths to leave that culture. The movie includes violence, profanity, the brief "bedroom scene" and nudity (P-16).

35. During the 2000 Summer Workforce Program, O'Neill was scheduled to teach mathematics in the PCTI Rocco Building for Periods 1 (8:00 a.m. to 8:55 a.m.) and 2 (9:00 a.m. to 9:55 a.m.) and to "cover" Prinzo's classroom for Period 3 (10:00 a.m. to 10:55 a.m.) (R-6). In connection with this "cover" period, O'Neill relieves Prinzo of his classroom duties. His primary function is to monitor discipline while the students continue the projects assigned to them by Prinzo (O'Neill at TIII 120-121; Prinzo at TIII 17-18, 63-64).

36. On August 2, 2000, O'Neill arrived at Prinzo's classroom at approximately 10:00 a.m. (O'Neill at TIII 124). Schulte and the visitors had already left by the time of his arrival. Although Prinzo opined that O'Neill arrived either when Schulte was leaving or shortly thereafter (Prinzo at TIII 23, 31, 82), O'Neill credibly testified, and I **FIND,** that he did not observe Schulte near the T.V. Production studio and, in turn, Ms. Schulte did not recall seeing O'Neill (O'Neill at TIII 147; Schulte at TI 175).

37. Upon his arrival, O'Neill observed Prinzo seated in the "yellow office" (O'Neill at TIII 123-124.) They had a brief conversation during which Prinzo told O'Neill that the students were "watching a movie" (he did not identify the movie as "Belly") (O'Neill at TIII 124-127, 150, 153). Shortly after O'Neill's arrival, Prinzo left on his break (Prinzo at TIII 34).

38. O'Neill went to the doorway by the desk area of the "yellow classroom" that looked into the "blue classroom" by the platform area (P-12; P-13). O'Neill either "stepped" into the "blue classroom" or "stuck" his head through the doorway. As he did, O'Neill observed approximately 3-4 students sitting in the dark in front of the large screen television watching a movie. O'Neill watched the movie for approximately one minute and then went to the desk in the "yellow classroom"

(P-6) to work on math problems. Throughout this period, the lights in the "blue classroom" remained off and O'Neill could hear the movie soundtrack through the open doorway including "four letter words" and noises suggesting firearms (O'Neill at TIII 127-134, 137, 139-140, 142). O'Neill did not view hearing profanity in a movie that he believed the students had been allowed to watch as "unusual" and he did not observe anything about the movie that troubled him (O'Neill at TIII 136).

39. At approximately 10:05 a.m., Betar and Schulte reported the incident to DiGise (DiGise at TII 163, 192-194; Schulte at TI 116; P-21). DiGise contacted Bania, who came to DiGise's office, and DiGise apprised him of the situation (DiGise at TII 163, 192-193; Bania at TI 211-212). DiGise also reported the information to Lobosco who instructed that DiGise and Bania pursue an investigation (*e.g.,* interview the students, retrieve and view the film) and report back to her (Lobosco at TIII 182; DiGise at TII 164).

40. Prior to taking lunch Schulte was directed by Betar, in the presence of DiGise, to prepare a report of the incident. As directed, Schulte prepared a written incident report (Schulte at TI 116-120, 149-151, 177; P-1).

41. Bania left DiGise's office and went to the T.V. Production classroom for purposes of speaking to the students who had viewed the movie (Bania at TI 211-213, TII 69). The evidence as to the time of this encounter reveals that, and I **FIND**, Bania went to the T.V. Production studio after the reporting by Schulte and Betar (at approximately 10:05 a.m.), Bania's subsequent contact with DiGise and during the time that O'Neill was scheduled to cover, and was in fact covering, Prinzo's class (*i.e.,*10:00 a.m. to 10:55 a.m.). O'Neill testified, and I **FIND**, that he had been at the desk in the "yellow classroom" approximately 15 to 30 minutes (which would be in or around 10:15 a.m. to 10:30 a.m.) at the time of Bania's arrival (O'Neill at TIII 139-140). Based upon O'Neill's unequivocal and credible testimony as to his presence at this time, which is consistent with the timeframe of the events and corroborated by Prinzo's testimony that he did not see Bania before 11:30 a.m. in the cafeteria area (Prinzo at TIII 66), I **REJECT**

Bania's testimony that Prinzo was near the desk area in the "yellow classroom" when he arrived to remove the students.

42. Bania appeared to O'Neill to be agitated (O'Neill at TIII 141). Bania observed that the large screen television was on (Bania at TII 218; TIII 8-9). The lights in the "blue classroom" were then turned on, the movie was stopped and Bania instructed the three students in the "blue classroom" who had been watching the movie to come with him (O'Neill at TIII 141-143; Bania at TI 215, 218, 222). Bania brought the students to DiGise's office area to be questioned (O'Neill at TIII 143; DiGise at TII 164-165; Bania at TI 218-192, TII 54, 69).

43. O'Neill credibly testified, and I **FIND,** that he followed Bania and the students to DiGise's office, he observed the students enter the office, DiGise told O'Neill "this doesn't concern you" and, as a result, O'Neill left (O'Neill at TIII 143). I found O'Neill's testimony as to this encounter unequivocal, forthright and believable and I **REJECT** the testimony of Board's witnesses to the extent that it suggests otherwise. Neither Bania, DiGise nor Lobosco spoke with O'Neill (or could recall speaking with him) concerning what transpired during the time he was assigned to the classroom (O'Neill at TIII 146, 148-149; Lobosco at TIII 190, 216; DiGise at TII 197-198; Bania at TII 67, 70). Before the day on which O'Neill testified at the hearing, Lobosco had no knowledge of what O'Neill knew about the incident in the classroom (Lobosco at TIII 216). Similarly, DiGise testified as to his unawareness of whether O'Neill had any responsibilities on August 2, 2000 with regard to the delivery of instruction in Prinzo's classroom (DiGise at TII 202).

44. In the conference room by DiGise's office, the three students (D.M., E.C. and D.G.) were questioned in the presence of one another. No written statements were requested from the students. From this discussion it was learned that the students had viewed the "Belly" videotape in Prinzo's classroom, the tape was still in the "blue classroom" and it had been brought in by another student (T.J.) (DiGise at TII 165-170, 199-200; Bania at TII 69, 76-77; TI 219, 222). DiGise's subsequent report to Lobosco further recites that when DiGise asked if Prinzo "gave them permission to watch this film" E.C. "responded 'Yes'" (P-21). While

not reflected in his report, DiGise testified that the other student(s) also nodded which DiGise understood to mean that the student(s) agreed with E.C.'s advice (DiGise at TII 166-167, 170, 199).

45. Bania left the conference with one of the students (D.M.) to retrieve the video from the T.V. Production studio (DiGise at TII 169-70; Bania at TI 220, 222-224, TII 6, 9-10, 68). At the time of his arrival, the movie was not in play on the screen (Bania at TII 9) and O'Neill was in the classroom (or its immediate vicinity) (O'Neill at TIII 144-146; Bania at TII 7, 17, 72).

46. After Bania and the student returned to DiGise's office, the students were released. DiGise and Bania then spent the next hour to hour and a half viewing the "Belly" videotape in its entirety (DiGise at TII 171-172, 203-204; Bania at TII 19-21, 78, 80, 82).

47. Subsequent to the viewing of the movie by DiGise and Bania, DiGise contacted Betar for purposes of having Schulte report to the conference room. DiGise requested Schulte to view a portion of the movie. This meeting transpired after Schulte's lunch in the presence of Betar. In connection therewith, DiGise had queued the film to the "bedroom scene," believing that it signified the portion of the movie observed by Schulte in Prinzo's classroom. During Schulte's viewing of this portion, which lasted for a few minutes, Schulte identified it as the scene (Schulte at TI 93-94, 120-121, 178-180; DiGise at TII 174-176, 204-205). Before her viewing at the hearing, Schulte had not seen the portion of the movie prior to the "bedroom scene" (Schulte at TI 115, 121-122, 180-181).

48. After releasing Schulte and Betar, DiGise forwarded the videotape to Lobosco. DiGise authored a report to Lobosco (P-21), the substance of which DiGise orally discussed with Lobosco when he provided the film, and his written report was given to Lobosco the next day (DiGise at TII 176). The video was queued up to the "bedroom scene" and viewed by Lobosco who then viewed the videotape from its beginning up to this scene (Lobosco at TIII 184, 185; Easton at TIV 54).

49. Based on their respective viewings of the "Belly" movie, Lobosco, DiGise and Bania found the film to be inappropriate for an educational setting (Lobosco at TIII 197-198; DiGise at TII 173; Bania at TII 22-23). Similarly, based on Prinzo's viewing of the 12-14 minute portion of the movie at the hearing, Prinzo "absolutely" agreed that it was inappropriate to be shown at PCTI (Prinzo at TIII 33).

50. PCTI has a written procedure regarding "The Use of Videos" by a teaching staff member in classroom instruction (P-27). In general, it requires the teacher to submit a form at least two weeks prior to the planned use of the video setting forth, among other things, the title of the video and the rationale for its use. This information is then subject to review and approval by a supervisor. The PCTI Faculty Manual, which is available on the PCTI website and previously had been provided to all teaching staff members, also includes a section addressing "Request for A.V. Equipment/VCR" (DiGise at TII 179-181; Bania at TI 38-39; P-24). I **FIND** that the written video procedure, along with the PCTI Faculty Manual, were in force and effect during the Summer Workforce Program (see Lobosco at TIII 169-171; O'Neill at TIII 119; Bania at TII 34-35; DiGise at TII 185-186) and **REJECT** the testimony of Prinzo and Easton to the extent it suggests otherwise. Prinzo did not obtain approval from Bania for the use of any video during the Summer Workforce Program and Prinzo did not complete a request for approval to use the "Belly" movie (Bania at TII 36-37; Prinzo at TIII 33, 34).

51. Prinzo first learned of an incident involving his class at 11:30 a.m. on August 2, 2000. Bania met Prinzo in the cafeteria area when Prinzo was picking up his afternoon students. Bania inquired whether Prinzo had knowledge of an incident that occurred in his classroom that morning and, when Prinzo indicated he did not, Bania relayed that he thought some students might have been watching an inappropriate film (Prinzo at TIII 16, 65).

52. At the commencement of Prinzo's morning class on August 2, 2000, there were seven students in class (Prinzo at TIII 42).

53. Subsequent to 9:30 a.m. and before Schulte's arrival at approximately 9:40 a.m., four students (T.J., R.E., M.J. and K.W.) left the T.V. Production studio to accompany a teacher, Mr. Iurato, on another project (T.J. at TII 104-105, 114; Prinzo at TIII 12-13, 43, 87).

54. Prior to Schulte's arrival that morning, the students had been engaged in independent editing activities. The three remaining students in the class (D.G., E.C. and D.M.) were involved in this activity. In this regard, a portion of Prinzo's curriculum included watching a videotape of a championship football game that PCTI had played against Union Hill in Giants Stadium. The students watched this film essentially on a daily basis during the Summer Workforce Program and also were involved in the project of editing clips of the video and creating highlight films. This editing process could occur in the editing rooms (*i.e.*, the "blue" and "yellow" offices) or the "blue classroom" in which the platform and large screen television are located. Prinzo had checked the students and observed them engaged in this activity with the championship football film between 9:30 a.m. and Schulte's arrival at approximately 9:40 a.m. (Prinzo at TIII 28, 37, 39-40, 61-62, 64-65, 88-89, 108-110).

55. T.J. testified that, although he did not remember the exact time that the "Belly" videotape began playing, he viewed the movie (which was started at the beginning) on the large screen television for approximately two minutes before he left with Mr. Iurato, during which time Prinzo was at his desk in the "yellow" area and the door to his office was closed (T.J. at TII 103-105, 124-128).

56. After the students left with Mr. Iurato and before Schulte and her guests arrived, Prinzo had been cleaning up from the class' earlier activities in the "yellow office" (Prinzo at TIII 21, 44-45, 91-92). The three remaining students in Prinzo's class were in the "blue classroom" area when Schulte arrived. The "blue classroom" is not visible from within the "yellow office" (P-8).

57. It is physically impossible to observe all areas of the T.V. Production classroom from any single point (Prinzo at TIII 58-59; Lobosco at TIII 175; P-2). Part of the instructional process in Prinzo's class entails students working on projects, such

as the editing activity described above, independently with one another at various stations located throughout the classroom without hands-on instruction from Prinzo (Prinzo at TIII 58, 60, 63, 108).

58. T.J. credibly testified, and I **FIND**, that he brought in the "Belly" videotape to Prinzo's class on August 2, 2000. He did not show it to Prinzo. He did not ask Prinzo's permission to watch it. Prinzo did not watch the video in T.J.'s presence and T.J. did not hear words by Prinzo to the effect that it was alright to watch the "Belly" movie (T.J. at TII 101-102, 109, 120). In this regard, T.J. testified "I was messed up from bringing the tape in by accident" and "I shoulda asked him before we popped it in and looked at it. . . ." (T.J. at TII 108, 109).

59. Prinzo credibly testified that, and I **FIND**, although he was aware that between 9:30 a.m. and 10:00 a.m. (when he left on break) the students were watching something on the large screen television in the darkened "blue classroom" (Prinzo at TIII 13-14, 20-21), he had no knowledge of the "Belly" film being viewed. Prinzo testified, and I **FIND**, that no student asked his permission to watch the "Belly" movie. He did not observe the "bedroom scene" during the tour. He did not look out the windows in the "blue office." He did not observe what was on the television screen from the time of Schultz's arrival to his departure on break. He did not hear the movie soundtrack. Rather, during this period, it was Prinzo's belief that the students were involved in the editing activities previewing the championship football game videotape (Prinzo at TIII 11, 20-21, 27-28, 33, 37-38, 51, 53, 57, 79, 102, 110). Prinzo testified that at the time of the tour his "concern wasn't heightened about what they [the students] were doing" and he "assumed they were continuing to do what [he] had observed them doing earlier" (Prinzo at TIII 103).

60. At the 11:30 a.m. cafeteria encounter on August 2, 2000, Bania requested Prinzo to write a statement about what occurred in the classroom that morning. When Prinzo asked Bania how he could write a statement about something that he had no knowledge of, Bania requested Prinzo to write a statement about the parent/student tour with Schulte (Prinzo at TIII 66-67).

61. Bania later came to Prinzo's classroom at approximately 12:30 p.m. - 1:00 p.m. inquiring about the status of the statement (Prinzo at TIII 67-69).

62. Bania returned to Prinzo's classroom for the statement approximately twenty minutes later. Prinzo provided a written statement to Bania (P-32), and Bania left. Bania returned shortly thereafter and asked Prinzo to sign the statement (Prinzo at TIII 69-71; Bania at TII 60-62, 90-91).

63. Bania returned to Prinzo's classroom at approximately 2:00 p.m. and requested a copy of Prinzo's lesson plans for the summer program which Prinzo furnished (Prinzo at TIII 71-72; Bania at TII 62-63). On the same day, Lobosco had questioned Easton concerning whether teachers in the summer program were required to submit lesson plans and the procedure vis-à-vis showing videos in the classroom (Easton at TIV 52-54).

64. Prior to meeting with Prinzo, Lobosco had received Schulte's statement, along with an oral report from DiGise, and viewed the "Belly" excerpt. Lobosco's purpose for the conference was to "listen to what he [Prinzo] had to say about the incident. . . ." Inasmuch as Lobosco believed that discipline was "at least a realistic possibility," she directed Bania to notify Prinzo of his right to have a union representative present (Lobosco at TIII 186-188, 190-191, 204, 207-208).

65. At approximately 2:30 p.m., Bania advised Prinzo of the need to see Lobosco. Prinzo was also advised prior to the conference of the need for a union representative (Prinzo at TIII 72-73; Bania at TII 63-64).

66. The conference with Prinzo transpired at approximately 2:30 p.m. on August 2, 2000. It was attended by Lobosco, Bania, Prinzo, his union representative and Lobosco's administrative assistant who took notes of the meeting as memorialized in a report prepared by her (P-26) (Lobosco at TIII 189-190, 192-194). The conference began by Lobosco reading Schulte's written statement (P-1) to Prinzo and Lobosco then asked Prinzo six questions which he answered (Lobosco at TIII 195-196; Prinzo at TIII 75-78). As memorialized, Prinzo denied that he brought the "Belly" film into his class. He further indicated that the

bringing in of films by students is "not encouraged or suggested;" as part of his lesson, Prinzo uses "pieces of film to use affects"; "[w]e were preparing for break" when Ms. Schulte arrived; he "didn't see what the students were watching;" and his "assumption was - based on the time, break time - that students were watching clips of the championship football game, which they've watched every other day" (P-26). Lobosco read a letter to Prinzo (P-25), which she previously had prepared, informing him that she was terminating Prinzo's employment in the Summer Workforce Program effective immediately for conduct unbecoming a teacher, suspending Prinzo from his coaching duties and suspending Prinzo, with pay, from his teaching duties for the upcoming 2000-2001 school year pending Board action scheduled for August 29, 2000 (see Lobosco at TIII 198-199, 207). Prinzo gathered his belongings and left the premises (Prinzo at TIII 77).

67. Easton was directed by either DiGise or Bania to meet with the students in Prinzo's morning shop class to determine what had occurred (Easton at TIV 55-56; Bania at TII 52-53). In or around 8:00 a.m. on August 3, 2000, Easton met with approximately five students, including T.J. and E.C., in the school cafeteria (Easton at TIV 55-59). Easton testified that the students told him, among other things, that they did not have Prinzo's permission to watch the video and identified T.J. as the student who had brought it to class (Easton at TIV 60-62). Easton debriefed Bania of this meeting with the students, including the information conveyed as to O'Neill's presence in the classroom (Easton at TIV 67-69).

68. On August 3, 2000, Bania dismissed T.J. from the Summer Workforce Program (Bania at TII 27-28, 30; P-17). Subsequent to an appeal by the student's parent, Lobosco reinstated T.J. after a two or three day suspension (Lobosco at TIV 12-13, TIII 205-206; Bania at TII 30-31, 87-89).

69. At its public meeting on August 29, 2000, the Board unanimously voted to continue Prinzo's suspension with pay (P-18). After the Board determined to certify the tenure charges and suspend Prinzo without pay, he received no salary

for one hundred twenty (120) calendar days in an approximate amount of $29,719.20 (*i.e.,* 2000-2001 year salary of $74,298 divided by 10 months multiplied by 120 days) (see Lobosco at TIV 8-10; R-2).[3]

DISCUSSION AND CONCLUSIONS OF LAW

The legislative design of the statutory tenure provisions is "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. Borough of Prospect Park Board of Education,* 5 *N.J. Super.* 215, 218 (App. Div. 1949). Tenure protects competent and qualified teachers during good behavior and guards them against "dismissal for 'unfounded, flimsy or political reasons.'" *Spiewak v. Rutherford Board of Education,* 90 *N.J.* 63, 73 (1982) (citation omitted). In furtherance of this objective, a tenured teacher shall not be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just cause," *N.J.S.A.* 18A:6-10, and only after compliance with the litany of procedural safeguards engrafted in the Tenure Employees Hearing Law. *N.J.S.A.* 18A:6-10 *et seq.*

The Board shoulders the burden of establishing the truth of the charges against Prinzo by a preponderance of the credible evidence. *Atkinson v. Parsekian*, 37 *N.J.* 143, 149 (1962). This forum has the duty "to decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." *Jackson v. Delaware, Lackawanna & Western Railroad Co.,* 111 *N.J.L.* 487, 490 (E & A 1933). Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" *Jaeger v. Elizabethtown Consolidated Gas Co.,* 124 *N.J.L.* 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, 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, 275 (1958). *See Loew v. Union Beach,* 56 *N.J. Super.* 93,

[3]Prinzo also did not receive pay for the remainder of the Summer Workforce Program (i.e., August 2 through 11, 2000) and a stipend for coaching in the 2000-2001 school year (see Lobosco at TIV 6-12; R-12). Prinzo's post-hearing brief (at p. 52, n. 4) states that these issues are the subject of separate grievance/arbitration proceedings which are being held in abeyance by agreement of the parties pending a determination of this matter.

104 (App. Div. 1959). Precisely what is needed to satisfy this burden necessarily must be judged on a case by case basis.

The Board charges Prinzo with conduct unbecoming a teacher based upon his alleged failure to follow proper procedures, as set forth in the written "Use of Videos" procedure (P-27), and his alleged failure to "properly supervise the students in his charge" through which Prinzo "allowed the students to view a sexually explicit video."

Conduct unbecoming a public employee has been described as an "elastic" phrase that includes "'any conduct which adversely affects the morale or efficiency'" of the public entity or "'which has a tendency to destroy public respect for . . . [public] employees and confidence in the operation of . . . [public] services.'" *In re Emmons*, 63 *N.J. Super.* 136, 140 (App. Div. 1960) (citation omitted). *See Karins v. City of Atlantic City,* 152 *N.J.* 532 (1998). Behavior rising to the level of unbecoming conduct need not be predicated upon a violation of any particular rule or regulation and may be based simply upon a violation of the implicit standard of good behavior. *City of Asbury Park v. Department of Civil Service*, 17 *N.J.* 419, 429 (1955); *In re Tuch,* 159 *N.J. Super.* 219, 224 (App. Div. 1978). In the context of a tenured teacher, the contours for dismissal set forth in *N.J.S.A.* 18A:6-10 have been found to provide a sufficient standard which, while "general in terms," when "measured by common understanding . . . fairly and adequately conveys its meaning to all concerned." *Laba v. Newark Board of Education,* 23 *N.J.* 364, 384 (1957). Succinctly stated, "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), *certif. den.* 65 *N.J.* 292 (1974). Such unfitness to remain a teacher may be demonstrated by a single incident, if sufficiently flagrant. *In re Fulcomer*, 93 *N.J. Super.* 404, 421 (App. Div. 1967); *Redcay v. State Board of Education,* 130 *N.J.L.* 369, 371 (Sup. Ct. 1943), *aff'd o.b.* 131 *N.J.L.* 326 (E & A 1944).

Preliminarily, this matter does not implicate the issue of whether the observed portion of the "Belly" movie rises to the level of pornography as described by Ms. Schulte or a teacher's right to show the film, due to its content, in an educational

setting. Rather, Prinzo readily acknowledges that it is not an appropriate movie to be shown to high school students in class.

Against this backdrop, the Board asserts, in its post-hearing brief, that Prinzo "deviated from the standard of conduct required of him as a teacher at PCTI in that he failed to follow procedure regarding the use of a VCR and video for instructional purposes" and, more particularly, Prinzo "failed to follow the above procedure when he allowed his summer program students to watch the film, *Belly."* See Post-Hearing Brief on Behalf of Petitioner Passaic County Technical Institute at 9, 10. The Board emphasizes that "[t]he use of videos for instructional purposes is an extremely sensitive topic" and the "VCR/video use policy is primarily a screening process used so that inappropriate material is not shown to students in the classroom." *Id.* at 9. The Board further contends that Prinzo "failed to supervise his students and further engaged in conduct unbecoming of a teacher in that his students were watching an inappropriate film while under his instruction." *Id.* at 12. In this regard, it is urged that "a responsible teacher would not have allowed such an R-rated video in the classroom setting," "a responsible teacher would have turned off the videotape after viewing the sex scene" and, "regardless of whether the students had respondent's permission to watch the movie, the *Belly* videotape should not have been playing in respondent's classroom on August 2, 2000 or on any other day." *Id.* at 12, 13. The Board avers that "[a]s a teacher, it was respondent's responsibility to be aware of his students' activities" and, "[a]lthough the production classroom is divided into two sections, respondent was nonetheless still held accountable for what his students were doing while under his instruction." *Id.* at 15.

The gravamen of Prinzo's position is that the "charge relating to an alleged failure to follow the video approval procedure is void" for want of "legally competent proof on which it can be concluded that Prinzo was aware the students were watching the video 'Belly,' let alone gave permission for them to do so." See Post-hearing Brief for Respondent at 52. With respect to the lack of supervision charge, Prinzo argues that "it ill-behooves the Board to assert that because of an administrative determination requiring him to cease the instructional process and to give a tour which resulted in

something unfortunate occurring while the tour was going on" he engaged in conduct unbecoming a teacher and/or failed to supervise the students. *Id.* at 53 (emphasis in original).

Based upon a careful review of the entire record, I **FIND** insufficient credible and legally competent evidence to support a conclusion that Prinzo either gave the students express permission to watch the "Belly" videotape during his class or, with knowledge that this activity was underway, he permitted it to continue. Although the evidence demonstrates the capability of Prinzo to view the television screen from a vantage point within the "blue office" had he looked out the windows (*e.g.,* as he was backing in, exiting the office, *etc.*), there is a lack of evidentiary support that Prinzo made any such observation. The record is further bereft of sufficient credible evidence to support a conclusion that Prinzo authorized the students to watch the "Belly" videotape or was aware of this activity during the tour or at any other time. No witness testified that they observed Prinzo view any portion of the "Belly" movie while present in the T.V. Production studio or that Prinzo looked out the "blue office" glass windows into the "blue classroom" area. Similarly, no testimony was presented to support a conclusion that the soundtrack of the movie could be heard during the tour or from within the "yellow office" where Prinzo was situated before the tour and at the time of O'Neill's arrival. The undisputed evidence also reveals that no student spoke to Prinzo throughout the entire period of the tour and its participants left without mentioning to Prinzo what they had observed on the television screen. I am unpersuaded that the testimony presented by Schulte and O'Neill as to Prinzo's advice vis-à-vis the students watching "a film" or "a movie" preponderates in favor of the conclusion that Prinzo knew that they were watching "Belly." The phraseology used by Prinzo can reasonably have more than one connotation and it is not necessarily inconsistent with Prinzo's testimony (and advice to the administration shortly after the incident) as to his belief that the students were watching the championship football game.

It is apparent that a critical underpinning of the Board's charges, to the extent that they impute knowledge to Prinzo or a deliberate action on his part, was premised on the belief that Prinzo had been at his desk in the "yellow classroom" within earshot

of the large screen television when Bania arrived. For the reasons previously expressed, I **FIND** that the evidence reveals otherwise. The charges in this regard are also founded to a substantial extent on the unsworn statement allegedly made by the student to DiGise during the course of his investigation on August 2, 2000 which, according to DiGise's testimony, was accompanied by the other student(s) signifying their assent. Apart from the absence of any reference in DiGise's report to the other student(s) nodding, none of the students questioned by DiGise testified at the hearing.

Hearsay evidence is admissible in administrative proceedings and "shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability." *N.J.A.C.* 1:1-15.5(a). However, notwithstanding its admissibility, "some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." *N.J.A.C.* 1:1-15.5(b). In the words of the New Jersey Supreme Court:

> [A] fact finding or a legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it.
>
> [*Weston v. State*, 60 *N.J.* 36, 51-52 (1972).]

See Clowes v. Terminex International, Inc. 109 *N.J.* 575, 599 (1988). In other words, under the residuum rule, I cannot rely solely upon hearsay, such as the student's unsworn statement, to support the charges in this matter. Rather, there must be some legally competent evidence in the record to support the ultimate finding of fact.

Beyond the inability to judge the veracity of the students involved in DiGise's meeting, the reliability of this evidence is highly questionable. The alleged advice

emanated after the students were removed from the classroom for questioning by the Assistant Principal and, thus, may have evidenced an attempt to avoid being called to task for the incident. The unreliability of this evidence is also demonstrated by the unequivocal sworn testimony of T.J., coupled with the testimony of Easton as to the significantly different information conveyed to him by the group of students (which included the one who allegedly made the remark to DiGise) the morning after the incident. Simply put, the only legally competent evidence regarding whether Prinzo gave the students permission to watch the movie consists of Prinzo's unwavering denial and T.J.'s corroborative testimony. In this regard, I found Prinzo's detailed recitation of the events during the morning hours of August 2, 2000 persuasive and believable.

The evidence adduced at the hearing gives rise to a reasonable inference that, at some point in time after Prinzo had observed the students engaged in the editing/viewing activity (*i.e.,* between 9:30 a.m. and Schulte's arrival at approximately 9:40 a.m.), the football tape was switched with "Belly." That T.J. did not remember watching the football video on August 2, 2000 (T.J. at TII 110-112) did not, in my view, undermine Prinzo's precise recollection and credible testimony that this activity occurred. As detailed above, T.J.'s testimony raises some doubt as to his ability to recall and relate the events that transpired in the classroom that morning and, given the timeline evidence presented in this case, it is reasonable to conclude that T.J.'s recollection as to the sequence and occurrence of certain events is not accurate.

Based upon the foregoing, I **CONCLUDE** that the Board did not sustain its burden of proving, by a preponderance of the credible evidence, that Prinzo failed to follow the video procedure and that the charge of conduct unbecoming a teacher premised on this basis should be **DISMISSED**. Although Prinzo did not submit a request or obtain approval as to the "Belly" videotape in accordance with "The Use of Video Procedure," this procedure governs situations when a teacher seeks to use a video as part of the instructional process. Notwithstanding the testimony regarding Bania's request for Prinzo's lesson plans, the Board did not introduce any lesson plans or other evidence to establish a pre-planned design on the part of Prinzo to utilize the "Belly" videotape as part of his curriculum. Beyond this, a violation of the video

procedure plainly hinges on a teacher permitting, through affirmative action or deliberate inaction, a videotape to be viewed during classroom time. For the reasons detailed, I **FIND** that the weight of the evidence does not support such a conclusion as to the "Belly" videotape and the credible evidence in the record demonstrates the opposite.

The Board further alleges, however, that Prinzo engaged in conduct unbecoming a teacher by failing to properly supervise his students through which Prinzo permitted the inappropriate activity to occur. This charge does not depend on whether Prinzo had knowledge of the activity or gave the students express permission to watch the film. In judging its validity, the evidence elicited concerning the timeline of events is instructive.

As detailed in the Findings of Fact previously made, Prinzo had observed the students at some point between 9:30 a.m. and Schulte's arrival at approximately 9:40 a.m., engaged in the editing/previewing activities. Ms. Schulte arrived at approximately 9:40 a.m. and the portion of the videotape witnessed by her through the "blue office" windows is 12 minutes and 25 seconds from the beginning of the movie. I am unpersuaded by Prinzo's argument that this evidence, coupled with Schulte's testimony regarding the duration of discussions at each location during the tour, proves that the videotape was only viewed by the students after the tour commenced. Schulte's testimony as to the time spent in each section of the classroom represented simply a reasonable estimate by her and the direct evidence from T.J. addressing this issue was that he watched approximately 2 minutes of the movie before leaving with Mr. Iurato. Although the exact moment in time that the students began watching the movie cannot be precisely ascertained, the evidence does lead to a reasonable conclusion that the students engaged in this viewing either immediately before the tour started or shortly after it was in progress. The movie then continued to be viewed by the students for the next approximate 20 minutes until Prinzo was relieved by O'Neill. While at that juncture the students were no longer under Prinzo's charge, this activity continued during a portion of O'Neill's "cover" period and until Bania's appearance at approximately 10:15 a.m. to 10:30 a.m. Accordingly, the issue essentially boils down to whether Prinzo failed to properly supervise the students during the period commencing from after the

point that Prinzo had checked on the students (between 9:30 a.m. and approximately 9:40 a.m.) and until such time as Prinzo was relieved of his duties by O'Neill (at approximately 10:00 a.m.), and whether any such dereliction rises to the level of conduct unbecoming a teacher warranting disciplinary action.

It is initially observed that this case is markedly distinguishable from a situation where a teacher consciously and deliberately exposes his/her students to inappropriate material. *See e.g., In the Matter of the Tenure Hearing of William Lee Johnson,* 1979 *S.L.D.* 267 (holding that teacher exhibited unbecoming conduct by allowing his 12th grade class to view a film, which included a scantily-clad female, brought in by a student after the student had described its content and by failing to stop the film when its content became evident and imposing a penalty of loss of 120 days' pay). The instant matter also does not involve unbecoming conduct premised on a teacher physically leaving a classroom unattended. *See e.g., In the Matter of the Tenure Hearing of Alan S. Tenney,* 1983 *S.L.D.* 836 (holding that teacher failed to properly and adequately supervise a student who the teacher placed outside the classroom for disciplinary reasons and also left his classroom unattended for 23 minutes warranting a loss of three months' salary); *In the Matter of the Tenure Hearing of Lorraine Sondey,* 1975 *S.L.D.* 652 (teacher charged with leaving her class unattended and unsupervised on approximately 218 occasions); *In the Matter of the Tenure Hearing of Sally Williams,* 1973 *S.L.D.* 464, *aff'd* State Board of Education, 1974 *S.L.D.* 1437, *aff'd* New Jersey Superior Court, Appellate Division, 1975 *S.L.D.* 1162 (teacher left classroom unattended and unsupervised).

Although Prinzo did not leave the T.V. Production classroom, his mere physical presence does not *per se* equate with proper supervision of the students. *See In the Matter of the Tenure Hearing of Victoria Jakubiak,* EDU 3961-97, Initial Decision (December 22, 1998), adopted, Commissioner (February 11, 1999) <http://lawlibrary.rutgers.edu/oal/search.html> (finding that respondent left student unattended in an area of the library and substantially unsupervised warranting a forfeiture of one month's pay). *See* also *Black's Law Dictionary* 1452 (7th ed. 1999) (defining "supervision" as "[t]he act of managing, directing, or overseeing persons or

projects"). The T.V. Production studio is undeniably not the typical classroom setting. Its size and layout do not enable one to observe all parts of the classroom at any given time. However, this does relieve a teacher of his/her duty to properly supervise the students, whether they are situated in the "blue" or "yellow" rooms and irrespective of whether or not the students are believed to be engaged in independent activities, by continually circulating throughout the entire classroom.

Based upon a review of the evidence, I **FIND** that Prinzo left the three students unattended in the "blue classroom" and substantially unsupervised for an approximate period of 20-30 minutes. The evidence discloses that, subsequent to Prinzo's observation of the students between 9:30 a.m. and 9:40 a.m., he took no meaningful effort before leaving on break (approximately 20-30 minutes later) to supervise the activities of these students. Had he done so, Prinzo would have clearly recognized that the videotape being viewed by them did not involve football. Prinzo's shortcomings in failing to properly oversee, supervise and make himself aware of the activities of the students in his care are not vitiated by the tour. While this activity is a mitigating factor in the equation and appears to have consumed the majority of the time that the students watched the film, it does not discharge Prinzo of his primary responsibilities as a teacher. The conducting of the tour further does not explain the reason why Prinzo plainly did not monitor the students' activities upon Schulte's arrival knowing that his full attention to them would be soon diverted and did not take measures during the tour (*i.e.,* from the "blue office" or the "blue classroom") to observe the students' activities which would have disclosed the content of the videotape playing on the screen. And, after the tour was concluded, Prinzo left the students unattended in the "blue classroom" and substantially unsupervised as evidenced by the continuation of the videotape, notwithstanding that Prinzo had not checked on them for an approximate 20-30 minute period and O'Neill would be essentially monitoring their discipline (versus the instructional activities) for next approximate hour. Simply put, it is clear from a review of the record that for an approximate 20-30 minute period Prinzo took no meaningful actions to make himself aware of what the students were watching on the large screen television and ensure that the students were engaged in appropriate instructional activities.

Based on the foregoing, I **FIND** and **CONCLUDE** that the Board has proven, by a preponderance of the credible evidence, that Prinzo left the three students essentially unattended in the "blue classroom" for an approximate 20-30 minute period and failed to properly supervise the students which, in turn, lead to their viewing of an inappropriate movie during classroom time. I further **FIND** and **CONCLUDE** that through these actions Prinzo engaged in conduct unbecoming a teacher warranting disciplinary action.

Unquestionably, a teacher holds a sacred position demanding public trust and, as such, they are held to a high standard against which their conduct is to be measured:

> [Teachers] are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal. Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling.
>
> [*In the Matter of the Tenure Hearing of Jacque L. Sammons,* 1972 *S.L.D.* 302, 321.]

Succinctly stated, Prinzo displayed poor judgment and an indifference to the needs of his students by leaving them unattended and substantially unsupervised in the "blue classroom." This conduct falls short of the high standard of conduct expected of a teacher.

The only remaining issue concerns the appropriate penalty under the circumstances. Focusing on the nature of Prinzo's dereliction on August 2, 2000, the Board seeks his dismissal. Without condoning Prinzo's poor judgment and lack of attentiveness with regard to the students entrusted to his care, I am persuaded that

dismissal is an unduly harsh penalty to impose under the circumstances presented. Relevant considerations to be balanced in the equation of whether dismissal or something less is appropriate include the nature and gravity of the teacher's offense, the context in which it arose, the impact on the teacher's career and the harm or injurious effect the conduct "may have had on the maintenance of discipline and the proper administration of the school system." *Fulcomer, supra*, 93 *N.J. Super.* at 421-422.

There are several factors present in this case which mitigate in favor of a penalty less than dismissal. The charge involves a single incident that transpired over a relatively *de minimis* period of time. Prinzo's actions cannot be said to be "premeditated, cruel or vicious." *In re Fulcomer, supra*, 93 *N.J.* at 421. Rather, the record supports a conclusion that Prinzo's actions evidence misguided judgment. I give weight to the fact that Prinzo was at all times physically present in the room and during a substantial portion of this timeframe Prinzo was actively engaged in conducting the tour which undeniably compromised his ability to provide undivided attention and supervision to the students. In addition, the presence of the videotape in the classroom along with its viewing were not precipitated by Prinzo but through the apparent intervening actions of the students (*i.e.,* switching of the videotape). The videotape viewing also did not cease sooner, in part, because the participants on the tour did not make their observations known to Prinzo. And, there is an absence of evidence to support a conclusion that Prinzo's actions had any lasting effect on the operation of the school or the students involved. Based upon a consideration of the totality of the circumstances presented, I **CONCLUDE** that a loss of salary for a period of thirty (30) days is a reasonable discipline regarding this charge.

ORDER

It is hereby **ORDERED** that the charge of conduct unbecoming a teacher pertaining to the video procedure be and hereby is **DISMISSED**; that the charge of conduct unbecoming conduct of a teacher relating to respondent's failure to properly supervise the students be and hereby is **SUSTAINED**; that respondent be reinstated to his tenured teaching position; that respondent be subject to a forfeiture of salary for a period of thirty (30) days; and that respondent be provided remuneration for the period of his suspension with any associated emoluments as dictated by *N.J.S.A.* 18A:6-14, except to the extent of the aforesaid thirty (30) day period.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 29, 2001
DATE

Margaret M. Monaco
MARGARET M. MONACO , ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 9 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

APPENDIX

LIST OF WITNESSES

For Petitioner

Elizabeth Schulte
Kent Bania
T.J.
Ms. C.
Joseph M. DiGise
Joseph Prinzo
Mark O'Neill
Diana C. Lobosco

For Respondent

William Easton

LIST OF EXHIBITS IN EVIDENCE

Joint Exhibits

J-1 Joint Stipulation of Facts (2 pp)

For Petitioner

P-1 Internal Incident Report of Elizabeth Schulte dated August 2, 2000
P-2 Second Floor Plan Drawing
P-3 Photograph
P-4 Photograph
P-5 Photograph
P-5 Photograph
P-6 Photograph
P-7 Photograph
P-8 Photograph

P-9 Photograph
P-10 Photograph
P-11 Photograph
P-12 Photograph
P-13 Photograph
P-14 Photograph
P-15 Photograph
P-16 "Belly" videotape
P-17 Memorandum from Dr. Kent Bania, Supervisor of Adult/Continuing & Apprentice Education, to Diana C. Lobosco, Chief School Administrator, dated August 3, 2000
P-18 Letter from Mae Remer, Board Secretary, to Joseph Prinzo dated August 30, 2000, letter from Mae Remer to Joseph Prinzo dated September 29, 2000 and Tenure Charges (9 pp)
P-19 Letter from Mae Remer, Board Secretary, to Joseph Prinzo dated November 29, 2000, letter of Mae Remer to David C. Hesp, Commissioner of Education, dated November 29, 2000 and Tenure Charges (8 pp)
P-21 Memorandum from Joseph M. DiGise, Assistant Principal, to Diana C. Lobosco, Chief School Administrator dated August 3, 2000 (2 pp)
P-24 Excerpt of PCTI Faculty Manuel (22 pp)
P-25 Letter from Diana C. Lobosco, Chief School Administrator, to Joseph Prinzo dated August 2, 2000
P-26 Investigative Conference Report dated August 1, 2000 (2 pp)
P-27 Document entitled "The Use of Videos" (3 pp)
P-31 Letter from Joseph Prinzo to Mae Remer, Board Secretary, dated October 13, 2000
P-32 Statement of Joseph Prinzo

For Respondent

R-2 Passaic County Technical Institute Salary Information, 2000-2001
R-3 Memorandum from Mae Remer, Board Secretary, to Joseph Prinzo, dated June 14, 2000
R-6 2000 Summer Workforce Program Master Schedule
R-7 Letter from Mark D. Phillips dated August 15, 2000
R-8 Copy of videocassette box and videotape cassette for "Scarlett-Part I"
R-12 Memorandum from Mae Remer, Board Secretary, to Joseph Prinzo dated August 12, 1999
R-87 Respondent's First Set of Interrogatories and Request for Production of Document, Nos. 3 and 4 (2 pp)
R-88 Petitioner's Responses to Respondent's First Set of Interrogatories, Nos. 3 and 4 with Certification dated February 8, 2001 (3 pp)
R-89 Request for Production of Documents, No. 10 (2 pp)
R-90 Petitioner's Responses to Respondent's Request for the Production of Documents, No. 10 with Certification dated February 8, 2001 (3 pp)

OAL DKT. NO. EDU 10324-00
AGENCY DKT. NO. 424-11/00

IN THE MATTER OF THE TENURE	:	
HEARING OF JOSEPH PRINZO,	:	COMMISSIONER OF EDUCATION
PASSAIC COUNTY TECHNICAL	:	DECISION
INSTITUTE, PASSAIC 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 and were duly considered by the Commissioner in reaching his determination herein.

In his exceptions, respondent takes issue with Finding of Fact 55 in the Initial Decision wherein the Administrative Law Judge (ALJ) credits student T.J.'s statement that he viewed the videotape "Belly" for approximately two minutes before he left the room with Coach John Iurato. (Respondent's Exceptions at 1) Pointing out that the ALJ stated that she placed limited weight on T.J.'s testimony because of his inability to accurately remember certain particulars about the August 2, 2000 incident, including the number of students in the class, Mr. O'Neill's arrival time and his alleged observation of respondent in the locker room, and given the ALJ's observation on page 31 of the Initial Decision that "'it is reasonable to conclude that TJ's recollection as to the sequence of events and occurrence of certain events is not accurate,"' respondent argues that T.J.'s testimony that he viewed the "Belly" video for two minutes should not be credited in Finding of Fact 55 to establish that the video was first watched between 9:30 a.m. and 9:40 a.m. before the tour for the prospective student commenced. (*Id.* at 2-3)

Respondent alleges that the only competent direct evidence dictates that the "Belly" film could not have been viewed before the tour began because the portion of the video that Guidance Counselor Elizabeth Schultz identified as seeing at the end of the tour occurs at 12 minutes, 25 seconds into the video and the testimony establishes that the tour lasted between 13-16 minutes. Thus, respondent argues that it is improper to draw the inference that respondent improperly supervised his students prior to the start of the tour. (*Id.* at 4) In further support of his contention that the ALJ erred in Finding of Fact 55, respondent points to the ALJ's comments on page 32 of the Initial Decision wherein she states that it is reasonable to conclude that the viewing of the film occurred either shortly before or shortly after the tour began. (*Ibid.*)

Respondent also objects to the ALJ's conclusion that he failed to properly supervise his students following the tour. Respondent maintains that the students in his class were well disciplined and that he wasn't concerned about what the students were doing after he completed the tour because he assumed they could work independently following their regular routine of editing portions of the football film. (*Id.* at 5) Respondent also notes that at no time during the tour did the prospective student, the parent or Ms. Schulte mention that they observed anything inappropriate on the screen. (*Ibid.*) Respondent also underscores the fact that the teacher relieving him, Mathematics Teacher Mark O'Neill, actually watched the movie with the students, and that the District does not have a policy restricting tours by potential students and their parents to times when the instructional process is not underway. (*Ibid.*)

Respondent submits that the size and the layout of the production studio prohibits any one person from being able to observe the whole area at any one time and that the Board bears some responsibility in what occurred because respondent was operating under an administrative directive to conduct the tour during an instructional session and Ms. Schulte failed to immediately inform respondent about what she saw on the screen so that he could put a stop to it. (*Id.* at 6-7) Respondent also takes issue with the manner in which the Board conducted the

investigation of the incident, averring that Superintendent Lobosco acknowledged that she was unaware of what Mr. O'Neill knew about the incident until he was called as a witness because Mr. O'Neill had never been interviewed. (*Id.* at 7)

Finally, respondent argues that it is unfair that he is subjected to the loss of a month's pay when other staff members whose actions or inactions directly contributed to what occurred are permitted to "simply walk away." (*Id.* at 8) Respondent, therefore, asks that the charges against him be dismissed in their entirety, or in the alternative, that a non-pecuniary penalty be imposed, such as placing a letter in respondent's file warning him that if future acts of a similar nature occur, respondent will be subject to dismissal and/or reduction in salary. (*Id.* at 9-10)

In its reply, the Board urges the Commissioner to accept the ALJ's findings of fact as they relate to the sequence of events, arguing that regardless of when the students started watching the "Belly" video, the students were in respondent's class and under his care at the time. (Board's Reply Exceptions at 1-2) The Board also takes issue with respondent's claim that he is a scapegoat and that a flawed administrative policy permitting tours during instructional time and other staff members' actions or inactions are to blame for this incident, arguing that this is respondent's attempt to try to shift blame for what was clearly respondent's responsibility. (*Id.* at 4) The Board, therefore, requests that the Commissioner affirm the Initial Decision in its entirety and assess the penalty of 30 days loss of pay. (*Id.* at 5)

Having conducted a careful and independent review of the record in this matter, including the hearing transcripts and the arguments advanced by the parties, the Commissioner finds no cause to disturb the credibility determinations and factual findings rendered by the ALJ. The Commissioner is satisfied, based upon the record before him, that the ALJ appropriately measured the plausibility of content in deciding the credibility of witnesses and the proper weight to assign to testimony in reaching her factual findings and conclusions.

Accordingly, the Commissioner concurs that the Board has sustained its burden of proving that respondent is guilty of conduct unbecoming a teacher for failure to properly supervise his students during a 20-30 minute period of time by a preponderance of credible evidence.

As to the appropriate penalty, the Commissioner finds it necessary to balance the totality of the record herein with the need to stress most emphatically on respondent the seriousness of his conduct and his need to properly supervise the students under his care. The Commissioner agrees with the ALJ that, in view of all the circumstances in this matter, the extreme penalty of loss of tenured employment is not warranted. However, the Commissioner also agrees that respondent's lack of supervision of his students is a serious infraction deserving an appropriately severe penalty. The Commissioner, therefore, concurs with the penalty crafted by the ALJ.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/20/01

Date of Mailing: 8/20/01

* 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.

#261-01R

IN THE MATTER OF THE TENURE	:	
HEARING OF DR. ROBERT H. MANN,	:	
ASBURY PARK SCHOOL DISTRICT,	:	COMMISSIONER OF EDUCATION
MONMOUTH COUNTY.	:	DECISION ON REMAND
_____:		

August 20, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2964-01

AGENCY DKT. NO. 331-11/99

(EDU 6843-00 ON REMAND)

IN THE MATTER OF THE TENURE HEARING OF DR. ROBERT H. MANN, ASBURY PARK SCHOOL DISTRICT

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

James E. Collins, Esq., for respondent (Cerrato, Dawes, Collins, Saker & Brown, attorneys)

Record Closed: June 6, 2001 Decided: July 5, 2001

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

This matter is returned for revision of the agreement entered into by the parties. The matter was transmitted to the Office of Administrative Law pursuant to *N.J.S.A.* 52:14B-1 through -15 and *N.J.S.A.* 52:14F-1 through -13.

The Commissioner of Education appropriately notes his duty to refer tenure determinations to the State Board of Examiners for possible revocation of certificate(s) where loss of tenure or dismissal results from inefficiency, incapacity, unbecoming conduct or other just

cause. Just as important for today's purposes in the Commissioner's observation that a board's decision to certify tenure charges leads to the dedication of significant administrative resources. That clearly is true of this case.

Nevertheless, the record herein shows a clash of leadership styles more than anything else. Under these circumstances, it may fairly be said that the charges were intemperately preferred. Yet, even if that were not so, the sound public policy of the State favors settlements and they are to be effected where possible. In determining whether complained of conduct is indeed causally connected to a harm so as to justify the imposition of some sort of liability, overall fairness and sound public policy must be considered. *Brown v. United States Stove Co.*, 98 *N.J.* 155, 173 (1984). Such a balancing here strongly preponderates in favor of approving the revised settlement herein and allowing the parties to go their separate ways.

The parties have carefully redrafted the agreement, particularly the third acknowledgement. I am satisfied that, under the circumstances and especially recognizing problems of proof because so much of what was presented is lay opinion, the parties have done their best. They recognize the difficulties each party faces and want to end the matter. They should be permitted to. I **FIND** that the submitted settlement agreement has been voluntarily agreed to and 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. The parties have waived the right to file exceptions hereto.

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

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

JUL 05 2001
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

7-10-01
DATE

Deborah A. DiTomaso
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 11 2001
DATE

Jeff S. Mazi
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jh

STIPULATION OF SETTLEMENT AND AGREEMENT

THIS STIPULATION OF SETTLEMENT AND AGREEMENT, made this day of , 2001, by and between Asbury Park Board of Education, whose principle place of business is 407 Lake Avenue, Asbury Park, New Jersey 07712 and Dr. Robert Mann (hereinafter "Dr. Mann"), whose address is 110 Tanya Circle, Ocean, New Jersey 07712 if as follows:

RECITALS

WHEREAS, Asbury Park Board of Education is a public school district, which school district has been designated as an "ABBOTT" district and is required to comply with the rules and regulations as codified in NJSA 18A et seq and NJAC 16:9A entitled "ABBOTT Regulations" as well as all laws governing public schools as delineated in the State and Federal Codes; and

WHEREAS, Asbury Park Board of Education has a staff of approximately 600 and a student body of approximately 3700; and

WHEREAS, the district has three elementary schools (Bangs Avenue, Thurgood Marshall and Bradley), one middle school and one high school as well as the Goody School, the Pre-School Center, the Adult Learning Center and the Computer Center; and

WHEREAS, Dr. Robert Mann had been an educator and/or Administrator employed by the Asbury Park Board of Education since July 1, 1970; and

WHEREAS, Dr. Mann obtained tenure as the Assistant Superintendent of Asbury Park Board of Education in or around July 2, 1996; and

WHEREAS, On October 19, 1997 Dr. Mann was named Superintendent of Asbury Park School District; and

WHEREAS, on or about June 25, 1998 Dr. Mann entered into a contract with the Asbury Park Board of Education wherein Dr. Mann would be employed as Superintendent for a period of five years; and

CERTIFIED TRUE COPY
CAROL A. BOYD HALL
NOTARY PUBLIC - NEW JERSEY
MONMOUTH COUNTY
My Commission Expires 04-17-02

WHEREAS, on or about November 2, 1999 the Asbury Park Board of Education authorized the Board Attorney to certify tenure charges against Dr. Mann; and

WHEREAS, the said tenure charges were filed with the Commissioner of Education on November 3, 1999; and

WHEREAS, the said tenure charges alleged that Dr. Mann failed to faithfully perform his duties and obligations as Superintendent, that he failed to keep the Board fully informed of all Administrative actions, that he failed to appropriately address issues surrounding student athletic eligibility, that he failed to address the State's Corrective Action Plan, that failed to advise the Board of the need to update the policy manual, that he failed to address state requirements for special education, that he failed to assign staff so as to achieve maximum effectiveness, and that he failed to ascertain that all teachers were properly certified; and

WHEREAS, the attorney for the Petitioner Asbury Park Board of Education forwarded all discovery requests to Respondent's attorney; and

WHEREAS, trial commenced in front of the Honorable Bruce R. Campbell, Administrative Law Judge, in May 2000; and

WHEREAS, the trial continued for four days during which time Petitioner called the Board President, the Board Vice President, and numerous Board Members to testify; and

WHEREAS, the Petitioner also called Dr. Vito Gagliatti, Mr. Gerald O'Malley, Mr. Francis McGorty, Mr. Angelo Rizzo and Dr. Guy Barabto who were special monitors from the Office of Commissioner of Education; and

WHEREAS, Petitioner and Respondent submitted over one hundred evidentiary exhibits; and

WHEREAS, after four days of trial that included testimony from state monitors and Board Members as well as cross examination of the aforesaid witnesses, it was acknowledged by the Petitioner and Respondent the following:

1. The testimony and evidence exhibits indicated that facts set forth in the tenure charges could not be provable.

2. All parties thereafter agreed that even though the charges could not be provable and it would be in the best interest of the students and citizens of Asbury Park as well as the Superintendent to allow the said Superintendent to resign from his position in consideration of the Asbury Park Board of Education making the payment of certain monies subsequent to the approval of the Court and Commissioner of Education and as set forth in detail hereinbelow.

3. The Petitioner and Respondent have been represented throughout these proceedings by counsel and have been informed of their rights and responsibilities. Accordingly both parties enter into this Agreement with the full and complete knowledge and understanding of their respective rights and responsibilities. Additionally, Dr. Mann has been advised by counsel as to the provisions of NJAC 6:11-3.6. However, it is the opinion of Respondent's attorney that the aforesaid New Jersey Administrative Code provision does not apply to the within matter since the Petitioner acknowledged that it could not meet it's burden of proof and the Respondent elected to resign as a opposed to an adverse finding concerning the loss of tenure or dismissal of Respondent as specifically required in NJAC 6:11-3.6.

NOW, THEREFORE, based upon the representations and covenants contained herein, the parties agree as follows:

a. Dr. Mann resigned from his position as Superintendent effective June 30, 2000.

b. The Asbury Park Board of Education agrees to pay to Dr. Mann the sum of $310,000.00 distributed as follows:

$50,000.00, to be paid upon approval of the within Agreement for services previously rendered by Dr. Mann during the September 1999-June 2000 school year.

The sum of $260,000.00 to be paid in annual installments of $130,000.00. The first installment to be made within 30 days of approval by the Court and the Commissioner of Education of the

within settlement and the remaining $130,000.00 to be paid on or before August 15, 2001.

c. The Asbury Park Board of Education and Dr. Mann acknowledge that the sum of $310,000.00 represents a compromise settlement of the contractual obligation existing between the parties and is further acceptable to both parties under the terms and conditions of the Superintendent's contract, past practice and policies of the District with regard to the severance of employment relationships with employees, including sick and vacation days; and the annuity provision of his contract.

d. The parties voluntarily entered into this agreement in good faith to resolve this matter and have been continuously represented by counsel.

e. The Asbury Park Board of Education additionally has paid counsel fees of $40,000.00 to James E. Collins. This payment having been made pursuant to the receipt of an invoice for services by Asbury Park Board of Education.

f. The terms and conditions set forth immediately hereinabove had been approved by the Asbury Park Board of Education on Thursday May 18, 2000.

James E. Collins, Esquire
Attorney for Dr. Mann

Kathleen Smallwood-Johnson
Attorney for Asbury Park Board of Education

OAL DKT. NOS. EDU 2964-01 AND EDU 6843-00 (ON REMAND)
AGENCY DKT. NO. 331-11/99

IN THE MATTER OF THE TENURE	:	
HEARING OF DR. ROBERT H. MANN,	:	
ASBURY PARK SCHOOL DISTRICT,	:	COMMISSIONER OF EDUCATION
MONMOUTH COUNTY.	:	DECISION ON REMAND
	:	

The record, revised 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 consideration of the record in this matter, which has been delegated to him for review pursuant to *N.J.S.A.* 18A:4-34, the Assistant 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.* A copy of this decision will be transmitted to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: August 20, 2001

Date of Mailing: August 20, 2001

* Although the agreement does not specify that the Board has approved its terms as recently revised (*N.J.A.C.* 6A:3-5.6(b)), the record herein reflects that that the Board considered this matter in executive session on December 14, 2000 vis-à-vis the Commissioner's December 7, 2000 decision which rejected the second proposed settlement. At that meeting, the Board authorized the reformulation of the proposed agreement to meet the Commissioner's requirements. (Smallwood-Johnson Letter, December 18, 2001)

260-01

#260-01

D.W., on behalf of minor child, S.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

August 20, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3364-01
AGENCY DOCKET NO. 41-2/01

D.W. o/b/o S.G.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

Respondent.

D.W., petitioner, *pro se*

Stephen J. Christiano, Esq., for respondent

Record Closed: June 29, 2001 Decided: July 2, 2001

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

This matter involves an appeal by petitioner D.W., on behalf of S.G., from a residency determination by respondent Board of Education of the Township of West Orange. The Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL) where, on April 20, 2001, it was filed for expedited hearing and determination as a contested case. Subsequent to the assignment of the matter to the undersigned on May 4, 2001, a

hearing was scheduled for June 20, 2001. The parties appeared on June 20, 2001 and the hearing was adjourned to provide the parties additional time to finalize an amicable resolution of the matter. The parties reached a settlement and, thereafter, submitted the attached Stipulation of Settlement indicating the terms of agreement which the undersigned received on June 29, 2001. Having reviewed the record and the terms of 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.

July 2, 2001
DATE

MARGARET M. MONACO, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 9 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

pb

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY

OAL DOCKET NO. EDU 3364-01
AGENCY REF. NO. 41-2/01

D.W. O/B/O MINOR CHILD, S.G.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

Respondent.

STIPULATION OF SETTLEMENT

JUN 29 11 04 AM '01

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. S.G., based on a custody order obtained by petitioner, is eligible to attend school in respondent's district, provided that petitioner and S.G. continue to meet the school residency requirements set forth in *N.J.S.A.* 18A:38-1, *et seq.*

4. Petitioner agrees to pay respondent the sum of $2,000 for back tuition charges. Payment shall be made in eight (8) monthly installments of $250. The first installment is due July 1, 2001 and the succeeding installments will be due on the first day of each month thereafter. If petitioner defaults on any of the payments, respondent shall be entitled to the entire tuition from the date S.G. began attending school in West Orange to the date custody was obtained by petitioner, less any payments made.

5. This settlement is subject to approval by the Commissioner of Education. If the Commissioner rejects this settlement, any tuition payments made by petitioner shall be refunded by respondent.

DATED: 6-20-01

Delana Williamson

Delana Williamson, Petitioner

Board of Education of the
Township of West Orange

Mark A Rue 6/25/01

Secretary

By:

President

OAL DKT. NO. EDU 3364-01
AGENCY DKT. NO. 41-2/01

D.W., on behalf of minor child, S.G.,	:	
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: 8/20/01

Date of Mailing: 8/20/01

262-01

CHRISTINE KNIGHT AND THE NEPTUNE EDUCATION ASSOCIATION,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,

RESPONDENT,

AND

ERNEST RIZZITELLO AND THE NEPTUNE EDUCATION ASSOCIATION,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners challenged the Board's handling of two separate incidents involving threats made by students against teaching staff members pursuant to *N.J.S.A.* 18A:37-2, arguing that a suspension/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/expulsion hearings before the Board of Education.

The ALJ permitted petitioners to amend both petitions to assert claims pursuant to *N.J.S.A.* 18A:37-2.1, and concluded that the superintendent was required to place both incidents before the Board for suspension/expulsion hearings because the conduct underlying each incident constituted an assault. The ALJ recommended remanding both matters to the Board for suspension/expulsion hearings.

The Commissioner reversed the decision of the ALJ and dismissed the petitions. The Commissioner determined that the district superintendent's decisions not to schedule suspension/expulsion hearings before the Board in each case were not arbitrary, capricious or unreasonable. The Commissioner noted that district administrators, at the time the incidents occurred, determined that these matters fell within the purview of *N.J.S.A.* 18A:37-2 and, thus, a suspension/expulsion hearing was not required. In addition, 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 a review of the administrators' determinations within the 30-day time frame for conducting suspension/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 capricious, and did not constitute an abuse of the Board's discretion and authority.

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 20, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. EDU 4005-00 and EDU 4805-00

AGENCY DKT. NOS. 115-4/00 and 176-5/00

(CONSOLIDATED)

CHRISTINE KNIGHT, ERNEST RIZZITELLO, AND THE NEPTUNE TOWNSHIP EDUCATION ASSOCIATION,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE,

Respondent.

David L. Rosenberg, Esq., on behalf of petitioners (Klausner, Hunter and Rosenberg, attorneys)

James T. Hundley, Esq., on behalf of respondent (Hundley and Parry, attorneys)

Record Closed: April 18, 2001 Decided: May 18, 2001

BEFORE **SOLOMON A. METZGER,** ALJ:

This matter arises out of separate incidents in which Christine Knight and Ernest Rizzitello, teachers, were threatened by two students. The teachers and their collective bargaining unit sought review before the Commissioner of Education pursuant to *N.J.S.A.*

18A:6-9 and the matter was transmitted to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15. The Board filed a motion to dismiss for lack of standing and petitioners have cross-motioned for a decision remanding the matter to the Board for hearing.

The facts for purposes of the motions are undisputed. During the 1999-00 school year B.S. was assigned to Christine Knight's fourth-grade class. On March 7, 2000, the school nurse reported overhearing B.S. say to another student "I'm going to kill my teacher with my father's gun – word is bond." The information was reported to the administration and an investigation followed. B.S. was suspended for four days and required to attend anger management therapy sessions. He returned to school and to Ms. Knight's class on March 14, 2000, after being required to apologize to her.

H.B. is enrolled in respondent's high school and during the 1999-00 school year was assigned to Mr. Rizzitello's math and homeroom classes at the middle school. On March 2, 2000, H.B. was disruptive and Mr. Rizzitello instructed him a few times to quiet down. Mr. Rizzitello then asked H.B. to stay after class to discuss his behavior. After class H.B. was not receptive to dialogue. He used profanity and approached Mr. Rizzitello menacingly, threatening to punch him in the face. The matter was reported to the administration and H.B. was sent home pending a parent conference. A conference was held on March 6, 2000, and H.B. was suspended for five days. Upon his return H.B. was transferred from Mr. Rizzitello's classes and was required to undergo anger management counseling. This is the substance of the record.

The Board argues that it enjoys wide policymaking discretion, *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288 (App. Div. 1960), which extends by statute to disciplinary matters, *N.J.S.A.* 18A:37-2. While affected students may challenge such decisions, *Tibbs v. Board of Education of the Township of Franklin*, 59 *N.J.* 506 (1971), a teacher and his/her union may not. This is the general rule, but circumstances here compel a different result.

Our courts bar persons with ephemeral interests from pursuing litigation, but otherwise construe standing liberally so that parties with a sufficient stake and adverseness can go forward. *Crescent Park Tenants Ass'n v. Realty Equities Corp. of New York*, 58 *N.J.* 98 (1971); *New Jersey Chamber of Commerce v. New Jersey Election Law Enforcement Comm'n*, 82 *N.J.* 57 (1980). Ms. Knight and Mr. Rizzitello are not mere intermeddlers; they were personally

threatened and in one way or another were likely to come into contact with these students again. In Ms. Knight's case, B.S. was returned to her class. This distinguishes these two teachers from all other school personnel with a generalized interest in school safety. No case has been cited by petitioners in the administrative context granting standing *per se* to victims. Such a step raises important policy considerations and I take note of the fact that in the criminal law victims are gaining increasing rights of participation. *State v. Muhammad*, 145 *N.J.* 23 (1996); *State in the Interest of K.P.*, 311 *N.J. Super.* 123 (Ch. Div. 1997).

Standing here, however, need not rest on the nascent rights of victims. The facts sound in simple assault. *N.J.S.A.* 2C:12-1 defines assault to include putting another in fear of imminent serious bodily injury. In such cases *N.J.S.A.* 18A:37-2.1 requires immediate suspension "pending suspension or expulsion proceedings before the local board of education."[1] This statutory section supplements the general provisions for discipline in *N.J.S.A.* 18A:37-2, where the Board is more free to proceed as it chooses. In assault cases a hearing before the Board is mandatory, presumably because this class of offense is generally serious and deserves a higher profile. No such hearing was conducted. Unless Ms. Knight and Mr. Rizzitello are given sufficient standing to seek a remand the broad public interest in having the Board act lawfully cannot be served. A long line of cases supports standing in such circumstances. *See Elizabeth Fed. Sav. and Loan Ass'n v. Howell*, 24 *N.J.* 488 (1957); *Associates in Radiation v. Siegel*, 272 *N.J. Super.* 208 (App. Div. 1994); *see also* 37 *New Jersey Practice, Administrative Law and Practice* § 7.4 (Steven L. Lefelt, Anthony Miragliotta & Patricia Prunty) (2d ed. 2000).

It is not necessary to decide whether the union also has standing.

Based on the foregoing it is ordered that this matter be returned to the Board for a disciplinary hearing.

[1] In their response to the Board's motion, petitioners sought to amend their complaint to include the allegation that this section was violated. The Board did not oppose this application, although counsel represented during a telephone conference that no hearing was held below because petitioners did not raise the assault charge until now. The motion is granted pursuant to *N.J.A.C.* 1:1-6.2.

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

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

5/18/01
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

5-21-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 22 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/caa

CHRISTINE KNIGHT AND THE NEPTUNE EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	
RESPONDENT.	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
ERNEST RIZZITELLO AND THE NEPTUNE EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions and petitioners' reply thereto were timely filed in accordance with *N.J.A.C.* 1:1-18.4, and were considered by the Commissioner in reaching his decision.

In its exceptions, the Board avers that the stipulated facts do not establish that Petitioner Knight was assaulted within the meaning of *N.J.S.A.* 2C:12-1(a)(3) because she was not present when her fourth-grade student stated to another pupil, "I'm going to kill my teacher

with my father's gun – word is bond," and, moreover, the student was not in possession of a weapon. Noting that *N.J.S.A.* 2C:12-1 states that a person is guilty of simple assault if that person "'attempts *by physical menace* to put another in fear of imminent serious bodily injury' [Emphasis added]," the Board asserts that there is no evidence that the student directed physical menace toward Petitioner Knight because she only learned of the student's statement through the school nurse and there was no showing that the student ever intended that she should learn of the remark. (Board's Exceptions at 4, 5)

With respect to the incident involving another student and Petitioner Rizzitello, wherein the student engaged in a verbal confrontation, threw a brush to the floor and threatened to punch Rizzitello in the face, the Board notes that there are no allegations that the student made physical contact with Rizzitello or caused him bodily harm (*Id.* at 6) The Board also contends that the threat to punch Rizzitello in the face does not establish that he was placed "in fear of imminent serious bodily injury" as required by the statute. (*Ibid.*) In support of this argument, the Board points to *N.J.S.A.* 2C:11-1(b), which defines serious bodily injury as follows:

> "Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ. (*Id.* at 6-7)

In reply, petitioners maintain, *inter alia*, that the Administrative Law Judge's (ALJ) legal analysis was correct and that both of the students committed simple assault by attempting, by physical menace, to put their teachers in fear of imminent serious bodily injury, thus requiring the initiation of expulsion proceedings against these two students pursuant to *N.J.S.A.* 18A:37-2.1. (Petitioners' Reply at 3) Petitioners further posit that the Board has cited no case law in support of its contention that there must be actual physical contact to put another in fear of imminent serious bodily injury by physical menace. (*Ibid.*) Citing the definitions for

"physical" and "menace" in Black's Law Dictionary, petitioners also assert that incidents such as those herein where a student threatened to kill his teacher with his father's gun and where a student threatened to punch his teacher in the face would cause any reasonable person to fear imminent serious bodily injury. (*Id.* at 3-4)

Moreover, petitioners proffer that the "Legislature has gone out of its way to provide extra protection to school personnel," noting that *N.J.S.A.* 2C:12-1 was amended in 1979 to provide that a person committing simple assault under *N.J.S.A.* 2C:12-1(a)(1), (2) or (3) is guilty of aggravated assault if committed upon a school board member or any employee of the school board while those individuals are engaged in the performance of their school duties. (*Id.* at 4) Petitioners also argue that, prior to the filing of its exceptions, the Board had not submitted any legal arguments with respect to whether the students committed simple assault and, therefore, should not be permitted to first raise the issue of whether the students' conduct constituted simple assault under the statutes in its exceptions to the Initial Decision. (*Id.* at 5) Finally, pointing to their Brief in Opposition to Respondent's Motion for Summary Decision and *N.J.S.A.* 18A:37-2.1, petitioners assert that Petitioners Knight and Rizzitello and the Neptune Township Education Association have standing in the instant matter. (*Id.* at 5)

Upon a careful and independent review of the record, the Commissioner, for the reasons set forth below, cannot accept the recommended decision of the ALJ.

Initially, the Commissioner notes that petitioners filed a challenge to the Board's actions in two incidents involving students and teachers, alleging that the Board's refusal to initiate expulsion hearings under *N.J.S.A.* 18A:37-2 in these two consolidated cases was arbitrary, capricious, and unreasonable. Neither petition alleged that the individual teacher had been assaulted so as to trigger proceedings under *N.J.S.A.* 18A:37-2.1. As an Affirmative

Defense, the Board, in its Answer in the Rizzitello matter stated that it was not required to institute suspension or expulsion proceedings because petitioner did not allege that the pupil's actions constituted an assault upon petitioner within the meaning of *N.J.S.A.* 2C:12-1 and *N.J.S.A.* 18A:37-2.1. (Board's Answer in Rizzitello at 3-4) In a footnote in their Brief in Opposition to Respondent's Motion for Summary Decision, filed approximately one year later, petitioners sought to amend each petition to allege a violation of both *N.J.S.A.* 18A:37-2 and *N.J.S.A.* 18A:37-2.1. (Brief in Opposition to Respondent's Motion for Summary Decision at 4, Footnote 1) The ALJ granted the Motion to Amend the Petition by footnote in the Initial Decision. (Initial Decision at 3, Footnote 1)

N.J.S.A. 18A:37-2.1(a) requires that any pupil who commits an assault, as defined in *N.J.S.A.* 2C:12-1, 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 proceedings* before the board of education. In the instant matters, however, the Board argues that the facts fail to establish that criminal assaults were committed by the two students at issue, and that, therefore, the school administration in each instance, although recognizing the two incidents as serious, proceeded with disciplinary measures pursuant to *N.J.S.A.* 18A:37-2. (Board's Exceptions at 4 and 8) The record supports the Board's contention that the school's administrators, after interviewing the students and teachers involved, did not believe that these students had attempted, by physical menace, to put the respective teachers in fear of imminent serious bodily injury, and, therefore, they did not consider these incidents to be assaults within the intendment of *N.J.S.A.* 2C:12-1.

Of particular note, in the Rizzitello matter, Petitioner Rizzitello was given an assault form to fill out, which might lead one to believe that either Rizzitello had raised the issue

or the principal was giving Rizzitello an opportunity to assert such a claim. However, as of March 6, 2000, the principal notes that petitioner had not filed a complaint and there is nothing in the record to demonstrate that it was ever filed. (Board's Exceptions, Exhibit C, Exhibit 2 attached thereto) The superintendent's letter to Petitioner Rizzitello confirms that the superintendent's review of the incident led to a conclusion that a suspension or expulsion hearing was discretionary, not required, as it would be if determined to be an assault under *N.J.S.A.* 18A:37-2.1(a). (*Id.* at Exhibit 4) The superintendent reported to Petitioner Rizzitello the actions that were being taken in response to the verbal confrontation and responded to the Association's request for an expulsion hearing by stating, in pertinent part:

> I have carefully reviewed the conduct of H.B. as well as the actions taken by Principal Lampinen, which included the following:
>
> - Five day suspension and parent conference.
> - Removable (sic) of pupil from your math and homeroom.
> - Referral to counseling for Anger Management Program.
> - Reassignment of pupil or yourself to alternate lunch period site as of 5/1/00.
>
> I view the incident as serious and am requesting the Child Study Team to further investigate and assess the educational and emotional profile of the pupil. We have requested a CST evaluation in this case and issued an administrative letter to the parent insisting upon the need for a CST evaluation, along with my discussion at the Superintendent's level to underscore the seriousness of H.B.'s verbal interaction with you.***
>
> Your Association's request for an expulsion hearing in this case is viewed as not in keeping with the progressive discipline and social service approach that we feel will correct H.B's deportment now and in the future. (*Ibid.*)

The State Board recently adopted *N.J.A.C.* 6A:16-5.7, specifying the procedures to be followed, pursuant to *N.J.S.A.* 18A:37-2.1, when a student commits an assault. Although not controlling in this matter, this regulation is instructive in the implementation of

N.J.S.A. 18A:37-2.1, and, thus, provides guidance for deciding the issues herein. *N.J.A.C.* 6A:16-5.7 requires that any pupil who commits an assault, as defined in *N.J.S.A.* 2C:12-1, 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 proceedings,* which must take place before the board of education within 30 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 with respect to whether an assault has occurred.

There is nothing in the record indicating that the principals at the two schools where these incidents occurred deemed the pupils' actions to constitute assaults as defined in *N.J.S.A.* 2C:12-1, which would have required that they act in accordance with *N.J.S.A.* 18A:37-2.1(a). Additionally, the superintendent's actions reflect that he, too, did not deem the actions to be assaults as defined in *N.J.S.A.* 2C:12-1 because, upon assessment of the situations, he concluded that suspension or expulsion hearings were *not required,* as would be the case were the incidents determined to be assaults. Moreover, as noted above, the Petitions of Appeal did not allege that petitioners had been assaulted.

Petitioners were put on notice that the District had determined that these incidents were not assaults 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 30 days, as required by *N.J.S.A.* 18A:37-2.1(a) when an assault upon a staff member has occurred. If petitioners believed that they had been assaulted, as they

now claim, nothing precluded petitioners from making written allegations of alleged assaults pursuant to *N.J.S.A.* 18A:37-2.1(b), thereby triggering mandatory reporting by the principal to the superintendent, who must then report allegations of assault to the Board. Petitioners could also have filed Petitions for Emergent Relief at that juncture, naming the alleged assaulters as party respondents, asserting that these incidents constituted assaults so as to trigger the provisions of *N.J.S.A.* 18A:37-2.1(a).

According to the petitions, the Neptune Township Education Association (NTEA) was advised through the superintendent that the Board would not conduct expulsion hearings for the students involved in these incidents. (Knight Petition at 2-3, and Rizzitello Petition at 3) The Commissioner is unable to determine whether the NTEA requested expulsion hearings alleging assaults, as prescribed by *N.J.S.A.* 18A:37-2.1(b), because those communications are not part of the record. However, *assuming arguendo,* that allegations of assaults were reported by NTEA pursuant to *N.J.S.A.* 18A:37-2.1(b), a board is *not required* to hold suspension or expulsion hearings upon receipt of such allegations. *See N.J.S.A.* 18A:37-2.1(b), which reads as follows:

> Whenever a teacher, administrator, board member, other employee of a board of education or a labor representative on behalf of an employee *makes a allegation in writing* that the board member or employee has been *assaulted* by a pupil, the principal shall file a written report of the alleged assault with the district's superintendent of schools. The superintendent to whom the alleged assault is reported or, if there is no superintendent in the district, the principal who received the allegation from the board member, employee, or labor representative shall report the alleged assault to the board of education of the district at its next regular meeting; provided that the name of the pupil who allegedly committed the assault, although it may be disclosed to the members of the board of education, shall be kept confidential at the public board of education meeting. (emphasis added)

In the instant matter, the administration conducted an immediate investigation of the two incidents at issue, determined that these incidents fell within the parameters of *N.J.S.A.* 18A:37-2, not *N.J.S.A.* 18A:37-2.1, and proceeded to assess punishment and administer corrective action accordingly. Of particular note, petitioners herein did not allege that these incidents fell within the parameters of *N.J.S.A.* 18A:37-2.1, so as to require expulsion or suspension hearings, until a year after the incidents occurred.[1] Moreover, there is nothing in the record to indicate that petitioners made an allegation in writing that an alleged assault had occurred in accordance with *N.J.S.A.* 18A:37-2.1(b) upon learning that the Board was not going to conduct expulsion or suspension hearings. Neither can the Commissioner conclude, upon a thorough review of the undisputed facts presented in this matter, that the Board's assessment that these incidents fell within the parameters of *N.J.S.A.* 18A:37-2 was arbitrary, capricious or unreasonable. Therefore, petitioners have not met their burden of proving that the Board acted unreasonably in concluding that these incidents did not fall within the prescriptions of *N.J.S.A.* 18A:37-2.1, but rather within *N.J.S.A.* 18A:37-2.[2]

With respect to petitioners' claim that the Board's failure to initiate expulsion hearings, pursuant to *N.J.S.A.* 18A:37-2, in these two instances was arbitrary, capricious,

---

[1] The Commissioner notes that the Petitions of Appeal asserted that the Board's refusal to conduct expulsion hearings under *N.J.S.A.* 18A:37-2 was arbitrary, capricious and unreasonable. Petitioners amended their petitions to include a claim that the Board was in violation of *N.J.S.A.* 18A:37-2.1 in response to the Board's contention in its Motion for Summary Judgment that it was not required to hold suspension or expulsion hearings because petitioners did not invoke a claim under *N.J.S.A.* 18A:37-2.1. With the amendment of their petitions, therefore, petitioners asserted claims under both *N.J.S.A.* 18A:37-2 and *N.J.S.A.* 18A:37-2.1. In amending their claims, petitioners did not assert, however, that these incidents fell within the prescriptions of *N.J.S.A.* 18A:37-2.1, *rather than* *N.J.S.A.* 18A:37-2.

[2] In *Garrity v. State-operated School District of Paterson*, 96 *N.J.A.R.*2d (EDU) 567, the Commissioner found that the board failed to comply with *N.J.S.A.* 18A:37-2.1 when it did not schedule expulsion proceedings for several students who assaulted their teachers. *Garrity* was decided prior to the effective date of amendments of *N.J.S.A.* 18A:37-2.1(a) in 1995 and 1997, which changed the language requiring expulsion proceedings for students committing assault to that of requiring *suspension or expulsion* proceedings, and changed the requirement for a hearing to be held from to within twenty-one days to within thirty days. *Garrity* also differs from the proceedings herein in that the board in *Garrity* had compelling reasons to believe that assaults had occurred, substantiated by the fact that the students involved subsequently pled guilty to, or were convicted of, assault.

unreasonable and in violation of that statute, the Commissioner notes that *N.J.S.A.* 18A:37-2 does not *require* expulsion hearings before the Board. *N.J.S.A.* 18A:37-2 states, in pertinent part:

> Any pupil who is guilty of continued and willful disobedience, or of open defiance of the authority of any teacher or person having authority over him, or of the habitual use of profanity or of obscene language, or who shall cut, deface or otherwise injure any school property, *shall be liable to punishment and to suspension or expulsion from school.*
>
> Conduct which shall constitute good cause *for suspension or expulsion of a pupil guilty of such conduct shall include, but not be limited to*, any of the following***. (emphasis added)

It is undisputed that, in each instance herein, the administration immediately conducted an investigation of the underlying incident, assessed punishment and administered corrective action. With respect to the incident involving Petitioner Knight, the following steps were taken:

1. Instituted an investigation of the incident;
2. Notified the local police department which also conducted an investigation;
3. Notified the student's parents;
4. Conducted a parent conference;
5. Suspended the student for four days;
6. Principal conducted a conference with the student, his parents, Petitioner Knight and the school nurse;
7. Student was removed form petitioner's fourth grade class and placed in another class for the remainder of the 1999-2000 school year; and
8. Student was referred to a licensed Clinical Psychologist for counseling.

(Answer at 4)

With respect to the incident involving Petitioner Rizzitello, the following steps were taken:

1. Instituted an investigation of the incident;
2. Suspended student for five days;
3. Removed the student from Rizzitello's math and homeroom classes and reassigned lunch period;

4. Conducted a parent conference;
5. Directed that the student receive counseling through the Anger Management Program.

(Answer at 4 and Board's Exceptions, Exhibit C, Exhibit 4 attached thereto)

N.J.S.A. 18A:11-1(d) grants a board of education broad discretionary powers to "[p]erform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district." Thus, the Board herein had the discretionary authority to determine the appropriate punishment to be imposed in these two instances. Further, it is well-settled law that when a board acts within its discretionary authority, its decision "is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious and unreasonable." *Thomas v. Bd. of Ed. of Morris Tp.*, 89 *N.J. Super.* 327, 332 (App. Div. 1965), *aff'd* 46 *N.J.* 581 (1966).

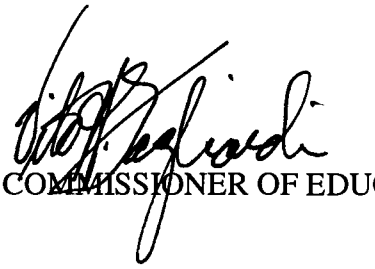
The standard of review for determining whether or not a board of education action was arbitrary, capricious or unreasonable is narrow in its scope and, consequently, imposes a heavy burden on those who challenge actions of boards of education. The standard defined by the New Jersey Courts states:

> 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. *** 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. (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).

In applying this standard to the instant matter, the Commissioner finds and determines that the record does not establish that the Board herein took willful or unreasoning action, without consideration and in disregard of the circumstances. On the contrary, it shows that the Board acted quickly to investigate the two incidents at issue and determined to punish the students involved, remove the students from the teachers' classes and require the students to attend counseling to deal with the underlying issues surrounding their behavior.

Accordingly, the Commissioner finds that petitioners have failed to demonstrate that the Board actions were arbitrary, capricious or unreasonable or contrary to law. The petitions are, therefore, dismissed.

IT IS SO ORDERED.[3]



COMMISSIONER OF EDUCATION

Date of Decision: 8/20/01

Date of Mailing: 8/20/01

[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.

262-01

EDU #4005-00 and 4805-00 (consolidated)
C # 262-01
SB # 35-01

CHRISTINE KNIGHT AND THE NEPTUNE TOWNSHIP EDUCATION ASSOCIATION,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,

RESPONDENT-RESPONDENT,

AND

ERNEST RIZZITELLO AND THE NEPTUNE TOWNSHIP EDUCATION ASSOCIATION,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 20, 2001

For the Petitioners-Appellants, Klausner and Hunter (Stephen B. Hunter, Esq., of Counsel)

For the Respondent-Respondent, Hundley and Parry, P.C. (James T. Hundley, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed substantially for the reasons expressed therein. In so doing, we clarify that the investigation of the incidents

at issue and the disciplinary action were undertaken by the district's administrators, rather than by the Board. We stress, in addition, that there is nothing in the record that would indicate that either of the staff members involved were "in fear of imminent serious bodily injury," N.J.S.A. 2C:12-1, so as to require the Board to conduct a suspension/expulsion hearing under N.J.S.A. 18A:37-2.1 as the result of an assault.

Kathleen A. Dietz abstained.

January 2, 2002

Date of mailing JAN 04 2002

263-01 R

E.G.P., on behalf of minor child, M.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

SYNOPSIS

Petitioner sought to compel the respondent Board to provide a free public education to her grandson, M.B. The Board contested the petition because petitioner had not demonstrated that her grandson was legally entitled to a free public education in Rutherford. After initial decisions were issued, the case was twice remanded to the OAL for a plenary hearing, the second time based on the Commissioner's determination that testimony from petitioner was essential to a determination of whether M.B. resided with her because of a family or economic hardship and the length of time M.B. resided with E.G.P.

The ALJ concluded that petitioner failed to demonstrate that M.B.'s parents could not support him because of a family or economic hardship, and that M.G. was not entitled to a free public education in Rutherford prior to the date his father resided with him in petitioner's home. The ALJ ordered payment of tuition by petitioner in the amount of $23,234 for the period of M.B.'s attendance at school in the Rutherford schools prior to his father residing with him and petitioner.

The Commissioner affirmed the decision of the ALJ, agreeing that petitioner had failed to demonstrate a family or economic hardship that would entitle M.G. to attend school in Rutherford free of tuition prior to his father residing with him in E.G.P.'s home.

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 20, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
On REMAND
OAL DKT. NO. EDU 9881-00
AGENCY REF. NO. 143-5/97

IN THE MATTER OF E.G.P. ON BEHALF OF MINOR CHILD M.B.,

Appellant,

v.

BOARD OF EDUCATION OF RUTHERFORD, BERGEN COUNTY,

Respondent.

E.G.P., Esq., petitioner, *pro se*

Ellen Walsh, Esq., for respondent
(Forgarty & Hara, attorneys)

Record Closed: May 21, 2001 Decided: July 2, 2001

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE

This is a further remand of OAL Docket Nos. EDU 5562-97 and EDU 1162-99. The instant remand is a result of the Commissioner of Education's (Commissioner) January 24, 2000 decision and the State Board of Education's decision of July 5, 2000

that remanded this matter for further hearing. A plenary hearing was held on February 28, 2001 at the Waterview Center, an elder care facility in Cedar Grove, New Jersey. At this hearing, the petitioner presented testimony. The respondent did not present additional testimony but did submit a letter brief on March 7, 2001. The petitioner filed a letter brief on May 21, 2001 at which time the record closed.

PROCEDURAL HISTORY

The procedural history in this matter is long and laborious. However, it is significant and relevant, thus worthy of consideration.

Briefly, the petitioner, E.G.P., (Petitioner) is the grandmother of M.B., a student in the respondent's, Rutherford Board of Education, (District or respondent) school District. On April 31, 1997, E.G.P. filed an action challenging the respondent's, decision to disenroll her grandson from the district schools, effective April 15, 1997. The decision to disenroll M.B. was based on the District's conclusion that M.B. was not entitled to a free education in the school district. Pursuant to *N.J.S.A.* 52:14B-1 to 15 and *N.J.S.A.* 52:14F-1 to 13, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case. After a prehearing conference, hearing dates were established. In February 1998 petitioner was hospitalized and in an elder care facility for several months. Thus, the parties agree to have the matter decided on the papers. After written submissions were filed an Initial Decision was issued on October 29, 1998 granting the petitioner's cross motion for summary judgment. See *I/M/O E.G.P. on behalf of Minor child M.B.*, OAL Dkt. No. EDU 5562-97.

On December 21, 1998, the Commissioner issued a decision that affirmed in part and reversed in part the Initial Decision. The Commissioner found that M.B. was not domiciled in the District with his legal guardian or parents. Further, that petitioner was a domiciliary of Rutherford and that she supported M.B. gratis. However, it was concluded that the issue of whether M.B. had resided with the petitioner since he was

three months old was a disputed issue.[1] Thus, the Commissioner found the matter to be inappropriate for summary disposition and ordered that a plenary hearing be held to determine:

1. The length of time that M.B. lived with the petitioner;

2. Whether an economic or family hardship existed so as to render M.B.'s parents incapable of caring for and supporting him; and

3. The Board's annual per pupil cost for the grades and school years at issue.

Petitioner appealed the Commissioner's decision to the State Board of Education. Remand hearings were scheduled for March 8 and 10, 1999. On March 8, 1999, the respondent was present for the remand hearing. However, the petitioner did not appear but telephoned my chambers to advise that she would not be appearing due to her appeal. Over the objection of the District, the hearings were adjourned pending the decision with the State Board of Education. On June 2, 1999, the State Board affirmed the decision of the Commissioner of Education. Remand hearings were rescheduled for October 19th and October 20, 1999.

On October 12, 1999, petitioner filed a letter advising that she was ill, thus unable to attend the remand hearings. She requested that the hearings proceed based on the documents that she had previously submitted. Respondent opposed this request stating that it would be inappropriate to proceed if the petitioner would not be present to give testimony on the contested issues. The respondent appeared for the hearing on October 20, 1999 and there was no appearance by the petitioner. Respondent moved to dismiss the case for petitioner's failure to prosecute. This motion was denied. Respondent also objected to any consideration of any documents

[1] The Board asserted that M.B. had only resided with the petitioner when he became of school age.

submitted by petitioner since it could not be cross examined. The hearing proceeded wherein respondent presented the testimony of Hazel E. Ralph, Margaret Vaccarino, Danielle Sabato and Steve Albin, Administrative Assistant to the Principal.

An initial decision was issued on December 6, 1999 wherein it was found that the petitioner was not M.B.'s legal guardian and that he was not domiciled in Rutherford. Further, that the record was barren of any evidence of an economic or family hardship, that would prevent M.B.'s parents from being able to care for him. Thus, it was concluded that M.B.'s domicile is with his parents and the petitioner was assessed tuition in the amount $28,798.82.

On January 24, 2000, the Commissioner issued a decision finding that the petitioner's testimony was essential to resolve the material facts in the case. Further, that the matter should not be dismissed for failure to prosecute and that the delays in this case were not deliberately caused by petitioner. Finally, the Commissioner found that measures could have been taken by the respondent or the Court to elicit the testimony needed to present petitioner's case rather than to proceed without her. Consequently, the Commissioner reversed the findings in the initial decision and remanded the matter for another remand hearing.

The respondent filed an appeal with the State Board of Education on or about February 22, 2000. On July 7, 2000, the State Board issued a decision remanding the matter to the OAL. By letter dated November 13, 2000, the State Board advised that the matter was being transmitted and it was accepted and docketed at the OAL on November 22, 2000. The matter was assigned to the undersigned on November 29, 2000. A prehearing conference was scheduled for January 17, 2001. By letters of January 12, 2000 and February 21, 2001, petitioner requested an adjournment until such time that she was released from the Waterview elder care facility. In said letter, petitioner expressly refused to allow anyone, e.g. M.B.'s parents, to replace her in these proceedings. Petitioner also made several calls to my chambers regarding the scheduling of this matter. At my request a social worker at the Waterview Center

advised the undersigned that the petitioner was physically able to attend a hearing at the nursing home. Thus, on February 16, an Order was entered wherein a field hearing was ordered at the nursing home for February 28, 2001. (See attached Order). Petitioner was advised that she could have witnesses present to testify. Indeed, it was urged that M.B.'s parents be present to give testimony as to why their son resides with the petitioner.

On February 28, 2001, a hearing was held at the Waterview Center. The petitioner was the sole witness. At the conclusion of the hearing, the parties were allowed to submit their closing statements in writing. The respondent filed a statement on March 9. On May 3, petitioner was advised that her statement had not been received and if not filed by May 21, 2001 a decision would be rendered without it. Petitioner filed a written statement on May 21, 2001, at which time the record closed.

TESTIMONY

E.G.P. testified that M.B. came to live with her and her husband (Mr. P.) when he was three months old. Her husband died in 1994. Prior to his death, Mr. P. had a heart attack and the baby, (M.B.) helped his health. The two bonded very well and M.B. gave Mr. P. a new reason for living. M.B. was claimed as a dependent on their income tax returns. While petitioner cannot recall the exact year that M.B. initially declared a dependent, she was certain that he was listed as a dependent when he attended the Slyvan School in Rutherford. During this time, she worked full time at the Rutherford Municipal Court as a Deputy Court Clerk.

Petitioner recalls meeting a Mrs. Carrie, M.B. second grade teacher. She also attended PTA meetings, until she was hospitalized in 1994. After she had a mastectomy, she had a housekeeper and a home health aide who assisted her. Petitioner is currently suffering from phlebitis and diabetes.

Her daughter works full time for Valley National Bank. Her son-in-law, M.B.'s father, is depressed because his former employer (Hertz) moved from the area. He now works for an Amoco Station in Hackensack. Presently, he takes care of M.B. at her home. Indeed, after her husband died, M.B.'s father would take him out for different activities. M.B. sleeps in his own room and his parents have their own room at her house. Prior to the instant hospitalization, M.B.'s parents resided in Clifton. Petitioner asserts that she does not know the salaries of her daughter and son-in-law. She only knows that M.B. is cared for by all three of them.

FINDINGS AND CONCLUSIONS

Based on the testimonial and documentary evidence, I **FIND** that M.B. has resided with the petitioner since he was three months old. Consequently, I **CONCLUDE** that he is not living in the District for the sole purpose of attending its schools. The record supports that M.B.'s parents reside in and are domiciled in Clifton and I so **FIND**. The law is clear that a child's domicile is where his parents reside, thus I **CONCLUDE** that M.B. is a resident and not a domiciliary of Rutherford.

I **FIND** that the petitioner is not M.B.'s legal guardian. She has failed to present any legal documents that confers legal guardianship. The fact that M.B. was declared as a dependent for income tax purposes is insufficient.

Having failed to demonstrate that she is M.B.'s legal guardian, petitioner must demonstrate that M.B. resided with her because of the existence of an economic or family hardship that rendered his parents incapable of caring for and supporting him. On this issue, petitioner's testimony at the nursing home is essentially the same as she stated in previous written submissions, that is, that M.B. resides with her as a matter of family choice. He is cared for by the entire family. His father is employed at Amoco in Hackensack after having been downsized from his previous job with Hertz. Mr. B. is depressed as a result of the downsizing. M.B.'s mother is employed by Valley National Bank and takes a vanpool to her job from her home in Clifton.

I **FIND** that petitioner has failed to demonstrate an economic or a family hardship. There has been no showing that M.B.'s parents are incapable of caring for him. Petitioner has not shed any light on why her grandson lives with her in lieu of living with his parents. Indeed, there has been no participation in this case by M.B.'s parents.

The statute requires the showing of an economic or family hardship. While a hardship need not be financial, it must be real and demonstrable. See *J.B. on behalf of her grandchild, R.H. v. BOE Township of Ocean, Monmouth County*, OAL Dkt. No. EDU 8770-95, *State Bd. of Ed.* For example, hardship can be found where the parents was so uncaring as to have essentially abandoned the child. E.*L. and J.L. on behalf of A.H. v. Morris Hills Regional School District*, OAL Dkt. No. EDU 3172-97. In this case, petitioner has failed to present any demonstrable hardship. She has neither claimed a financial or a family hardship. Indeed, the adjusted income tax returns previously submitted by the petitioner reveals that her income is only $300 greater than M.B.'s parents. Petitioner's unrefuted assertion, I will presume to be true, that M.B. lives with her based on a cultural custom has been deemed insufficient by the Commissioner. In any event, cultural customs do not constitute a hardship. Nor does the lack of child care qualify as a hardship. *H.K. and G.K. v. Bd. of Cherry Hill*, 1998 *S.L.D.* ___

I **CONCLUDE** that the District has proven by a preponderance of the credible evidence that it is entitled to tuition for the 1996-1997, 1997-1998 and 1998-1999 school years in an amount of $23,234. As noted in the District's written submission, M.B. is and has been living with his father at the petitioner's home for the last two years. Consequently, he is residing with his legal guardian and is entitled to a full education in the District schools for the school year commencing in the 1999-2000 term.

ORDER

It is **ORDERED** that the petitioner shall remit to the District the sum of $23,234 for tuition of M.B. for the 1996-1997, 1997-1998 and 1998-1999 school 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.

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.

7/3/01
DATE

IRENE JONES, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 9 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

sej

OAL DKT. NOS. EDU. 5562-97, EDU 1162-99
(ON REMAND) AND EDU 9881-00 (ON REMAND)
AGENCY DKT. NO. 143-5/97

E.G.P., on behalf of minor child, M.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

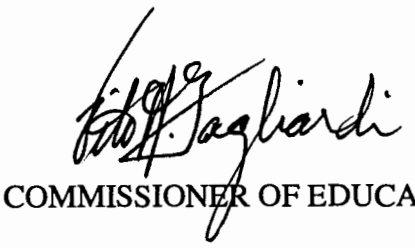
The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the Administrative Law Judge (ALJ) that, due to petitioner's failure to make any demonstration as to a family or economic hardship, which necessitated her grandson living with her rather than with his parents, petitioner has failed to satisfy her burden of proving by a preponderance of the credible evidence that, prior to the commencement of the 1999-2000 school year, when M.B.'s legal guardian began living with him in petitioner's home, M.B. was entitled to a free public education in the Rutherford School District.

Accordingly, the Initial Decision of the OAL is affirmed for the reasons expressed therein. Petitioner is directed to reimburse the Board a total of $23,234, representing tuition for the 1996-1997, 1997-1998 and 1998-1999 school years. Since M.B. has been residing with his legal guardian in petitioner's home since the 1999-2000 school year, he is entitled to a free

public education in the District from that time forward, unless and until this circumstance changes so as to alter his entitlement.

IT IS SO ORDERED.*



COMMISSIONER OF EDUCATION

Date of Decision: 8/20/01

Date of Mailing: 8/20/01

* 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.

264-01

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, **(EARLY CHILDHOOD PROGRAM AID FUNDING REQUEST)**	:	DECISION
RESPONDENT.	:	
	:	

August 23, 2001

OAL DKT. NO. EDU 04434-99S
AGENCY DKT. NO. 112-5/99

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, **(EARLY CHILDHOOD PROGRAM AID FUNDING REQUEST)**	:	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: 8|23|01

Date of Mailing: 8|23|01

265-01

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, **(IN THE MATTER OF THE DISTRICT'S SUPPLEMENTAL AID APPLICATION),**	:	DECISION
RESPONDENT.	:	

August 23, 2001

OAL DKT. NO. EDU 7771-99
AGENCY DKT. NO. 167-6/99

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, **(IN THE MATTER OF THE DISTRICT'S SUPPLEMENTAL 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.

ACTING ASSISTANT COMMISSIONER

Date of Decision: 8|23|01

Date of Mailing: 8|23|01

266-01

BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, **(IN THE MATTER OF THE DISTRICT EARLY CHILDHOOD AID APPLICATION)**	:	DECISION
RESPONDENT.	:	
_____	:	

August 23, 2001

OAL DKT. NO. EDU 6289-00
AGENCY DKT. NO. 233-6/00

BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY 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.

ACTING ASSISTANT COMMISSIONER

Date of Decision: 8|23|01

Date of Mailing: 8|23|01

268-01

IN THE MATTER OF THE TENURE	:	
HEARING OF EDWARD JACKUS,	:	
SCHOOL DISTRICT OF THE CITY OF	:	
ELIZABETH, UNION COUNTY,	:	
AND	:	COMMISSIONER OF EDUCATION
IN THE MATTER OF THE TENURE	:	DECISION
HEARING OF SHARON GAINES,	:	
SCHOOL DISTRICT OF THE CITY	:	
OF ELIZABETH, UNION COUNTY.	:	

SYNOPSIS

In consolidated matter, the Board certified tenure charges of unbecoming conduct against two respondent vice principals for allegedly aiding and abetting the principal of their school, School 17, in failing to hold two fire drills each month as required by *N.J.S.A.* 18A:41-1 and failure to notify the administration that their school did not hold the requisite number of fire drills (two drills each month within school hours).

The ALJ determined that, in this situation, the duty to conduct fire drills and to file reports was clearly placed on the principal. The ALJ stated, "Even by the most general standards of good conduct, the inaction of the vice principals would not likely affect morale or efficiency by destroying public respect for or confidence in school operations or services." The ALJ concluded that the principal's misconduct should not be thrust upon the vice principals and that, therefore, respondents did not engage in conduct unbecoming a vice principal. Motion for Summary Decision was granted. The ALJ determined that the charges should be dismissed.

The Commissioner agreed with the ALJ's determination that respondent's Motion for Summary Decision could be decided to the extent of ascertaining whether or not respondents were guilty of unbecoming conduct. Moreover, the Commissioner agreed with the ALJ's recitation of the law and citing of the *Motley* decision on what constitutes unbecoming conduct and he concurred with the ALJ that unbecoming conduct may be based on a failure to act where there is a duty to do so and that "a duty to act is the touchstone for unbecoming conduct based on failure to act." The Commissioner, however, did not agree with the conclusions of law reached by the ALJ that the charge of unbecoming conduct levied against each respondent should be dismissed. The Commissioner determined that, under the facts of this matter, the unbecoming conduct charge rested upon the inaction of the vice principals who have a professional duty to ensure the health, safety and well-being of the students and staff under their care and supervision. The Commissioner emphasized that "[t]he very fact that the law requires fire drills to be conducted *at least two times each month* in schools underscores the grave importance of such safety drills for ensuring the emergency preparedness of students and staff." Moreover, this duty gave rise to a duty on respondents' part to act on/report the continuous, long-term violations of law in that respondents' failure to act on/report such violations was no less serious than the failure of the principal to hold fire drills, given that the health, safety and well-being of students and staff were seriously jeopardized. The Commissioner further concluded that, under the circumstances of this matter, wherein the health, safety and well-being of students and staff were seriously jeopardized, an undue burden would not have been placed on respondents to act on their knowledge of long-term, continuous violations of safety law and Board regulation, even if one accepts *arguendo* that respondents did not know if the principal was failing to report noncompliance with the fire drill law. Thus, the Commissioner sustained the charge of unbecoming conduct against respondents. However, because the ALJ dismissed the tenure charges, the record was insufficiently developed to determine either the assignment or mitigation of penalty. Therefore, the Commissioner was compelled to remand this matter to the OAL solely for proceedings as necessary to develop a full and factual record in order that recommendations may be made, as appropriate, with respect to penalty.

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 24,2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION

IN THE MATTER OF THE TENURE HEARING OF EDWARD JACKUS, BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY.

OAL DKT. NO. EDU 1537-01
AGENCY DKT. NO. 6-1/01

IN THE MATTER OF THE TENURE HEARING OF SHARON GAINES, BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY.

OAL DKT. NO. EDU 1601-01
AGENCY DKT. NO. 7-1/01

(CONSOLIDATED)

David F. Corrigan, Esq., and **Mary E. Hennessy,** Esq.,
for the Board of Education of the City of Elizabeth
(Murray, Murray & Corrigan, attorneys)

Robert F. Varady, Esq., for Edward Jackus
(LaCorte, Bundy, Varady & Kinsella, attorneys)

Robert M. Schwartz, Esq., for Sharon Gaines

Record Closed: May 24, 2001

Decided: July 6, 2001

BEFORE **RICHARD McGILL**, ALJ:

The Board of Education of the City of Elizabeth (hereinafter "Board," "School District" or "petitioner") filed charges with the Commissioner of Education against Edward Jackus and Sharon Gaines (hereinafter sometimes "respondents"), both of whom it employs as vice principals. Each respondent faces one count of conduct unbecoming a vice principal.

The charges against the respondents are substantially the same. The charge against Ms. Gaines states as follows:

> Ms. Gaines is guilty of conduct unbecoming a Vice Principal by aiding and abetting the Principal in failing to hold two (2) fire drills per month as required by New Jersey Statutes and the Fire Code. Ms. Gaines had knowledge that the school has failed to hold two (2) fire drills per month as required by Board Policy and New Jersey Law. (Exhibits A and B). Ms. Gaines is aware of the law and Board policy yet did not advise the administration that her school has failed to hold the requisite number of fire drills in her school. (Exhibit C).
>
> Such conduct establishes Ms. Gaines' unfitness to supervise the education and safety of the children in the Elizabeth schools, violates the public trust placed with Ms. Gaines as a Vice Principal and endangers the physical well being of the students.

Both respondents denied that they engaged in conduct unbecoming a vice principal, and they also raised various affirmative defenses. Most notable among the affirmative defenses, Mr. Jackus asserted that the charge was filed against him in violation of his constitutional rights because of his political activity and constitutes a form of selective prosecution in that other schools had similar violations. Likewise, Ms. Gaines maintains that she was improperly singled out in a situation where there were similar violations at other schools in the district.

PROCEDURAL HISTORY

The School District filed both charges of conduct unbecoming a vice principal with the Commissioner of Education on January 8, 2001. Mr. Jackus filed an answer on January 25, 2001, and the matter was transmitted to the Office of Administrative Law on February 9, 2001, for determination as a contested case. Ms. Gaines filed an answer on February 8, 2001, and that proceeding was transmitted to the Office on February 16, 2001, for determination as a contested case. The two matters were consolidated by Order dated April 26, 2001.

On April 24, 2001, Ms. Gaines filed a motion for summary decision. On April 26, 2001, Mr. Jackus joined in the motion, and on May 8, 2001, petitioner submitted papers in opposition to the motion. After Ms. Gaines filed a reply on May 17, 2001, an oral argument was conducted on May 24, 2001, concerning the motion for summary decision. It may be noted that on May 24, 2001, the parties also argued the merits of petitioner's motion *in limine* to exclude evidence intended to prove that similarly situated individuals were treated in a dissimilar manner related to the selective prosecution defense.

MOTION FOR SUMMARY DECISION

a. Legal Standard

A motion for summary decision should be granted where there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. *N.J.A.C.* 1:1-12.5(b). The same standard is applied in the courts of this State pursuant to *R.*4:46-2. Summary judgment "is designed to provide a prompt, businesslike and inexpensive method" to dispose of actions which do not present any genuine issue of material fact. *Judson v. Peoples Bank & Trust Co. of Westfield,* 17 *N.J.* 67, 74 (1954). The movant must show that there is no genuine issue of material fact, and all inferences of doubt are drawn against the movant. *Id.*, at 74-75. However, excessive caution which would undercut the purposes of a motion for summary judgment should be avoided. *Pierce v. Ortho Pharmaceutical Corp.*, 84 *N.J.* 58, 65 (1980). Thus, if the opposing party offers only facts which are immaterial or insubstantial in nature, this circumstance should not defeat a motion for summary judgment. *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* at 75. Although the pleadings may raise a factual issue, summary judgment procedure pierces the allegations in the pleadings, where the other papers show the absence of any genuine issue of material fact. *Ibid.*

In determining whether there exists a genuine issue as to a material fact, the judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are

sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520, 523 (1995).

b. Facts

In support of the motion for summary decision, Ms. Gaines submitted a statement of material facts as to which no genuine dispute exists. The statement contains twenty-eight numbered facts. Mr. Jackus filed a separate statement of material facts as to which no genuine dispute exists. This statement contains twenty-one numbered facts. In its response to the motion, petitioner contends that there are numerous genuine issues of material fact.

Petitioner has demonstrated that there are genuine disputes as to some of the numerous facts asserted by respondents. However, I am satisfied that there is a core of facts as to which there is no genuine dispute in this matter and that the pending motion for summary decision can be decided based thereon. The only fact which requires comment concerns various sources such as statutes and Board policies which petitioner cites as sources of a duty for respondents to act in regard to the fire drills. While the parties differ as to the proper interpretations of these sources, there is no dispute as to what they say. Therefore, there is no need for a hearing with respect to these sources.

The material facts as to which there is no genuine dispute are as follows:

1. During the 1998-1999 and 1999-2000 school terms, Mr. Jackus served in the capacity of vice principal at the Theodore Roosevelt School (School 17).

2. During that same period of time, Ms. Gaines served in the capacity of vice principal at the Theodore Roosevelt School (School 17).

3. During that same period of time, Jean Cina served as principal at the Theodore Roosevelt School (School 17).

4. A statute, *N.J.S.A.* 18A:41-1, requires that the principal shall have at least two fire drills each month within school hours.

5. The School District has Fire Drill Regulations, which incorporate *N.J.S.A.* 18A:41-1 to -4. The Regulations specify additional details and responsibilities. The Regulations state in part as follows:

> FIRE ALARMS:
>
> All members of the faculty, office personnel and maintenance staff shall be acquainted with the location of building fire alarm boxes and instructed in their use. The school principal shall test the fire alarm system regularly as required to ensure it is functioning properly.
>
> . . . .
>
> RESPONSIBILITY:
>
> Responsibility for a fire drill shall be assumed by a designated person in the absence of the principal from the building.
>
> . . . .
>
> It shall be the duty of the principal, his assistants and maintenance staff to see the doors to the furnace room, hallways, fire towers and smoke doors are kept closed at all times. This rule shall apply whether or not the building is occupied. This is a State law requirement.
>
> GENERAL RULES:
>
> . . . .
>
> The State Law requires two fire drills in each calendar school month. During inclement weather students may be advised of a drill and permitted to put on clothing before fire alarm is sounded. It is not required that all fire drills be spontaneous.
>
> . . . .

IMPORTANT:

All principals are to continue to send to this office monthly, the "Emergency Drill Report" indicating compliance with the State Law that required a minimum of two fire drills every month. This office will then report to the Board of Education that all schools are in compliance.

6. Ms. Cina, Mr. Jackus and Ms. Gaines were all aware of the requirement to hold fire drills.

7. During the 1998-1999 and 1999-2000 school terms, fire drills were not conducted as required by *N.J.S.A.* 18A:41-1.

8. Ms. Cina, Mr. Jackus and Ms. Gaines were all aware that fire drills were not conducted as required by *N.J.S.A.* 18A:41-1.

9. The job description for vice principal provides in part as follows:

TITLE:

Assistant House Director/Vice Principal

....

QUALIFICATIONS:

A New Jersey Certificate with the appropriate Principal's endorsement.

....

BASIC FUNCTIONS OF POSITION:

To effectively assist the House Director or principal in the administration and supervision of the educational program within the assigned school.

....

SPECIFIC RESPONSIBILITIES:

Within the approved limits of authority and in compliance with all applicable rules, regulations and policies of the Elizabeth Board of Education and the New Jersey Administrative Code, the Assistant House Director/Vice Principal is responsible for assisting the House Director or Principal in the effective performance of the following:

....

7) Maintenance of the Physical Plant:

b. Determines the needs and develops an efficient program of plant operation.

c. Develops a plan for the orderly growth and improvement of school facilities.

d. Recommends a program of repair, replacement and structural changes when necessary.

e. Supervises the custodial staff.

....

10) Implements the negotiated agreement between the Elizabeth Board of Education and the Elizabeth Education Association, and the rules, regulations and policies of the Elizabeth Board of Education.

10. In or about June 2000, petitioner began an investigation into the failure to hold fire drills at the Theodore Roosevelt School.

11. Prior to June 2000, Mr. Jackus did not take any action in regard to the failure to hold fire drills at the Theodore Roosevelt School.

12. Prior to June 2000, Ms. Gaines did not take any action in regard to the failure to hold fire drills at the Theodore Roosevelt School.

c. Law and Analysis

The charge against respondents is that they engaged in conduct unbecoming a vice principal in that: (1) they aided and abetted the principal in failing to hold two fire drills each month as required by statute and (2) they did not advise the administration that the school had not held the requisite number of fire drills. At the oral argument, petitioner contended that the expression "aided and abetted" is not a factual assertion but rather a legal term which adds nothing to the charge. However, this phrase appears to be sufficiently central to the charge to require discussion.

The phrase "aid and abet" is usually used in the context of criminal law. "Aid and abet" refers to "all assistance rendered by words, acts, encouragement, support or presence, actual or constructive, to render assistance if necessary." *State v. Sullivan*, 43 *N.J.* 209, 236 (1964).

The terms "aiding" and "abetting" are also used in the civil context, *e.g.*, *Halberstam v. Welch,* 705 *F.*2d 472 (D.C. Cir. 1983) (tort liability for aiding or abetting a wrongful act). In that case, the Court stated that aiding-abetting includes the following elements: "(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; and (3) the defendant must knowingly and substantially assist the principal violation." *Id.*, at 477.

In the context of civil rights, aiding or abetting is prohibited by statute. *N.J.S.A.* 10:5-12(e). However, the requirement of shared intent which is necessary in the criminal law is not an element of aiding and abetting in the civil context. *Failla v. City of Passaic*, 146 *F.*3d 149, 157(3rd Cir. 1998). Liability for aiding or abetting requires that one know the other's conduct constitutes a breach of duty and that one gives substantial assistance or encouragement to that

conduct. *Id.*, at 158. See also, *Shepherd v. Hunterdon Dev. Ctr.*, 336 *N.J. Super.* 395, 424-426 (App. Div. 2001).

Inaction can form the basis for aiding and abetting liability under the New Jersey Law Against Discrimination (NJLAD), *N.J.S.A.* 10:5-1 to -49, if it rises to the level of providing substantial assistance or encouragement. *Hurley v. Atlantic City Police Dept.*, 174 *F.*3d 95, 126 (3rd Cir. 1999). When a supervisor flouts or is deliberately indifferent to a duty to act against harassment, the supervisor may be liable for aiding and abetting. *Ibid.* Thus, a failure to act in a context in which there was a duty to do so may constitute aiding and abetting. This principle may reasonably be applied in the context of this case.

Unbecoming conduct constitutes grounds for dismissal or reduction in compensation for various school personnel including principals and vice principals in accordance with *N.J.S.A.* 18A:28-5, which provides in pertinent part as follows:

> The services of all teaching staff members employed in the positions of teacher, principal, other than administrative principal, assistant principal, vice-principal, assistant superintendent ... 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 ... .

Unbecoming conduct may be grounds for removal in other types of public employment. *N.J.A.C.* 4A:2-2.3(a)6. Our Supreme Court addressed the concept of unbecoming conduct in *Karins v. City of Atlantic City*, 152 *N.J.* 532 (1998), which involved a situation where an off-duty firefighter directed a racial epithet at an on-duty police officer during a traffic stop. The Court noted that the phrase "unbecoming conduct" is an elastic one that includes any conduct that adversely affects morale or efficiency by destroying "public respect for municipal employees and confidence in the operation of municipal services." *Id.*, at 554. A finding of misconduct 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 Dept. of Ridgewood*, 258 *N.J. Super.* 32, 40 (App. Div. 1992).

A charge of unbecoming conduct may be based upon a failure to act where there is a duty to do so. *City of Asbury Park v. Department of Civil Service*, 17 *N.J.* 419 (1955). In that case, a police officer was suspended for conduct unbecoming for failure to conduct an investigation despite ample evidence of infractions of the law. The Court stated as follows:

> The fundamental duty of a policeman "from chief of police to patrolman, is to be on the lookout for infractions of the law and to use due diligence in discovering and reporting them, and in a proper case arresting the perpetrator and lodging and prosecuting a proper complaint," [citation omitted.] *Id.*, at 429.

Thus, a duty to act is the touchstone for unbecoming conduct based upon failure to act.

In the school context, failure to act has been found to constitute unbecoming conduct in a variety of situations. For example, where a teacher repeatedly and willfully disregarded directions to conform his conduct to the level expected by staff members, a charge of unbecoming conduct was sustained. *In the Matter of the Tenure Hearing of Loria*, 96 *N.J.A.R.* 2d (EDU) 379. Similarly in *In the Matter of the Tenure Hearing of Graceffo*, OAL Dkt. No. EDU 5619-99 (June 19, 2000), affirmed with modifications, Comm'r (September 21, 2000), charges of unbecoming conduct against a vice principal were sustained in a situation where he willfully and repeatedly violated State law and Board policy regarding drug testing of students who were suspected of being under the influence of alcohol or other drugs.

In the situation *sub judice*, the duty to conduct the prescribed number of fire drills is placed squarely upon the principal by *N.J.S.A.* 18A:41-1. Similarly, the School District's Fire Drill Regulations, which incorporate *N.J.S.A.* 18A:41-1, place the responsibility squarely on the principal to file the "Emergency Drill Report" indicating compliance with State law requiring a minimum of two fire drills every month. It may be noted that the principal of the Theodore Roosevelt School (School 17) was subject to tenure charges, which were not consolidated with this proceeding, based upon the failure to hold fire drills and to file proper reports.

With respect to respondents, *N.J.S.A.* 18A:41-1 does not refer in any way to vice principals. Similarly, the Fire Drill Regulations do not place any specific responsibility on vice principals. In the job description for vice principal, there is no mention of fire drills or a responsibility to report acts or omissions of the principal. Under the circumstances, the vice

principals were not under a specific duty to conduct the fire drills or to report the principal's failure to do so. Since the vice principals were not under a duty to act, the failure to act would not rise to the level of providing substantial assistance or encouragement. It follows that respondents did not aid or abet the principal in this case.

The final question is whether in the absence of a specific duty to act the vice principals engaged in conduct unbecoming by failing to uphold an implicit standard of good behavior. One general concern is that a duty of this nature would place a burden on subordinates to report questionable acts or omissions of superiors or risk facing tenure charges. This seems to be an undue burden to place on subordinates.

In this situation, the duty to conduct fire drills and to file reports was clearly placed on the principal. Even by the most general standards of good conduct, the inaction of the vice principals would not likely affect morale or efficiency by destroying public respect for or confidence in school operations or services. Under the circumstances, any possible misconduct by the principal should not be thrust upon the vice principals. Therefore, I **CONCLUDE** that respondents did not engage in conduct unbecoming a vice principal and that therefore the charges of conduct unbecoming a vice principal in this matter should be dismissed.

Accordingly, it is **ORDERED** that:

1. The motion for summary decision is granted.

2. The charge of conduct unbecoming a vice principal against Edward Jackus is dismissed.

3. The charge of conduct unbecoming a vice principal against Sharon Gaines 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.

July 6, 2001
DATE

RICHARD McGILL, ALJ

Receipt Acknowledged:

7-10-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 11 2001
DATE

OFFICE OF ADMINISTRATIVE LAW

cml

IN THE MATTER OF THE TENURE	:	
HEARING OF EDWARD JACKUS,	:	
SCHOOL DISTRICT OF THE CITY OF	:	
ELIZABETH, UNION COUNTY,	:	
AND	:	COMMISSIONER OF EDUCATION
IN THE MATTER OF THE TENURE	:	DECISION
HEARING OF SHARON GAINES,	:	
SCHOOL DISTRICT OF THE CITY	:	
OF ELIZABETH, UNION COUNTY.	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) in his consolidated tenure charge matter have been reviewed. Petitioner's (Board) exceptions were timely filed pursuant to *N.J.A.C.* 1:1-18.4, as were the reply exceptions filed by Respondent Jackus. Respondent Gaines' reply exceptions were untimely filed.[1] Further, it is noted for the record that while the Board recognizes that *N.J.A.C.* 1:1-18.4 does not provide for a response to reply exceptions, the Board submitted such a response because it contends that the

[1] Pursuant to *N.J.A.C.* 1:1-18.4, Respondent Gaines' reply exceptions were due on July 30, 2001. On July 31, 2001, Ms. Gaines' counsel filed reply exceptions via facsimile transmission acknowledging that they were due on July 30 but requesting relaxation of the rule because he "was out of [his] office for a portion of last week." While *N.J.A.C.* 1:1-18.8(a) permits time limits for filing exceptions and replies to be extended for good cause, *N.J.A.C.* 1:1-18.8(b) requires that a request for such extension be submitted no later than the day on which time period for filing is to expire. This did not occur herein. Moreover, that regulation provides that the time period for requesting an extension may only be waived in case of emergency or other unforeseeable circumstances. Because counsel's justification for not filing reply exceptions on or before July 30, 2001 does not meet the requisite criteria for relaxation of the filing time limit, the reply exceptions are deemed to be untimely.

replies filed by respondents do not address the Board's exceptions and, therefore, should have been filed as primary exceptions to the Initial Decision.[2]

Initially, it is noted that the Board's exceptions essentially reiterate and/or recast arguments previously made before and rejected by the Administrative Law Judge (ALJ); therefore, the exceptions will only be briefly summarized below.

In its exceptions, the Board argues, *inter alia,* that the ALJ erred in granting respondents' Motion for Summary Decision because there are numerous issues of material fact to be decided. As to this, the Board urges that the ALJ erred in deciding this matter purely on a legal question as to whether the vice principals could be held responsible for the failure of their school to hold fire drills, when the crux of the charges against respondents is their knowledge of a violation of Board policy and their failure to report and/or correct this violation. The Board vehemently objects to the ALJ's ruling that as a matter of law the tenure charges should be dismissed as respondents cannot be held responsible for fire drills, urging instead that vice principals, in light of their administrative certificates and position, are aware that schools must conduct two fire drills per month. Further, the Board reiterates its assertion that respondents failed to ensure that the school followed this rule of law and Board regulation and, therefore, are guilty of unbecoming conduct, urging that "[t]he issue to be decided by the [ALJ] at a hearing is whether the Vice-Principals are guilty of unbecoming conduct by their failure to ensure compliance with Board policy. The Respondents deny that they have violated Board policy. Thus, a material fact must be decided by the [ALJ]." (Board's Exceptions at 5)[3]

---

[2] Since there is no provision in law for submission of a response to reply exceptions, the Board's submission will not be considered by the Commissioner in reaching a final decision in this matter.

[3] The Commissioner also notes for the record that the Board's exceptions argue that "[b]ased on the Commissioner's transmittal of this matter for a hearing [pursuant to the provisions of *N.J.S.A.* 18A:6-16], the issue of whether [respondents] could be held responsible for the fire drills at School No. 17 had been decided. The law of the case precluded the [ALJ] from making a different determination as it would be *res judicata.*"[3] (Exceptions at 5) The Commissioner finds the Board's *res judicata* argument entirely without merit. Transmittal of tenure charges to the OAL for hearing under the provisions of *N.J.S.A.* 18A:6-16 is *not* tantamount to a legal conclusion.

Returning to the ALJ's finding that, as a matter of law, the vice principals were not responsible for holding fire drills, the Board reiterates its argument that according to their certificate, training and job description, vice principals are required to implement Board policy, including fire drills and, therefore, should be held accountable for their inaction in the face of a school safety hazard. The Board also urges that the ALJ erred in finding that the vice principals' refusal to do anything in the face of their knowledge that fire drills were not being conducted in their school did not constitute unbecoming conduct. It reiterates its position that the vice principals have a duty to implement Board policy based on their job description and, therefore, have a duty to ensure that fire drills were being held in their school when they became aware that the drills were not being held because they plainly had a duty that arises from their status as administrators in a school to ensure the safety of students. Of this, the Board states:

> The Respondents were assigned to School No. 17 for over two (2) years, never heard the fire bells ring, never witnessed a fire drill and ignored the situation. The Respondents knew that the law was being violated and failed to act. (Initial decision at 6). The response from respondents that they assumed [the principal] was reporting to the Board that no fire drills were being conducted is irrelevant. The Respondents are charged with the care and instruction of the students of Elizabeth. Their principal responsibility is to ensure the safety and well-being of those students. Carried to its logical conclusion, based upon the "its [sic] not my job" defense of the respondents, if the Respondents became aware of abuse of a child, they could assume that the counselors knew about it because it was not their job. Or, in the alternative, if a dangerous condition was created in the School, that they did not have responsibility to see it was fixed because that was the Head Custodians (sic) job. (*Id.* at 8)

The Board next argues that a determination as to whether an action constitutes unbecoming conduct is discretionary and must be decided on a case-by-case basis. In support of this contention and its position that respondents are guilty of unbecoming conduct, the Board relies upon *In the Matter of the Tenure Hearing of Charles Motley, State-operated School*

District of the City of Newark, Essex County, issued by the Commissioner August 4, 1999, *aff'd* State Board of Education December 1, 1999, wherein the ALJ stated:

> "Unbecoming conduct" is an elastic term broadly defined to include any conduct "which has a tendency to destroy public respect for [government] employees and competence in the operation of [public] services." *Karins v. City of Atlantic City*, 152 *N.J.*, 532, 554 (1998). Behavior rising to the level of unbecoming conduct "need not be predicated upon a violation of any particular rule or regulation, but may be based merely upon a violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of what is morally and legally correct. [citation omitted] Despite the apparent vagueness of this standard, "it fairly and adequately conveys its meaning to all concerned." *Laba v. Newark Bd. of Educ.*, 23 *N.J.* 364, 384 (1957). In the context of a school tenure case, "the touchstone is fitness to discharge the duties and functions of one's office and position." *In re Tenure Hearing of Grossman*, 127 *N.J. Super.* 13, 29 (App. Div. 1974), *certif. den.* 65 N.J. 292 (1974). (Slip op. at 15-16)

Lastly, the Board argues that the ALJ erred in finding that (1) requiring a vice principal to address the failure of the school to hold fire drills would place an undue burden on subordinates to report illegal acts of superiors or risk facing tenure charges and that (2) the inaction of respondents would not likely affect morale or efficiency by destroying public respect for, or confidence in, school operations or services. With respect to this, the Board argues, *inter alia,* that the Conscientious Employee Protection Act (CEPA) protects employees who report unsafe conditions and protects such employees from retaliation for their whistle-blowing. It further urges that the ALJ minimized the conduct in this case when referring to the failure of the school to hold fire drills as "questionable acts or omissions." (Initial Decision at 11) Of this, the Board states, "It is more than that. It is illegal conduct that violates *N.J.S.A.* 18A:41-1 and jeopardized the children's safety." (Board's Exceptions at 10) Consequently, the Board requests that the Commissioner find that respondents have a duty to implement Board policies regarding the safety of students and their failure to do so warrants discipline.

Initially, Respondent Jackus' reply exceptions[4] aver, *inter alia*, that it is clear that the motives for bringing tenure charges against respondents had nothing to do with the Board's desire for safety in the schools, but rather was a vendetta and retaliatory action against him for his political association outside of school. He next argues that the ALJ's decision correctly states the principle of law for consideration of a motion for summary judgment and urges that it is clear from all submissions by the Board and *N.J.S.A.* 18A:41-1 that the duty to conduct fire drills is placed squarely upon the principle. Of this, Respondent Jackus reiterates that, "[n]owhere in either the statute or the school district's fire drill regulations is there any mention of Vice Principal's duty either to conduct fire drills, report fire drills or report the lack of fire drills to the administration." (Jackus' Reply Exceptions at 3) Jackus further argues that the ALJ is correct in finding that "[e]ven by the most general standards of good conduct, the inaction of the vice principals would not likely affect morale or efficiency by destroying public respect for or confidence in school operations or services." (Initial Decision at 11) Jackus also contends that the only factual assertion for evidence presented by the Board as to the effect of morale and efficiency was the Board's own assertions.

Upon review of the record in this matter, the Commissioner agrees with the ALJ's determination that, notwithstanding the Board's demonstration that there are genuine disputes as to some of the numerous facts asserted by respondents, there exists, nonetheless, a core of essential facts over which there is no dispute; thus, respondents' Motion for Summary Decision can be decided to the extent of ascertaining whether or not respondents are guilty of unbecoming conduct. Further, the Commissioner is in agreement with the ALJ's recitation of the law on what constitutes unbecoming conduct, found on pages 9-10 of the Initial Decision, and as set forth

[4] A review of the record indicates that respondent Jackus' reply exceptions address exhibits which were not part of the record before the Administrative Law Judge. Those exhibits will not, pursuant to *N.J.A.C.* 1:1-18.4(c), be considered herein.

above in the Board's recitation from *Motley, supra.* Moreover, the Commissioner fully concurs with the ALJ that unbecoming conduct may be based on a failure to act where there is a duty to do so and that "a duty to act is the touchstone for unbecoming conduct based upon failure to act." (Initial Decision at 10)

However, upon careful and thorough consideration of the record, the Commissioner does not agree with the conclusions of law reached by the ALJ that the charge of unbecoming conduct levied against each respondent should be dismissed because, pursuant to *N.J.S.A.* 18A:41-1 and the Board's regulations, the duty to conduct fire drills is placed squarely on the principal and because neither the law, nor Board regulations, nor the job description for vice principals assign any responsibilities for fire drills on vice principals; thus, under the circumstances of this matter, respondents were not under a specific duty to conduct fire drills or to report the principal's failure to do so. Moreover, the Commissioner does not agree with either of the ALJ's conclusions that "[e]ven by the most general standards of good conduct, the inaction of the vice principals would not likely affect morale or efficiency by destroying public respect for or confidence in school operations and services," and that an undue burden would be placed on subordinates to report questionable acts or omissions of superiors or risk facing tenure charges. (*Id.* at 11)

In so holding, the Commissioner fully concurs with the Board that the crux of the unbecoming conduct charge, under the facts of this matter, rests upon the inaction of the vice principals who have a professional duty to ensure the health, safety and well-being of the students and staff under their care and supervision. The very fact that the law requires fire drills in schools to be conducted *at least two times each month* underscores the grave importance of such safety drills for ensuring the emergency preparedness of students and staff. Of paramount importance to the core of undisputed facts in this matter is that (1) respondents had knowledge

that statute and Board regulations require that two fire drills be conducted each month in their school; (2) respondents had knowledge that the law and Board regulations for the conduct of fire drills were violated continuously for at least two years at School 17; and (3) respondents failed to act on that knowledge. To have such knowledge and not act upon it in the face of the duty of care for student and staff safety, which they bear as administrators of School 17, constitutes, in the Commissioner's judgment, unbecoming conduct, even if one accepts *arguendo* that respondents did not know if the principal was reporting noncompliance with the fire drill law and Board regulations. In other words, respondents, by virtue of their status as vice principals, have a duty to protect the health, safety and well-being of students and staff in School 17. Moreover, this duty of care in turn gave rise to a duty on respondents' part to act on/report the continuous, long-term violations of law in that the vice principals' failure to report such violations was no less serious than the failure of the principal to hold fire drills, given that the health, safety and well-being of students and staff were seriously jeopardized.

Next, the Commissioner finds and determines that, under the factual circumstances of this matter, wherein the health, safety and well-being of students and staff were seriously jeopardized, an undue burden would not have been placed on the respondent vice principals to act on their knowledge of the long-term, continuous violations of law and Board regulation with respect to fire drills in School 17.

Having sustained the charge of unbecoming conduct against respondents, it is necessary to make a determination as to the appropriate penalty in this matter. However, because the ALJ dismissed the tenure charges, the record is insufficiently developed to determine either the assignment or mitigation of penalty; therefore, the Commissioner is compelled to remand this matter to the OAL solely for proceedings as necessary to develop a full and factual record in order to make recommendations, as appropriate, with respect to penalty.

Accordingly, respondents' Motion for Summary Decision is denied and the charge of unbecoming conduct certified by the Board against each respondent is sustained for the reasons set forth above. The matter is, therefore, remanded to the OAL for further proceedings, as necessary, on the question of appropriate penalty.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 8|24|01

Date of Mailing: 8|24|01

[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.

269-01

CYNTHIA J. WINTER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

August 27, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9201-00

AGENCY DKT. NO. 129-4/00

CYNTHIA J. WINTER,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY

Respondent.

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

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

Record Closed: July 10, 2001 Decided: July 10, 2001

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

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on October 6, 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.

A hearing was scheduled for June 12, 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.* 52:14B-10.

July 10, 2001
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

7-12-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 17 2001
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

RECEIVED
STATE OF NEW JERSEY
OFFICE OF
JUL 10 12 37 PM '01

SETTLEMENT AGREEMENT
Between
THE ELIZABETH BOARD OF EDUCATION
and
CYNTHIA WINTER

1. This Agreement is being entered into between the Elizabeth Board of Education ("Board") and Cynthia Winter ("Winter") to resolve all the litigation pending between them before the Commissioner of Education, Agency Docket No. 129-4/00 and all grievances filed by Ms. Winter against the Board of Education, as well as any litigation that could have been brought.

2. The Board agrees to grant Ms. Winter a sabbatical leave for rest and recuperation for a duration of September 1, 2001 to December 31, 2001 as provided in Article XVI of the negotiated agreement between the Board of Education and the Elizabeth Education Association. Ms. Winter will receive compensation in the amount of half her regular salary from September 1, 2001 to December 31, 2001. The Board of Education will continue all other benefits until December 31, 2001 as set forth in the collective bargaining agreement. No payment shall be made by the Board of Education until the approval of this agreement by the Commissioner of Education.

3. Ms. Winter agrees to submit, within five (5) working days from the approval of this Agreement by the Commissioner of Education, a letter of resignation which shall state it is effective on January 1, 2002.

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

5. Ms. Winter 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.

6. In consideration for this Agreement, Winter 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 Winter, 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 Title VII of the Civil Rights Act of 1964, the Equal Pay Act, the New Jersey Law Against Discrimination Act, the New Jersey Conscientious Employee Protection Act, the Civil Rights Act of 1866, 42 U.S.C. §1983, The Americans with Disabilities Act, Title 18A of the New Jersey Statutes, Title 6 and 6A of the New Jersey Administrative Code, all claims arising under the public policy of the State of New Jersey, all tortious claims (including intentional infliction of emotional distress and inducing breach of contract) and all other federal, state and local labor and anti-discrimination laws, the common law and any other purported restriction on the Board's employment related decisions with the following exceptions: claims arising under the Worker's Compensation Act, N.J.S.A. 34:15-1 et seq., claims arising under the Teacher's Pension and Annuity Fund Act, N.J.S.A. 18A:66-1 et seq., and claims alleging a breach of this Settlement Agreement.

7. The Board, for and in consideration of the undertakings of Ms. Winter set forth herein, and intending to be legally bound, does hereby remise, release and forever discharge Ms. Winter 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 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 the 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 the 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 the Board, including but not limited to tenure charges, with the following exception: claims alleging a breach of this Settlement Agreement.

8. Each party hereto represents that, in executing this Agreement, such party has not relied and does not rely upon any representation or statement of any other party not set forth herein with regard to the subject matter, basis or effect of this Agreement or otherwise.

9. 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.

10. Ms. Winter has voluntarily and without coercion entered into this Agreement.

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

By: Mary E. Hennessy

Dated: 7/9/01

For Cynthia Winter

SELIKOFF & COHEN

Steven R. Cohen, Esq.

By: Steven R. Cohen

Dated: July 5, 2001

Cynthia Winter

Cynthia Winter

Dated: 06/29/01

OAL DKT. NO. EDU 9201-00
AGENCY DKT. NO. 129-4/00

CYNTHIA J. WINTER,	:	
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 the parties' compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8|27|01

Date of Mailing: 8|28|01

270-01

CONCETTA CAPONEGRO, VIRGINIA DEVANE, HOWARD JOHNSON, NORMAN JEFFRIES AND BESSIE WHITE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

August 27, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 5783-00
AGENCY DKT. NO. 370-9/95
OAL DKT. NO. EDU 11980-95 (On Remand)
AGENCY DKT. NO. 370-9/95

CONCETTA CAPONEGRO, VIRGINIA
DEVANE, HOWARD JOHNSON,
NORMAN JEFFRIES AND BESSIE WHITE,
Petitioners,
v.
STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Sanford R. Oxfeld, Esq., for petitioners
(Oxfeld Cohen, LLC, attorneys)

Cherie Adams Maxwell, Esq., for respondent
(Sills, Cummis, Radin, Tishman, Epstein & Gross, attorneys)

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

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

On September 18, 1995, petitioners Concetta B. Caponegro, Virginia DeVane, Howard Johnson, Norman Jeffries and Bessie White filed a petition of appeal with the Commissioner of Education alleging that they were each improperly denied 60 days' pay and that due to implied contracts of employment, each petitioner should be awarded his or her full position for the entirety of the 1995-96 school year. Respondent filed an answer on November 1, 1995, alleging *inter alia* that implied contracts do not exist between any of the petitioners and respondent and that petitioners are not entitled to additional compensation for any accumulated vacation, personal or sick days or to 60 days' pay pursuant to *N.J.S.A.* 18A:7A-44.

On November 6, 1995, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter 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 matter was assigned to the undersigned judge on December 15, 1995. After a hearing was held and the record closed, the undersigned issued an Initial Decision on November 18, 1998.

Subsequent thereto, on January 4, 1999, the Commissioner of Education rendered a decision affirming the undersigned's decision with clarification. On April 7, 1999, the State Board of Education affirmed the Commissioner's decision. On April 14, 2000, the Appellate Division affirmed in part and reversed and remanded in part the agency's decision. More particularly, the Appellate Division decision reversed the decision to the extent it denied petitioners compensation for accumulated vacation and sick days and remanded for reconsideration and calculation of these benefits in accordance with the policy and procedure manual of the Board and, to the extent appropriate, the Board's past practices. The Appellate Division also remanded for determination of whether Johnson's accumulated vacation limit is forty or sixty days. The Appellate Division affirmed the decision in all other respects.

The matter was remanded to the undersigned judge on July 21, 2000 and a number of settlement conferences were held in an effort to resolve the remanded issues.

The parties have agreed to settle this matter and have prepared the attached Stipulation of Settlement in regard to petitioners Caponegro, Devane, Johnson and White. The parties further agreed to a dismissal of the matter of Norman Jeffries for failure to prosecute.

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

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

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

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

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

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

July 10, 2001
DATE

ELINOR R. REINER, ALJ

Receipt Acknowledged:

7-12-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 17 2001
DATE

OFFICE OF ADMINISTRATIVE LAW

al

SILLS CUMMIS RADIN TISCHMAN
EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(973) 643-7000
Attorneys for Respondent

CONCETTA B. CAPONEGRO, VIRGINIA DEVANE, HOWARD JOHNSON, NORMAN JEFFRIES, and BESSIE WHITE, Plaintiff, -vs- STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, Defendant.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW Agency Ref. No.: 370-9/95 Civil Action **STIPULATION OF SETTLEMENT AND DISMISSAL WITH PREJUDICE**

IT IS HEREBY AGREED by and between the Petitioners herein and the Respondent, in full settlement of all issues, with prejudice but without costs, as follows:

1. Pursuant to the Appellate Division determination in this matter, Petitioners shall receive the following sums, subject to any necessary withholdings, in full and final satisfaction of all claims under the above petition:

a. Petitioner Caponegro shall receive $7,917.80.

b. Petitioner DeVane shall receive $37,439.30.

c. Petitioner White shall receive $39,188.80.

d. Petitioner Johnson shall receive $2,958.00.

~~e. Petitioner Jeffries shall receive $8,725.00.~~

SRO

2. The remanded petition shall be dismissed with prejudice, based upon the parties' agreement.

3. The above payments shall be made within 30 days of approval of this Agreement and each check shall be made payable to the named Petitioner and "Sanford R. Oxfeld, Esq."

State-Operated School District of the
City of Newark, Essex County

Dated	By:
Dated	Concetta B. Caponegro
Dated	Virginia DeVane
Dated	Howard Johnson
Dated	Norman Jeffries
Dated	Bessie White

SILLS CUMMIS RADIN TISCHMAN
EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(973) 643-7000
Attorneys for Respondent

CONCETTA B. CAPONEGRO, VIRGINIA DEVANE, HOWARD JOHNSON, NORMAN JEFFRIES, and BESSIE WHITE, Plaintiff, -vs- STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, Defendant.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW Agency Ref. No.: 370-9/95 Civil Action **STIPULATION OF SETTLEMENT AND DISMISSAL WITH PREJUDICE**

IT IS HEREBY AGREED by and between the Petitioners herein and the Respondent, in full settlement of all issues, with prejudice but without costs, as follows:

1. Pursuant to the Appellate Division determination in this matter, Petitioners shall receive the following sums, subject to any necessary withholdings, in full and final satisfaction of all claims under the above petition:

a. Petitioner Caponegro shall receive $7,917.80.

b. Petitioner DeVane shall receive $37,439.30.

c. Petitioner White shall receive $39,188.80.

d. Petitioner Johnson shall receive $2,958.00.

~~e. Petitioner Jeffries shall receive $8,725.00.~~

SPW

4c

2. The remanded petition shall be dismissed with prejudice, based upon the parties' agreement.

3. The above payments shall be made within 30 days of approval of this Agreement and each check shall be made payable to the named Petitioner and "Sanford R. Oxfeld, Esq."

State-Operated School District of the
City of Newark, Essex County

Dated	By:
Dated	Concetta B. Caponegro
3/15/01 Dated	Virginia DeVane Virginia DeVane
Dated	Howard Johnson
Dated	Norman Jeffries
Dated	Bessie White

VPD

4d

SILLS CUMMIS RADIN TISCHMAN
EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(973) 643-7000
Attorneys for Respondent

CONCETTA B. CAPONEGRO, VIRGINIA DEVANE, HOWARD JOHNSON, NORMAN JEFFRIES, and BESSIE WHITE, Plaintiff, -vs- STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, Defendant.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW Agency Ref. No.: 370-9/95 Civil Action **STIPULATION OF SETTLEMENT AND DISMISSAL WITH PREJUDICE**

IT IS HEREBY AGREED by and between the Petitioners herein and the Respondent, in full settlement of all issues, with prejudice but without costs, as follows:

1. Pursuant to the Appellate Division determination in this matter, Petitioners shall receive the following sums, subject to any necessary withholdings, in full and final satisfaction of all claims under the above petition:

a. Petitioner Caponegro shall receive $7,917.80.

b. Petitioner DeVane shall receive $37,439.30.

c. Petitioner White shall receive $39,188.80.

d. Petitioner Johnson shall receive $2,958.00.

~~e. Petitioner Jeffries shall receive $8,725.00.~~

SRo

2. The remanded petition shall be dismissed with prejudice, based upon the parties' agreement.

3. The above payments shall be made within 30 days of approval of this Agreement and each check shall be made payable to the named Petitioner and "Sanford R. Oxfeld, Esq."

State-Operated School District of the
City of Newark, Essex County

3-14-01
Dated

By:

3-14-01
Dated

Concetta B. Caponegro

Dated

Virginia DeVane

Dated

Howard Johnson

Dated

Norman Jeffries

Dated

Bessie White

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
JUN 22 1 45 PM '01

SILLS CUMMIS RADIN TISCHMAN
EPSTEIN & GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(973) 643-7000
Attorneys for Respondent

CONCETTA B. CAPONEGRO, VIRGINIA DEVANE, HOWARD JOHNSON, NORMAN JEFFRIES, and BESSIE WHITE, Plaintiff, -vs- STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, Defendant.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW Agency Ref. No.: 370-9/95 Civil Action **STIPULATION OF SETTLEMENT AND DISMISSAL WITH PREJUDICE**

IT IS HEREBY AGREED by and between the Petitioners herein and the Respondent, in full settlement of all issues, with prejudice but without costs, as follows:

1. Pursuant to the Appellate Division determination in this matter, Petitioners shall receive the following sums, subject to any necessary withholdings, in full and final satisfaction of all claims under the above petition:

a. Petitioner Caponegro shall receive $7,917.80.

b. Petitioner DeVane shall receive $37,439.30.

c. Petitioner White shall receive $39,188.80.

d. Petitioner Johnson shall receive $2,958.00.

e. ~~Petitioner Jeffries shall receive $8,725.00.~~ SRe

2. The remanded petition shall be dismissed with prejudice, based upon the parties' agreement.

3. The above payments shall be made within 30 days of approval of this Agreement and each check shall be made payable to the named Petitioner and "Sanford R. Oxfeld, Esq."

State-Operated School District of the
City of Newark, Essex County

Dated	By:
Dated	Concetta B. Caponegro
Dated	Virginia DeVane
March 20, 2001 Dated	Howard Johnson
Dated	Norman Jeffries
Dated	Bessie White

Sills, Cummis, Radin, Tischman,
Epstein & Gross, P.A.
One Riverfront Plaza
Newark, New Jersey 07102
(973) 643-7000
Attorneys for Defendant

CONCETTA B. CAPONEGRO, VIRGINIA DEVANE, HOWARD JOHNSON, NORMAN JEFFRIES, and BESSIE WHITE,

Plaintiff.

vs.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,

Defendant.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

CIVIL ACTION

OAL Docket No.: EDUOA 05783-00N
Agency Ref. No.: 370-9/95

ORDER OF DISMISSAL

This matter in controversy in connection with Norman Jeffries is hereby dismissed for failure to prosecute.

I HEREBY CONSENT TO THE FORM OF THE WITHIN ORDER.

Oxfeld Cohen, LLC

By: _____
Sanford R. Oxfeld, Esq.

OAL DKT. NOS. EDU 5783-00 AND EDU 11980-95 (ON REMAND)
AGENCY DKT. NO. 370-9/95

CONCETTA CAPONEGRO, VIRGINIA DEVANE, HOWARD JOHNSON, NORMAN JEFFRIES AND BESSIE WHITE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record, Stipulation of Settlement and Dismissal with Prejudice, 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: 8|27|01

Date of Mailing: 8|28|01

#271-01

W.A., on behalf of minor child, B.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY.	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning parent challenged the Board's residency determination that his daughter B.A. was not domiciled in the South Plainfield District and, therefore, was not entitled to continue to attend school in the District.

In light of testimony from witnesses, including the School District's Residency Officer and former police investigator, the ALJ dismissed the petition, concluding that B.A. resided with her mother, who was not domiciled in the District, and that since B.A. was not kept in the home within the respondent District, B.A. was not entitled to be educated in the District. The ALJ ordered that petitioner was liable for tuition from the time B.A. enrolled in the South Plainfield School District in 1998 to the present, a total amount of $25,617. The ALJ denied the Board's request for prejudgment interest, but awarded postjudgment interest pursuant to *N.J.A.C.* 6A:3-17.

The Commissioner agreed with the ALJ that petitioner failed to prove that B.A. was domiciled in the District so as to be entitled to a free public education in that District. The Commissioner directed that petitioner reimburse the Board tuition in the amount of $25,617. Concurring with the ALJ, the Commissioner denied prejudgment interest. The Commissioner, however, also denied postjudgment interest because the requisite time had not passed pursuant to *N.J.A.C.* 6A:3-17. In the absence of express statutory authority to award counsel fees, the Commissioner determined that he may not direct that the Board be compensated for legal fees.

August 27, 2001

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 4016-00

AGENCY DKT. NO. 136-5/00

W.A. o/b/o B.A.,

Petitioner,

v.

SOUTH PLAINFIELD BOARD OF EDUCATION, MIDDLESEX COUNTY,

Respondent.

W.A., petitioner, *pro se*

Marc H. Zitomer, Esq., and **Nicholas Celso, III,** Esq., for respondent (Schwartz, Simon, Edelstein, Celso and Kessler, attorneys)

Record Closed: May 29, 2001 Decided: July 12, 2001

BEFORE **JOSEPH F. MARTONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On March 14, 2000, respondent South Plainfield Board of Education (Board) determined that B.A. is not domiciled in South Plainfield and, therefore, is not entitled to continue to attend school in the District. (C-1, ¶ 14). Petitioner appealed the Board's determination to the

Commissioner of Education on or about April 3, 2000. The Board filed an Answer with Affirmative Defenses on or about May 8, 2000, and on May 12, 2000, the Commissioner transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case. The matter was assigned to the undersigned administrative law judge (ALJ) to hear the matter. On December 8, 2000, the Board was permitted to amend its answer to include a counterclaim for tuition. Petitioner did not file an answer to the counterclaim.

A prehearing conference was held on December 21, 2000, and the parties discussed the nature of the proceeding, the issues to be resolved, the scheduling of hearing dates and discovery deadlines. The matter was scheduled for hearing on January 10 and 11, 2001.

The hearing in this matter commenced on January 10, 2001, and on January 11, 2001, the parties concluded the hearing telephonically. At the conclusion of the hearing, the ALJ directed that the Board's post-hearing brief be submitted within thirty days of receiving the transcripts and that Petitioner's brief be submitted within thirty days of receiving the Board's brief and allowing the Board to submit a reply brief within seven (7) days thereafter. Because petitioner was late in submitting his brief, a letter order was entered on April 26, 2001, establishing a final date for the petitioner to submit his brief or no submission would be accepted. All submissions were eventually received, and the record closed on May 29, 2001.

FACTUAL DISCUSSION

It is stipulated or otherwise undisputed that B.A. is the daughter of petitioner W.A. and C.R. (C-1, ¶1). B.A.'s date of birth is September 11, 1986. (C-1, ¶2). W.A. and C.R. never married. (C-1. ¶3) B.A. is a student currently enrolled in South Plainfield School District pursuant to the stay-put provision of *N.J.S.A.* 18A:38-1. On March 14, 2000, the respondent Board determined that B.A. is not domiciled in South Plainfield and, therefore, is not entitled to continue to attend school in the District. (C-1, ¶ 14).

It is additionally stipulated or otherwise undisputed that B.A. enrolled in the South Plainfield School District in September, 1998. (C-1, ¶4; J-1). The enrollment application lists

the address of C.R. as 517 C. Road and petitioner's address as 705 P. Avenue, Plainfield, New Jersey. (C-1, ¶ 14). C.R. also provided the District with a lease dated September 1, 1998 in support of her claim that she is domiciled in South Plainfield. (C-1, ¶5; J-2). The lease lists C.R. and B.A. as the sole occupants of 517 C. Avenue, South Plainfield, New Jersey. (C-1, ¶14). B.A.'s parents also provided the District with a transfer card from the Plainfield Public School District which states that B.A. formerly lived at 946 M. Avenue, Plainfield, New Jersey. (C-1, ¶6, J-3).

As is indicated in the Legal Discussion, the burden is on petitioner to establish that he is entitled to the requested relief by a preponderance of the credible evidence. Thus, petitioner testified first; however, because his testimony was responsive to the respondent's case, I shall first discuss the testimony and evidence elicited by respondent school district.

Kenneth Van Kleef, the School District's Residency Officer and a former police investigator with 25 years experience, testified that had received a tip from a middle school guidance counselor who told him that she suspected that B.A. is not living in South Plainfield. Upon receiving the tip, Mr. Van Kleef reviewed B.A.'s file and found certain of the information contained therein to be questionable. For instance, the application (J-1) lists C.R.'s address as C. Road, South Plainfield. However, the correct address is C. Avenue because there is no C. Road in South Plainfield. Moreover, petitioner's address is listed as 705 P. Avenue, but Mr. Van Kleef testified that he is fully familiar with this location, and that 705 P. Avenue is a professional building rather than a residence. (R-1). He then sent a letter to both parents on January 14, 2000, requesting various documents in support of B.A.'s claim of domicile in South Plainfield. (C-1, ¶7, J-4).

Mr. Van Kleef testified that neither petitioner nor C.R. responded to his correspondence of January 14, 2000. As a result, he decided to conduct surveillance to ascertain whether B.A. was living in South Plainfield with C.R. His surveillance lasted from mid-January until mid-March, 2000. He prepared a report documenting the results of his surveillance (R-2), and he took a number of photographs documenting his findings. (R-5).

Mr. Van Kleef testified that during the three months of his surveillance he never saw B.A. leave for school from the South Plainfield home in the morning, except for the day following the Board hearing. In addition, during the three months of his surveillance, he never saw B.A. return to the South Plainfield home after school. On all of the days that he conducted surveillance, B.A. left for school in the morning from the home located at 946 M. Avenue, Plainfield, New Jersey where she was driven to school by a female adult which he believed to be C.R., and following school each day, B.A. was driven back to the home on 946 M. Avenue, Plainfield, New Jersey. B.A. was never seen carrying a suitcase, nor was B.A. ever seen in the presence of petitioner. Mr. Van Kleef testified that it was only on January 24, 2000, that B.A. was picked up from school in a white stretch limousine and driven to the home in Plainfield. (R-5).

Mr. Van Kleef also testified that during the early stages of his investigation he sent a letter to both parents requesting a meeting to discuss his preliminary findings and to obtain additional documentation. (C-1, ¶8, J-5 & J-6). He sent the letter to C.R. via certified mail, at the Plainfield home because he believed that this is where she and B.A. continued to reside. When Mr. Van Kleef received the signed certified mail card from the Plainfield address, it was signed for by B.A. (R-3).

A residency hearing was held before the South Plainfield Board of Education on March 7 and 14, 2000, to determine whether B.A. is domiciled in South Plainfield. (C-1, ¶ 10). At the March 7, 2000 hearing, a board member asked petitioner if he would mind if Mr. Van Kleef went to his home to view B.A.'s living quarters. Petitioner consented to the request, and Mr. Van Kleef went to petitioner's home. Two police officers met Mr. Van Kleef and petitioner at the home. Petitioner escorted Mr. Van Kleef to B.A.'s living quarters. Mr. Van Kleef testified that the room contained a bed, a dresser and a computer on a table. Mr. Van Kleef looked in the dresser drawers, with petitioner's consent, and observed that there was nothing in them. Mr. Van Kleef then asked petitioner to open the closet where he observed that there were just a few things hanging, and that there were no shoes in the closet or anywhere else in the room. He indicated that the room simply did not look lived in. Mr. Van Kleef explained that he is the father of a young girl and has viewed hundreds of children's' homes as a police investigator, and that B.A.'s

room was totally barren and contained no toys, posters, jewelry, make-up, footwear, or stuffed animals, and there was nothing at all in the room to indicate any child of any age lived therein.

Petitioner W.A. testified that B.A. has a serious illness and because of this illness she must be between both parents and that these are extenuating circumstances. In his legal argument, W.A. asserts that B.A. has a life-threatening health condition which requires special medication and constant monitoring by both parents. She has attended school in South Plainfield since kindergarten.

Petitioner testified with respect to the surveillance by the school district. He indicated that he was out of the country on business between January 13 to January 24 or 25, 2000, and that B.A. stayed with her mother until January 30, 2000. He is self-employed and sometimes he works at LaGuardia Airport. Because of his employment, B.A. stays with her mother two or three times per week. He also explained that B.A. was upset with the surveillance because there are many crazy people out there. There is less than one mile between his home in South Plainfield and the home where C.R. lives in Plainfield.

Petitioner identified his passport (P-4) and indicated that this shows the amount of time that he was out of the county. He also identified a statement which he provided to the respondent Board of Education.

Petitioner testified that B.A. has continuously resided at the South Plainfield home for two or three years from 1997 to the present. Unfortunately, W.A. is trying to develop an import-export business which requires a great deal of his time.

On cross-examination, petitioner admitted that he does not claim B.A. as a dependent and he does not know if C.R. claims her as a dependent. Travel is part of his job because he is self-employed. In petitioner's brief, petitioner asserts that when C.R. listed W.A.'s address at 705 P. Avenue, C.R. and W.A. were engaged in serious relationship disputes and he saw that it was fitting for the sake of B.A. to stay at 705 P. Avenue. He further asserts that when Mr. Van Kleef commenced the surveillance in January, he was out of the country on business and B.A. was

staying with C.R. He also asserts that during the month of February 2000, Mr. Van Kleef only made two observations out of 21 school days, and that his surveillance reports do not show that he conducted surveillance before 7:00 a.m. or after 5:00 p.m.

Petitioner testified that when Mr. Van Kleef came to examine B.A.'s room at his home in South Plainfield, there were four policemen. He allowed Mr. Van Kleef and one police officer into the home. When Mr. Van Kleef examined B.A.'s room, he only looked into two drawers of a six-drawer dresser and he failed to indicate that there was a 19" color television, a matching nightstand and lamp, a matching desk for the computer, a bean bag in the corner, a sheepskin rug on the floor and a teddy bear. He also failed to look under the bed where B.A. stores her shoes. W.A. also explained that the room is only seven feet by nine feet, and that B.A. keeps her sweaters, light jackets and outerwear in a front entrance hall closet. B.A.'s room also has a computer and a teddy bear. Petitioner testified that all of B.A.'s clothing were in the wash when Mr. Van Kleef looked into her underwear drawer, and he also indicated that B.A. does not have many clothes. W.A. testified that he if was afraid of what Mr. Van Kleef would see, he would not have let him into the room.

Petitioner testified that the other, unopened drawers were full of clothes, but that he did not feel it was necessary to show this to Mr. Van Kleef. He indicated that he offered to show Mr. Van Kleef B.A.'s clothing, which he claimed was piled up in the laundry room, but then rescinded his offer to show it to Mr. Van Kleef. Petitioner also testified that B.A.'s shoes were under the furniture, but he admitted that he did not point this out to Mr. Van Kleef. At that point, Mr. Van Kleef and the police officers left the home with petitioner to return to the Board hearing. The Board reconvened on March 14, 2000, to consider any additional evidence and concluded by a unanimous vote that B.A. is not domiciled in South Plainfield. (J-9, J-10).

Petitioner testified that during the past two years he has been away at least five times for business, for his own pleasure as well as to develop an import-export business and that B.A. lived with her mother in Plainfield during this time. He also indicated that there are other occasions when B.A. lives with her mother on some weekends and sometimes during the day because petitioner also has own personal life.

When he was asked how often B.A. lives with her mother, petitioner testified that during the year in question, the job that he was working on was at LaGuardia Airport, and that he was working there every day. He testified that B.A. stayed with her mother during that year.

Petitioner testified that most of his jobs are out-of-State which requires him to leave early in the morning and return late at night, and that B.A. cannot care for herself because of her medical condition. B.A. has to receive injections in her personal areas, which have to be administered by her mother. Petitioner admitted that he does not claim B.A. as a dependent on his tax returns.

LEGAL DISCUSSION AND ANALYSIS

N.J.S.A. 18A:38-1b.(2) provides as follows:

> 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 and the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, 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 or the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child as provided for in paragraph (1) of this subsection, 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. If in the judgment of the commissioner the evidence does not support the claim of the parent or guardian, the commissioner shall assess the parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced. Nothing shall preclude a board from collecting tuition from the parent or guardian for a student's period of ineligible attendance in the schools of the district where the issue is not appealed to the commissioner . . .

Based on this provision, the petitioner bears the burden of proving by a preponderance of the evidence that B.A. is domiciled in the South Plainfield School District and thus is eligible for a free public education therein. *N.J.S.A.* 18A:38-1(b)(2). In an administrative proceeding such as this the party seeking relief has the burden to establish his claim by a preponderance of the competent, relevant and credible evidence. *Atkinson v. Parsekian*, 37 *N.J.* 143 (1962); *In re Polk,* 90 *N.J.* 550 (1982). Precisely what is needed to satisfy this standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to a given conclusion. *Bornstein v. 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 depending on the number of witnesses, but having the greater convincing power. *State v. Lewis*, 67 *N.J.* 47 (1975).

Domicile is 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. *Mercandante v. City of Paterson,* 111 *N.J. Super.* 35, 39 (Ch. Div. 1970), *aff'd,* 58 *N.J.* 112 (1971). Domicile is an individual's true and permanent home. *In re Jaffe,* 74 *N.J.* 86, 90-91(1977).

The Commissioner has held that the domicile of a minor depends upon where a minor lives if the parents were never married or if there is no fixing of legal custody. *C.K.F. v. Upper Twp. Bd. Of Educ.,* 1975 S.L.D. 723, 723-24 (Comm. of Ed., 1975). It has also been held that when parents are divorced, the assignment of legal custody determines the domicile of the child.

Clifton Bd. of Ed. v. Sauro, 96 *N.J.A.R. 2d.* (EDU) 497, 500 (Comm. of Ed., 1996); *Gunther v. Bd. of Ed. of Borough of Bay Head,* 1978 S.L.D. 771 (Comm. of Ed., 1978). Even where a custody order is in place, the Commissioner will look to see where the minor child actually is residing, and a custody order is not always dispositive.

Respondent relies on a number of cases to support its position. In *Bd. of Ed. of the City of Summit v. Bd. of Ed. of the Township of Millburn,* 95 *N.J.A.R. 2d* (EDU) 506, 508 (Comm. of Ed., 1995) the divorce decree allowed for joint custody, but the father had physical custody. The Commissioner found that by mutual consent of her parents, the child had lived with her mother in Summit for most of her life and all of the evidence supported that assertion. The child used her mother's address as her address, she had a bedroom in her mother's house, and when she stayed at her father's house, she used a guest room that was used by others when she was not there. The Commissioner held that if there was any ambiguity as to the child's domicile, the judgment of divorce might be determinative, but because there was no ambiguity as to where the child spent most of her time, the judgment of divorce was not controlling. Thus, the Commissioner found that the child was domiciled with her mother and, therefore, the school district in which the mother resided bore responsibility for the child's education.

In *R.A. v. Ewing Twp. Bd. of Ed.,* 95 *N.J.A.R.2d* (EDU) 49 (Comm. of Ed., 1994), the board contended that the children of an unmarried couple lived with their father in Trenton. However, the Commissioner did not uphold the board's position, finding that the children and their mother lived in Ewing, where they left for school in the morning and returned each evening. Thus, although there was some evidence presented that the mother and one or both of her children spent some time at the Trenton apartment, this was insufficient to establish domicile.

In *Roxbury Tp. Bd. of Ed. v. W. Milford Bd. of Ed.,* 283 *N.J. Super.* 505 (App. Div. 1995), the Court considered a residency dispute involving an autistic child whose parents divorced. The father maintained physical custody at first, but later consented to the mother taking physical custody when he moved to Roxbury. The mother, who had remarried, moved to West Milford, but the West Milford school district challenged the child's domicile and refused to accept responsibility for the child. The Appellate Division concluded that West Milford, the mother's

domicile, was responsible for the child's education, holding that a child of a divorced couple is domiciled where the parent the child lives with is domiciled (*Id.* at 521-22). The Court went on to find that certain factors, such as the presence of a room for the child in the mother's home, combined with the intent that the child live with his mother, established the mother's home as the child's domicile.

Respondent argues that applying the principles in the foregoing decisions to the facts in this case, petitioner was required to show that B.A. lives with him at the South Plainfield home, at least for a majority of the time, since there is no formal custody order in place. Respondent contends, however, that petitioner has fallen far short of sustaining this burden and that the record amply demonstrates that B.A. is domiciled with her mother in Plainfield, New Jersey and that B.A. spends little, if any, time at the South Plainfield home of petitioner.

Specifically, respondent Board relies on the testimony of Kenneth Van Kleef to the effect that he never saw B.A. return to the South Plainfield home following school during the entire period of his surveillance, but would return to her mother's home in Plainfield, New Jersey carrying only a bookbag, and that BA. was never seen carrying a suitcase. It further relies on his testimony that during the surveillance period, B.A. was seen on every occasion except one, leaving early in the morning from the Plainfield home. The only day B.A. was seen leaving from the South Plainfield home to go to school was the day following the residency hearing before the Board. It also points out that when Mr. Van Kleef sent a certified letter to B.A.'s mother at the Plainfield home, it was signed for by B.A.

Also, when Mr. Van Kleef viewed B.A.'s living quarters, the room identified as hers by petitioner was virtually barren except for a bed and a dresser, and there was no indiciation that the room was lived in by young girl. There were no toys, posters, make-up dolls, stuffed animals, and B.A.'s dresser drawer was empty of clothing. Petitioner, testified on re-direct examination that the other, unopened drawers were full of clothes, but that he did not feel it was necessary to show this to Mr. Van Kleef. Petitioner offered to show Mr. Van Kleef B.A.'s clothing, which he claimed was piled up in the laundry room, but then rescinded his offer to show Mr. Van Kleef the laundry room after Mr. Van Kleef agreed to view it. There were only a

few articles of clothing hanging in the closet and there was no footwear. In response, petitioner testified that B.A.'s shoes were under the furniture, but again he did not point this out to Mr. Van Kleef.

Respondent Board argues that the petitioner's own testimony shows that B.A. clearly is not domiciled in the South Plainfield home, but instead is domiciled in Plainfield with her mother, where BA. spends most, if not all of her time.

Respondent argues that the totality of the evidence leads to only one conclusion - B.A. does not live in petitioner's home, but rather she lives with her mother in Plainfield, and that petitioner's busy work schedule, which requires extensive interstate travel, renders him unable to care for B.A., other than on a sporadic basis, if at all. Even assuming *arguendo* that B.A. lives with petitioner on an intermittent basis, respondent argues that this is not sufficient to establish her domicile in South Plainfield, relying on *Bd. of Ed. of the City of Summit v. Bd. of Ed. of the Township of Millburn, supra.* Respondent concludes that petitioner has fallen far short of sustaining his burden of proof in this matter and that his petition should be dismissed in its entirety, and petitioner should be found liable for tuition for the time B.A. illegally attended school in South Plainfield. Moreover, B.A. should immediately be removed from the South Plainfield School District.

Based on the legal discussion set forth above, it is clear that the domicile of a child depends upon where the child lives if the parents were never married. In such a case, it is necessary to look to see where the minor child actually is residing. A child of a couple is domiciled where the parent the child lives with is domiciled, and factors, such as the presence of a room for the child in the parent's home, combined with the intent that the child live with the one parent establishes that parent's home as the child's domicile.

When the testimony of witnesses is in disagreement, it is the obligation and responsibility of the trier of fact to weigh the credibility of the witnesses in order to make factual findings. Credibility is the value that a fact finder gives to the testimony of a witness. The word contemplates an overall assessment of the story of a witness in light of its rationality, internal

consistency, and manner in which it "hangs together" with other evidence. *Carbo v. United States*, 314 *F.*2d 718 (9th Cir., 1963). The term has been defined as testimony which must proceed from the mouth of the credible witness and must be such as our 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); *see, also, Gilson v. Gilson*, 116 *N.J. Eq.* 556, 560 (E. & A. 1934). 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. *Spagnulo v. Bonnet*, 16 *N.J.* 546, 554-55 (1954). A fact finder is expected to base decisions on credibility on his or her common sense, intuition or experience. *Barnes v. United States*, 412 *U.S.* 837 (1973). Credibility does not depend on the number of witnesses and the finder of fact is not bound to believe the testimony of any witness. *In re Perrone*, 5 *N.J.* 514 (1950).

The circumstances surrounding the visit of Mr. Van Kleef to petitioner's home, and petitioner's testimony concerning that visit raises serious doubts in my mind as to petitioner's credibility. Even though petitioner gave the explanation that most of B.A.'s clothes were being washed and were not in the room, he did not permit Mr. Van Kleef to go to the laundry room to confirm the presence of clothing. At first he offered to show Mr. Van Kleef B.A.'s clothing which he claimed was piled up in the laundry room, but he then rescinded his offer to do so. Petitioner also testified at the hearing that other drawers in the room were full of B.A.'s clothes, but he did not feel it was necessary to show this to Mr. Van Kleef. Petitioner also testified that B.A.'s shoes were under the furniture, but he failed to point this out to Mr. Van Kleef. He also indicated that because the room is small, B.A. keeps her sweaters, light jackets and outerwear in a front entrance hall closet, but he did not feel it was necessary to show this to Mr. Van Kleef. Most of this testimony seems unlikely and improbable.

Even petitioner's undisputed testimony does not support his claim that the B.A. is domiciled with him in South Plainfield. B.A. testified that during the past two years he has been away at least five times for business, for his own pleasure as well as to develop an import-export business and that B.A. lived with her mother in Plainfield during this time. He indicated that most of his jobs are out-of-State which requires him to leave early in the morning and return late at night, and that B.A. cannot care for herself. B.A. has to receive injections in her personal

occasions when B.A. lived with her mother on weekends and sometimes during the day because petitioner has own personal life. Further, petitioner testified, that during the year in question, he was working at LaGuardia Airport every day and that B.A. stayed with her mother during that year. Finally, petitioner admitted that he does not claim B.A. as a dependent on his tax returns.

On the other hand, I **FIND** the testimony of Kenneth Van Kleef to be entirely credible. My overall assessment of Mr. Van Kleef's testimony is that it was rational, internally consistent, it was consistent with the documentary evidence, and it appeared probable under the circumstances. I **FIND** it to be significant that Mr. Van Kleef never saw B.A. return to the South Plainfield home following school during the entire period of his surveillance, but she would return to her mother's home in Plainfield, New Jersey carrying only a bookbag. It is also significant that BA. was never seen carrying a suitcase. During the entire surveillance period, B.A. was seen on every occasion except one, leaving early in the morning from the Plainfield home. When Mr. Van Kleef sent a certified letter to B.A.'s mother at the Plainfield home, it was signed for by B.A.

I also **FIND** it to be significant that the room identified as belonging to B.A. in the South Plainfield home appeared to be relatively unused, and there were no toys, posters, make-up, dolls, stuffed animals, or other indicia that the room was lived in by a young girl. The dresser drawers which were opened were found to be empty of clothing, and the petitioner did not feel it was necessary to show the other unopened drawers which he claims were full of clothes, to Mr. Van Kleef. There were only a few articles of clothing hanging in the closet and there was no footwear. Petitioner claimed that B.A.'s shoes were under the furniture, but he did not point this out to Mr. Van Kleef at the time. Petitioner refused to show Mr. Van Kleef the laundry room where petitioner claimed B.A.'s clothes were.

Based on the foregoing, I **FIND** that W.A. has failed to sustain the burden of showing that B.A resides with him in South Plainfield, New Jersey. I **FIND** that the evidence actually shows that B.A. resides with her mother in Plainfield, New Jersey, and that because the mother is not domiciled within the district and the child is not kept in the home within the school district she is not entitled to be educated within respondent's school district.

she is not entitled to be educated within respondent's school district.

It is now necessary to address respondent's counterclaim. *N.J.S.A.* 18A:38-1(b)(2) provides:

> If in the judgment of the commissioner the evidence does not support the claim of the parent or guardian [that the minor child is domiciled in the district], the commissioner shall assess the parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced.

Respondent argues that the foregoing provision regarding payment of tuition is mandatory when a petitioner fails to sustain the burden of proof. Respondent cites to, *Bd. of Ed. of the Township of Cranford. Union County v. A. McG. And L.M.,* 95 N.J.A.R. 74 (Comm. of Ed., 1995), where tuition was awarded to the Cranford school district where a child was domiciled in Newark; *A.A. v. Bd. of Education of the City of Paramus,* 97 *N.J.A.R.2d.* 244 (Comm. of Ed., 1997), where the Commissioner awarded tuition to the Paramus school district where the custodial parent was unable to prove that he was domiciled therein; *D.W. v. Greater Egg Harbor Regional Bd. of Ed.,* 95 *N.J.A.R.2d.* 227 (Comm. of Ed., 1995), where the Commissioner awarded three years of tuition to the school district because the parents were not domiciled within the school district but chose to send the child to school in the grandmother's district.

Respondent also relies on *Mansfield Township Bd. of Ed. v. State Board of Education. Mary M. Towner and Lillian Baysdorf,* 101 *N.J.L.* 474 (1925), wherein respondent asserts that the Supreme Court expressed as a basic school law policy that public schools shall only be free to domiciliaries of a school district.

I agree with the legal position taken by respondent in this regard. The rationale behind requiring a parent or guardian to pay a school district tuition for his or her child's ineligible attendance, is not to create a hardship on the family, but to ensure that local tax dollars which are

who have a lawful right to attend the school in question. To provide non-residents with a free public education could potentially drain a school district's limited financial resources, as well as cause overcrowding by illegal student attendance.

Because petitioner has failed to prove that B.A. is domiciled in South Plainfield, I **FIND** that the Board should be awarded tuition for the entire period of ineligible attendance together with any postjudgement interest which may be awarded by the Commissioner pursuant to pursuant to *N.J.A.C.* 6A:3-1.17(a) and (c)2 if there is any delay in payment. Based on Mr. Van Kleef's report as to tuition in the District (R-8), as of June 30, 2001, the accrued tuition totals $25,617.00 and is broken down as follows:

School year	***Tuition per pupil***
1998-1999	$8,138.00
1999-2000	8,797.00
2000-2001	8,682.00
Total	$25,617.00

With regard to prejudgement interest, *N.J.A.C.* 6A:3-1.17(a) 1 and (c)1 provide as follows:

> (a)The Commissioner may, pursuant to the criteria of this section, award prejudgment and/or postjudgment interest in any circumstance in which a petitioner has sought such relief and has successfully established a claim to a monetary award.
>
> 1. Any petitioner seeking award of prejudgment interest shall propose, before the Commissioner or the ALJ, whoever is hearing the case, an interest calculation consistent with (c) below.
>
> * * *
>
> (c) The following criteria shall be applied when awarding interest:
>
> 1. The Commissioner shall award prejudgment interest when he or she has concluded that the denial of the monetary claim was an action taken in bad faith and/or has been determined to have been

> action taken in bad faith and/or has been determined to have been taken in deliberate violation of statute or rule.

In order to succeed in obtaining prejudgement interest, respondent is required to establish that petitioner either deliberately violated the statute or acted in bad faith or from other improper motive. *Bassett v. Bd. of Educ. of Borough of Oakland,* 223 *N.J.Super.* 136 (App .Div. 1988). I **FIND** that respondent has not established these prerequisites on the part of petitioner. It is clear to me that petitioner was only seeking to provide his daughter with the best possible education, and I cannot conclude that this amounts to bad faith or other improper motive. Therefore, I **CONCLUDE** that respondent is not entitled to prejudgement interest on its counterclaim.

DECISION AND ORDER

For the foregoing reasons, and based on the finding and conclusion that B.A. resides with her mother in Plainfield, New Jersey, and the mother is not domiciled within the South Plainfield School District and B.A. is not kept in the home within the school district, B.A. is not entitled to be educated within respondent's school district, it is hereby **ORDERED** that petitioner's petition is hereby **DENIED** and **DISMISSED**. It is further **ORDERED** that petitioner is liable for tuition from the time B.A. enrolled in the South Plainfield School District in 1998, to the present in the total amount of $25,617.00 together with postjudgment interest pursuant to *N.J.A.C.* 6A:3-17.

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

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

July 12, 2001
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

7-13-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 16 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

APPENDIX

LIST OF WITNESSES:

For petitioner:

W.A.

For respondent:

Kenneth Van Kleef

Sergeant Peter Arancio

LIST OF EXHIBITS:

OAL Exhibits:

C-1 Stipulation of Facts

Joint Exhibits:

J-1 B.A. Enrollment Application, dated September 14, 1998 (one page)

J-2 Residential Lease, dated September 1, 1998 (one page)

J-3 Transfer Card from Plainfield Public School District, dated September 14, 1998 (one page)

J-4 Memo to both parents from Van Kleef, dated January 14, 2000, requesting documentation (one page)

J-5 Letter, dated February 1, 2000, from Van Kleef to W.A. requesting a meeting (one page)

J-6 Letter, dated February 25, 2000, from Van Kleef to C.R. requesting a meeting (one page)

J-7 Letter dated February 25, 2000, to both parents from Ferri advising them of a hearing before the Board of Education (four pages)

J-8 Letter from Johnson dated March 15, 2000, to both parents informing them of Board of Education's decision (three pages)

J-9 Copy of Board of Education's Resolution adopting Statement of Findings and Determination (two pages)

J-10 Copy of Board of Education's Statement of Findings and Determination (two pages)

For petitioner:

P-4 W.A. Passport – indicating time out of the country

P-5 W.A.'s Final Statement omitted in SP PS letter, dated March 15, 2000

P-6 Verified Complaint and Letter, Superior Court Docket No. L-4555

For respondent:

R-1 Copy of page from Professional Business Directory (one page)

R-2 Investigative Report for inclusive dates January 14, 2000-March 10, 2000 re: B.A. matter (eight pages)

R-3 Certified Mail Return Receipts, signed by B.A. on February 4, 2000, at address located at 946 M. Avenue, Plainfield, NJ, and W.A. at a different address (one page)

R-4 Letter, dated February 11, 2000, from Van Kleef to Johnson re: determination of investigation (two pages)

R-5 Surveillance Photographs (four pages, seven photographs)

R-6 Executive Session Minutes from March 7, 2000 Board meeting re: B.A. matter (five pages)

R-7 Letter, dated March 8, 2000, from Board attorney to both parents re: Board of Education's decision to defer its final decision until March 14, 2000 (four pages)

R-8 Letter, dated January 4, 2001, from Van Kleef to Ferri re: total amount of back tuition owed by B.A.'s guardians (one page)

OAL DKT. NO. EDU 4016-00
AGENCY DKT. NO. 136-5/00

W.A., on behalf of minor child, B.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY.	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Exceptions were submitted by petitioner in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination herein.

Petitioner's exceptions state in their entirety:

> On July 12, 2001, a decision was render[ed] on the above referenced petition by the honorable Joseph F. Martone.
>
> Consider this letter my exceptions to the entire decision rendered.
>
> It is obvious we need help from a higher authority for BA to receive her basic civil rights.

Upon careful and independent review of the record in this matter, which includes transcripts of proceedings before the Administrative Law Judge (ALJ), the Commissioner concurs with the finding by the ALJ that petitioner has failed to prove that B.A. is domiciled in the South Plainfield School District so as to entitled her to a free public education in that District. Pursuant to *N.J.S.A.* 18A:38-1b(2), therefore, the Commissioner directs that petitioner reimburse the Board for tuition in the amount of $8,138 for the 1998-99 school year, $8,797 for the 1999-

2000 school year and $8,682 for the 2000-01 school year, for a total of $25,617, as set forth in the Initial Decision at page 15.

With respect to the Board's counterclaim for prejudgment and postjudgment interest, the Commissioner concurs with the ALJ that the Board has failed to establish that petitioner deliberately violated the statute, acted in bad faith or acted from other improper motive. Accordingly, the Commissioner concludes that the Board is not entitled to prejudgment interest in this matter. The Commissioner also observes that the Board's claim for postjudgment interest is not properly before him at this time, since the requisite time period has not passed pursuant to *N.J.A.C.* 6A:3-1.17(c)2. The Board's claim for postjudgment interest is, therefore, also denied.

Finally, in the absence of express statutory authority to award counsel fees, the Commissioner may not direct that the Board be compensated for legal fees in this matter.[1] *See Balsley v. North Hunterdon Bd. of Educ.,* 117 *N.J.* 434 (1990) *and State, Dept. of Environ. Protect. v. Ventron Corp.,* 94 *N.J.* 473 (1983).

Accordingly, the Initial Decision of the ALJ is affirmed, with modification as set forth above. Petitioner is, therefore, directed to reimburse the Board for tuition in the amount of $25,617.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 8/27/01

Date of Mailing: 8/29/01

[1] The Commissioner notes that the Initial Decision is silent with respect to the Board's counterclaim for legal fees.
[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.

#272-01

H.M., on behalf of her minor child, R.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the Board's determination that her daughter is not entitled to a free education in the District. After petitioner's request for emergent relief was denied, an administrative hearing was conducted.

The ALJ determined that the petition should be dismissed because petitioner and her child did not reside in the respondent District but, rather, petitioner had rented a duplex with two other persons based on her incorrect understanding that doing so would satisfy the requirements for registering her child in the District's schools although she continued her domicile and residence in Pennsylvania. Concluding that petitioner was not misled by respondent, the ALJ rejected petitioner's fairness/equitable estoppel argument and her assertion that renters are treated disparately from those who own property or are building homes in the District.

The Commissioner affirmed the decision of the ALJ for the reasons set forth therein. The Commissioner denied petitioner's motion to reopen the record to permit her to demonstrate that, had she known of the District policy of permitting persons who intend to move into the District within 60 days of the start of school to enroll their children in the District's schools free of tuition, she would have enrolled her daughter and obtained a suitable residence within the 60-day period, rather than the duplex she rented. In this regard, the Commissioner noted that petitioner had failed to secure a residence for the 2001-2002 school year as of the date of the ALJ's decision, which was months after the expiration of the 60-day period. The Commissioner also rejected petitioner's estoppel and disparate treatment arguments and affirmed the determination of the ALJ that petitioner's daughter is not entitled to a free education in the District. Finally, the Commissioner determined that petitioner must pay respondent $9,791 in tuition for the 2000-2001 school year.

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

August 27, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 889-01
AGENCY DKT. NO. 55-2/01

H.M., ON BEHALF OF
MINOR CHILD, R.E.,
Petitioner,
v.
BOARD OF EDUCATION OF THE
PRINCETON REGIONAL SCHOOL
DISTRICT, MERCER COUNTY,
Respondent.

H.M., petitioner, *pro se*

Philip E. Stern, Esq., on behalf of respondent (Sills, Cummis, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: June 22, 2001 Decided: July 9, 2001

BEFORE **SOLOMON A. METZGER,** ALJ:

This matter arises out of respondent's determination that petitioner is not domiciled in the Princeton Regional School District and that she owes tuition for the 2000/01 school year. Petitioner requested a hearing pursuant to *N.J.S.A.* 18A:6-9 and the matter was transmitted to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15. Petitioner's application for emergent relief was denied and a plenary hearing was conducted on May 21, 2001. The record closed on June 22, 2001, with the receipt of post-hearing memoranda.

The basic facts are undisputed. Petitioner resides with her daughter, R.E., and son in Lahaska, Pennsylvania. R.E. attended a private preparatory school in Lawrenceville, New Jersey, during the 1999/00 school year, but petitioner began a search for a public school district in the 2000/01 school year. R.E. is a gifted child and petitioner did not feel that the Solebury district in which she resides could provide the advanced placement courses necessary to challenge her. Petitioner then settled upon the respondent district because of its high reputation and ability to provide an appropriate education.

Petitioner proceeded to rent a duplex in Princeton with two other people. Petitioner and her daughter never intended to live in this house and have not lived there. Rather, the arrangement was made to satisfy the terms of a one-page document petitioner obtained from respondent's guidance office regarding registration procedures. Among other things this page indicates that a student must establish residency. This may be accomplished by presenting an "up-to-date lease," a current tax bill, a sales agreement on a new home, or an official letter from the Princeton University housing office, the Institute for Advanced Study, or the Theological Seminary. Petitioner testified without contradiction that during the summer of 2000 she asked in the guidance office about the lease requirement and was told that this was a prerequisite for registration. Petitioner then secured the lease and R.E. was enrolled. Petitioner told no one in the guidance office that she would not be living in these premises.

Respondent became suspicious about the residency issue when its attendance officer, Nicholas Cream, noticed that R.E. was arriving to school daily in a van marked East Coast Limousine Service bearing Pennsylvania license plates. Mr. Cream conducted an investigation and learned that petitioner was living in Lahaska. He reported his findings in January 2001 and the Board of Education conducted a hearing in February 2001, at which it concluded that R.E. was not entitled to a free education. Petitioner was notified that if she relocated into the district costs going forward would stop. Petitioner testified that she injured her back during this period and could not undertake such a move.

Petitioner called as her own witness Charles Bryant, the district's director of student personnel services. Mr. Bryant testified that he had no contact with petitioner until early February 2001, when they spoke a few times about the upcoming Board hearing and related

questions. Mr. Bryant testified that there are some children in the district who attend for free but reside elsewhere. These are cases where the family is in the process of relocating into the district. Board policy grants 60 days from the start of school, or from an application to attend, in which to complete such a move. Additionally, families constructing a home in the district have until the beginning of the fourth quarter of the school year to complete that process and still receive free tuition for the entire year (P-1). Mr. Bryant testified that the 60-day rule applies equally to tenants and homebuyers. None of these exceptions are automatic, however; a written request must be submitted to the superintendent for approval. Mr. Bryant testified also that he has on occasion directed Mr. Cream to check on whether families who have claimed these waivers actually did move into the district.

Nicholas P. Cream was also called by petitioner. He is the district's attendance officer and he spoke with petitioner one time while delivering papers to her after the Board's decision. Mr. Cream acknowledged discussing Board policy with petitioner regarding families who relocate during the school year, but he did not recall the details and conceded that he is not expert in such matters.

Petitioner testified in her own behalf. She did not learn that the 60-day exception was available to tenants until Mr. Bryant so testified. The guidance office told her that having a lease in hand was a condition for registration. Had she been aware of this policy in the summer of 2000 she would not have rushed to lease a property by the beginning of the semester and might have found a rental that she could move into, obviating this entire problem. Petitioner testified that when she obtained the page of registration instructions from the guidance office and saw that she could establish residency with an "up-to-date lease," she earnestly understood this to mean that living in Princeton was unnecessary; all that was required was a stake in a lease. If she was mistaken district staff ought to have clarified for her.

Petitioner testified that she did not know there was a distinction between the concepts of domicile and residence. She knows little of government procedure and made an error that anyone not schooled in such legalities might make. Petitioner also testified that for financial reasons she is currently a member of the tenant class and that the district's policies treat tenants less favorably than they do landowners. The parties stipulated that petitioner spoke with a

longtime staff member at the high school after this matter came to light, who said that she did not know that domicile was necessary to attend. This is the substance of the record.

Petitioner acknowledges that that she is not a domiciliary of Princeton within the meaning of *N.J.S.A.* 18A:38-1. She argues rather that tuition should be excused on equitable estoppel or general fairness principles. It is axiomatic that a governmental entity may not misdirect a party and then seek advantage from the resultant error, *W. V. Pangborne & Co. v. Department of Transp.*, 116 *N.J.* 543 (1989). That, however, did not occur here.

Petitioner wanted her daughter to attend public school in a district, and for that matter in a state, in which she did not live. There are many citizens who would not know the nuances of such an undertaking, but most could be expected to realize that there are nuances and that they carry a burden of inquiry. At no time did petitioner ask anyone in authority about the legitimacy of retaining her domicile in Lahaska and sharing a rental in Princeton that she would not live in. The guidance office could not intuit these circumstances. A better reading of the registration procedures page is that a current tax bill, an agreement of sale, or an up-to-date lease are indicia that the individual makes or plans to soon make his/her home in the district. The district does have a detailed policy concerning non-resident student attendance and an open exploration of the issue with school personnel might have led petitioner to it.

Having come into possession of this written policy after the fact, petitioner now works to find fault with it. Learning from Mr. Bryant for the first time at hearing that the Board allows a renter up to 60 days to relocate into the district, petitioner argues that this knowledge would have changed everything.[1] She would have waited to find a house that she could actually live in. We cannot speculate about what might have been. Petitioner may have found another rental, although her own testimony suggests that affordable rentals in Princeton are hard to come by.[2] Moreover, a waiver application would have to be filed with the superintendent and approval

[1] After the hearing closed but before briefs were due petitioner filed a motion to reopen based on newly discovered evidence. She now asserts that Mr. Bryant testified falsely that the 60-day grace period applied to renters as well as buyers and that he did so only to blunt her constitutional arguments. If she were permitted to present four additional Board employees she could prove this. Petitioner expects these to be hostile witnesses and she has not sought affidavits from them in support of her motion. The motion is denied. Petitioner has already called two Board employees, Mr. Cream and Mr. Bryant, in an effort to find some contradiction in Board policy. She appears to believe that her own mistake will diminish if she can discover error on the other side. Nothing in the motion papers leads me to expect useful disclosures from such testimony and the only likely result is delay.

[2] Her closing statement notes that she has yet to find a house in Princeton for the coming school year.

would depend on the facts presented. The critical consideration, however, is that petitioner asked no question that would have led her timely to the non-resident attendance policy, and thus what she might have done had she known of it is irrelevant.

Petitioner argues also that renters are treated as second-class citizens under the district's policies. The children of persons who buy land and are building a home in the district need not live in the district until the fourth quarter of that school year in order to receive a free public education. Renters, on the other hand, do not have this option. At best they must relocate within 60 calendar days from the beginning of school year, or the time they make their application. School districts have wide discretion to fashion policy 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). Distinctions of every stripe are made daily in school districts and this alone is not an infirmity. Renters and existing-home buyers appear to fall into one category; new construction falls into another. There is nothing particularly invidious about this, as new construction is often marked by unanticipated delays. Although petitioner submitted copies of a number of equal protection cases,[3] none suggest that the distinctions here suffer from constitutional infirmities. Moreover, petitioner was not a tenant, homeowner, or landowner within the meaning of Princeton's out-of-district admission policy, and she is in no position to assert the rights of others. To fall within the policy petitioner would have to actually relocate into leased premises during the school year and then be denied free tuition. At that point she could join issue on the question of whether landowners and homeowners are wrongly favored.

Based on the foregoing, it is **ORDERED** that the petition seeking a tuition waiver is **DENIED** and that the Board is entitled to tuition for the 2000/01 school year.

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

[3] These come from a 1979 edition of a constitutional law text appended to petitioner's closing submission.

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

7/9/01
DATE

SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

7/11/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 12 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/caa

LIST OF WITNESSES

For Petitioner:

Charles Bryant
Nicholas P. Cream
H.M.

For Respondent:

None

LIST OF EXHIBITS

For Petitioner:

P-1 Princeton Regional Schools Policy Manual, File Code 5118, December 17, 1996

For Respondent:

Exhibits attached to the motion papers in the emergent relief proceeding are incorporated into the record by agreement of the parties

OAL DKT. NO. EDU 889-01
AGENCY DKT. NO. 55-2/01

H.M., on behalf of her minor child, R.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. Exceptions were submitted by petitioner in accordance with *N.J.A.C.* 1:1 18.4 and were duly considered by the Commissioner in reaching his determination. [1]

In her exceptions, petitioner essentially reiterates the arguments presented before the Administrative Law Judge (ALJ) claiming that, although she and her daughter never lived in the house she rented in conjunction with two other individuals so that she could produce the required lease specified on the green enrollment form, she believed that she was acting in accordance with the District's requirement for residency as listed on that form because respondent's enrollment form failed to explain the definition of residency within the meaning of the residency statutes. Thus, petitioner maintains, she honestly misunderstood the legalities of residency and domicile which would entitle her daughter to attend respondent's schools free of charge. (Petitioner's Exceptions at 6-8) Petitioner also asserts that the ALJ's contention that the

[1] Petitioner submitted additional exceptions, which she labels as an "addendum" to her exceptions, five days after the due date for exceptions. Since *N.J.A.C.* 1:1-18.4 does not provide for submissions after the date for filing exceptions or for submitting exceptions in a bifurcated manner, petitioner's additional submission has not been considered.

basic facts are undisputed is not correct, stating that the facts as the ALJ recites them are "absolutely disputed." (*Id.* at 2) Petitioner claims that the ALJ misconstrued her testimony and that of Director Bryant and Attendance Officer Cream and that the ALJ was biased in favor of respondent's view of the disputed facts. (*Id.* at 1-2) Additionally, petitioner asserts that Mr. Bryant lied on the witness stand with respect to the availability of any waiver offered to tenants, and that the ALJ's denial of her motion to reopen the case so that she might bring other witnesses to prove that Mr. Bryant testified falsely and to prove that respondent "is allowing people to rent or own without sleeping in their domiciles, and yet still attend school," prevents a fair determination in this matter. (*Id.* at 8)

Upon careful and independent review of the record in this matter, including transcripts of the proceedings before the ALJ and exceptions submitted by petitioner, the Commissioner affirms the findings and conclusions in the Initial Decision.

Initially, the Commissioner notes his agreement that no meaningful purpose would be served by the granting of petitioner's motion to reopen. Even assuming, *arguendo*, that Mr. Bryant testified falsely with respect to the availability of any waiver offered to tenants who plan to move into the District within 60 days of the opening of school, petitioner's assertion that, if she had known about the waiver, this knowledge would have changed everything because she would have waited to find a house that she could live in, is, at best, speculative. Petitioner has stated that rentals are difficult to find in Princeton, and, as the ALJ observed, petitioner's closing statement indicates that she has yet to find a house in Princeton for the coming year. Even if petitioner had been successful in finding a home in order to move into Princeton after the start of school, however, she would have had to apply to the superintendent for approval of the 60-day waiver and such approval would be based on the facts presented in her application. Moreover,

petitioner did not provide affidavits from the additional witnesses she now wishes to call indicating what "newly discovered" evidence they would testify to in a second hearing. Additionally, the Commissioner concludes that petitioner has had a full and fair opportunity to present her arguments and to present witnesses on her behalf. Therefore, the Commissioner finds that petitioner's motion to reopen was appropriately denied.

The Commissioner also rejects petitioner's claim that equitable estoppel should be applied so as to excuse her from paying tuition for her daughter's ineligible attendance in respondent's schools because she made an error that anyone not familiar with the legalities of domicile might make, and that she was misled by the lack of information explaining that a person had to actually live in the District, not just rent or own property in the District, to attend school without charge. Nothing in the record demonstrates that petitioner consulted with anyone in authority in the District concerning her plan to rent part of a house in Princeton, without living there, so that her daughter could qualify for a free education in respondent's schools, while she and her daughter continued to live in Lahaska, Pennsylvania. As noted by the ALJ, the District does have a detailed policy on nonresident student attendance and full disclosure by the petitioner would have enabled a full exchange of information.

With respect to petitioner's claim that tenants are treated disparately from those building a home within respondent's School District because those building a home need not live in the District until the fourth quarter to receive a free education, while tenants, at best, must move into the District within 60 days, the Commissioner finds that such distinction alone is not necessarily improper. As noted by the ALJ, the Board's policy is written such that tenants and existing home buyers fall into one category and new construction falls into another, which may reasonably be attributed to the fact that construction of a new home is often marked by

unanticipated delays. Moreover, as the ALJ pointed out, *petitioner lives out-of-state*, not in respondent's District, and is, therefore, not a tenant or homeowner within the meaning of the District's out-of-district admission policy.

Accordingly, the Commissioner affirms the Initial Decision of the ALJ for the reasons expressed therein. Petitioner is, therefore, directed to reimburse the Board tuition in the amount of $9,791.[2]

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 8/27/01

Date of Mailing: 8/29/01

[2] This amount is the total annual tuition for Princeton High School due from petitioner for a full year of her daughter's attendance pursuant to a letter from the superintendent of schools dated February 8, 2001. (Answer to Motion for Emergent Relief, Exhibit C)

[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.

273-01

DARYL M. HASTING,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MIDDLESEX COUNTY VOCATIONAL-TECHNICAL SCHOOL, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

August 29, 2001

OAL DKT. NO. EDU 4647-98
AGENCY DKT. NO. 115-4/98

DARYL M. HASTING,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MIDDLESEX COUNTY VOCATIONAL-TECHNICAL SCHOOL, 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: 8|29|01

Date of Mailing: 8|29|01

274-01

A.S., on behalf of minor child, M.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

August 29, 2001

OAL DKT. NO. EDU 4066-00
AGENCY DKT. NO. 162-5/00

A.S., on behalf of minor child, M.S.,	:	
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.

ACTING ASSISTANT COMMISSIONER

Date of Decision: 8|29|01

Date of Mailing: 8|29|01

275-01

JAMES BAINBRIDGE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAWRENCE, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

August 29, 2001

OAL DKT. NO. EDU 6765-96
AGENCY DKT. NO. 172-5/96

JAMES BAINBRIDGE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAWRENCE, 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

Date of Decision: 8|29|01

Date of Mailing: 9|29|01

276-01

JUANITA BOYLAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	
	:	DECISION
RESPONDENT.	:	
	:	

August 29, 2001

OAL DKT. NO. EDU 3978-00
AGENCY DKT. NO. 93-3/00

JUANITA BOYLAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE-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: 8|29|01

Date of Mailing: 8|29|01

277-01

THEODORE M. WURSTER, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF SCOTCH PLAINS-FANWOOD, UNION COUNTY, :

DECISION

RESPONDENT. :

_____:

August 29, 2001

OAL DKT. NO. EDU 9577-99
AGENCY DKT. NO. 207-7/99

THEODORE M. WURSTER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF SCOTCH PLAINS-FANWOOD, 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.

Maria Rinaldi

ACTING ASSISTANT COMMISSIONER

Date of Decision: 8|29|01

Date of Mailing: 8|29|01

278-01

CAROLYN NOBLE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF STILLWATER TOWNSHIP, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

August 29, 2001

OAL DKT. NO. EDU 9131-99
AGENCY DKT. NO. 153-6/99

CAROLYN NOBLE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF STILLWATER TOWNSHIP, 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.

Maria Kuncetti

ACTING ASSISTANT COMMISSIONER

Date of Decision: 8|29|01

Date of Mailing: 8|29|01

279-01

#279-01E

S.M., on behalf of minor child, R.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINWOOD, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

August 29, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 4833-01

AGENCY REF. NO. 321-8/01

S.M., ON BEHALF OF MINOR CHILD, **R.M.**

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF LINWOOD, ATLANTIC COUNTY,

Respondent.

Michael K. McFadden, Esq., for petitioner

William S. Donio, Esq., for respondent (Donio, Bertman & Donio, attorneys)

BEFORE LILLARD E. LAW, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter having been opened before the Commissioner of Education (Commissioner) on August 17, 2001, by Michael K. McFadden, Esq., by the filing of a Petition of Appeal and seeking emergent relief concerning the placement of minor child, R.M., in the fourth grade under the direction and control of the Board of Education of the City of Linwood, commencing on or about September 4, 2001; and

The matter having been 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; and

The parties having filed briefs of law before this administrative tribunal prior to the scheduled Oral Argument on August 23, 2001; and

The undersigned having heard and considered the oral arguments of the parties; and

This tribunal having applied the criteria for the granting of emergent relief as set forth by our Supreme Court in the matter of Crowe v. Degioia, 90 N.J. 126 (1982); and

Having denied petitioner's application for emergent relief on the grounds that petitioner failed to demonstrate that immediate and irreparable harm would be visited upon R.M.;

It is **NOW ORDERED**, that this matter move forward to a plenary hearing on August 30, 2001; September 11, 13, and 14, 2001, at the Atlantic City OAL, Atlantic County Civil Courthouse, Atlantic City, New Jersey.

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 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.

August 24, 2001
DATE

Robert S. Miller obo Lillard E. Law
ROBERT S. MILLER, ALJ
on behalf of **LILLARD E. LAW**, ALJ

/LEL(tmp)

OAL DKT. NO. EDU. 4833-01
AGENCY DKT. NO. 321-8/01

S.M., on behalf of minor child, R.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINWOOD, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The decision and Order of the Administrative Law Judge (ALJ), along with an audiotape of the hearing conducted at the Office of Administrative Law on this emergent matter have been reviewed.

Upon such review, the Commissioner 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 as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Most particularly, petitioner has failed to demonstrate that irreparable harm would inure absent the granting of the requested relief.

Accordingly, the within application for emergent relief is hereby denied. This matter shall move to plenary hearing on its merits, scheduled to begin on August 30, 2001, as directed by the ALJ.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/29/01

Date of Mailing: 8/29/01

* 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.

280-01

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

August 31, 2001

OAL DKT. NO. EDU 8590-00
AGENCY DKT. NO. 346-10/00

BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN 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: 8/31/01

Date of Mailing: 8/31/01

281-01

ROBERT BUSLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, former assistant principal with 25 years experience in the District's employ, sought back pay, attorney fees and service credit for the period of suspension in 1997 when criminal indictment was filed against him and later dismissed after pre-trial intervention (PTI) was completed by petitioner. Petitioner had been charged with sexually assaulting and recklessly endangering the welfare of a child.

The ALJ noted that indemnification for the costs of defending against the charges for which petitioner was indicted, pursuant to *N.J.S.A.* 18A:16-6 and 16-6.1, require 1) that the charges arose out of the course of his employment and 2) that the charges resulted in a final disposition in favor of petitioner. In this matter, the ALJ determined that petitioner's participation in PTI was not tantamount to an acquittal; the component factors of the PTI program imply guilt with amenability to rehabilitation, not innocence. Therefore, the ALJ concluded that petitioner's participation in the PTI program was not a final disposition in his favor under the provisions of the indemnification statutes. The ALJ further found that the charges did not arise out of or in the course of his employment. Moreover, there was no statutory or equitable basis on which to award back pay and service credit.

The Commissioner adopted the findings and determination in the Initial Decision as his own with clarification. The Commissioner agreed with the ALJ that it is well-established that the Courts, in interpreting *N.J.S.A.* 18A:16-6.1, have held that successful completion of PTI leading to dismissal of charges is not a dismissal or favorable determination of a criminal proceeding entitling the employee to reimbursement. Thus, the Commissioner found it unnecessary to reach to the ALJ's discussion as to whether petitioner's criminal charges arose out of and during the course of his employment. As to petitioner's claim for back pay, benefits and restoration of service credit for the period of his suspension, the Commissioner concurred with the ALJ that *N.J.S.A.* 18A:6-8.3 makes no provision for back pay, regardless of the disposition of the criminal indictment and there is no basis under education laws here to award such relief. As to petitioner's reliance on the concepts of fundamental fairness and estoppel as justification for his recovery, the Commissioner found no merit to petitioner's contention that he properly and reasonably relied on a District administrator as having the authority to grant him the relief he sought thereby rendering the representations of this individual binding on the Board. The Commissioner noted that it is well-established that representations of an individual board member or administrator are insufficient to bind a board to a particular course of action. (*Dorrington*) Petition was dismissed.

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

August 30, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3916-00

AGENCY DKT. NO. 107-3/00

ROBERT BUSLER,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY

Respondent.

Sharon Kean, Esq., appearing for Petitioner
(Law Offices of Alan L. Zegas, attorneys)

Marvin L. Comick, Esq., appearing for Respondent
(Love & Randall, attorneys)

Record Closed: June 12, 2001 Decided: July 11, 2001

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

STATEMENT OF THE CASE

Petitioner seeks back pay, attorney fees and service credit for the period during which he was suspended in 1997. Criminal charges which had been filed were dismissed after Petitioner completed a pretrial intervention program. The matter was

forwarded to the Office of Administrative Law (OAL) for determination as a contested case on May 12, 2000, in accordance with *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

At the time of hearing, the parties requested leave to submit briefs and a schedule was set. The record closed on May 9, 2001, but was reopened when the Court needed clarification of certain issues. The record then closed on June 12, 2001.

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. Robert Busler (Busler or Petitioner) was employed at all times relevant to this petition by the East Orange Board of Education (Board or Respondent) and the East Orange School District (District) whose address is 715 Park Avenue, East Orange, New Jersey.

2. Busler was arrested in East Orange, New Jersey in June 1996. He was charged with sexually assaulting and recklessly endangering the welfare of a child.

3. As a result of those charges, the Respondent voted to suspend Busler without pay from his position as Assistant Principal at Clifford J. Scott High School (Clifford School) effective January 23, 1997, pursuant to *N.J.S.A.* 18A:6-8.3. As of that date, Busler had accumulated 24 years and 5 months service. His suspension without pay continued through November 30, 1997. During Busler's entire education career, he had been assigned to the Clifford School where he taught English for 16 years and was Assistant Principal for the remainder of his career.

4. Busler retired from the District on December 1, 1997.

5. During the period between January 23 and November 30, 1997, Busler would have been paid $51,476.37 and the time would have been credited toward early retirement and pension.

6. The State dismissed the charges against Busler with prejudice on August 13, 1998, upon completion of Pre-Trial Intervention (PTI). There was no finding or admission of criminal liability and no plea agreement was entered into. An investigation by the New Jersey Division of Youth and Family Services (DYFS) determined that the allegations against Busler were unsubstantiated.

7. Busler's admission into the PTI program was intentionally structured to delay the disposition so that Busler could accumulate enough time for early retirement. Busler would then voluntarily resign from his position with the District and obtain his back pay and pension credit. The Assistant Prosecutor, Robert Laurino, who handled the case, was aware of and consented to this arrangement. It was because of representations made to him by District employees that Busler agreed to accept PTI as a means to resolution of the criminal case. If not for the promises of the school District employees, Busler would have elected to go to trial to prove his innocence.

8. Shortly after the charges against Busler were dismissed, his counsel wrote numerous letters to Dr. King and Marvin Comick, Board attorney, demanding the plaintiff immediately be paid all salary, benefits, pension and reimbursement for legal expenses owed to him since his suspension on January 23, 1997. The Board owes Busler legal fees in the amount of $17,943.87.

9. On May 13, 1999, Dr. King, in a letter to Mark Kramer, authorized Busler's back pay and requested that the payment of the monies be expedited to

Busler. That letter also instructed Busler be given a Perfect Attendance Bonus for the 1996-97 school year and a Responsibility Factor Stipend for the 1997-98 school year.

10. Two checks were issued to Busler on June 15, 1999, by the Board: check number 130659 in the amount of $6,339.25 and check number 130657, in the amount of $45,137.12. Busler deposited those checks on June 16, 1999, into his joint checking account.

11. Busler made a request for attorney fees on June 17, 1999, pursuant to *N.J.S.A.* 18A:16-6.1. An invoice for legal services rendered to Busler was sent to Mr. Comick on that date for a total amount of $17,943.87.

12. Subsequently, on June 17, 1999, Mr. Comick instructed the Board to stop payment on the two checks issued to Busler.

13. Busler received notice that the Board would meet to decide whether he was entitled to back pay and counsel fees on October 19, 1999.

14. Respondent has not reimbursed Busler for any amount of the salary owed to him for the period of time in which he was suspended without pay.

15. Dr. King and the District had timely notice of Petitioner's claim for reimbursement Busler and Alan L. Zegas.

16. A copy of the complaint and retainer agreement were furnished in compliance with District policy.

DISCUSSION AND CONCLUSION

The issues to be resolved in this matter are twofold:

1. Is Petitioner entitled to retroactive pay and service credit lost during the period of suspension, from January 23, 1997 to November 30, 1997, after which he resigned; and

2. Is Petitioner, under the circumstances of this case, entitled to be reimbursed for attorney fees incurred?

Initially, I note that the District's action in suspending Petitioner was predicated on the provisions of *N.J.S.A.* 18A:6-8.3, which provides for suspension without pay when an indictment is handed down against any employee or officer of a board of education.

In this case, an indictment on charges of sexual assault and recklessly endangering the welfare of a child was handed down against Petitioner, who was then suspended without pay.[1] Petitioner chose to participate in a PTI program which he completed. As a result of the successful completion of the program, the charges against Petitioner were dismissed. Petitioner resigned his position effective December 1, 1997. He now seeks restoration of service credit lost and back pay for the period of the suspension, as well as indemnification of legal fees.

The first issue to be determined is whether Petitioner is also entitled to indemnification for the costs of defending against the charges on which he was indicted. In resolving this issue, it is necessary to read the provisions of the indemnification statutes *in pari materia*. The pertinent statutes provides that a school employee may be reimbursed for expenses incurred in defending a civil or criminal action when the underlying charges are predicated on an act or omission arising out of and in the course of the performance of the employee's duties. A final disposition in favor of the employee results in indemnification. *N.J.S.A.* 18A:16-6; *N.J.S.A.* 18A:16-6.1.

[1] A female student accused Petitioner of inappropriate touching and he was arrested in June 1996; during the period of investigation, he was assigned to the District administrative offices and received his full salary until the indictment was handed down.

Petitioner rests his claim for back pay and the restoration of service credit on two separate grounds, those of fundamental fairness and estoppel. The parties agree that the statute makes no provision for the relief Petitioner seeks. Turning first to the issue of fundamental fairness, Petitioner cites several cases to support the assertion that he is entitled to pay for the period of suspension. In each of he cases on which this Petitioner relies, however, the Petitioner was acquitted of the charges for which he was suspended.[2] In this case, the criminal charges against Petitioner were dismissed after successful completion of PTI.

As Respondent asserts, participation in the PTI program is not tantamount to an acquittal. The component factors of the PTI program imply guilt with amenability to rehabilitation, not innocence. *Lindes v. Sutter*, 621 *F. Supp.* 1197 (1985).[3]

In this case, Petitioner asserts that the dismissal of the charges with prejudice at the successful completion of the PTI program is a disposition in his favor. Respondent, on the other hand, argues that while such a dismissal may be a final disposition of the charges, it is not a favorable one within the meaning of the statute. In coming to a determination as to whether a claimant is entitled to indemnification, the courts engage in a two pronged analysis which focuses on whether the charges involved arose out of the performance of the employee's duties and responsibilities and whether successful completion of PTI constituted grounds for indemnification because the underlying was dismissed or resulted in a final disposition in favor of the employee. *Pawlak v. Borough of Hopatcong,* 1988 *S.L.D.* 132; *McCorkle v. Pittsgrove Township Board of Education* (App. Div. A-5580-81T2, June 2, 1983).

---

[2] Petitioner relies on *Griffin v. Board of Educ. of the City of Paterson*, 93 *N.J.A.R.* 2d (Edu), 1993; *Beatty v. Newton Board of Education*, 1991 *S.L.D.* (Comm'r June 25, 1991) as decisions specific to school law; he relies on *Eaddy v. Dept. of Transportation*, 208 *N.J. Super.* 156, 162; *Romanowski v. Board of Educ. of Jersey City*, 89 *N.J. Super.* 38, 40-41 (App. Div. 1965) for the general proposition that a "fully vindicated employee must be made whole."

[3] I reject Petitioner's assertion that *Lindes* is not relevant to the case at bar. For the purpose for which Respondent offered *Lindes*, the court's analysis of the purpose of the PTI program, it is certainly relevant.

In each of the cases cited by Respondent, the tribunal found that the charges, similar to those lodged against Busler, were not of the quality or character to be classified as arising out of or in the performance of the duties of the Petitioner therein. Thus, having failed to meet the first of the two-pronged test, it was unnecessary for either tribunal to proceed to address the issue of the impact of the successful completion of the PTI program on the claim for indemnification.

Petitioner asserts that the determination in *Bower v. Bd. of Educ. of East Orange*, 149 *N.J.* 416 (1997) is applicable in resolving this case. In *Bower,* however, the criminal charges were dismissed before trial and not as a result of participation in PTI. Dismissal of the charges before trial rises to the level of exculpation. As noted above, the component factors of the PTI program imply guilt; the purpose of the program is rehabilitation, not exoneration. Moreover, the Appellate Division has addressed the issue, noting that the statute intends that only exoneration will entitle a claimant to reimbursement of legal expense. A claimant cannot use the legal fiction of a diversionary program to support a conclusion that there was a final determination in his favor. *Cressinger v. Board of Educ.*, 256 *N.J. Super.* 155, (App. Div. 1992) Citations omitted.

I **CONCLUDE**, therefore, that Petitioner's participation in the PTI program is not a final disposition in his favor under the provisions of the indemnification statutes; I further **CONCLUDE** that the determination of Respondent should be affirmed.

In a case involving similar charges, Petitioner also participated in PTI, was required to resign his position as a condition of participation, and, at the successful completion of PTI, made claims for indemnification of legal costs, back pay and other contractual benefits. The State Board of Education issued a decision concurring with the determination of the Administrative Law Judge and the Commissioner, both of whom had found the conduct with which Petitioner had been charged could not have arisen out of the scope of his duties under any circumstances; accordingly, there could be no indemnification; in addition, the State Board held that the claim for back pay for

the period of his suspension pursuant to *N.J.S.A.* 18A:6-8.3 was without merit because that statute makes no provision for back pay regardless of the disposition of the indictment and the Board could find no basis under the education laws upon which to award such a claim. *Pawlak v. Bd. of Educ. of Hopatcong*, 1988 *S.L.D.* 154.

Similarly, in this case, I **FIND** no basis under the education laws to award back pay and service credit for the period of suspension.

Petitioner also asserts, however, that because Assistant Superintendent Dr. Kenneth King assured him that he would receive back pay and service credit, Respondent is estopped from denying his claims. Petitioner asserts, in essence, that an agency by estoppel exists between the District Board and Dr. King. The concept of agency by estoppel is predicated on several factors. First, the alleged principal must have engaged in conduct calculated to mislead the third party.[4] Second, the alleged principal should have expected the conduct to be relied and acted upon in good faith to the injury of an innocent party. Most importantly, there must have been some representation or conduct on the part of the purported principal; the representations of the purported agent are not sufficient. 2A *C.J.S.* § 61.

In this case, there is nothing in the record to indicate that the District engaged in any conduct which was calculated to mislead Busler. The representations of Dr. King, without more, are not sufficient to cloak him in a mantel of agency.

Moreover, Petitioner was employed by the Board as a teacher and as an assistant principal for 25 years. It is inconceivable that someone who has literally spent his adult, professional life in public education would rely on informal discussions with a colleague, albeit a supervisor, in making decisions regarding retirement and indemnification. Petitioner asserts that there is no evidence that Busler knew or should have known that Dr. King did not have the authority to bind the Board or District.

[4] In this case, the alleged or purported principal would be the District; the alleged or purported agent would be Dr. King and the third party would be Busler.

Looking at the record as a whole, however, it is reasonable to infer that, based on 25 years of experience in public education, Petitioner was aware of the hierarchical nature public education.

Accordingly, I **FIND** that there is no basis grounded in estoppel on which to award back pay and service credit.

I **CONCLUDE**, therefore, that he determination of Respondent should be affirmed; I further **CONCLUDE** that this petition should be dismissed in its entirety with prejudice.

ORDER

I hereby **ORDER** that the determination of Respondent be and hereby is **AFFIRMED**; I further **ORDER** that this petition 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.

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.

July 11, 2001
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

7/17/01
DATE

Debbie Antanaitis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 19 2001
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Witness:

Robert Busler

Exhibit List:

P-3 Letter from Busler to Dr. King, October 24, 1997

P-4 Notice of action of the Board to Busler from Dr. King, November 6, 1997

P-6 Letter from Sharon Kean, Esq., to Dr. King, November 23, 1998

P-7 Memo to Mark Kramer, School Business Administrator, from Dr. King, December 14, 1998

P-8 Letter from Ms. Kean to Marvin Comick, Esq. (mis-dated February 19, 1998 should read 1999)

P-9 August 13, 1998 Order of Dismissal in State v. Busler, Ind. No. 98-12-3960

P-12 Letter to Busler from Dr. King, June 15, 1999, enclosing checks #130657 for $45,137.12 and #130659 for $6,339.25.

P-13 Letter from Busler to Dr. King, June 15, 1999

OAL DKT. NO. EDU. 3916-00
AGENCY DKT. NO. 107-3/00

ROBERT BUSLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto were filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4 and were fully considered by the Commissioner in reaching his determination here.

Petitioner's exceptions 1) object to the omission of what he avers are certain relevant facts in points 7, 8 and 9 of the Administrative Law Judge's (ALJ) Factual Findings[1]; 2) claim the cases cited by the ALJ on pages 6-7 of the Initial Decision are factually irrelevant as they are distinguishable from the within matter because in none of these cited cases "was a petitioner actually issued a check for the *full disputed amount* let alone actually receiving and depositing said check***," as was the circumstance here (emphasis in text) (Petitioner's exceptions at 2); and 3) contest the ALJ's determination that the Board was not bound, by the doctrine of agency by estoppel, to honor Dr. King's representations that petitioner would be reimbursed for counsel fees and back pay if the charges against him were dismissed, irrespective

[1] It is noted that all of the ALJ's Factual Findings are derived, point by point, from the petitioner's Petition of Appeal, with points 8 and 9 being a verbatim presentation from that document.

of any conditions accompanying such dismissal. Here, petitioner argues that his undisputed hearing testimony established that Dr. King, who was Assistant Superintendent of Personnel and his long-standing supervisor, was aware of the charges against him and served as his conduit to the personnel committee throughout the pendency of the matter. He professes that Dr. King's authority to speak for the Board was evidenced by the fact that it was he who informed petitioner of his suspension and authorized the issuance of checks to petitioner, which were subsequently issued. As such, he argues, contrary to the conclusion of the ALJ, it was entirely reasonable for petitioner to rely on the representations which had been made to him by this individual.

In reply, the Board advances that although petitioner claims to have placed a great deal of reliance on representations, supposedly made by Dr. King, that he would be reimbursed back pay and legal fees if the charges against him were dismissed, irrespective of any conditions on such dismissal, there is no independent corroboration of such a "sweeping representation" in the record. (Board's Reply Exceptions at 1) Indeed, it argues, the statement, in and of itself, is illogical. Even assuming, *arguendo,* that Dr. King may have been of the impression that petitioner's successful completion of pretrial intervention (PTI) would entitle him to the compensation he claims, this administrator's suppositions are not the issue here. The focus of attention in this matter is whether petitioner is legally entitled to the relief he seeks. Pursuant to applicable statutes and relevant case law, PTI is not a successful disposition of criminal charges which would operate to trigger the monetary protections claimed by petitioner.

Upon careful and independent review of the record, which it is noted did not contain transcripts of the hearing conducted at the OAL, the Commissioner, finding petitioner's exceptions without merit, is in accord with the ALJ's conclusion that petitioner is neither entitled

to indemnification for attorney fees and expenses nor back pay and pension credit for the period he was suspended subsequent to his indictment.

Initially, the Commissioner notes that petitioner seeks reimbursement for legal fees and expenses accrued in defending against his prior criminal action pursuant to *N.J.S.A.* 18A:16-6 and *N.J.S.A.* 18A:16-6.1 which must be read *in pari materia* and, in pertinent part, specify:

> *N.J.S.A.* 18A:16-6: **Indemnity of officers and employees against civil actions**
> Whenever any civil action has been or shall be brought against any person holding any office, position or employment under the jurisdiction of any board of education, ****for any act or omission arising out of and in the course of the performance of the duties of such office, position, employment* ***, the board shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom***. (emphasis supplied)
>
> *N.J.S.A.* 18A:16-6.1 **Indemnity of officers and employees in certain criminal actions**
> Should any criminal action be instituted against any such person *for any such act or omission and should such proceeding be dismissed or result in a final disposition in favor of such person,* the board of education shall reimburse him for the cost of defending such proceeding, including reasonable counsel fees and expenses of the original hearing or trial and all appeals. (emphasis supplied)

Thus, an employee is entitled to reimbursement for the cost of attorney's fees and expenses upon the satisfaction of a two-pronged analysis: 1) whether the charged offense arose out of and during the course of the employee's performance of his duties and responsibilities; *and* 2) whether the underlying criminal action is dismissed or resulted in a final disposition in favor of the employee. As was recognized by the ALJ, it is well-established that the Courts, in interpreting *N.J.S.A.* 18A:16-6.1, have held that an employee's successful completion of PTI

leading to dismissal of the charges against him is *not* a dismissal or favorable determination of a criminal proceeding, within the intendment of this statute, entitling the employee to reimbursement. *See Cressinger, supra; Thadeus Pawlak v. Board of Education of the Borough of Hopatcong*, (App. Div. A-5083-87T2, July 12, 1989). Given that petitioner's application here clearly fails to satisfy this requisite statutory condition, the Commissioner finds it unnecessary to reach to the ALJ's discussion on page 7 of the Initial Decision as to whether petitioner's criminal charges arose out of and during the course of his employment.[2]

With respect to petitioner's claim for back pay, benefits and restoration of service credit for the period of his suspension, pursuant to *N.J.S.A.* 18A:6-8.3, from January 23, 1997 to November 30, 1997, the Commissioner finds and concludes, as did the ALJ, that this statute makes no provision for back pay, regardless of the disposition of the criminal indictment, and that there is no basis under education laws here to award such relief.

Finally, turning to petitioner's contention of entitlement to his requested reliefs pursuant to the concepts of fundamental fairness and estoppel, the Commissioner is in full agreement with the ALJ that reliance on either of these doctrines is misplaced in this matter. First, as to fundamental fairness, as was pointed out by the ALJ, each of the cases relied on by petitioner "for the general proposition that a 'fully vindicated employee must be made whole,'" (Initial Decision at 6, footnote 2) are inapposite to the within matter, as in those cases each of the petitioners was *acquitted* of the charges for which he was suspended while here the charges were dismissed subsequent to completion of PTI, which is not tantamount to an acquittal or vindication. The Commissioner similarly finds no merit in petitioner's contention that he properly and reasonably relied on a District administrator as having the authority to grant him the

[2] *See, however, Bower v. Board of Education of the City of East Orange*, 149 *N.J.* 416 (1997).

relief he sought, thereby rendering the representations of this individual as binding on the Board. It is by now well-established that the representations of an individual board member or administrator are insufficient to bind a board to a particular course of action. *See Cheryl Dorrington v. North Bergen Board of Education*, 1982 *S.L.D.* 247; *see, also, Kevin Griffin v. Board of Education of the City of Paterson*, 93 *N.J.A.R.* 2d (EDU) 882 (1993). Rather, the Commissioner concludes that here, as in *Dorrington*:

> ***An examination of the [full] record reveals that the Board committed itself not at all to petitioner, but that petitioner mistakenly relied on the opinions and assurances of [a Board administrator] in concluding that a commitment had been made. Such reliance was misplaced, since opinions and assurances cannot stand in the stead of deliberate Board action.***
> *Dorrington* 1982 *S.L.D.* at 256, *quoting Anna Brennan v. Board of Education of the City of Pleasantville*, 1977 *S.L.D.* 1059.

As found by the ALJ, it is inconceivable that petitioner, as a professional educator and administrator with 25 years experience in the District's employ, would be unaware of this "hierarchical nature of public education." Initial Decision at 9.[3]

Accordingly, the Initial Decision of the OAL is affirmed for the reasons stated therein as clarified above and the instant Petition of Appeal is dismissed.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 8/30/01

Date of Mailing: 8/30/01

[3] Petitioner's contention that issuance of checks for the monies he sought at the direction of Dr. King evidences the reasonableness of his reliance on this individual's representations is misplaced. This argument is specifically belied by the fact that payment on such checks was almost immediately stopped, in obvious recognition that the administrator had exceeded his authority in directing their issuance.

[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:2-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

282-01

#282-01

D.M., on behalf of minor child, B.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

August 30, 2001

OAL DKT. NO. EDU 6448-00
AGENCY DKT. NO. 272-7/00

D.M., on behalf of minor child, B.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

On June 6, 2001, following review of 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 the notification sent to the petitioner by the OAL on April 18, 2001, providing petitioner ten days to submit an explanation for such nonappearance, the Commissioner dismissed this matter with prejudice due to petitioner's failure to appear at hearing or to provide an explanation for her nonappearance. Petitioner was further ordered to pay tuition for the period of B.N's ineligible attendance in the District's schools on the basis of 1/180 of the total annual per pupil cost multiplied by the number of days of ineligible attendance.

On August 29, 2001, the Commissioner received a letter from petitioner requesting that the matter be rescheduled for hearing due to a "mix up on my behalf and the mail," stating that she "[could] not remember receiving a notice stating a hearing date" and that failure to attend a hearing was purely an oversight on her part. (Petitioner's Letter of August 27, 2001 at 1-2) Petitioner further submits that she has custody of B.N. and that if she cannot attend Ewing Schools, B.N. has no school to attend. (*Id.* at 2)

Upon a careful review of the record in this matter, and in light of petitioner's assertion that she cannot remember receiving notice of the hearing date and was unaware of such date, the Commissioner determines that, in the interest of fundamental fairness and B.N's ability to obtain an education, this matter must be returned to the OAL for further proceedings consistent with *N.J.A.C.* 1:1-1 *et seq.*

Accordingly, this matter shall be returned to the OAL for further proceedings, along with a request that this matter be heard on an expedited basis as it involves a residency dispute.

IT IS SO ORDERED. *

COMMISSIONER OF EDUCATION

Date of Decision: 8/30/01

Date of Mailing: 8/30/01

* 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 the date of mailing to the parties.

284-01

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

September 4, 2001

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO: EDU 9315-96

AGENCY DKT. NO: 314-7/96

MARY FORCE,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY,

Respondent.

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

Charlotte Kitler, Esq., for respondent
(Jersey City Public School, Legal Department)

Record Closed: July 17, 2001 Decided: July 18, 2001

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

This matter was transmitted to the Office of Administrative Law (OAL) on September 11, 1996, 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 Order Dismissing Petition.

Having reviewed the contents of the attached Order Dismissing Petition, **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 Order Dismissing Petition 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.

DATE

JEFFREY A. GERSON,
Administrative Law Judge

Receipt Acknowledged:

7/20/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 24 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/g

CHARLOTTE KITLER
General Counsel
State-Operated School District
of Jersey City
346 Claremont Avenue
Jersey City, New Jersey 07305
(201) 915-6231
Attorney for Respondent

MARY FORCE, Petitioner, v. STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OAL Dkt. No. EDUOR 09315-96 Agency Dkt. No. 314-7/96 ORDER DISMISSING PETITION

THIS MATTER having been brought before the Commissioner of Education and the Office of Administrative Law by Feintuch, Porwich & Feintuch, attorneys for petitioner, and by Charlotte Kitler, Esq., attorney for respondent, and it appearing that the petition seeks to have certain sick days restored to the petitioner's credit for absences alleged to be due to work-related injury;

AND IT appearing that the petition in the matter was filed beyond the 90-day time period prescribed by N.J.A.C. 6A:3-1.3(d) (previously 6:24-1.2(c)), and the sole issue is whether the 90-day rule should be relaxed because of an alleged custom of having disputes about sick days submitted to a Judge of Workers' Compensation for resolution;

AND it further appearing that this issue has already been determined by Administrative Law Judge Elinor Reiner and by the Commissioner of Education in the case of *Nichols et als. v. State-Operated School District of Jersey City*, OAL Docket No. EDU

9048-96, where it was held that the 90-day rule should not be relaxed and the petitions were dismissed;

AND finding that the determination in the *Nichols* case should properly be the same to apply here; and for good cause shown,

IT IS on this 17 day of July 2001,

ORDERED that the petition in this matter shall be and hereby is DISMISSED.

JEFFREY GERSON, A.L.J.

WE HEREBY CONSENT TO THE FORM AND ENTRY OF THE WITHIN ORDER.

FEINTUCH, PORWICH & FEINTUCH
Attorney for Petitioner

By: _____
ALAN S. PORWICH

Date: 6/5/01

Charlotte Kitler
CHARLOTTE KITLER
Attorney for Respondent

Date: 4/6/01

OAL DKT. NO. EDU 9315-96
AGENCY DKT. NO. 314-7/96

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

The record, the parties' agreed-upon Order Dismissing Petition, and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the agreed-upon order and adopts such order as the final decision in this matter. The matter is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9|04|01

Date of Mailing: 9|05|01

285-01

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

September 4, 2001

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO: EDU 9646-96

AGENCY DKT. NO: 344-7/96

MARIA LEIVA,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY,

Respondent.

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

Charlotte Kitler, Esq., for respondent
(Jersey City Public School, Legal Department)

Record Closed: July 17, 2001 Decided: July 18, 2001

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

This matter was transmitted to the Office of Administrative Law (OAL) on September 2, 1996, 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 Order Dismissing Petition.

Having reviewed the contents of the attached Order Dismissing Petition, **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 Order Dismissing Petition 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.

DATE

JEFFREY A. GERSON,
Administrative Law Judge

Receipt Acknowledged:

7/26/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 24 2001
DATE

OFFICE OF ADMINISTRATIVE LAW

/g

CHARLOTTE KITLER
General Counsel
State-Operated School District
of Jersey City
346 Claremont Avenue
Jersey City, New Jersey 07305
(201) 915-6231
Attorney for Respondent

MARIA LEIVA, Petitioner, v. STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OAL Dkt. No. EDUOR 09646-96 Agency Dkt. No. 344-7/96 ORDER DISMISSING PETITION

THIS MATTER having been brought before the Commissioner of Education and the Office of Administrative Law by Feintuch, Porwich & Feintuch, attorneys for petitioner, and by Charlotte Kitler, Esq., attorney for respondent, and it appearing that the petition seeks to have certain sick days restored to the petitioner's credit for absences alleged to be due to work-related injury;

AND IT appearing that the petition in the matter was filed beyond the 90-day time period prescribed by N.J.A.C. 6A:3-1.3(d) (previously 6:24-1.2(c)), and the sole issue is whether the 90-day rule should be relaxed because of an alleged custom of having disputes about sick days submitted to a Judge of Workers' Compensation for resolution;

AND it further appearing that this issue has already been determined by Administrative Law Judge Elinor Reiner and by the Commissioner of Education in the case of *Nichols et als. v. State-Operated School District of Jersey City*, OAL Docket No. EDU

9048-96, where it was held that the 90-day rule should not be relaxed and the petitions were dismissed;

AND finding that the determination in the *Nichols* case should properly be the same to apply here; and for good cause shown,

IT IS on this day of 200 1,

ORDERED that the petition in this matter shall be and hereby is DISMISSED.

JEFFREY GERSON, A.L.J.

WE HEREBY CONSENT TO THE FORM AND ENTRY OF THE WITHIN ORDER.

FEINTUCH, PORWICH & FEINTUCH
Attorney for Petitioner

By: _____
ALAN S. PORWICH

Date: June 5, 2001

_____
CHARLOTTE KITLER
Attorney for Respondent

Date: 7/16/01

OAL DKT. NO. EDU 9646-96
AGENCY DKT. NO. 344-7/96

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

The record, the parties' agreed-upon Order Dismissing Petition, and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the agreed-upon order and adopts such order as the final decision in this matter. The matter is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9|4|01

Date of Mailing: 9|5|01

286-01R

IN THE MATTER OF THE TENURE	:	
HEARING OF GERALD M. MABLI,	:	
SCHOOL DISTRICT OF THE BOROUGH OF	:	COMMISSIONER OF EDUCATION
DEMAREST, BERGEN COUNTY.	:	DECISION ON REMAND
	:	

September 4, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5399-01

AGENCY DKT. NO. 331-9/00

(OAL DKT. EDU 7998-00 ON REMAND[1])

IN THE MATTER OF THE TENURE HEARING OF GERALD M. MABLI, SCHOOL DISTRICT OF THE BOROUGH OF DEMAREST, BERGEN COUNTY

Matthew J. Giacobbe, Esq., for petitioner Demarest Board of Education
(DeCotiis, Fitzpatrick, Gluck, Hayden & Cole, attorneys)

Harold N. Springstead, Esq., for respondent Gerald M. Mabli
(Springstead & Maurice, attorneys)

Record Closed: July 10, 2001 Decided: July 16, 2001

BEFORE **MICHAEL L. RAVIN**, ALJ:

STATEMENT OF THE FACTS

This matter involves tenure charges of conduct unbecoming certified by the Demarest Board of Education ("Board") against Gerard Mabli ("Mr. Mabli") under the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 to-18.1.

---

[1] The original Initial Decision - Settlement, bearing OAL Dkt. EDU 7998-00, was dated April 7, 2001 and is incorporated herein by reference.

Gerard Mabli is a tenured teacher designated as a Technology Coordinator employed by the Board. On or about September 8, 2000, tenure charges were filed with the New Jersey Commissioner of Education ("Commissioner") in connection with actions Mr. Mabli took on or about June 21 or June 22, 1999. The four separate charges alleged that Mr. Mabli, while employed by the Board as a Technology Coordinator, committed acts of conduct unbecoming, namely: (1) the destruction, misuse, and unauthorized removal of computer software operating systems; (2) violation of policies and procedures; (3) insubordination; and (4) disregard of the educational needs of students. On September 15, 2000, respondent filed an answer. On September 21, 2000, the Commissioner referred this matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

The matter was heard by me on January 9, 10, 11 and 12, 2001. The parties were then offered the opportunity to submit posthearing submissions and replies.

Prior to the due date for the parties posthearing submissions, I was advised that the parties had agreed to a Stipulation of Settlement, subject to approval by the Commissioner.

After reviewing the Stipulation of Settlement and as reflected in my April 7, 2001 Initial Decision, I found that it was in accordance with the decision of the State Board of Education in *In Re Cardonick,* 1990 S.L.D. (1983), which instructs that the record of any proposed settlement must include:

> . . . the nature of the charges, circumstances justifying the settlement, consent or authorization by the Board of Education and the teacher to the proposed agreement, the Administrative Law Judge's finding that the teacher entered into the agreement with a full understanding of his rights, and [a finding] that the agreement is consistent with the public interest.

I therefore ordered the parties to comply with the settlement terms, concluded the proceedings and sent the Initial Decision adopting the settlement to the Commissioner of the Department of Education for consideration.

On or about June 1, 2001, the Commissioner rejected the settlement and remanded the matter to the OAL. As stated in the synopsis of the Decision:

> The Commissioner noted that the proposed agreement does not indicate that the parties considered the potential impact referral of this matter to the State Board of Examiners might have on their agreement should the State Board of Examiners act on respondent's certification during the term of employment contemplated by the agreement. Absent an expression by the parties of their understanding and acceptance of this eventuality, the Commissioner could not approve the settlement.

After discussing the Commissioner's concerns with the parties, the parties agreed to submit an Addendum to the Stipulation of Settlement and Settlement Agreement, subject to the approval of the Commissioner. In addition to incorporating therein by reference all terms and conditions of the original settlement, the Addendum, which was filed with the OAL on July 10, 2001, recites in pertinent part:

> [T]he parties have reviewed the comments and objections to the settlement from the Commissioner of Education and are mindful of the issues raised by the Commissioner concerning any potential action taken by the State Board of Examiners, and agree to the terms and conditions of the underlying agreement and will deal with the consequences of any such action when and if they arise.

Having reviewed the Stipulation of Settlement, Settlement Agreement and Addendum ("agreement"), I **FIND** that it explicitly includes the nature of the charges and the consent or authorization of the Board and Mr. Mabli. I **FIND** that Mr. Mabli entered into the agreement with full understanding of his rights. I further **FIND** that Mr. Mabli understands the Commissioner's duty pursuant to *N.J.A.C.* 6:11-3.7(b)(1)(i) to refer tenure determinations to the State Board of Examiners for possible revocation of his certificate.

I further **FIND** that the agreement expresses that the Board and Mr. Mabli considered the potential impact such referral might have on their agreement should the State Board of Examiners act on Mr. Mabli's certification during the term of employment contemplated by the agreement. I further **FIND** that the parties understand and accept this eventuality.

I **FIND** that Mr. Mabli is satisfied with his attorney's representation and had adequate time to discuss the contents of the agreement.

Finally, I **FIND** the agreement is consistent with public policy. The parties acknowledge the public interest in saving considerable costs in attorney's fees through amicably settling this matter. The Board is expressly aware of the public's interest in the proper pursuit and handling of tenure charges, but recognizes that even if the charges were proven true, Mr. Mabli might not be dismissed, given mitigating factors which arguably exist in the record. For his part, Mr. Mabli, while never conceding the validity of the tenure charges, does not want to risk that the charges may be sustained and that he may be dismissed.

I **FIND** the settlement fully disposes of all issues in controversy.

ORDER

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.

July 16, 2001
DATE

Michael L. Ravin
MICHAEL L. RAVIN, ALJ

Receipt Acknowledged:

7/20/2001
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 24 2001
DATE

OFFICE OF ADMINISTRATIVE LAW

md

DeCotiis, FitzPatrick, Gluck, Hayden & Cole, LLP
500 Frank W. Burr Boulevard
Teaneck, New Jersey 07666
Telephone (201) 928-1100
Facsimile (201) 928-0588
Attorneys for Demarest Board of Education

IN THE MATTER OF THE TENURE CHARGES AGAINST GERARD M. MABLI, TEACHING STAFF, MEMBER OF THE DEMAREST BOARD OF EDUCATION DISTRICT, BERGEN COUNTY

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL Docket No. EDU 7998-00
Agency Ref. No. 311-9/08

STIPULATION OF SETTLEMENT AND SETTLEMENT AGREEMENT

The parties to this matter, the Petitioner, Demarest Board of Education ("Board") and Respondent, Gerard M. Mabli ("Mabli"), having reached an agreement to resolve the matter amicably, hereby request 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 and all terms of this agreement are contingent upon approval by the Administrative Law Judge and Commissioner of Education, and that if any of the terms of this agreement 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 completion of the record including the rendering of a decision by the Administrative Law Judge in relation to tenure charges filed in this matter, but that nothing in this paragraph or agreement shall, in any event, preclude the parties from agreeing to a new, revised or modified settlement agreement,

provided that such agreement shall be subject to the approval of the Administrative Law Judge and of the Commissioner of Education.

2. Rationale for Settlement: On or about September 6, 2000 some four separate tenure charges were filed by the Board against the respondent for his actions occurring on June 22, 1999. The four separate charges alleged that Mabli, while employed as a Technology Coordinator with the Board, committed acts of conduct unbecoming, namely, (1) the destruction, misuse, and unauthorized removal of computer software operating systems; (2) violation of policies and procedures; (3) insubordination; and (4) disregard of the educational needs of students. Mabli denied the charges and the matter proceeded to a hearing on January 9, 10, 11 and 12, 2001. Transcripts have been received and a briefing schedule was ordered by Administrative Law Judge Ravin. Both the Board and Mabli believe that it is in the best interest of all parties and the public to amicably resolve this matter pursuant to the specific terms set forth below.

The Board is aware of the public's interest in the proper pursuit and handling of tenure charges which in the present case are considered serious and warranted. However, the Board understands that the charges, even if proven true may not result in a dismissal of Mabli in light of his having taught in the District for over 21 years without incident and with positive evaluations.

Mabli does not concede nor has he conceded the validity of the tenure charges. Nevertheless, he understands that the tenure charges may be sustained and he does not want to take the risk.

Furthermore, the parties both acknowledge the public interest in saving considerable costs in attorneys fees through amicably settling this matter.

3. 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.

4. Mabli agrees to withdraw his challenge to the increment withholding, which is pending in arbitration and to rescind his Notice of Tort Claim filed against the Board and the Superintendent of Schools. The parties recognize that Mabli has claims and certain rights, including status as a tenured teacher arising from his employment by the Board. In exchange for the foregoing promises made by the Board, Mabli hereby releases the Board, its members, officers, agents, servants, employees, attorneys, representatives, and insurers (collectively referred to as "the Board") from all claims and liabilities which it or they may be subject to arising from Mabli's employment with the Board, except for any claims Mabli may assert for benefits under the State Workers Compensation laws, or any other rights Mabli may have pursuant to this agreement. Further, Mabli and anyone who succeeds to his rights, such as heirs or executors of his estate, or his assigns, waive any and all claims against the Board including, but not limited to claims for attorneys' fees, compensatory damages, emotional distress, punitive damages and costs allegedly incurred, as well as all claims arising under contract, Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Civil Rights Act of 1866, the Age Discrimination and Employment Act of 1967, the Employee Retirement Income Security Act of 1974, the Americans with Disabilities Act, Executive Orders 11246 and 11141, the New Jersey Law Against Discrimination, the New Jersey

Conscientious Employee Protection Act, and all other claims arising under federal law, state law or the common law. Mabli will not make any claim to or receive additional monies or benefits which may be provided to the teachers in the Demarest 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 personal days. Mabli further represents that he has been given twenty-one days from the date of the receipt of this document to accept or reject this Agreement, and further that he has up to seven (7) days after signing this document to withdraw his agreement to this settlement. Nothing in this Agreement or the General Release given by Mabli shall preclude either party from bringing an action to enforce performance of any of the terms of this agreement, should there be a default of performance.

5. The parties agree that the Board shall pay Mabli his full salary, medical benefits and pension contributions, if any, for the 2000-2001 school year which salary is currently $73,605.00 per year, less the 120 days Mabli was suspended without pay during the 2000-2001 school year. The Board shall place Mabli on a terminal leave of absence for the 2001-2002 and 2002-2003 school years at half-pay ($36,802.50 per school year) with medical benefits and pension contributions, if any. The Board agrees to consider the 120-day suspension without pay as an unpaid leave of absence so as to permit Mabli to attempt to purchase back the time from the Teachers Pension & Annuity Fund ("TPAF"). If the TPAF does not permit the purchase back of his time, then commencing July 1, 2003, Mabli will be granted an unpaid leave of absence until on or about December 31, 2003, so as to permit Mabli to achieve 25 years of credited service with the TPAF. It is Mabli's sole responsibility to arrange for and purchase his pension credit for this unpaid leave of absence. During this

unpaid leave of absence, the Board will continue Mabli's medical benefits with the expense thereof to be paid solely by Mabli. Mabli further agrees that he will pay the Board a lump sum payment by no later than June 15, 2003 to cover all such expenses for medical benefits for the entire period of this unpaid leave of absence. The Board will notify Mabli on or before June 1, 2003 of the exact amount of that lump sum payment. Should Mabli fail to make that lump sum payment to the Board on or before June 15, 2003, the Board will cease making all payments for Mabli's medical benefits as of June 30, 2003.

6. Along with this agreement, Mabli shall submit an irrevocable letter of resignation effective June 30, 2003 and shall not seek further employment with the Demarest Board of Education, which is annexed hereto as Exhibit A. If, however, the TPAF does not permit Mabli to purchase his pension credits for the 120-day suspension, then Mabli's resignation shall be deemed effective on or about December 31, 2003 so as to permit Mabli to achieve 25 years of credited service with the TPAF. Mabli further agrees that he will not enter Board property except for a legally required purpose.

7. The Board agrees that any reference for employment requested by and provided on behalf of Mabli will be a neutral recommendation stating the number of years worked with no mention of increment withholding or tenure charges. Mabli will not seek references from any administrator currently employed by the Board, with the exception of any administrator employed by the Board prior to the filing of the tenure charges. Any references received from current administrators employed by the Board will not be on Board or other Demarest Schools letterhead.

8. If Mabli obtains employment during the term of this agreement with another public entity that makes contributions to the TPAF on Mabli's behalf, any payments by the Board due to Mabli pursuant to this agreement shall immediately terminate as of the effective date of Mabli's employment with the other public entity.

9. This Stipulation of Settlement incorporates the complete financial obligation of the Board with respect to Mabli's employment relationship and separation of employment from the Board.

10. 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 originals.

11. By settling this matter, respondent acknowledges that he is waiving his right to a decision from the Office of Administrative Law and Commissioner of Education, in which he could obtain an adjudication of the merits of the tenure charges and of the penalty, if any, if the charges were sustained. Mabli 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.

12. Mabli is aware, and it has been explained to him, that the Commissioner of Education has a duty to refer tenure determinations to the State Board of Examiners for possible revocation of his certificate.

THE UNDERSIGNED STATE THAT THEY HAVE CAREFULLY READ THE FOREGOING SETTLEMENT AGREEMENT, KNOW THE CONTENTS THEREOF, HAVE HAD THE OPPORTUNITY TO DISCUSS THOSE CONTENTS WITH COUNSEL OR OTHER PERSONAL ADVISOR OF THEIR CHOOSING, FREELY AND VOLUNTARILY CONSENT TO ALL TERMS AND CONDITIONS THEREOF AND SIGN SAME AS THEIR OWN FREE ACT.

Gerard Mabli

GERARD M. MABLI

DATE: 4/20/01

Harold Springstead

HAROLD N. SPRINGSTEAD, ESQ.
ATTORNEY FOR GERARD M. MABLI

DATE: 4/26/01

Frank G Chilson

FRANK G. CHILSON
SECRETARY AND BUSINESS ADMINISTRATOR
OF THE DEMAREST BOARD OF EDUCATION

DATE: 4/25/01

Matthew J Giacobbe

MATTHEW J. GIACOBBE, ESQ.
ATTORNEY FOR DEMAREST BOARD OF EDUCATION

DATE: 4/26/01

Frank G. Chilson
Business Administrator
Demarest Board of Education
568 Pierpont Road
Demarest, New Jersey 07627

Re: Irrevocable Resignation of Employment

Dear Mr. Chilson:

Please be advised that I hereby tender my resignation from the teaching staff and any other employment with the Demarest Board of Education, effective June 30, 2003, in accordance with the Stipulation of Settlement and Settlement Agreement. If TPAF does not permit me to purchase back the 120 unpaid leave days from September 6, 2000 to January 15, 2001, my irrevocable resignation shall be effective December 31, 2003 to allow me to earn twenty-five (25) years of service. Furthermore, If I obtain employment with another public entity which contributes to the TPAF on my behalf, this resignation will become effective on the date my employment with the other public entity commences. I understand that this letter of resignation is irrevocable under any circumstances. I have discussed the contents of this letter with my attorney and sign this letter of resignation upon my own free will and accord.

Very truly yours,

Gerard Mabli

Gerard M. Mabli

Date: 4/20/01

"Exhibit A"

RECEIVED
STATE OF NEW JERSEY
JUL 10 10 46 AM '01

DeCotiis, FitzPatrick, Gluck, Hayden & Cole, LLP
500 Frank W. Burr Boulevard
Teaneck, New Jersey 07666
Telephone (201) 928-1100
Facsimile (201) 928-0588
Attorneys for Demarest Board of Education

IN THE MATTER OF THE TENURE CHARGES AGAINST GERARD M. MABLI, TEACHING STAFF, MEMBER OF THE DEMAREST BOARD OF EDUCATION DISTRICT, BERGEN COUNTY

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL Docket No. EDU 7998-00
Agency Ref. No. 311-9/08

ADDENDUM TO STIPULATION OF SETTLEMENT AND SETTLEMENT AGREEMENT

The parties to this matter, the Petitioner, Demarest Board of Education ("Board") and Respondent, Gerard M. Mabli ("Mabli"), having reached an agreement to resolve this matter amicably, and the Commissioner of Education having raised some concerns regarding said agreement in his written opinion dated June 1, 2001, the parties hereby request that the Administrative Law Judge and the Commissioner of Education approve this Addendum to the Stipulation of Settlement and Settlement Agreement upon the following terms:

1. The Board and Mabli incorporate herein by reference all terms and provisions of the Stipulation of Settlement and Settlement Agreement dated April 26, 2001; and

2. Furthermore, the parties have reviewed the comments and objections to the settlement from the Commissioner of Education and are mindful of the issues raised by the Commissioner concerning any potential action taken by the State Board of Examiners, and agree to the terms and

conditions of the underlying agreement and will deal with the consequences of any such action when and if they arise.

THE UNDERSIGNED STATE THAT THEY HAVE CAREFULLY READ THE FOREGOING SETTLEMENT AGREEMENT, KNOW THE CONTENTS THEREOF, HAVE HAD THE OPPORTUNITY TO DISCUSS THOSE CONTENTS WITH COUNSEL OR OTHER PERSONAL ADVISOR OF THEIR CHOOSING, FREELY AND VOLUNTARILY CONSENT TO ALL TERMS AND CONDITIONS THEREOF AND SIGN SAME AS THEIR OWN FREE ACT.

Gerard Mabli

GERARD M. MABLI

DATE: 7/

HAROLD N. SPRINGSTEAD, ESQ.
ATTORNEY FOR GERARD M. MABLI

DATE:

Frank G. Chilson

FRANK G. CHILSON
SECRETARY AND BUSINESS ADMINISTRATOR
OF THE DEMAREST BOARD OF EDUCATION

DATE: 7/3/01

MATTHEW J. GIACOBBE, ESQ.
ATTORNEY FOR DEMAREST BOARD OF EDUCATION

DATE: 7/6/01

OAL DKT. NOS. EDU 5399-01 AND EDU 7998-00 (ON REMAND)
AGENCY DKT. NO. 331-9/00

IN THE MATTER OF THE TENURE	:	
HEARING OF GERALD M. MABLI,	:	
SCHOOL DISTRICT OF THE BOROUGH OF	:	COMMISSIONER OF EDUCATION
DEMAREST, BERGEN COUNTY.	:	DECISION ON REMAND
	:	

The record, Stipulation of Settlement and Settlement Agreement, along with the Addendum to such Agreement, and Initial Decision issued by the Office of Administrative Law in connection with this remanded case, 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. This case 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: 9|4|01

Date of Mailing: 9|5|01

287-01

287-01SEC

IN THE MATTER OF JEANNE GOLDEN, :
BOARD OF EDUCATION OF THE BOROUGH :
OF MANVILLE, SOMERSET COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

September 5, 2001

SCHOOL ETHICS COMMISSION	:	BEFORE THE
	:	SCHOOL ETHICS COMMISSION
v.	:	
	:	RESOLUTION
JEAN GOLDEN,	:	
Manville Board of Education	:	**SEC Docket No.: T31-01**
Somerset 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, Jean Golden was elected to serve a three-year term on the Manville Board of Education in April 2000; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on December 1, 2000 and February 13, 2001; and

WHEREAS, the NJSBA conducted seven training sessions between April 2000 and April 2001 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held in March 2001; and

WHEREAS, the Commission issued an Order on April 9, 2001, directing her to Show Cause why she had not attended training up until that time; and

WHEREAS, she replied that she could not attend due to her disability and that she had not received reminder notices from the NJSBA, but that she planned to attend the October 2001 session; and

WHEREAS, the Commission notified her that the Commission would discuss this matter at its June 26, 2001 meeting, that she had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission has considered the reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2000 to April 2001 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission granted an extension to similarly situated board members to attend one of the June sessions; and

WHEREAS, the Commission finds that if Ms. Golden fails to attend by October, the Commission finds that it would be appropriate to have her removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ms. Golden violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend her until she attends, but remove her from the board if she fails to attend by the October training session.

Dated: July 12, 2001

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 River View 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 June 26, 2001.

Lisa James-Beavers, Executive Director

h/lisa/decisions/T2701.doc

AGENCY DKT. NO. 245-7/01

IN THE MATTER OF JEANNE GOLDEN, BOARD OF EDUCATION OF THE BOROUGH OF MANVILLE, SOMERSET COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

Whereas, the School Ethics Commission (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 Commission sent ample notice to the above-named Board member of her failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on April 6, 2001, 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 by letter dated April 24, 2001, that she had not been able to attend training due to her disability and that she had not received reminder notices from the New Jersey School Boards Association, but that she planned to attend the October 2001 session; and

Whereas, the Commission voted on June 26, 2001 to recommend that the above-named Board member be suspended until she takes the required training program; and

Whereas, the Commission further voted on June 26, 2001 that the above-named Board member be removed from office if she fails to so attend a required training program by the

end of October 2001, and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on July 12, 2001, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, the above-named Board member submitted a comment to the Commissioner expressing her dismay with the Commission's determination since she feels that the Commission did not give full consideration to her April, 2001 letter of explanation for her failure to attend and the fact that, upon receipt of the Commission's first letter regarding training, she immediately undertook action to ensure her registration for the October session; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and notes that the Commission provides for an extension, without penalty, to Board members who attend one of the training sessions scheduled for June 2001;

Whereas, he further notes that the above-named Board member advised that, upon receiving notice of this amnesty, she inquired about attending a June session and was told that both scheduled sessions were 2-day sessions and required extensive walking which this Board member did not feel her disability would allow her to do, whereupon she immediately undertook action to ensure her registration at the 1-day October session;

Whereas, in light of the explanation provided by the above-named Board member, the Commissioner cannot concur with the Commission's determination that this Board member should be suspended from office until her attendance at the October training session; now therefore

IT IS ORDERED that, in the event the above-named Board member fails to complete the required training by October 23, 2001, the above-named Board member is hereby summarily removed from office effective October 24, 2001.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/5/2001

Date of Mailing: 9/6/2001

*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.

288-01

288-01 SEC

IN THE MATTER OF STANLEY BANES, :

BOARD OF EDUCATION OF THE TOWNSHIP :

OF WATERFORD, CAMDEN COUNTY. :

:

COMMISSIONER OF EDUCATION

DECISION

September 6, 2001

SCHOOL ETHICS COMMISSION	:	BEFORE THE
	:	SCHOOL ETHICS COMMISSION
v.	:	
	:	RESOLUTION
R. STANLEY BANES,	:	
Waterford Twp. Board of Education	:	SEC Docket No.: T09-01
Camden 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, R. Stanley Banes was elected to serve a three-year term on the Waterford Township Board of Education in April 2000; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on December 1, 2000 and February 13, 2001; and

WHEREAS, the NJSBA conducted seven training sessions between April 2000 and April 2001 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held in March 2000; and

WHEREAS, the Commission issued an Order on April 9, 2001, directing him to Show Cause why he had not attended training up until that time; and

WHEREAS, he replied that he did not attend due to his belief that he was exempt from training and his family obligations, but that he planned to attend the October 2001 session; and

WHEREAS, the Commission granted an extension for all similarly situated board members to attend one of the June sessions; and

WHEREAS, the Commission notified him that the Commission would discuss this matter at its June 26, 2001 meeting, that he had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission has considered the reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2000 to April 2001 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that if Mr. Banes fails to attend by October, the Commission finds that it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Banes violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend him until he attends training, but remove him from the board if he fails to attend the October training session.

Dated: July 11, 2001

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 River View 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 June 26, 2001.

Lisa James-Beavers, Executive Director

AGENCY DKT. NO. 247-7/01

IN THE MATTER OF STANLEY BANES, :	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP :	DECISION
OF WATERFORD, CAMDEN COUNTY. :	

Whereas, the School Ethics Commission (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 Commission sent ample 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 April 6, 2001, 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 by letter dated April 27, 2001, that he did not attend due to his belief that he was exempt from training, and because of his family obligations, but that he planned to attend the October 2001 session; and

Whereas, the Commission voted on June 26, 2001 to recommend that the above-named Board member be suspended until he takes the required training; and

Whereas, the Commission further voted on June 26, 2001 that the above-named Board member be removed from office if he fails to so attend a required training program by the

end of October 2001 and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on July 12, 2001, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, the above-named Board member did not submit a response to the resolution; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission recommending suspension and removal of the above-named Board member if the Board member fails to attend the required training by October 2001; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing date of this decision, and shall remain suspended pending completion of the requisite training, and, in the event the Board member fails to complete the required training by October 23, 2001, the above-named Board member is hereby summarily removed from office effective October 24, 2001.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/6/01

Date of Mailing: 9/6/01

*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.

#291-01

RONALD L. BURD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE DELAWARE VALLEY REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

September 6, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6901-00

AGENCY DKT. NO. 257-7/00

RONALD L. BURD,

Petitioner,

v.

BOARD OF EDUCATION OF THE DELAWARE VALLEY REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,

Respondent.

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

John E. Collins, Esq., for the respondent (Parker, McCay & Criscuolo, P.A., attorneys)

Record Closed: July 17, 2001 Decided: July 19, 2001

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

This matter concerns the allegation of the petitioner, Ronald L. Burd, that the decision of the respondent, the Board of Education of the Delaware Valley Regional High School District, Hunterdon County, to withhold his increment for the 2000-01 school year was arbitrary and capricious. The petitioner requested a hearing and the matter was transmitted to the Office of

Administrative Law (OAL) on September 27, 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.

There was a telephone prehearing conference on February 26, 2001 and the conference was continued on March 6, 2001. The hearing was scheduled for July 23, 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.

July 19, 2001
DATE

BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

7/23/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 24 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

ZAZZALI, FAGELLA & NOWAK
One Riverfront Plaza
Newark, New Jersey 07102
(973) 623-1822
Attorneys for Petitioner

RONALD L. BURD Petitioner, v. BOARD OF EDUCATION OF THE DELAWARE VALLEY REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY, Respondent.	: BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW : : Agency Ref. No. 257-7/00 : OAL Dkt No. EDUOR 06901-00S : : : : : STIPULATION OF SETTLEMENT :

The matter in dispute in the above-entitled action having been amicably resolved by and between the parties as per the terms set forth in Petitioner's Letter of Resignation dated March 15, 2001 and the Extract of Board Meeting Minutes, dated March 19, 2001, copies of which are annexed 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: July 10, 2001

ZAZZALI, FAGELLA & NOWAK
Attorneys for Petitioner

By: _____
Kathleen A. Naprstek, Esq.

PARKER, McCAY & CRISCUOLO
Attorneys for Respondent

By: _____
John E. Collins, Esq.

ZAZZALI, FAGELLA & NOWAK

Delaware Valley Regional High School
Board of Education

MAR 30 REC'D

19 SENATOR STOUT ROAD • FRENCHTOWN • NEW JERSEY • 08825-3721

Robert P. Walsh, RSBA
Business Administrator / Secretary

Telephone: 908-996-2727
Fax: 908-996-4527
E-mail:rpwalsh@dvrhs.k12.nj.us

EXTRACT OF MEETING MINUTES

DATE OF MEETING: March 19, 2001 **CALL TO ORDER:** 7:35 p.m.

ROLL CALL:

Present:	William Martin, President	Donna Herbel
	Robin Meaker, Vice President	Robert Looby
	John Ericson	Stephan Popiel
	Joseph Strasser	
Absent:	Dale Hanna	
	Donald Hutchins (arrived at 7:55 p.m.)	

DISTRICT ADMINISTRATORS

Present:	Dr. Martin J. Matula, Superintendent
	Robert P. Walsh, Business Administrator/Board Secretary

BE IT RESOLVED that the Board of Education restore the previously withheld increment for Ronald Burd and adjust his 2000-01 salary to $63,546 (Step 17), and;

BE IT FURTHER RESOLVED that the Board accept the resignation of Ronald Burd effective June 30, 2001. Moved by Ericson, seconded by Meaker. On roll call vote, resolution was ADOPTED as follows: ayes, 7; nays, 0; abstain, 1 (Herbel).

The foregoing information is a true copy of the official records of the Delaware Valley Regional High School District Board of Education, having been extracted from and compared with the contents of the original minutes by me.

Robert P. Walsh, Business Administrator/Board Secretary

Delaware Valley Regional High School
19 Senator Stout Road
Frenchtown, NJ 08825

Dear Dr. Matula:

Please accept this letter as notification of my resignation from the professional staff of Delaware Valley Regional High School effective June 30, 2001.

This letter also serves as notice of my acceptance of the offer of $20,000 in addition to my sick leave conversion. I understand that, should I require more than three (3) sick days between March 2, 2001 and June 30, 2001, one day of pay will be deducted from the sick leave conversion for each additional day used.

In accepting the offer, I am certifying to the following:

- that I shall have accumulated 25 years of eligible service in the New Jersey Teachers' Pension and Annuity Fund (TPAF) by June 30, 2001; and,
- that I shall leave the employ of the Delaware Valley Board of Education with no sick days to be used for any purpose.

I understand that, in order to satisfy eligibility requirements, this resignation must be filed in the Office of the Superintendent no later than March 16, 2001.

I also understand that I shall receive the money on the following schedule:

- half by July 1, 2001
- half by July 1, 2002

Ronald L Burd - 3/15/2001
(*) Employee Signature & Date

(*) = This agreement is contingent upon reinstatement of my increment for the 2000-2001 school year

Office Use Only

Date Received:_____

Initials:_____

OAL DKT. NO. EDU 6901-00
AGENCY DKT. NO. 257-7/00

RONALD L. BURD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE DELAWARE VALLEY REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON 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: 9/06/01

Date of Mailing: 9/06/01

292-01 R

IN THE MATTER OF THE TENURE HEARING OF JOHN H. YOUNG, SCHOOL DISTRICT OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION ON REMAND

September 7, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT

OAL DKT. No. EDU 5520-01
AGENCY DKT. NO. 198-6/00
(ON REMAND FROM OAL DKT.NO.7214-00)

IN THE MATTER OF THE TENURE HEARING OF JOHN H. YOUNG, CITY OF ORANGE TOWNSHIP SCHOOL DISTRICT, ESSEX COUNTY,

---

Joseph R. Morano, Esq., for petitioner (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Charles I. Auffant Esq., for respondent

Record Closed: July 11, 2001 Decided: July 20, 2001

BEFORE **STEPHEN G. WEISS,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) by the Commissioner of Education on July 3, 2001 following a decision by the Commissioner in which he rejected a previous settlement and remanded the case to the Office of Administrative Law for an explanation as to what underlying circumstances justified the conclusion that the settlement was in the public interest. *See, In the Matter of the Tenure Hearing of John H. Young, City of Orange Township School District,* OAL Dkt. No. EDU 7214-00, decided by the Commissioner May 24, 2001.

Following the Commissioner's remand to the Office of Administrative Law the parties reengaged in settlement discussions and prepared a revised Settlement Agreement. The new Agreement sets forth the prior history of the case and fully explains why the parties believe the settlement is in the public interest. Specifically, the

Board notes that during the course of the hearing, and as a result of the testimony of certain witnesses, it became apparent that the tenure charges likely could not be sustained and therefore it was in the interest of all parties, including the public, to withdraw the case and transfer respondent to the Orange Middle School from Orange High School. The revised settlement also notes there was no allegation in the tenure charges involving conduct by Young unbecoming a teaching staff member.

The parties have agreed that respondent will: (a) resume his duties as an Assistant Principal, but at Orange Middle School rather than at Orange High School; (b) he will not be reduced in salary as a result of his reassignment and; (c) in addition, he shall receive compensation, subject to payroll deductions, in the amount of $29,518.22 representing 120 calendar days of employment from June 14, 2000 to October 14, 2000. Young will receive his full salary increment for the 2001-2001 school year as well. In addition, the parties agree to release each other from any and all claims for damages, salary, benefits, back pay or any other civil/administrative claim or cause of action, known or unknown. Upon execution of the agreement, the Board will withdraw the tenure charges, with prejudice. If, however, the Commissioner should reject the revised settlement, it then would become null and void and the charges would be restored. Finally, Young acknowledged that he entered into the revised agreement only after having an opportunity to consult with an attorney of his own choosing regarding its terms, and fully understands its contents and the duties and obligations set forth therein.

Based upon my independent consideration of the record in this case, including a review of the prior testimony and my own notes pertaining thereto, I agree it was unlikely the Board could establish the truth of the charges by a preponderance of the credible evidence. Moreover, even if one or more of the charges actually were sustained, the possibility of a substantial sanction was extremely remote. Under the circumstances, then, I also agree it is in the public interest, as well as the parties, to resolve the matter in the amicable fashion agreed to here.

Accordingly, having reviewed the Stipulation of Settlement and Dismissal which is attached hereto and **FIND** as follows:

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

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

Therefore, I **ORDER** that the parties comply with the terms of the settlement 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.

July 20, 2001
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

7/24/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

JUL 26 2001
DATE

OFFICE OF ADMINISTRATIVE LAW

\mvh

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLP
Ten James Street
Florham Park, New Jersey 07932
TEL. (973) 301-0001; FAX (973) 301-0203
Attorneys for City of Orange Township Board of Education

RECEIVED
JUL 11 1 27 PM '01

IN THE MATTER OF THE TENURE HEARING OF JOHN H. YOUNG, CITY OF ORANGE TOWNSHIP SCHOOL DISTRICT, ESSEX COUNTY.	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
	:	AGENCY DKT. NO. 198-6/00 OAL DKT. NO. EDU 7214-00
	:	**SETTLEMENT AGREEMENT AND RELEASE**

This Settlement Agreement is made by and between John H. Young who resides at 1608 Montgomery Street, Rahway, New Jersey and the City of Orange Township Board of Education (hereinafter "the Board"), with offices located at 451 Lincoln Avenue, Orange, New Jersey. In consideration of the mutual promises and undertakings contained in this Agreement, and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned state:

WHEREAS, John H. Young is a tenured employee of the Board, having been employed as an assistant principal by the Board since on or about September 1, 1994; and

WHEREAS, the Board certified tenure charges of inefficiency against John H. Young to the Commissioner of Education captioned: *In the Matter of the Tenure Hearing of John H. Young, City of Orange Township School District, Agency Dkt. No. 198-6/00*; and

WHEREAS, during the course of the tenure hearing and the testimony of certain witnesses, it became apparent to the Board that it could not sustain the charges; and

WHEREAS, during the course of the tenure hearing, it became apparent to both parties that their interests would be better served by the voluntary transfer of John Young to the Orange Middle School as opposed to continuing with the adjudication of charges of inefficiency; and

WHEREAS, both parties believe that a transfer to the Orange Middle School would be in the best interests of the students, the District and Mr. Young; and

WHEREAS, in consideration of the fact that the allegations contained in the tenure charges of inefficiency did not involve conduct unbecoming a teaching staff member, both parties wish to amicably resolve this matter to the benefit of the Board of Education, as well as to benefit the professional improvement of the certificated employee involved; and

WHEREAS, in light of same, the Board believes that it is not in the public's interest to expend additional public funds in pursuit of these tenure charges; and

WHEREAS, the terms set forth below are acceptable to the Board and John Young; and

WHEREAS, this amicable resolution of the pending tenure matter shall not be construed as an admission of wrongdoing by either party;

IT IS on this 7th day of ~~June~~ July 2001, agreed that:

1. John H. Young will resume his duties as assistant principal in the Orange Public Schools, but at the Orange Middle School, rather than the High School, with such placement to be effective upon execution of this settlement agreement. For tenure purposes, Mr. Young's employment at the Middle School shall be treated as a voluntary transfer.

2. John H. Young's salary will not be reduced as a result of his reassignment by the District to an assistant principal position at the Orange Middle School. Mr. Young shall continue to be paid and receive the same benefits and emoluments as an Assistant Principal - High School.

3. John H. Young shall receive the amount of $29,518.22, which represents compensation for 120 calendar days of employment commencing on or about June 14, 2000 and ending on or about October 14, 2000, subject to the usual payroll deductions unless otherwise directed by the Court. Payment of this amount shall be released to Charles Auffant, Esq., attorney for John H. Young, within seven business days of approval of the settlement by the Commissioner of Education. By signing this agreement, Mr. Young authorizes the board to make payment to Mr. Auffant.

4. Mr. Young shall receive his full salary increment for the 2001-2002 school year.

5. John H. Young and the Board hereby release, abandon, surrender, and waive any and all other claims to damages, salary, benefits, back pay, recoupment of monies or any other

civil/administrative claim or cause of action, whether known or unknown, against one another, as well as against the Board's agents, employees, servants and Board members individually and collectively.

6. The Board agrees to withdraw the certified tenure charges against John H. Young captioned: *In the Matter of the Tenure Hearing of John H. Young, City of Orange Township School District, Agency Dkt. No. 198-6/00* with prejudice upon execution of the Settlement Agreement and Release by the parties.

7. Should the Commissioner refuse to approve the within settlement, then this Agreement shall be null and void and the subject charges shall continue in full force and effect.

8. John H. Young acknowledges that he has consulted with an attorney of his own choosing prior to signing this Agreement, and that he signs this Agreement and Release as his own voluntary act and deed, and that he fully understands the duties and obligations enumerated herein.

9. 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 and year aforesaid.

WITNESS:

Charles Auffant, Esq.

John H. Young

Dated: 6/20/01

WITNESS:

Ronald Lee,
Board Secretary/Business Administrator

Dr. Columbus Salley, Superintendent

Dated: 7/5/01

OAL DKT. NOS. EDU 5520-01 AND EDU 7214-00 (ON REMAND)
AGENCY DKT. NO. 198-6/00

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN H. YOUNG,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION ON REMAND
ORANGE TOWNSHIP, ESSEX COUNTY.	:	
	:	

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

Upon review, the Commissioner approves the revised 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. The matter is hereby dismissed subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

Date of Decision: 9/7/01

Date of Mailing: 9/7/01

293-01

IN THE MATTER OF PETER KOWAL,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
CITY OF RAHWAY, UNION COUNTY.	:	DECISION
	:	

September 6, 2001

SCHOOL ETHICS COMMISSION	:	BEFORE THE SCHOOL ETHICS COMMISSION
v.	:	
	:	RESOLUTION
PETER KOWAL, Rahway Board of Education Union County	:	SEC Docket No.: T40-01

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, Peter Kowal was elected to serve a three-year term on the Rahway Board of Education in April 2000; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on December 1, 2000 and February 13, 2001; and

WHEREAS, the NJSBA conducted seven training sessions between April 2000 and April 2001 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held in March 2001; and

WHEREAS, the Commission issued an Order on April 9, 2001, directing him to Show Cause why he had not attended training up until that time; and

WHEREAS, he replied that he did not attend due to his father's illness, but that he planned to attend the October 2001 session; and

WHEREAS, the Commission granted an extension for all board members who had failed to attend within the year to attend one of the June sessions; and

WHEREAS, the Commission notified him that the Commission would discuss this matter at its June 26, 2001 meeting, that he had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission has considered the reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2000 to April 2001 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that if Mr. Kowal fails to attend by October, the Commission finds that it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Kowal violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend him until he attends training, but remove him from the board if he fails to attend the October training session.

Dated: July 12, 2001

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 River View 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 June 26, 2001.

Lisa James-Beavers, Executive Director

h/lisa/decisions/T4001.doc

AGENCY DKT. NO. 251-7/01

IN THE MATTER OF PETER KOWAL,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
CITY OF RAHWAY, UNION COUNTY.	:	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 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 ample notice to the above-named Board member of his failure to attend such training; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on April 9, 2001 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 replied to the Commission, indicating that his non-attendance at training was due to his father's serious illness which had been for the better part of a year, and to his sole proprietorship of a business which specifically required his presence during weekend hours when the training sessions were held; and

Whereas, the Board member has registered for the October 2001 training session; and

Whereas, the Commission voted on June 26, 2001, to recommend suspension of the above-named Board member until he attends the required training, and to remove him from the Board if he fails to timely attend training 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 July 12, 2001, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to the Commission's resolution recommending suspension, pending attendance at training, and removal if he fails to so attend in October 2001; and

Whereas, on July 26, 2001, the above-named Board member responded to the Commissioner, seeking rescission of his suspension as he plans to attend the October 2001 training and in view of the fact that he was previously an elected Board member for three consecutive terms, 1986-1995 and other unique circumstances set forth above[1]; and

Whereas, the above-named Board member also urges that suspending him pending attendance at a one-day orientation session would not benefit anyone and explains that he is serving as Vice President of the Board and Chairperson of the Building and Grounds Committee during a $15,000,000 new construction and renovation project; and

Whereas, the Commissioner of Education has, pursuant to the authority granted him by *N.J.S.A.* 18A:4-34c, delegated the responsibility to decide this matter to an Assistant Commissioner; and

Whereas, the Assistant Commissioner has carefully considered the record of this matter and the decision of the School Ethics Commission recommending suspension and removal of the above-named Board member if he fails to attend a training session by October 2001; and

Whereas, the Assistant Commissioner concludes that, under the unique factual circumstances presented in this matter as detailed in the above-named Board member's

[1] Although the Commission's resolution does not reference the fact that Mr. Kowal had previously served as a Board member for three consecutive terms, the record before the Commissioner documents that the Commission had knowledge of this fact prior to making its decision to recommend suspending him pending attendance at a training session by October 2001.

submissions, suspension is not warranted pending his attendance at training in October 2001; now therefore

IT IS ORDERED that the above-named Board member shall remain as a Board member pending completion of the requisite training; however, in the event he fails to complete the required training by October 23, 2001, the above-named Board member is hereby summarily removed from office effective October 24, 2001.[2]

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 9|6|01

Date of Mailing: 9|10|01

[2] 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.

294-01

IN THE MATTER OF THE TENURE	:	
HEARING OF ADAM MUJICA,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF PATERSON, PASSAIC	:	
COUNTY.	:	

SYNOPSIS

Board certified tenure charges against respondent teacher alleging that he had, on numerous occasions, made sexually inappropriate remarks and gestures to students including commenting on female students' bodies, discussed his personal sex life, discussed the sexual aspects of a television program and addressed female students by the name of the title character, made sexual gestures and squeezed a sexual toy during class. In addition, respondent was alleged to have sexually harassed a female teacher by grabbing and squeezing her legs, made remarks in class about female students who had reported his inappropriate behavior in an attempt to intimidate them and approached a student after his suspension and attempted to convince her not to testify against him. Respondent denied all charges, and argued that the charges and testimony against him were motivated by a plot conceived by the physical education department to have him terminated from his position.

After hearing extensive testimony and argument and assessing the credibility of the witnesses, the ALJ concluded that the Board's witnesses were credible and that it had proven Charges one through five and eight, that Charge seven had been partially proven, and that Charges six and nine should be dismissed. The ALJ further determined that the charges that were sustained constituted conduct unbecoming a teaching staff member and, because of the nature of the charges, recommended dismissal of respondent.

Upon review of the Initial Decision, transcripts and evidence submitted, the Commissioner agreed with and adopted the determination of the ALJ that the Board had sustained most of its charges by a preponderance of the evidence. Based on the nature of the proven charges, involving sexually inappropriate statements and gestures, as well as actions intended to dissuade students from testifying against him, the Commissioner determined to dismiss respondent from his teaching position. The Commissioner noted several past incidents of inappropriate conduct by respondent, and the fact that he was specifically warned by the Board in 1995 that future inappropriate conduct of a sexual nature would result in tenure charges against him, in support of this determination that dismissal, rather than a lesser penalty, was appropriate in this case.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10130-00

AGENCY DKT. NO. 417-11/00

IN THE MATTER OF THE TENURE HEARING OF ADAM MUJICA, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,

---

Gregory Johnson, Esq., appearing for petitioner State-Operated School District of the City of Paterson

John H. Norton, Esq., and **Jonathan Meyers**, Esq. appearing for respondent Adam Mujica (Alpert, Butler, Sanders & Norton, attorneys)

Record Closed: June 5, 2001 Decided: July 20, 2001

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On November 21, 2001, the Superintendent for the State-Operated District of the City of Paterson (District) certified tenure charges against respondent Adam Mujica, a tenured teacher at Eastside High School. The charges alleged eight separate acts of conduct unbecoming a teacher, particularly inappropriate conduct towards female pupils and a teacher and one act of insubordination. Upon certification of the charges,

the respondent was suspended for 120 days. On December 5, 2000, respondent filed an answer denying all of the charges. On December 14, 2000, the Commissioner's office transmitted the matter to the Office of Administrative Law (OAL) for a plenary hearing. The OAL held a prehearing conference on January 8, 2001. After extended discovery, the hearings were held on April 2 through 6, 9 through 12, 16 & 17, 2001. After the District rested its case, the respondent moved to dismiss several of the charges; the undersigned dismissed Charge Nine (insubordination) and denied the remaining parts of the motion. The record was held open for transcripts, written summations and briefs. The record was closed with the submission of the petitioner's brief on June 5, 2001.

The Charges

Charge One:

During the 1999-2000 school year, the respondent made sexually inappropriate remarks and comments during history class causing female pupils to feel uncomfortable and embarrassed. On a number of occasions, the respondent made statements about an adult TV show entitled "Xica" (or Chica) and actors appearing naked. Respondent made statements to certain female pupils that they reminded him of naked actresses appearing on the show. The respondent's reprehensible conduct constitutes conduct unbecoming warranting his termination as a teacher.

Charge Two:

During the 1999-2000 school year, the respondent made sexually inappropriate gestures during history class. On several dates, the respondent held a bottle of whiteout in his hand and simulated a provocative motion masturbating in front of students. The respondent's reprehensible conduct constitutes conduct unbecoming warranting his termination as a teacher.

Charge Three:

During the 1999-2000 school year, the respondent had improper relations with female students. On one occasion, respondent told student V.D. that he was "going out" with a female student, L.R. Respondent stated that his wife had an operation resulting in sexual problems. The respondent's behavior caused V. to feel uncomfortable in respondent's class. The respondent's reprehensible conduct constitutes conduct unbecoming warranting his termination as a teacher.

Charge Four:

During the 1999-2000 school year, the respondent made sexually inappropriate remarks and comments during history class causing female pupils to feel uncomfortable and embarrassed. The respondent made statements about his personal sex life. Respondent told the class about a trip to Spain and his relations with a young lady in a hotel room. The respondent talked about kissing the young lady in the hotel room and stated "you guys know what happened next." On another occasion, the respondent talked of a vacation to the Philippines, and a woman who undressed in front of him. The respondent's reprehensible conduct constitutes conduct unbecoming warranting his termination as a teacher.

Charge Five:

During the 1999-2000 school year, the respondent made sexually inappropriate remarks and comments to students during history class causing female pupils to feel uncomfortable. The respondent squeezed a teddy bear toy, which made sounds mimicking people having sexual intercourse. Also, the respondent used his middle finger to point and make motions in a demeaning and profane manner. The respondent's reprehensible conduct constitutes conduct unbecoming warranting his termination as a teacher.

Charge Six:

On or about June 23, 1999, the respondent committed an act of sexual harassment by grabbing teacher Bonnie Cook on her legs and squeezing. At this time Ms. Cook was receiving medical attention by the school nurse for injuries suffered while breaking up a student fight. The respondent's actions were totally unjustified. The respondent's conduct constitutes conduct unbecoming a teacher warranting his removal.

Charge Seven:

During the 1999-2000 school year, the respondent made statements during class regarding female students that reported allegations of inappropriate conduct against him to school officials. Respondent identified these students during class to intimidate them. One female student was threatened by a male student in retaliation. The respondent's conduct constitutes conduct unbecoming warranting his termination as a teacher.

Charge Eight:

On or about September 22, 2000, the respondent was suspended by the State District Superintendent pending an investigation of charges. Subsequently, the respondent approached student V.D. and discussed his suspension. The respondent encouraged V. not to cooperate and refuse to testify, if asked. The respondent's conduct constitutes conduct unbecoming a teacher warranting his removal.

Charge Nine:

On numerous occasions, including May 2000, the District reported the respondent to DYFS for allegations inappropriate sexual conduct towards female students. On three occasions, the respondent received written warnings from building principals regarding his conduct: May 24, 2000, July 19, 1995, and April 18, 1985. The

respondent has ignored clear and direct warnings to stop all sexually inappropriate comments and behaviors toward students. The respondent's conduct constitutes gross insubordination.

ISSUE

The issue in this case is whether the District has demonstrated by a preponderance of the credible evidence that Mr. Mujica committed one or more of the charges against him and if so, what is the appropriate penalty.

FACTS

District's Testimony

A. *Spring 2000*

Hector Martinez

Hector Martinez, a physical education and health teacher at Eastside since September 1999, testified that G.A.[1] and M.A. were in his fourth period class. One day in spring 2000, when G.A. and M.A. came into the class, G.A. was visibly upset. When Mr. Martinez expressed concern, G.A. said that Mr. Mujica had made a remark to her that she found very upsetting. G.A. was wearing a low cut dress with a necklace with a dangling pendant. Mr. Mujica said that he would like to be that necklace so he could be close to her breasts. Mr. Martinez sent for the head of his department, Ms. Michaels. After he spoke to Ms. Michaels, she took over.

Lorraine A. Michaels

Lorraine A. Michaels, Department Chair of the Physical Education/Health Department, has taught at Eastside for 28 years. Sometime in May 2000 when the

[1] As several student witnesses were juveniles when the incidents occurred and some were still juveniles at the time of the hearing, all students will be identified by their initials only.

classes were changing she saw a young lady, later identified as G.A., crying. Ms. Michaels tried to talk to her but she was too upset. Mr. Martinez pulled Ms. Michaels aside and said G.A. had told him that Mr. Mujica had done or said something inappropriate. Ms. Michaels entered the office to call for the affirmative action officer. Although there are two affirmative action officers, she called Angie Ray because she thought the matter would be appropriate for a woman to handle this. Shortly thereafter she brought G.A. to Ms. Ray.

A few days after the previous incident, Ms. Sanchez, a health teacher, said that students had told her that Mr. Mujica was saying Ms. Sanchez had started rumors about Mr. Mujica to get him into trouble. Ms. Michaels called Ms. Ray again about this.

A few months prior to these incidents, Mr. Mujica had spoken to his department chair about Ms. Sanchez, saying that she was charging students money for various items like highlighters. Mr. Kushner had questioned Ms. Michaels about the matter. Ms. Michaels spoke to Ms. Sanchez, who explained that she bought highlighters for the driver's education manual and charged the class if they wanted to buy them. Ms. Michaels thought that Ms. Sanchez was providing a service to the students, not selling things to the students for profit. Ms. Michaels told Mr. Kushner that she had gotten a satisfactory explanation from Ms. Sanchez and nothing further had occurred concerning the inquiry.

Angenett Ray

Angenett Ray, a former English teacher, was a Teacher Assistant to the Principal as well as an Affirmative Action Officer. On May 10, 2000, Ms. Ray spoke to G.A., who stated that Mr. Mujica had been making inappropriate remarks and gestures to her. Mr. Mujica made direct sexual comments to G.A. and made sexually-charged remarks in class as well as sexual gestures. For example, G.A. said "I have a headache" and Mr. Mujica said in a suggestive tone, "I'll take care of you." He also used his middle finger to point. G.A. said that the way Mr. Mujica acted made her feel uncomfortable. G.A. was nervous and shy talking about her complaints but seemed determined.

Ms. Ray next spoke to A.M. and M.C., whom G.A. had named as witnesses. M.C. responded that Mr. Mujica made a lot of sexual remarks in the class. Mr. Mujica often stood uncomfortably close but M.C. had told Mr. Mujica that if he laid a finger on her he would go to jail. Mr. Mujica would make sexual gestures in class. M.C. had told her mother about it and her mother urged her to tell someone so she spoke to Mr. Martinez. At this interview with M.C., A.M. was present and agreed with M.C.'s accusations saying that Mr. Mujica made sexual remarks daily and when they were taking a test he took a toy that made sexual sounds and put it next to students and squeezed it. G.A. and M.C. had mentioned two teachers to whom they reported these charges, Mr. Martinez and Ms. Louro, a guidance counselor. Ms. Ray spoke to both teachers who confirmed that the girls had raised the allegations with them.

The next day Ms. Ray spoke to Mr. Mujica who denied making any sexual remarks or gestures. He expressed surprise at his accusers because the girls were good students and he has never had been any conflicts with them. Mr. Mujica did say that sometimes they refused to learn and he told them if they come to the class to do nothing then they should stay home. He said they were B students but there has never been any conflict over their grades.

The next day Mr. Mujica came to Ms. Ray after school and was very upset. He said that he was having a very bad time personally and that he could not imagine why anyone would say this. One of the girls had come to him saying that she just went along with everything and that someone was behind the accusations but would not tell him who. Mr. Mujica seemed to feel that someone had him set up in order to discredit and destroy his career.

On May 17, 2000, Mr. Howell called Ms. Ray to his office to hear V.D., a student in Mr. Mujica's first period class, who made similar sexual misconduct accusations about him. V.D. stated that she had not spoken about the inappropriate remarks before because she was an honor student and was afraid that her grades would be affected. For example, Mr. Mujica would take out a bottle of liquid whiteout and shake it in front

of his private parts. She said that he talked to her about his personal life such as his problems with his wife when she was pregnant and that he went out with girls because he needed sex. V.D. told him that she did not want to hear about it. V.D. said that Mr. Mujica taught a little history but he would also talk in the class about his personal life like when he was a young man when he had a girlfriend. When he made personal remarks that seemed to be sexual in nature and she objected he said that was her interpretation. Finally, V.D. reported that in her class and she had heard in other classes Mr. Mujica gave out the names of the girls who complained about him. The students began threatening harm to the girls if anything happen to Mr. Mujica. V.D. was uncomfortable discussing the allegations but stated she found it disgusting to be in his class.

On May 16, 2000, Ms. Ray determined that the complaint had merit and recommended to the principal reporting the matter to the Division of Youth and Family Services (DYFS). She did not make a determination of the truth of the accusations because the Institutional Abuse Division of DYFS investigated these types of matters. A few days later she heard from Vice-Principal Rizzo that male students had come outside her office protesting and yelling loudly "Mujica, Mujica." Ms. Ray interviewed several other students in Mr. Mujica's seventh period class, all of whom denied the Mr. Mujica made any sexual comments or gestures in class.

Robert L. Howell, Sr.

Robert L. Howell, Sr., the principal of Eastside High School since January 2000, certified the tenure charges on October 24, 2000. In Spring 2000 students had come to speak to him about Mr. Mujica. He interviewed G.A. who said that she did not like the way Mr. Mujica talked or looked at her. G.A. stated that when Mr. Mujica looked at the girl students, it is not the way a teacher should look. G.A. had a chain with a pendant around her neck and Mr. Mujica said he would like to be that chain. Mr. Howell also spoke to M.C., who stated that around the same time in April as the incident, Mr. Mujica stood by her and said that he wanted to have sex with her. M.C. thought that G.A. had heard. The students said that Mr. Mujica speaks with a "double tongue," meaning that

he said one thing but seemed to imply another. Both students said there was no touching involved.

Mr. Howell also interviewed a third student, A.M., who had been named as a witness to Mr. Mujica's action. The student said that she never heard Mr. Mujica say anything wrong or out of the way. A.M. said that a male student brought the toy in and was playing with it and Mr. Mujica took it away but did not squeeze it during the class. It was also discovered that she was a student in a different period than the two students who made the accusation. After these interviews Mr. Howell reached the conclusion that Institutional Abuse had to be contacted. On May 16, 2000, the case was referred to Institutional Abuse.

On May 16, 2000, he interviewed Mr. Mujica regarding the allegations in the presence of the chairperson for the department, Sanford Kushner. Mr. Mujica said that the students were mistaken in the translation of what he said and had the wrong impression. He said that both students were upset because of tests that they had taken. Mr. Mujica denied that he had ever made any suggestive comments or gestures to these young ladies or had ever been alone with them.

Shortly thereafter, Mr. Howell was out of the building. When he returned to school he learned that students had demonstrated in support of Mr. Mujica outside Ms. Ray's office during school hours during the change of classes.

On May 17, 2000, Mr. Howell met with V.D., who made similar allegations about Mr. Mujica and also said that Mr. Mujica had given out the names of the girls making complaints about him. This would be very inappropriate as the complaining witnesses had been told that what they said about a teacher was confidential.

In May after reporting Mr. Mujica, the students had expressed concern about their safety. They had reported that Mr. Mujica had said their names in class and that they were afraid and felt uneasy. Mr. Howell counseled them and told them they had nothing to worry about.

On May 24, 2000, Mr. Howell met with Mr. Mujica and gave him a letter talking about the allegations and instructing him to conduct himself properly. He also instructed Mr. Kushner to observe the classes more frequently to help ensure that further allegations were not made against him.

Sometime in September 2000 Mr. Howell had a meeting with Greta Anderson, the investigator from Institutional Abuse, and other people including Mr. Jimenez, the district's attorney. Ms. Anderson summarized the statements of the witnesses that she had interviewed. As a result of reviewing the investigation to date and consulting counsel, Mr. Howell filed the tenure charges against Mr. Mujica.

G.A.

G.A., a freshmen in college, graduated from Eastside in June 2000. In 1999-2000 semester, she had seventh period history with Mr. Mujica. She did not like the class because she felt she did not learn history. There was too much time spent talking about things like soap operas and personal life.

Mr. Mujica spent a lot of time talking about "Xica," the Spanish language soap opera. "Xica" was about a woman who dressed very sexually; she was often naked. The show depicted Xica as well as other people in bed. Their private parts would be shown but blocked on the screen. Mr. Mujica would often bring up "Xica," talking about how beautiful the lead character was and what a nice body she had. G.A. had spoken to her guidance counselor, Ms. Louro, and talked about how she did not like the class. Then one day when she was very upset she spoke to Mr. Martinez about the class. After she spoke to Mr. Martinez and Ms. Ray, all the students were mad at her.

She felt uncomfortable with the way Mr. Mujica looked at her. He looked at her like a man looks at a women when he was flirting. He used to tell her that she was pretty. One day she had a necklace and he said that he would like to be that pendant on her chest. It made her feel ashamed. Her final grade in the class was C. After she

reported Mr. Mujica, all the students in the school knew. Students asked her why she was doing such a thing. Last semester her aunt had called her and said that someone called and told her not to testify against Mr. Mujica.

Mr. Howell's summary of her statement is accurate. For instance, one day she asked to go to the nurse because she had a headache. He said "I will take care of you" not in a normal way. No other teacher ever acted like that; they would either say yes or no.

When G.A. met with Greta Anderson, the DYFS investigator, she related everything that she had told Mr. Howell plus other incidents that had been going on. Once Mujica gave lollipops to L. & M., then they sat in front of him licking the lollipops and he was just staring at them. Also, when the class was taking a test Mr. Mujica put a teddy bear on someone's desk that made sounds like people having sex. Another time she had asked to borrow whiteout and he gave it to her, shaking it first like he was jerking off. She saw Mr. Mujica do that every time a girl asked for the whiteout. G.A. denied making a statement to K.P. that Mr. Mujica was dating L.R. She never asked K.P. to lie. K.P. never said anything to her about L. and Mr. Mujica. G.A. denied saying what K.P. said she said in the statement. Nor did she ever tell K.P. that she was sorry about a false report.

G.A. had complained a lot to her classmates about Mr. Mujica's class because she did not like the way he acted; she had never said she would get revenge. She had never went to the principal; she complained to Mr. Martinez. She never intended to get Mr. Mujica in trouble.

M.C.

M.C., an Eastside graduate currently attended college and worked. In the 1999-2000 school year, she had Mr. Mujica for seventh period history. The problem started in February 2000 when Mr. Mujica said to her that he imagined her on the "Xica" show which made her feel embarrassed as Xica was often naked on the show. Mr. Mujica

said he imagined her in bed like Xica which had also made her embarrassed because he said this in front of other students. The students began to call her "Xica." When he would call the attendance list, he would call her Xica. She told him to stop calling her by that name. She watched the "Xica" show as did a lot of the other students. While waiting for class to start, the students would discuss it and when the period started Mr. Mujica would talk about it practically every day.

Mr. Mujica had a little teddy bear toy, which made a sound like people having sex. Mr. Mujica used it at least on three separate occasions when people were taking a test and everything was quiet. He also pointed with his middle finger suggestively. When she objected, he said there was nothing wrong with it but she told him it was not okay. Mr. Mujica often hugged and kissed the girls hello particular M. and L. Once he was pointing with his middle finger suggestively and he got up very close to her. She said "Stop. If you touch me, you will have to go to jail." The way he talked to her made her feel uncomfortable.

After she brought the complaints against him, she had problems with the other students because Mr. Mujica was such a popular teacher. She had only complained because one day in gym class they were upset about the problems and the gym teacher heard and told them they had to go to the office.

After her complaint, Mr. Mujica stopped calling her name for attendance and put a briefcase on the desk with the top open so that he could not see her or G.A. The students also isolated them. This was upsetting because no one was supposed to know about the complaint but when they went to the class everyone knew.

She did have an argument with Mr. Mujica because one time when she got a D, she thought she deserved a higher grade. M.C. denied seeking revenge against him but thought something was wrong with Mr. Mujica's actions. She was speaking up because she has a little cousin who will be going to the high school and she did not want her to have to put up with Mr. Mujica. Mr. Mujica said once in class that someone had brought charges against him but when he went to court, the girl did not show up so

he won the case. M.C. was testifying to stop Mr. Mujica so that he cannot continue his conduct. M.C. talked about Mr. Mujica's class in other classes and said that she wanted to stop the problem of Mr. Mujica before school ended but not to get revenge. M.C. never went to Ms. Sanchez and complained about Mr. Mujica. She had never complained to Mr. Mujica about her seat, she sat in the front row, although not directly in front of the teacher's chair. She never asked K.P. to lie about Mr. Mujica. She had never had a conversation with K.P. about the complaint.

V.D.

V.D., a senior at Eastside, had history class with Mr. Mujica first period in her junior year in 1999-2000. She had liked Mr. Mujica as a teacher. In May 2000 she spoke to Ms. Sanchez, her health teacher, concerning his class because Mr. Mujica had asked the students to sign a paper saying that Ms. Sanchez was bad and did bad things to the students. V.D. did not sign it and did not examine the list. After the class V.D. spoke to Ms. Sanchez and later went to the principal's office to talk about it.

On another day V.D. was interviewed by the DYFS investigator and discussed other problems with Mr. Mujica. She talked about the favoritism shown in the class for L.R. Mr. Mujica said things in class or to her in the hallway that were sexual. For example, Mr. Mujica spoke to her about his wife, saying he could not have sex with her because she had had an operation and did not feel like having sex anymore. V.D. had asked if he was going out with L.R. He said yes but not having sex with her. She thought that meant Mr. Mujica was L.R.'s boyfriend who made her feel bad because L.R. was young and her friend and Mr. Mujica was her teacher.

V.D. did not want to testify because this was not her problem and it made her nervous. She had received an A in Mr. Mujica's class and had been on high honor roll consistently. She does not want to hurt anyone but her mother had told her to come to court and say the truth.

A lot of the kids watched the TV show called "Xica," about a beautiful lady who was shown at the beginning of every show taking a bath without clothes. "Xica" was often discussed in the class; Mr. Mujica would bring it up about three times per week. Everyone liked to talk about it, particularly the guys. Mr. Mujica told one of the girls, F.S., that she looked the actress playing Xica. Sometimes the discussions were okay but sometimes the discussions "got a little bit nasty." In these discussions she felt like they were discussing sex.

She gave another example that one time in one of the history books said in the old days that families have a lot of children. Mr. Mujica said it was not so bad because women like it when they have sex and make children. These remarks made V.D. feel uncomfortable. One day he told the class about going on a trip with a girlfriend. He described kissing the girlfriend and going to a hotel and then said "You can imagine what happened after that." Male students said "say it, say it" but he did not say it. She felt like it was not appropriate for history class.

Mr. Mujica used whiteout and shook it like he was masturbating. She found it disgusting. Mr. Mujica also used his middle index finger suggestively to point and to touch his head. He would say that he was just thinking.

One day in the Fall of 2000 Mr. Mujica gave her his phone number and asked her to call him. When she called, he spoke to her about the accusations against him. Mr. Mujica told her about the other students who had accused him but she did not know them. He said the other girls were lying and he had never touched anyone. He said if he had to go to court he could not be a teacher and he would lose his pension. He was very concerned about his job. He made her feel that it would be her fault if he did not have a job. He spoke to her for about a half of hour. He also said Ms. Sanchez did bad things to him because she did not like him.

While at Eastside, she had brought a charge against a student because he touched her in her private parts. The case had not been dismissed; it was settled out of

court after V.D. and the student met with a social worker and he agreed not to approach her or speak to her.

J.T.

J.T., a senior in Eastside, had Mr. Mujica for first period history in the 1999-2000 school year. The students sometimes talked about "Xica" and he only heard Mr. Mujica talk about it several times; Mr. Mujica would talk about the actresses. He called one of the students by the name Xica, just playing around and the class would often laugh. J.T. had mentioned Mr. Mujica's behavior to his father and mother.

In the summer of 2000, his father, who worked at Eastside, took him to meet the DYFS investigator. When he reviewed the synopsis of the statement he gave to Ms. Anderson, he said only one or two of the words were not his. He was certain that Mr. Mujica never named the girls who brought charges.

J.T. felt that Mr. Mujica treated the girls differently than the boys; in his opinion almost all the girls were passing and all the boys were failing. Mr. Mujica would use his middle finger to point; the class would laugh and he would tell them it's just a finger the same as the index finger. There was a language difference, for instance, between Puerto Rican Spanish and Dominican Spanish. Quera means like bitch in Dominican but means leather in Puerto Rican. After Mr. Mujica learned about the charges against him, he told the students about them. He did not teach a class that day, because he spent the whole class period talking about the charges. Before the charges several girls used to always hug Mr. Mujica. After the charges, the hugging stopped. He did not want to testify because he liked Mr. Mujica, one of the most popular teachers.

Greta M. Anderson

Greta M. Anderson, an investigator with the Institutional Abuse Unit (IAU), had worked for DYFS for approximately two years. Ms. Anderson had a bachelor degree in Criminal Justice and has been undergone training in investigation techniques. When

the matter was referred to her to investigate, she contacted Mr. Howell after reviewing the two previous investigations of Mr. Mujica by DYFS. Next she spoke to witnesses.

Ms. Anderson also interviewed M.C., who stated that Mr. Mujica was not speaking to G.A. and her since they reported his behavior. He had put a brief case on his desk and opened it in such a way so that he blocked them from his sight. He had been telling the other students that M.C. and G.A. have been saying false things about him.

M.C. stated that her problems with Mr. Mujica began when he said that she was beautiful. She had told Mr. Mujica if he put one finger on her, he was going to jail. Mr. Mujica does not teach ninth period and all the girls cut class and hang out in his room, especially a girl name L.R. M.C. told her about the sex toy, the sexual gesture with the whiteout, the intentional use of his middle finger to point and the lollipops for two girls who licked them like they were having oral sex while he watched.

On May 28, 2000, Ms. Anderson interviewed G.A., who said that since the accusation she had been cutting school because some of the male students had threatened her because of her complaint about Mr. Mujica. G.A. reiterated her prior accusations about the lollipops, teddy bear, "Xica" and the whiteout. She said that Mr. Mujica told the class that the girls have nice bodies and talked about how he has had sex with young girls. There was a rumor going around that Mr. Mujica was dating L.R.

On May 25, 2000, Ms. Anderson spoke to L.R., first at Eastside but continuing at the IA office because she needed a translator. In the IA office the staff used Aracelis Vasquez as a Spanish translator and during this interview, the translation seemed to go very smoothly. According to L.R. she had heard that other students were saying that she had a special relationship with Mr. Mujica but she denied the rumor. However, she had heard Mr. Mujica speak to other girls in a sexual manner. The other girls kissed Mr. Mujica on the cheek and he kissed them back. He makes sexual comments to the other girls like how he liked their bodies and how they reminded him of women on the TV show "Xica." She admitted that she had cut class a couple times during ninth period

to hang out with Mr. Mujica. She had walked into the room with Mr. Mujica, he had his face up close in a girl's cleavage and when he saw her, he would back out. He talked about how he had a young girlfriend. He shook whiteout like he was masturbating. Mr. Mujica had a stuff white animal that sounded like people having sex. Mr. Mujica taught in double meanings by using a word in Spanish that has a dirty meaning in Dominican dialect. Ms. Anderson verified from L.R.'s attendance record that L.R. had cut numerous classes from her ninth period. On May 25, 2000, Ms. Anderson also interviewed V.D ,who corroborated the prior accusations by other students. During all interviews, Ms. Anderson took notes then reviewed the notes with the witness to make her notes were correct.

Next Ms. Anderson randomly chose 25 names, five from each class period that he taught and sent a letter in Spanish and English asking students to come and answer some questions. Only two students responded, K.C. and J.T.

Ms. Anderson interviewed K.C. after she spoke to K.C.'s mother. Aracelis Vasquez, a secretary at DYFS, was present to translate. After Ms. Anderson asked K.C. if anything made her feel uncomfortable in Mr. Mujica's class, K.C. said yes and corroborated a lot of what had been said by the others. K.C. was in fifth period and said that Mr. Mujica was not a good teacher, he flirted with the girls and grabbed their hand and looked at the girls like he was undressing them with his eyes. During ninth period class he talked to the boys and girls about sex and his sexual experiences. During class he mimicked sexual things with his hands, such as purposely using his middle finger to point. He grabbed the whiteout and shook it like he was jerking off. He always talked about the show "Xica" and about how the girls in the class reminded him of the naked women. He purposely used double entendres when he taught.

In August J.T. also came in response to Ms. Anderson's letter. He said that Mr. Mujica talked about "Xica" a lot in class. Mr. Mujica used his hands to make sexual gestures. For example, Mr. Mujica always used his middle finger to point and said "What? It is only a finger." He looks at the girls up close right in their eyes. Mr. Mujica would look at the boys and then at a girl in the class and when she was not looking he

would make a gesture with his hands like he was grabbing her breast and wink at the boys. Mr. Mujica shook the whiteout like he was jerking off. Mr. Mujica also told the class the names of the girls who complained about him and said that the class should go to the office to tell the principal about what a good teacher he was.

On September 8, 2000, Ms. Anderson presented the information that she had gathered to date at a meeting with District personnel. During the meeting it was decided that a female Spanish language aide would be placed in Mr. Mujica's classroom until the investigation was completed and Mr. Mujica would be removed from all private contact with students.

Ms. Anderson was scheduled to interview Mr. Mujica but it did not occur. After receiving the letter to call for an appointment, Mr. Mujica had gone to the Paterson DYFS office to see her but she was unable to see him. Although she scheduled an appointment, she was called away on an emergency and was unable to see him that day. In October 2000 Ms. Anderson left the Northern Region of DYFS before completing the investigation with the understanding that the case would be reassigned but apparently it was not.

Aracelis Vasquez

Aracelis Vasquez worked for DYFS in the Institutional Abuse Unit in Paterson as a senior clerk transcriber. Because she was from Puerto Rico and fluent in Spanish, she also served as a Spanish translator when necessary. She recalled translating for two students who were interviewed at her office. One student came in with her mother and one student came after school. She recalled the statement made by K.C. Ms. Vasquez felt that she spoke Spanish very well and there was never any suggestion during the interview that K.C. or her mother did not understand her Spanish. Ms. Anderson wrote down everything that was being translated for her. At the end of the interview, Ms. Anderson went over the notes with K.C., who agreed that was what she said. In reviewing Ms. Anderson's notes of the interview, Ms. Vasquez recalled K.C. making the summarized statement.

Ms. Vasquez also remembered translating during the interview with L.R., who had said basically what the other girls had told them. L.R. said that Mr. Mujica had treated the girls like sexual things and looked at the girls like he wanted to undress them. L.R. also admitted cutting her ninth period class to hang out with Mr. Mujica. In reviewing Greta Anderson's summary of L.R.'s interview, Ms. Vasquez recalled translating most of it except the part that said Mr. Mujica had a young girlfriend.

K.C.

K.C., currently a junior at Eastside High School, had Mr. Mujica during the 1999-2000 school year for history in fifth period. She had heard that a student made a complaint about Mr. Mujica but she knew nothing about it. K.C. did not know M.C. and never met or spoken to her.

K.C. recalled meeting with Ms. Anderson sometime in May or June 2000 and giving her information. Ms. Anderson's secretary translated but the secretary did not speak Spanish well enough to understand K.C. K.C. denied having said anything against Mr. Mujica at the DYFS interview. She denied saying that Mr. Mujica was not a good teacher or that he used his middle finger or whiteout suggestively. He only spoke about "Xica" to give an example of history. Ms. Anderson never asked if her summary was true. K.C. also met in the principal's office with Ms. Pagan and Mr. Jimenez as translators. At that time she also never said any bad things about Mr. Mujica.

On March 17, 2000, K.C. gave a statement to Mr. Mujica's private investigators. That statement, in which she denied that Mr. Mujica even said anything about sex in history class, was true and the statement that Ms. Anderson claimed she made was false. When she was interviewed in March 2001, her stepfather and her brother were present.

K.C. knew someone name F.H., who told her that he brought the bear to class and that Mr. Mujica had confiscated it but had given it back to him. She had seen the bear in another class, not Mr. Mujica's.

J.A.

J.A. testified that she was in Mr. Mujica's class. She never heard or saw Mr. Mujica say anything inappropriate. She only heard him discuss "Xica" one time when he stopped the class to tell the students that they should not talk about. Sometimes Mr. Mujica said words that had double meanings but she did not believe that he meant them sexually.

Matilde Louro

Matilde Louro, a guidance counselor at Eastside, worked with both G.A. and M.C. in the Spring of 2000 because they were both preparing to go to college. In the course of a number of conversations separately and together, they both brought up things that were happening in their history class. G.A. was an excellent student, the best one that Ms. Louro had last year, who was accepted in two colleges and was very serious about it. Initially all G.A. said was that she did not like Mr. Mujica's class because she was not learning anything. Later G.A. said that Mr. Mujica talked about a racy soap opera and spoke about the girls in the class. After G.A. and M.C. had told Mr. Martinez and others, they gave Ms. Louro more details, including the remark that Mr. Mujica had made about the necklace and about the headache. Ms. Louro never wrote anything down as it had already been reported.

Rocio Sanchez

Rocio Sanchez, now Rocio Fernandez, has taught bilingual physical education and health at Eastside for nine years. During the 1999-2000 school year she had no personal problem with Mr. Mujica. One day V.D. told her that during first period Mr. Mujica had passed around a paper for students to sign because Ms. Sanchez was

telling students to say bad things about him. Immediately Ms. Sanchez went to her department chair, Ms. Michaels, and they both went to Mr. Rizzo, the vice-principal to tell him. She understood that Mr. Rizzo spoke to Mr. Mujica who denied that this was happening.

Ms. Sanchez learned from Mr. Martinez that some girls had made accusations about Mr. Mujica. As far as she knew she did not know the girls and had not sent them. Later she learned that Mr. Mujica kept blaming her but she had nothing to do with the whole matter. The students kept saying that he was telling the class that she had sent the girls to report him. She became very upset and called Mr. Montanez, who was her friend, to tell him that the girls never came to her and she wanted the accusations to stop.

Mr. Montanez had expressed concern about her charging students for pens. Ms. Sanchez explained that every marking period she bought highlighters and gave the students an option to buy them from her or to buy them on their own. She also sold students pencils for a nickel when they came to school and they were not prepared.

V.D. had come to Ms. Sanchez to tell her things that had to be reported. When V.D. told her about Mujica's behavior, she had told V.D. to go to Ms. Ray.

Sanford Kushner

Sanford Kushner, Chair of the Eastside Social Studies Department, had taught for over thirty years in the District. During March and April 2000, several other teachers came and expressed concern about female students frequently milling around Mr. Mujica's desk. Mr. Kushner said that he was aware of it and would keep his eye on it. He also warned Mr. Mujica to keep the students away from his desk.

In May 2000 Mr. Kushner and Mr. Mujica attended a meeting concerning the allegations about Mr. Mujica's conduct. Mr. Mujica said he was offended by the

accusations, which he denied. Mr. Howell asked Mr. Kushner to observe Mr. Mujica as much as possible to monitor the situation.

During the 1999-2000 school year, Mr. Kushner sat in the hall of the Social Studies wing, often outside of Mr. Mujica's room. After Mr. Howell's orders, he sat in the hall much more and went into the classroom every few days. He spoke to Mr. Mujica and told him to keep his distance from the students. During his observations, he noted that female students were still milling around his desk and he told Mr. Mujica to keep those kids away. Most of the time at the end of the day Mr. Mujica had tutoring time in the ninth period. Again he saw female students around the desk and told Mr. Mujica to keep them away.

Mr. Mujica and Mr. Kushner had lunch in Mr. Kushner's office almost every day. In April 2000, Mr. Mujica raised a concern about Ms. Sanchez selling highlighters to kids because he did not think it was proper. Mr. Kushner mentioned Mr. Mujica's concern about Ms. Sanchez to her department head, Ms. Michaels, who said she would speak to Ms. Sanchez. That was the end of the matter as far as Mr. Kushner was concerned. Mr. Mujica never mentioned it again. The whole issue was not a big deal at the time.

Mr. Kushner and others had consistently rated Mr. Mujica highly as a teacher. Mr. Mujica had the control and respect of the class. He respected the students and they respected him. He never heard Mr. Mujica mention "Xica" and when he sat in the hallway and the door was open he could hear what was going on. He was in the hallway four hours out of the six. Mr. Kushner does not speak Spanish and could not understand what Mr. Mujica said in Spanish. Mr. Mujica's door was not always open and he could not hear everything that went on in Mr. Mujica's class when he sat outside. Mr. Mujica's door was either more closed than open or equally closed and open.

Appellant's Testimony

Fernando Montanez

Fernando Montanez, a social studies teacher with Morristown Board of Education, had worked from 1989 to June 2000 at Eastside High School. From September 1989 to June 1993 he was a teacher's aide assisting Mr. Mujica. In September 1993 he became a teacher. He considered himself to be a friend of Mr. Mujica. Mr. Montanez had never seen Mr. Mujica act inappropriately. He had never seen or heard Mr. Mujica make sexual comments.

In 1999-2000 Mr. Montanez could see Mr. Mujica's classroom door from his classroom. Mr. Mujica taught with his door open most of the time although teachers generally did close their door because of the high level of noise. Mr. Montanez explained that the show "Xica," which he had seen a few times, was very popular and students like to discuss it. In his opinion it was not pornographic but it was a lot racier than any of the other Spanish language shows on TV. The show was often very revealing physically, occasionally shocking, and sometimes very sexually suggestive. However, the show was quite historic and based on true facts about the ill treatment of Blacks in Brazil during a certain period.

Mr. Montanez knew Ms. Sanchez and knew that she did not like Mr. Mujica. Ms. Sanchez had said that Mr. Mujica could not be trusted because he went too far with the girls. In April 2000 Ms. Sanchez called him at home sounding very emotional and saying that Mr. Mujica had accused her of charging the students for supplies. She was crying and said that she did not want any problems.

Mr. Montanez explained that the bilingual program at Eastside were mostly Hispanic speaking students, a majority from the Dominican Republic, but also from Peru, Puerto Rico and Colombia. Different words can mean different things in dialects from different Spanish-speaking countries.

A.M.

A.M., a senior at Eastside in 1999-2000 school year, had taken history with Mr. Mujica during eighth period that year. Mr. Mujica was a good teacher and had never said anything disrespectful or sexual to any students in her class. Last year when Ms. Ray had asked her questions about Mr. Mujica, she had denied that he became fresh with the girl students or that he used words with double meanings. M.C. was also being interviewed at the time. A.M. knew that M.C. was not happy with her grade in history from Mr. Mujica. She did not know G.A.

About three days later she was called to see the principal. Mr. Howell read her a report saying she had made complaints against Mr. Mujica. A.M. told the principal that she did not say what was in Ms. Ray's report. . A.M. thought that because M.C. was also being interviewed that Ms. Ray was confused about what M.C. had said and what A.M. had said. When she went to Ms. Ray with M.C. she did speak in English as she can understand and read English but cannot fully express herself. She heard and understood M.C. speak in English about sexual remarks and gestures in Mr. Mujica's seventh period class. At the meeting she had told Ms. Ray that Mr. Mujica did not do anything similar in her eighth period class.

A.U.

A.U., who had graduated from Eastside in June 2000, had Mr. Mujica for history in her senior year during seventh period. Mr. Mujica was a good teacher and a nice person and was always very helpful. During her senior year her grades went down and he gave her extra attention to help her.

Mr. Mujica had never made any sexual remarks or gestures towards her or during her class. He was always very professional. Mr. Mujica told the students not to talk about "Xica;" he never made any statements about "Xica" not even about history. Mr. Mujica never mentioned the accusations against him in class. She had at times

spoken to G.A. and M.C., and she never heard them say anything about Mr. Mujica. When a girl wore inappropriate clothing, Mr. Mujica made her put a sweater on.

J.R.

J.R. was a student in Mr. Mujica's seventh period class. Mr. Mujica never said anything inappropriate or disrespectful. He believed that G.A. and M.C. had a problem with Mr. Mujica because they used to sit in the front and one semester they did not get to sit in the front. Many times throughout the entire year H.R. had overheard M.C. and G.A. say that Mr. Mujica was bad. He had heard rumors that they were going to go to the principal to get revenge. They did not like the way Mr. Mujica taught but he did not remember why. J.R. had liked Mr. Mujica as a teacher and often spoke to him about personal problems.

K.P.

K.P., a student in Mr. Mujica's seventh period history class in 1999-2000, sat behind G.A. and M.C. G.A. and M.C. were unhappy in the class because they had wanted to sit in front of Mr. Mujica but were not permitted to do so. She overheard M.C. saying that she wanted to report Mr. Mujica. M.C. and G.A. wanted K.P. to report Mr. Mujica after they had done so but she refused.

After school ended in June 2000, K.P. spoke with G.A. who said that she was sorry for reporting Mr. Mujica. G.A. said she did not realize that her complaint was going to come to this extreme but it was the fault of the people in the office who investigated the matter more.

K.P. never heard Mr. Mujica say anything sexual. He was a very good teacher and respectful of everyone.

E.N.

E.N. was in Mr. Mujica's fifth period history class during the 1999-2000 school year. Mr. Mujica at times may have discussed vacations, trips and his family, but he never spoke about sexual things. E.N. had brought the teddy bear that made sexual noises into history class. Mr. Mujica was giving a lecture when E.N. pressed it so Mr. Mujica confiscated it. Later, E.N. went back in when the classroom was empty and just took it from Mr. Mujica's desk drawer. Other teachers in other classes heard the toy and just laughed. Mr. Mujica was a good teacher, always helpful. Unlike a lot of teachers, when E.N. needed help Mr. Mujica helped him out. In particular Mr. Mujica helped him pass the second marking period which he needed in order to be eligible to play baseball. He was absent from the class about 20 to 25 days.

A.P.

A.P. was in Mr. Mujica's history class. He knew G.A. and M.C. but they were not in the same history class. Once during the 1999-2000 school year, he had breakfast at school and was sitting near M.C. He overheard M.C. talking to someone. M.C. appeared upset and stated that she had to retaliate against Mr. Mujica but she did not give any reason. M.C. also said that she had gone to Ms. Sanchez. Ms. Sanchez spoke about Mr. Mujica in health class. Everyday she asked the class about how Mr. Mujica was in the class and the students who were in his class said he was a good teacher. A.P. never saw Mr. Mujica do anything sexual or inappropriate in the class. A.P. knew that a window had fallen in Mr. Mujica's class sometime in the 1998-99 school year that resulted in him having his middle finger taped and in a metal splint for a while. This period was the only time Mr. Mujica had pointed with his middle finger.

L.R.

L.R., a student in Mr. Mujica's class in 1999-2000, had graduated and was attending college. Around June 2000 L.R. spoke to the DYFS investigator. Ms. Anderson asked her many questions through the translator and said M.C. was accusing

Mr. Mujica. L.R. told Ms. Anderson that Mr. Mujica never did anything inappropriate or sexual. The translator did not speak very good Spanish.

M.C. had talked a lot in Mr. Mujica's class even though Mr. Mujica had told her to keep quiet. M.C. had also argued with Mr. Mujica about a grade in front of the class. L.R. had never heard G.A. or M.C. talk about Mr. Mujica.

In her seventh period class one day a student with a teddy bear doll walked in and started showing the teddy bear doll to the students. When the class started he was still playing with the doll. Mr. Mujica went to the back of the classroom and took the doll from the student. He did not squeeze it.

Sometimes Mr. Mujica would give her a ride home with her cousin who lived at her house. The cousin worked and needed to get there by 3:30 p.m. and school ended at 3:05. The cousin asked Mr. Mujica for the favor of riding home and L.R. would go along.

J.S.

J.S. was a sophomore in Mr. Mujica's fifth period history class in 1999-2000. Mr. Mujica was a good teacher who never spoke about anything sexual or inappropriate. In the fall of 2000 she was supposed to be in Mr. Mujica's class but after a few weeks a substitute started teaching his class. J.S. started the petition to bring Mr. Mujica back which many students in his classes signed. She did not know that Mr. Mujica had been brought up on tenure charges at that time.

George DeLatorre

George DeLatorre was a teacher assistant to the principal, an affirmative action officer, and a former bilingual math teacher at Eastside. Mr. Mujica was a personal friend. No students had ever approached him concerning Mr. Mujica's behavior although students come to him with problems. He had never seen Mr. Mujica do

anything inappropriate and he was surprised and shocked by the charges. He remembered on cross-examination that in the past other female students had made sexual misconduct allegations against Mr. Mujica but he did not remember the details. In 1994 he was questioned about similar allegations against Mr. Mujica and was part of an investigation of the charges but he did not recall the allegations.

Mr. DeLatorre was very close to K.C. and her family as they all came from the same hometown in Colombia. At some point K.C. came to his office and asked his advice before going to make a statement about Mr. Mujica in the principal's office. He told her to go into the office and tell the truth, without asking what the truth was. Afterward she came and said that she had told the truth and it would not harm Mr. Mujica. J.A.'s and R.A.'s father is also a friend of Mr. DeLatorre. The family asked about the letter J.A. received about the case. She only had positive things to say about Mr. Mujica.

He thought that Ms. Ray's investigation of the charges was a thorough job. Students were interviewed more than once to make sure that the District had a case.

Ms. Pagan, a secretary in the front office who was Puerto Rican, did some of the translation for the investigation. Ms. Pagan often did Spanish translation for many Spanish-speaking students for the office and always did a very thorough job. There are only a few Spanish words in other countries differed from Puerto Rican Spanish, mainly dialect. Mr. DeLatorre was confident that a person who could speak Puerto Rican Spanish would be able to translate for someone who was from the Dominican Republic.

C.A.

C.A., an Eastside High School graduate, had Mr. Mujica for second period history class in the 1999-2000 school year. He also had gym with M.C. and G.A. that year. One day in gym he had heard M.C. tell G.A. and others that she had to do something to Mr. Mujica even if it was the last thing she did before leaving school because she had received a C and thought she deserved an A. He did not report M.C.

but he did tell Mr. Mujica about the threat, which had been made before M.C. reported Mr. Mujica.

Mr. Mujica was a very good teacher. He helped the students after school in ninth period. Mr. Mujica had spoken personally to him and to others encouraging them to stay in school.

R. P.

R.P., a senior at Eastside High School, testified that in the 1999/2000 school years she was in Mr. Mujica's first period history class. In class the students spoke about "Xica" both before and during class. She thought the show was X-rated because of the nude scenes although the picture was scrambled the actors' private parts. Mr. Mujica said "Xica" was history and the real life of Blacks in Brazil. She was not a friend of V.D. because V.D. had once told her something that was untrue.

Mr. Mujica never discussed anything sexual in class. He refused to discuss his personal life, saying it was private. Once a girl was wearing something and her whole back was uncovered. Mr. Mujica told her to put something on and when she refused, he sent her to the office.

Mr. Mujica was a good teacher; he had helped her out a lot. He was very honorable and had helped many other students too.

W.P.

W.P., a graduate of Eastside High, had Mr. Mujica second period in the 1999-2000 school year. He denied that Mr. Mujica would ever say anything inappropriate concerning his personal or sexual life. Mr. Mujica had taught correctly and was very concerned about the students.

Adam Mujica

Adam Mujica, 65 years of age, grew up in Puerto Rico and moved to the continental United States in 1968. He has a B.A. in psychology, a teaching certificate in social studies and a bilingual license. He began teaching in Paterson since 1977 and has always taught U.S. History and World History.

In 1999-2000, he taught five periods of bilingual U.S. History. Some students spoke poor Spanish and none were fluent in English. He taught the class by first speaking in English and then translating into Spanish. Additionally, in ninth period he had tutoring when students came for extra help or for makeup tests.

In his class if students did not have the proper attire according to the dress code, he would make them put on a jacket or refer them to the office. One time early in the 1999-2000 school year, M.C. came into the classroom with a scanty top. Mr. Mujica told her to put on a jacket but she refused. When he went out to call security, M.C. put the jacket on. That was the only time he had such a problem with her.

In February 2000 M.C. argued with him about a grade because she flunked a test and she thought she deserved better. One time in April 2000 M.C. was doing algebra homework in class and he told her to stop. She said "I'm going to report you." He forgot about it because he did not think he had anything to worry about.

In his class Mr. Mujica kept his desk in the middle of the front of the room and often walked around the room. He kept the door open most of time, just closing it at lunch and when classes were changing. Mr. Kuschner was in the hallway approximately ninety-eight percent of the day and he could hear everything that went on in Mr. Mujica's classroom.

In the spring of 1999 Mr. Mujica had fractured his left middle finger in school while closing the window. For a period of time his fourth finger and his middle finger

were taped together to promote healing. Mr. Mujica never used his middle finger sexually or inappropriately and never pointed with his middle finger.

Mr. Mujica generally and specifically denied all of the allegations made by the students. He used whiteout every day for his class record book but never inappropriately. In his grade book he saw that for the first three marking periods G.A. had a B in his class. During the fourth marking period which began in early May she had seven absences and four cuts so she got an F for that marking period making her final grade a C. He had considered G.A. to be a good student. M.C. got a C for the first marking period and a B for the next two marking periods. However, during the fourth marking period when she cut class a lot, she did poorly and got a D. V.D. was a good student. Her final grade for the year was A.

Three or four times per year he purchased lollipops from students selling them as a fundraiser and gave them to other students. He did not allow the students to eat in the class. In September 1999 M.C. had wanted to sit by him and moved her desk next to Mr. Mujica's desk. He said no and moved her back, which made M.C. unhappy. G.A. did not say anything or ask for a seat by him. G.A. generally worked hard and sat quietly. He had never had any problem with V.D.

In his classes students would bring up the TV show "Xica" as a usual student delaying tactic. He never called any student "Xica." He only watched the show two or three times. Other teachers said that the students liked to talk about the "Xica" show.

He had never taken a vacation in Spain or the Philippines so he never spoke about being in Spain or the Philippines or being in a hotel with a woman. He did confiscate a teddy bear one period because two students in the back of the room were playing with it. He never heard any sound coming from the teddy bear. He put it in his desk immediately and the next day it was not there. He never discussed his personal life or sex life in class. During the mid-1990s he was aware that at least one student alleged he engaged in improper sexual conduct but to his knowledge he had received no discipline.

Every Spanish-speaking country has unique expressions or slang that can result in ordinary words having sexual meanings. He gave an example of the word "totalitarian" which has a double meaning to people from the Dominican Republic. He found out in class about the double meaning because the kids laughed. It was part of the course to teach about totalitarianism and he never meant to use it sexually. He never used words intentionally to convey a sexual meaning.

He never said anything to G.A. about a necklace or a pendant. He never said he was going out with L.R. and he never dated her although on occasion he had given her a ride home. He never said his wife had an operation resulting in sexual problems.

At least three students had complained to him about Ms. Sanchez, saying that she collected money for paper, pencils and fines for chewing gum. Mr. Mujica told the students to tell Mr. Kushner, which they did. A few days later, Mr. Montanez said Ms. Sanchez had called crying and upset that Mr. Mujica had reported her.

Sometime in February or April 2000, Mr. Rizzo called Mr. Mujica to the office to ask about a list or petition. Mr. Rizzo said students had said that Mr. Mujica had started a petition against Ms. Sanchez. Mr. Mujica was not involved in circulating a petition and did not know anything about a petition.

Mr. Mujica first became aware of the allegations against him some time in May 2000, when he was called to Ms. Ray's office. Ms. Ray never asked him to provide witnesses. At that time he told Ms. Ray that G.A. and M.C. were good students. He did not tell her that M.C. and G.A. talked in class a lot or that they were not prepared for tests. When he went back to his eighth period classroom, the students told him they knew all about the charges and the names of the girls who had complained. He did not talk about it to the students; they talked about it to him. Then A.M. came to him and said she had not said anything bad about him. Mr. Mujica told her to go to the office and tell them. Later he heard about the demonstration in his favor. He was surprised

as he knew nothing about it. He spoke to his seventh and eighth period classes and he told them this was not the way to go about it.

On approximately May 16, 2000, he met with Principal Howell. At this time he told Howell that there had been a problem with G.A. and M.C. because they had refused to take a test one day. He only meant M.C., as on more than one occasion, M.C. was upset about taking a test but G.A. had never given him any problem.

Mr. Kushner had never told Mr. Mujica that he was doing anything inappropriate in ninth period. Mr. Kushner had never warned him prior to the complaints to stay away from the girls or that there had been complaints from other teachers about the ninth period class. He was doing nothing wrong in ninth period as the students always sat on their seats and he sat at his desk.

In the summer of 2000, he went to DYFS to make a statement. He made an appointment, which Ms. Anderson did not keep. He spoke to Ms. Anderson's supervisor who promised to set up another appointment but none was ever set up. He denied that he had spoken to V.D. and asked her not to cooperate.

Mr. Mujica denied receiving a letter from DYFS in 1995 discussing the abuse charges brought against him. He also denied receiving a letter from the school in 1995 commenting on the DYFS finding and warning him that further such conduct could result in discipline.

District's Testimony

B. *June 1999 Incident*

Zynida Banks

In June 1999 around 8:20 a.m., Zynida Banks, the school nurse at Eastside, was called to the scene of an incident where a teacher had been injured breaking up a

student fight. When she got to the hall in front of the gym she found physical education teacher Bonnie King-Cook in a chair with her legs elevated in front of her on a desk. Ms. Banks did an initial assessment and obtained ice for Ms. King-Cook's injuries. Ms. King-Cook was wearing shorts and her legs were exposed. As Ms. Banks was applying ice to the leg, out of nowhere, someone stroked Ms. King-Cook's leg from the knee to the lower leg for a few seconds and Ms. King-Cook screamed. Ms. Banks did not remember Mr. Mujica saying anything. Ms. King-Cook said "Why are you touching my leg, you don't know me like that." Ms. Banks did not know why Mr. Mujica touched Ms. King-Cook or what he did after that. Ms. Banks did not know Mr. Mujica and never had a problem with him. She remembers Mr. Mujica saying "I didn't mean it."

Bonnie King-Cook

Bonnie King-Cook, a physical education teacher at Eastside for approximately 25 years, was now a Teacher Assistant to the Principal. Around June 23, 1999, while breaking up a student fight, her left knee was badly scrapped and her upper back was injured. Other teachers helped her to a chair and elevated the leg and the nurse came and applied an ice pack.

Prior to the incident, Ms. King-Cook had been proctoring an exam. While the nurse was attending to her, Ms. King-Cook saw R.P., a student in the class, coming down the hall with Mr. Mujica. Ms. King-Cook said, "Why are you coming so late to class and you better not have Mr. Mujica lie for you." Ms. King-Cook thought Mr. Mujica had given a lot of students passes for being late but R.P. did not have a pass. Mr. Mujica came up to her and leaned down and put both of his hands on her calf. R.P. went pass her into the gym. Mr. Mujica was about two feet away when he squeezed her calf. She said "Get you f---g hands off my leg. I am not your wife." Mr. Mujica did not move so she said again "Get your f---ing hands off my leg, I am not your girlfriend." He stopped. Mr. Mujica said nothing to Ms. King-Cook just turned and walked away.

Ms. King-Cook has never had any problems with Mr. Mujica but she was very annoyed and offended. After the incident Ms. King-Cook went to the principal, Mr.

Lighty, and said she wanted to file a sexual harassment charge. The principal sent her to Ms. Ray, who took a written statement. When she spoke to Mr. Lighty again he told her to file a police report, which she did. The detective contacted her later and told her she could not file a report because there was no touching of sexual parts. Ms. King-Cook felt what Mr. Mujica did was unwanted and unwelcome and touching her bare legs and squeezing them was sexual.

Appellant's Testimony

Adam Mujica

In June 1999 Mr. Mujica was standing in the hallway with Mr. Kushner when a Spanish-speaking student came up and said she was late for an exam and asked for help. Mr. Kushner told Mr. Mujica to take her to the exam. As he was walking with her he saw Ms. King-Cook at the end of the corridor sitting with her feet up. When Ms. King-Cook saw him she started yelling, "Don't come lie for the student." Mr. Mujica was surprised and tried to explain. Ms. King-Cook kept calling him a liar and told him to shut up. Mr. Mujica tapped or touched her foot briefly, which made her explode like a bomb and say a lot of bad words. Mr. Mujica felt very ashamed and puzzled as he had never had a problem with Ms. King-Cook. He did not touch her in a sexual way. His gesture was like putting a hand on someone's shoulders to make a point.

R.P.

In June 1999, before R.P. was in Mr. Mujica's class, she came late for school one day. Walking into the building, she saw Mr. Mujica and ask for his help to explain why she was late because she did not speak English well and the gym teacher did not speak Spanish. Mr. Mujica walked with her to the gym where Ms. King-Cook was outside of the gym sitting on a chair normally with her feet on the floor. Ms. King-Cook and Mr. Mujica started arguing about something but she did not know what it was because they were speaking English. She went into the gym while they were talking

loudly then Ms. King-Cook stood up and started screaming but she did not know why. She saw Mr. Mujica gently touched Ms. King-Cook's foot.

R.A.

R.A., J.A.'s brother, went to Eastside until April 1999. In June 1999, he had went to Eastside to meet a friend who owed him money. The friend had met him on the stairway and as they were talking, they heard screaming. Immediately he came upstairs and opened the stairway door. He saw Ms. King-Cook, who was yelling "liar, liar," loudly. At that time she was sitting near the door leading to the gym. He stayed at the top of the stairwell looking out the door. He observed Mr. Mujica walking towards Ms. King-Cook saying "I am not a liar." Before he said he was not a liar, Mr. Mujica touched the tip of Ms. King-Cook's foot, which was raised up on the corner of her desk. Ms. King-Cook started yelling bad words at him.

LEGAL DISCUSSION AND CONCLUSION

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).

Respondent argued that the complaining witnesses' testimony was inherently incredible as full of exaggeration and inconsistency. According to respondent all the witnesses have motives to lie. M.C. and G.A. wanted revenge, V.D. was getting back at

L.R. and was put up to it by Ms. Sanchez, who disliked Mr. Mujica and got her entire department to lie about him. The principal and the affirmative action officer were "out to get" Mr. Mujica as was the DYFS investigator. Moreover, respondent argued that his witnesses were forthright with no motive to lie. On the other hand, the District argued that in spite of some inconsistencies the District's witnesses were credible and provided credible evidence of the charges by a preponderance of the evidence.

In evaluating the testimony and evidence in this matter, I have been mindful of the gravity of the charges brought against Mr. Mujica. Having carefully and thoroughly considered the testimony and observed the witnesses I **FIND** that the school personnel and the DYFS personnel testifying for the District testified credibly. No motive appeared in the record why the principal and Ms. Ray would fabricate the results of their investigation. The explanation that Mr. Martinez's and Ms. Sanchez's testimony was part of a plot by the physical education department is undeserving of belief. Both Ms. Michaels and Mr. Kushner said that Mr. Mujica's concern about Ms. Sanchez had been raised, a satisfactory explanation given, and then the issue was dropped with no consequences for Ms. Sanchez. I **FIND** it extremely unlikely that such a trivial matter could result in the sensational plot alleged by Mr. Mujica. Similarly, I **FIND** Ms. Anderson and Ms. Vasquez appeared straightforward and truthful and had no motive to lie and I credit their testimony.

Student testimony against a teacher must be viewed with great caution and scrutiny. *In the Matter of the Tenure Hearing of Polito*, 1974 *S.L.D.* 666. The students making allegations that Mr. Mujica engaged in improper sexual conversations and gestures were extremely reluctant witnesses. However, their demeanor and their testimony leads me to believe that they were generally testifying truthfully. While the details of each witness may differ in general I **FIND** that the fundamental testimony of G.A., M.C., V.D. and J.T. to be consistent, forthright, and credible. G.A., who was a good student and never gave Mr. Mujica any trouble, had no motive to lie except perhaps her friendship with M.C. M.C. has admitted that she had a disagreement about a grade sometime in February but she got a B for that marking period, making this is a rather trifling motive to lie in May. The allegations that because G.A. and M.C. were not

allowed to sit in front of the teacher in September they had made up these allegations is also so insubstantial that it will be disbelieved. V.D. was an honor student, who never gave Mr. Mujica any problems and had no motive to lie. I do not credit the theory of the respondent that V.D. was a sexually obsessed person who was jealous of L.R. The fact V.D. was in a different class and did not know M.C. or G.A. yet had essentially the same experience with Mr. Mujica also lends credence to the testimony of G.A. and M.C.

Additionally, J.T., a student from another class corroborated many of their statements concerning the sexually-charged nature of Mr. Mujica's conversation and gestures in the class. He too, seemed to be a reluctant witness, because he liked Mr. Mujica. But he gave a statement to DYFS and he agreed that he said all the things in Ms. Anderson's statement except he denied that Mr. Mujica had mentioned the girls who brought charges against him by name.

To a great extent the charges by the original three complaining students were substantially corroborated by the statements made by K.C. and L.R. to the DYFS investigator. I **FIND** incredible their testimony that they never made such statements and that the fault lie in the inability of the Puerto Rican translator to understand their Spanish because they were from the Dominican Republic and Colombia. Mr. Mujica is Puerto Rican and he teaches in Spanish and English to predominantly Dominican students. Mr. DeLatorre said there was no reason why a Puerto Rican speaker could not translate for a person from the Dominican Republic, as very few words were different. Moreover, neither of the girls had made any protest at the time of the interviews that they did not understand the translator. Additionally, the fact that K.C. changed her statement after talking to Mr. DeLatorre, a personal friend of Mr. Mujica as well as a personal friend of her father's, provides a motive for the switch. L.R.'s change of testimony must be viewed in light of the intense popularity of Mr. Mujica and the hostility to those who made statements against him. By contrast when first approached by DYFS, K.C. and L.R. had no motive to corroborate the charges made by G.A. and M.C. and yet they did. Indeed the swift reaction of students in support of Mr. Mujica provides the motive for A.M. to change the statement she made to Ms. Ray in a few days. I **FIND** her testimony that Ms. Ray misunderstood A.M.'s answer when Ms. Ray

asked if Mr. Mujica acted inappropriately in eighth period incredible as it is very difficult to confuse the word "no" with "yes" in English or Spanish.

I **FIND** less credible the many students who testified that there were no sexual conversations or gestures from Mr. Mujica. Mr. Mujica was a very popular teacher and they all freely stated that they very much liked Mr. Mujica. Many of his witnesses had examples of how he had helped them, urging them to stay in school, individually tutoring them, or enabling them to be eligible to play sports. I **FIND** incredible the testimony that M.C. and G.A. went around saying that they would get "revenge" on Mr. Mujica for a poor mark or a seat in class. Moreover, I am compelled to point out that I found the testimony of Mr. Mujica particularly unconvincing. He claimed that his conduct in the classroom is corroborated by Mr. Kushner, who was outside his classroom with an open door 98 percent of the day. Yet Mr. Kushner, whom I fully credit, said he was in the hallway four out of six hours and Mr. Mujica's door was closed more often, or equally open and closed. But Mr. Kushner did not speak Spanish so he could not understand at least half of the discussion or necessarily see the offending gestures as Mr. Mujica moved around the room. Moreover, Mr. Kushner testified that he told Mr. Mujica several teachers expressed concern in March and April 2000 about students milling around the desk in the ninth period yet Mr. Mujica denied it. I also **FIND** incredible his denial that he never received the letter from DYFS or the letter from Mr. Lighty in 1995 concerning the DYFS investigation and yet showed no concern about the results of that investigation.

Thus, on balance I **FIND** credible the accusations that on several occasions in the first, fifth and seventh period classes Mr. Mujica made sexually inappropriate remarks and gestures to members of the class, including commenting on the girls' bodies, discussing his personal sex life, talking about the sexual aspects of "Xica" and calling girls by that name, making sexual gestures with whiteout and his middle finger, and squeezing a sexual toy during class. I further **FIND** credible the complaint that his conduct made some of the students embarrassed and uncomfortable.

In light of these credibility findings I will consider the specific charges against Mr. Mujica. **Charge One** accused Mr. Mujica of making sexually inappropriate remarks and comments about the show "Xica" causing female students to feel uncomfortable. I **CONCLUDE** based on the credible testimony that this charge has been proven by a preponderance of the credible evidence. **Charge Two** accused Mr. Mujica of making sexually inappropriate gestures with a whiteout bottle simulating masturbation. Based on the credible testimony, I **CONCLUDE** that the charge has been proven by a preponderance of the credible evidence. **Charge Three** alleged that Mr. Mujica had improper relations with female students in that he said he was going out with L.R. and that he discussed his sex life with V.D. The testimony concerning "going out" with L.R. is ambiguous at best. Mr. Mujica never said he was dating L.R., which would be inappropriate, and even V.D. said that he said he was not having sex with her so the "going out" could be as innocuous as giving her a ride home, the explanation of both Mr. Mujica and L.R. However, V.D. testified credibly that Mr. Mujica discussed his wife's sexual problems and his sexual needs with her which made her feel uncomfortable. I **CONCLUDE** that the District has proven that part of Charge Three by a preponderance of the evidence.

Charge Four alleged that Mr. Mujica made sexually inappropriate remarks and comments during class about his sex life. Both M.C. and V.D. testified credibly that he discussed bringing women to hotel rooms and undressing women. That Mr. Mujica had never taken a vacation to Spain or the Phillipines does not undermine this as sexual fantasies are not necessarily based on actual occurrences. I **CONCLUDE** that the District has proven this charge by a preponderance of the credible evidence.

Charge Five alleged that respondent made sexually inappropriate gestures by squeezing a teddy bear toy, which made sexual sounds and used his middle finger to point sexually suggestively. While fifth period student stated that Mr. Mujica had confiscated such a toy in his class, other people saw such a toy confiscated in seventh period class. I **CONCLUDE** that based on the credible evidence that the district has proven this charge by a preponderance of the credible evidence.

Charge Six alleged that respondent committed an act of sexual harassment by squeezing Ms. King-Cook's legs. I **CONCLUDE** based on the fully credible testimony that Mr. Mujica squeezed her leg but that act alone did not constitute an act of sexual harassment, which requires conduct so severe and pervasive as to make a reasonable person believe the workplace had become a hostile environment. *Lehmann v Toys 'R' Us, Inc.,* 132 *N.J.* 587, 603(1993). Nor does the touch of Ms. King-Cook's leg for a few seconds while she was yelling, at him even though unwelcome, rise to the level of a violation of the implicit standard of good behavior that amounts to conduct unbecoming. See *City of Asbury Park v. Department of Civil Service*, 17 *N.J.* 419, 429 (1955). Therefore, I **CONCLUDE** that the credible testimony does not substantiate the charge and the charge must be dismissed.

Charge Seven alleged that Mr. Mujica made statements during class regarding students who reported allegations of inappropriate conduct to school officials and identified the students by name. J.T. testified that after the allegations were made Mr. Mujica spent a good part of the class discussing the allegations and urging the students to go to the school authorities to defend him. In his statement to DYFS J.T. reported that Mr. Mujica specifically named the girls but when he testified he denied that Mr. Mujica named the girls. No one with firsthand knowledge of Mr. Mujica naming the girls testified. Thus, **I CONCLUDE** under the residuum rule, there is no competent evidence that he gave out the names of the students. I **FIND** that Mr. Mujica did make statements during the class regarding the charges and generally regarding the female students who made the allegations.

Charge Eight alleged that Mr. Mujica subsequent to his suspension approached V.D. and discussed his suspension with her, encouraging her not to cooperate and refuse to testify if asked. I **FIND** that the credible evidence shows Mr. Mujica had a lengthy telephone conversation with V.D. telling her that the charges were ruining his life and that he was going to lose his job and his pension. She does not specifically state he said the words "do not cooperate" but by what he was saying he was obviously suggesting that. V.D. said the conversation made her feel that it was her fault if those

things happened if she testified. I **CONCLUDE** that the District has proven the charge by a preponderance of the credible evidence.

Charge Nine alleged that respondent received written warnings from the building principals regarding inappropriate sexual conduct with female students: May 24, 2000, July 19, 1995 and April 18, 1985. The charge alleged that respondent's ignoring these warnings to stop inappropriate behavior constituted gross insubordination. At the hearing Mr. Mujica's motion to dismiss this charge was granted. There is no proof that the inappropriate sexual conduct happened after May 24, 2000, leaving the last warning on July 19,1995. Said warning, even if received, advised him to have no further inappropriate conduct. Such a general letter hardly could result in insubordination five years later.

The dismissal of tenured persons in the public educational system can only be for "inefficiency, incapacity, unbecoming conduct, or other just cause." *N.J.S.A.* 18A:6-10(b). Conduct unbecoming a public employee has been described as an "elastic" phrase that includes "'any conduct which adversely affects the morale or efficiency'" of the public entity or "'which has a tendency to destroy public respect for . . . [public] employees and confidence in the operation of . . . [public] services.'" *In re Emmons*, 63 *N.J. Super.* 136, 140 (App. Div. 1940) (citation omitted). See *Karins v. City of Atlantic City,* 152 *N.J.* 532 (1998). Behavior rising to the level of unbecoming conduct need not be predicated upon a violation of any particular rule or regulation and may be based simply upon a violation of the implicit standard of good behavior. *City of Asbury Park v. Department of Civil Services*, 17 *N.J.* 419, 429 (1955); *In re Tuch*, 159 *N.J. Super.* 219, 224 (App. Div. 1978).

In the context of a tenured teacher, the contours for dismissal set forth in *N.J.S.A.* 18A:6-10 have been found to provide a sufficient standard which, while "general in terms," when "measured by common understanding . . . fairly and adequately conveys its meaning to all concerned." *Laba v. Newark Board of Education*, 23 *N.J.* 364, 384 (1957). Succinctly stated, "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), *certif. den.* 65 *N.J.* 292 (1974). Lack of fitness to remain a teacher is best demonstrated by a series of incidents but may be shown by a single incident if sufficiently flagrant. *In re Fulcomer*, 93 *N.J. Super.* 404, 421 (App. Div. 1967). The nature of the offense, any mitigating circumstances, and the teacher's record must be considered when determining unbecoming conduct. *In the Matter of the Tenure Hearing of Boyd*, 93 *N.J.A.R.* 2d (EDU) 445, 452. I **CONCLUDE** that the charges that have been sustained separately and together amount to conduct unbecoming a teacher.

Teachers found guilty of sexual misconduct have traditionally received harsh penalties. The rationale for this approach was explained in *Tenure of Sammons*, 1952 *S.L.D.* 302: "Teachers . . . are professional employees to whom the people have entrusted the care and custody of . . . school children. This heavy duty requires a degree of self-restraint and control of behavior rarely requisite to other types of employment." *Id.* at 321. The testimony of many witnesses demonstrated that over the years Mr. Mujica has helped many students in Eastside. His record is not unblemished given that there was evidence of undetermined prior complaints of inappropriate sexual misconduct in the past, *i.e.,* a 1985 suspension and a 1995 letter of warning which he said he never received. The sustained charges showed that in at least the first, fifth and seventh period classes, Mr. Mujica routinely talked about sexual issues in the class and routinely made inappropriate sexual gestures and inappropriate sexual remarks over much of the school year. Such behavior sets a very poor example and demonstrates a lack of respect for the students in the class. Additionally, the sustained charge demonstrated that Mr. Mujica attempted to manipulate one of the students not to testify against him. This one act in itself must be seen as a violation of an implicit standard of good behavior and extremely egregious conduct for a teacher to engage in.

Taken as a whole, there are more than enough incidences of unbecoming conduct to sustain dismissal of Mr. Mujica. Hence, I **CONCLUDE** that the charges in the instant matter which have been sustained by a preponderance of the credible evidence have shown respondent's conduct to be unbecoming, unprofessional and have demonstrated his unfitness to continue teaching in the school district.

ORDER

Based on the foregoing, I hereby **ORDER** that respondent Adam Mujica be dismissed as a tenured employee of the District.

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

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

July 20, 2001
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

7/24/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 26 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

jb/al

APPENDIX

Witnesses

For the District:	For the Respondent:
Hector Martinez	R.P.
Lorraine A. Michaels	Fernando Montanez
Angenett Ray	A.M.
Robert L. Howell, Sr.	A.U.
G.A.	H.R.
M.C.	K.P.
V.D.	E.N.
J.T.	A.P.
Greta M. Anderson	L.R.
Aracelis Vasquez	J.S.
K.C.	George DeLatorre
J.A.	C.A.
Matilde Louro	W.P.
Rocio Sanchez	Adam Mujica
Sanford Kushner	R.P.
Zynida Banks	R.A.
Bonnie King-Cook	

Exhibits

For Petitioner:

P-1	Letter by Principal Howell to Mr. Mujica, Sr., May 24, 2000
P-2	Principal Howell's interview with G.A., May 15, 2000
P-3	Principal Howell's interview with M.C., May 15, 2000

	P-4	Principal Howell's interview with A.M., May 15, 2000
	P-5	Principal Howell's note of meeting with Mr. Mujica, May 16, 2000
	P-6	Memo by Ms. Ray to Principal Howell, May 16, 2000
	P-7	Summary of student statements prepared by Ms. Anderson
	P-8	Letter of DYFS to Paterson Board, September 18, 2000
	P-9	Suspension letter for Mr. Mujica, September 22, 2000
	P-10	Suspension letter for Mr. Mujica from Principal Joe Clark, April 18, 1985
	P-11	Letter of warning to Mr. Mujica from Principal Charles Lighty, July 19, 1995
	P-12	Incident Report from Nurse Banks, June 23, 1999
	P-13	Paterson Police Report filed by Ms. King-Cook, June 28, 1999
	P-14	Grievance Report-Form A by Ms. Ray, May 10, 2000
	P-15	Affirmative Action Observation and Report Form (1 pg.)
	P-16	Affirmative Action Complaint (5 pgs.)
	P-17	Sexual Harassment Guidelines by Office of Civil Rights
	P-18	Timetable of class times for 1999-2000
	P-19	Chart by Ms. King-Cook (1 sheet)
	P-20	DYFS Referral Response Report (9-7), (3 pgs)
	P-21	Interview of K.C. (2 pgs)
	P-22	Interview of J.T. (1 pg)
	P-23	Interview of L.R. (2 pgs)
	P-24	Interview of M.C. (2 pgs)
	P-25	Interview of V.D. (2 pgs)
	P-26	Case Review Statement
	P-27	Interview of G.A. (2 pgs)
	P-28	Memo regarding permission of M.V.
*	P-29	Letter
	P-30	Chart
	P-31	Chart
	P-32	Grade Report of M.C. (3 pgs)
	P-33	Letter by DYFS to Mr. Mujica, June 28, 1995

	P-34	Subpoena by Mr. Mujica's attorneys, November 2000 (3 pgs)

For Respondent:

	R-1	Written Statement of F.T., November 12, 2000
	R-2	Written Statement of J.S., November 12, 2000
	R-3	Written Statement of E.N., November 12, 2000
	R-4	Written Statement of W.P., November 12, 2000
	R-5	Written Statement of R.P., November 12, 2000
	R-6	Written Statement of K.P., November 24, 2000
	R-7	Written Statement of A.M., November 24, 2000
	R-8	Written Statement of L.R., November 12, 2000
	R-9	Written Statement of E.A., December 20, 2000
	R-10	Written Statement of F.M., January 22, 2001
	R-11	Written Statement of A.U., March 17, 2001
	R-12	Written Statement of J.A., March 10, 2001
	R-13	Written Statement of J.R., March 10, 2001
	R-14	Written Statement of R.A., March 17, 2001
	R-15	Written Statement of K.C., March 17, 2001
	R-23	Eastside High School Teachers' Handbook
	R-24	Guidelines for School Personnel for the Management of Student Sexual Misconduct, February 6, 2001
*	R-34	A.R. Affirmative Action Complaint
	R-36	1 EZ Grader
	R-57	Various Tests of M.C.
	R-70	Various Tests of M.C.
	R-74	Various Tests of M.C.
	R-92 thru R-106	Various Pictures Taken at Eastside High School
	R-109	Class Record Book
	R-117 thru R-121	Informal Observation Report
	R-139	Martinez's Certifications to Interrogatories
*	R-140	Packet of District Witness Statements
	R-141	Schematic by Nurse Banks

*	R-142	Paterson Public Schools Investigation of Harassment Grievance
	R-143	May 25, 2000 Summary of Findings I
	R-144	Summary of Findings II
	R-145	DeLatorre Certification
	R-146	A.P. Statement
	R-147	Petition
	R-148	M.C. Intervention Report
	R-149	Attendance Profile – M.C.
	R-150	R.A. Schematic
	R-151	Mujica Schematic of Classroom
	R-152	Splint
	R-153	History Book
	R-154	History of United States
	R-155	Principal of American Government Textbook for US II

---

* Identification Only.

OAL DKT. NO. EDU 10130-00
AGENCY DKT. NO. 417-11/00

IN THE MATTER OF THE TENURE	:	
HEARING OF ADAM MUJICA,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF PATERSON, PASSAIC	:	
COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions, which included a Motion to Reopen the Record, and the District's reply thereto, were submitted in accordance with *N.J.A.C.* 1:1-18.4 and *N.J.A.C.* 1:1-18.5.

MOTION TO REOPEN THE RECORD

Respondent contends that the record in this matter should be reopened to admit his "newly-discovered" evidence that reveals the District's motives to remove him for improper reasons. (Respondent's Exceptions and Memorandum in Support of Motion at 49) Specifically, respondent requests that the Commissioner consider recently acquired witness statements, in that they provide:

> context, meaning and a motive to both (a) the prior testimony at hearing; and (b) the actions of Paterson officials, who seek to have [him] removed from his tenured teaching position on the verge of his retirement after almost twenty five years of service to the School District. (*Id.* at 49)

Respondent claims that these statements were not available to him until after the close of the hearing, and that they "go to the illegality of the District's action ***." (*Ibid.*) Respondent further alleges that the District's certification of a second set of charges to the Commissioner

during the pendency of the hearing before Administrative Law Judge (ALJ) Hayden, wherein such charges were based on incidents dating back as far as 16 years, "impermissibly tainted her ruling through the unmistakable implication that 'where there is smoke there must be fire.'" (*Id.* at 51-52)[1]

In support of his motion, respondent cites *In the Matter of the Tenure Hearing of Gregory Brewer, School District of Roselle, Union County,* decided by the Commissioner December 11, 2000, wherein the Commissioner granted respondent Brewer's Motion to Reopen the Record based upon his finding that the ALJ's credibility determinations, which were crucial to the outcome of the tenure matter, "were based, in part, on facts not supported by evidence in the record." (*Id.* at 8-9, *citing Brewer* slip. op. at 34) In this regard, respondent contends that the ALJ failed to make proper factual and demeanor findings and that recently discovered evidence supports a reopening of this case. "New witnesses," the respondent affirms, "are prepared to provide a compelling look at the motive behind petitioner's conduct and further assist the ALJ in regard to her credibility determinations." (*Id.* at 11) Respondent reasons that this newly discovered evidence provides "a clear insight into the motives of the District, and adds substantial additional credibility to the many witnesses who testified on [his] behalf." (*Id.* at 57)

In reply, the District asserts that respondent has failed to show good cause and reasonable diligence in making his application to reopen the record. As the District argues, respondent offers "no explanation why this motion was not made soon after the hearing ended on April 17, 2001 or before the ALJ issued her July 20, 2001 decision." (District's Reply at 9-10) Specifically, respondent appends to his motion the same 16 witness statements that have already

[1] Respondent further requests that the Commissioner consider an Interlocutory Order issued on July 13, 2001 by ALJ Giordano, who is currently hearing the matter entitled *In the Matter of the Tenure Hearing of Adam Mujica, State-operated School District of Paterson, Passaic County*, OAL Dkt. No. EDU 5184-01, wherein the District brought a second set of tenure charges against respondent based upon incidents alleged to have occurred in 1985 and 1994, since ALJ Giordano dismisses the charges dating back 16 years as reflective of bad faith. (*Id.* at 51, 54)

been submitted into evidence. As to the five additional certifications appended to the motion,[2] the District notes that: one of them is from Fernando Montanez, respondent's friend, who already testified at the hearing; all "contain old conspiracy allegations not relevant to the October 2000 Charges" (*id.* at 10); and respondent's "conspiracy" theory is *not* new evidence, but an attempt to raise old allegations. "The respondent has failed to explain why after an extensive discovery period, and 11 contentious hearing days, he failed to produce the so-called new witnesses or offer new evidence." (*Id.* at 10-11) Finally, the District argues that this matter is distinguishable from *Brewer*, wherein "the Commissioner found that the ALJ's determinations with respect to the teacher's credibility were based upon facts not in the record [and wherein] the teacher's counsel wrote to the school district's attorney before the hearing ended about presenting rebuttal testimony on a contested issue of student grades." (*Id.* at 11)

COMMISSIONER'S DETERMINATION ON THE MOTION TO REOPEN THE RECORD

Having thoroughly and carefully reviewed each of the transcripts for the 11 days of hearing in this matter, together with all documentary evidence on record, the Commissioner finds that, contrary to the situation in *Brewer,* each and every credibility determination issued by the ALJ *is* grounded in the record before her. Further, the record provides no basis for concluding that a reopening of this matter is warranted; there appears to be no reason why the motivational theory respondent now proposes to advance was impossible to develop, with reasonable diligence, prior to the close of the record. Even accepting, *arguendo*, that respondent only learned "around the beginning of May *** [that certain] individuals had relevant and important information which might assist [him] ***" in defending these charges, the Commissioner notes that the record did not close until June 5, 2001, thereby affording respondent and his counsel sufficient opportunity to, at minimum, alert the District and the

[2] Although the District notes that there are four certifications, there are actually certifications from five persons.

Office of Administrative Law of their "discovery." (Respondent's Exceptions and Memorandum, Certification of Adam Mujica, August 7, 2001, at 2) Under these circumstances, the Commissioner cannot find that respondent was denied an opportunity for a full and fair hearing or that principles of fundamental fairness were compromised. Accordingly, respondent's Motion to Reopen the Record is denied.

RESPONDENT'S EXCEPTIONS TO THE INITIAL DECISION

Respondent's exceptions essentially challenge the ALJ's consideration of witnesses' motives and the ALJ's resultant credibility assessments in the Initial Decision. He asserts, *inter alia*, that the ALJ failed to make adequate and necessary findings of fact or to make demeanor observations potentially worthy of deference. (Respondent's Exceptions and Memorandum at 11) In this connection, respondent underscores the testimony of his witnesses and asserts that the ALJ "summarily dismissed entire witnesses without even naming them, let alone recounting the demeanor, alleged inconsistencies, and/or purported motive to lie of each one, as required." (*Id.* at 17) Rejecting this testimony, respondent posits, is tantamount to finding that they all lied under oath and committed perjury. (*Id.* at 17-18) Mindful that a 23-year teaching career "hangs in the balance," respondent urges that:

> [T]his Department, the Third Circuit, and many other Courts require more on the part of an ALJ then [sic] a one sentence dismissal of the testimony of these *** witnesses. ***
>
> ***Fundamental fairness and due process requires [sic] that the ALJ provide basic findings of fact -- exactly how did each witness lie, why did *that* witness lie, what physical demeanor observations made it clear *that* witness was lying -- so that a reviewing tribunal or Court may glean the precise basis for the determination that has been rendered. (emphasis in text) (*Id.* at 18-19)

Respondent also asserts that despite the ALJ's indication that she fully credited the testimony of Stanford Kushner, Chairperson of the Social Studies Department, she failed to review key

components of his testimony, which includes his affirmation that he never saw anything inappropriate going on in respondent's classroom. (*Id.* at 21-22)

Respondent next challenges the ALJ's refusal to permit testimony or arguments of a Constitutional law or due process nature, as well as her refusal to consider the violation of respondent's Constitutional rights or its impact on the charges "constructed" by the District. (*Id.* at 24) Respondent contends that he repeatedly requested that the ALJ consider his arguments of Constitutional dimension, but the ALJ would not permit him to explore such issues, finding, instead, that the within proceeding was a *de novo* hearing rather than a review of a local district's action to determine whether that action was arbitrary, capricious and unreasonable. (*Id.* at 25-26) Respondent notes that he repeatedly argued before the ALJ that "at some point the procedures used [and] the method employed could be so egregious as to eclipse the conduct alleged and taint the process ***; and that justice would require a dismissal." (*Id.* at 28) Yet, respondent continues, the ALJ's recommendation "shows that she heard the testimony with a mindset successfully established by the taint of sensationalist charges that never should have been brought, and resurrected claims from decades past." (*Id.* at 29) Thus, respondent maintains that the Constitution requires a "probing analysis" of the circumstances under which these charges were brought. (*Ibid.*)

Respondent next argues that the ALJ's finding as to Charge Eight is wholly unsupported by the record and such finding constitutes misinterpretation of the law. Respondent notes that the ALJ stated, with regard to respondent's attempts to manipulate one of his students not to testify against him, "This one act in itself must be seen as a violation of an implicit standard of good behavior and extremely egregious conduct for a teacher to engage in." (*Id.* at 34, *citing* the Initial Decision at 43) Thus, respondent reasons that the ALJ "in large measure"

grounds her decision to recommend his termination upon her finding that he attempted to encourage V.D. not to cooperate and to refuse to testify against him, if asked. However, respondent argues that this finding is not supported by V.D.'s testimony or the testimony of Principal Robert Howell, Sr. (*Ibid.*) Furthermore, respondent argues that he has a right as a "defendant" to communicate with a witness in order to defend himself from serious charges, and he characterizes such communication as "innocuous conversation," rather than "witness tampering." (*Id.* at 34-35) Respondent, therefore concludes: (1) there is no evidence on the record to suggest that he urged V.D. not to cooperate or testify; and (2) if, *arguendo*, all or part of the District's allegations were true, "there is absolutely nothing improper about [his] talking to a witness and seeking a helpful statement or even a fuller measure of cooperation." (*Id.* at 37)

Respondent additionally claims that the ALJ improperly dismissed the significance of his theory that Ms. Sanchez and/or her Eastside High School Gym Department, "were shown to be at the genesis of each allegation of impropriety by [him]." (*Id.* at 39) Respondent maintains that Ms. Sanchez had a "strong motive" to harm him, (*ibid.*) and concludes that:

> The only reasonable inference that can be drawn is that Mrs. Sanchez, already angry at [him] for reporting her collection activities, did her best to retaliate. Her allies were other students who disliked [him]. Her target was his perceived area of vulnerability from charges frivolously lodged during the initial "get" Adam era, now verified by a high-ranking Administration official." (*Id.* at 43)

He urges that it was simply erroneous for the ALJ to conclude that the alleged money-collection activities were "trivial." (*Id.* at 47)

Finally, respondent argues that the ALJ's recommended penalty is disproportionate to the alleged violation, and asserts that the ALJ ignores an entire body of case

law suggesting that offenses such as those that he is alleged to have committed "are not worthy of a penalty as drastic as termination after 23 years of service to the School District." (*Id.* at 58) In support of this position, respondent cites to the decision in *In the Matter of the Tenure Hearing of Henry Allegretti, School District of the City of Trenton*, decided by the Commissioner March 22, 2000, *aff'd* State Board August 2, 2001, wherein the respondent was not dismissed from his tenured teaching position, notwithstanding a finding that he had engaged in unbecoming conduct of a sexual nature. Respondent reasons that the conduct charged to Allegretti "is vastly more serious that that which [he] is accused of." (*Id.* at 59)

PETITIONER'S REPLY

The District argues, in reply, that the Commissioner should affirm the finding in the Initial Decision that it has proven seven of the nine charges. The District underscores that as the factfinder, the ALJ "had the opportunity to observe the witnesses and take note of their demeanor during testimony. [As such] [h]er observations as to credibility should be given substantial weight." (District's Reply at 3) Moreover, the District contends that respondent failed to present a complete analysis of the evidence that the ALJ properly relied upon to sustain the seven charges. Specifically, "Judge Hayden declared the testimony of students GA, MC, VD and JT to be 'consistent, forthright, and credible.'" (*Id.* at 4, *citing* the Initial Decision at 37)

Further, contrary to respondent's assertion that the ALJ ignored crucial facts, the District argues that the ALJ carefully summarized the witnesses' testimony:

> The respondent's "revenge" theory that MC and GA were out to get him was properly rejected. *** Other students who had no alleged "revenge motive" corroborated the allegations of MC and GA. Students VD and JT testified about the numerous inappropriate actions of the respondent ***." (*Id.* at 5)

As to respondent's contention that the ALJ erred in sustaining Charge Eight, the District counters that this charge "is supported by credible and legally sufficient evidence.***" (*Ibid.*) Since the court found V.D.'s testimony credible, the ALJ "correctly inferred that by having a telephone conversation with V.D. while on suspension from school, and causing her to feel 'bad,' the respondent intended to persuade V.D. not to cooperate." (*Id.* at 6) The District notes that *N.J.A.C.* 1:1-15.5(b) requires "some legally competent evidence *** to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the appearance of arbitrariness." (*Id.* at 6, *citing N.J.A.C.* 1:1-15.5(b))

Turning to respondent's contention that the ALJ ignored his Constitutional claims, the District argues that:

> [T]he respondent suggests that in this case, the mere filing of tenure charges by the District pursuant to N.J.S.A. 18A:6-10 & 11, caused constitutional violations. The respondent's position is unsupported. In *In re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967), the court stated that the board's authority with respect to tenure charges is specifically limited to that of a preliminary review ***." (*Ibid.*)

This and other cases, the District advances, support the principle that the Board is not required to adjudicate tenure charges filed against an employee, but to consider the written statement of evidence as submitted, as well as the employee's statement, and to determine, pursuant to *N.J.S.A.* 18A:6-11, whether there is probable cause to credit such evidence. (*Id.* at 6-7, *citing In the Matter of the Tenure Hearing of Deborah Suitt-Green, State-operated School District of the City of Newark*, decided by the Commissioner October 14, 1997, *aff'd* State Board February 17, 1998, *aff'd* App. Div. A-3918-97T1 (February 17, 1999)) Thus, the District reasons, respondent's arguments attacking the quality of its investigation, as well as the DYFS investigation, are misplaced, and the ALJ properly focused upon the District's burden to prove

the charges. (*Id.* at 7 and 8) Moreover, the District denies that it acted unfairly or violated respondent's rights with respect to these charges. (*Id.* at 7)

Finally, the District contends that the ALJ correctly recommended respondent's termination based upon the proven charges. Here, the District argues, that the Commissioner has dismissed teachers for unbecoming conduct toward female students. In support of this, the District cites to, among others, the Commissioner's decisions in *In the Matter if the Tenure Hearing of Nicholas Ciufi, Board of Education of the Township of Irvington, Essex County*, 96 *N.J.A.R.*2d (EDU) 980; *In the Matter of the Tenure Hearing of George McClelland, School District of Washington Township, Mercer County*, 1983 *S.L.D.* 225, *aff'd* State Board 1983 S.L.D. 247, *aff'd* App. Div. 1984 *S.L.D.* 1964; and *In the Matter of the Tenure Hearing of Donald Henley, School District of the City of Camden*, Camden County, 1979 *S.L.D.* 356. Thus, the District urges the Commissioner to affirm the recommended decision of the ALJ in that she produced "a thorough and well reasoned decision that properly considered all testimony and evidence presented***." (District's Reply at 1)

COMMISSIONER'S DETERMINATION

Upon careful and independent review of the complete record in this matter, including transcripts from each of 11 days of hearing,[3] together with exhibits, posthearing briefs, exception and reply arguments, the Commissioner determines to affirm the Initial Decision of the ALJ for the reasons set forth below.

The parties recognize, as did the ALJ, that this matter turns on the issue of the credibility of the witnesses, many of whom were students. 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

[3] The hearing was conducted on April 2, 3, 4, 5, 6, 9, 10, 11, 12, 16, and 17, 2001.

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. The Commissioner finds that "[t]he ALJ carefully scrutinized the students' testimony recognizing that the case hinged on the issue of credibility." (96 *N.J.A.R.*2d (EDU) at 549)

As the District correctly observes, the ALJ's credibility determination is entitled to the Commissioner's deference. "The reason for the 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))

Further, contrary to respondent's assertion, the Commissioner determines that the findings issued by the ALJ provide him with a sufficient basis for reviewing her conclusions and recommendations. In this connection, the Commissioner recognizes that "the ultimate

determination of the agency and the ALJ's recommendations must be accompanied by basic findings of fact sufficient to support them." *State, Dept. of Health v. Tegnazian*, 194 *N.J. Super.* 435 at 442, 443. The purpose of such findings "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." (*Id.* at 443) Additionally,

> the sufficiency of evidence "must take into account whatever in the record fairly detracts from its weight"; the test is not for the courts "to read only one side of the case and, if they find any evidence there, the administrative action is to be sustained and the record to the contrary is to be ignored." (citation omitted) (*St. Vincent's Hospital v. Finley,* 154 *N.J. Super.* 24, 31 (App. Div. 1977))

Here, the Commissioner notes that the ALJ fairly summarizes the testimony and evidence on both sides, explaining how she weighed the proofs before her and why she credited, or discredited, certain testimony.[4] Each of the ALJ's conclusions is clearly aligned and consistent with those credibility determinations.[5] As such, the Commissioner finds that he can ascertain which testimony the ALJ accepted as fact, and further determines that these facts provide a reasonable basis for her conclusions.[6]

Additionally, the Commissioner is not persuaded by respondent's contention that the ALJ erred in denying him the opportunity to pursue in this forum his procedural due process claims regarding the District's investigation of this matter prior to the certification of tenure

---

[4] This includes, the Commissioner notes, the ALJ's proper rejection of respondent's theory that the within charges were, either in whole or on part, generated by the need of either Ms. Sanchez (now Mrs. Fernandez) or the Physical Education Department to retaliate against him.

[5] Contrary to respondent's urging, this is also true of the ALJ's conclusion with respect to Charge Eight, *i.e.*, that the District proved by a preponderance of credible evidence that respondent encouraged V.D. not to cooperate or to testify, if asked. (Initial Decision at 41-42)

[6] *Contrast, Pitts v. N.J. Racing Comm'n.*, 185 *N.J. Super.* 190, 196 (App. Div. 1982), wherein, notwithstanding that a hearing was conducted before the Racing Commission which included witness testimony, videotapes and photographic evidence, the Commission issued a decision "entirely lacking in findings and conclusions***" so as to render its decision "of no use" to the Court in its administrative review.

charges to the Commissioner.[7] The Commissioner concurs with the District's view that its role in this matter, prior to certification of tenure charges, is one of issuing a "preliminary determination." *See In re Fulcomer*, 93 *N.J. Super.* 404, 410 (App. Div. 1967).[8] Whereas, the Commissioner, by contrast, has jurisdiction to conduct the hearing and issue a decision on the charges in the first instance; *his jurisdiction is not appellate, but primary.* (*Id.* at 412) The Commissioner declines to find, therefore, that the ALJ's careful attention to gathering evidence relevant to the veracity of the charges was erroneous, as her rulings indicate:

> I don't look at whether they were acting arbitrary and capriciously. I make a finding De Novo. In the general civil service law, lack of due process at a prior hearing, isn't even taken into consideration as long as there's due process at the hearing that makes the decision.*** (Tr. (4/3/01) at 92-93)
>
> This is a hearing De Novo. In other words,-- the reason why I'm trying to stop you is that I think we're going to take a lot of time on extraneous matter. I understand what you're saying and to some extent I've allowed it to go on because if they didn't do a very good job or a tiptop job, it really goes to the weight of the evidence that I'm going to consider. *** (*Id.* at 94)

Moreover, the ALJ's Prehearing Order setting forth the issues to be resolved does not include respondent's procedural due process claims and he was, therefore, on notice as to the parameters of the hearing before the ALJ.[9]

---

[7] The Commissioner notes that respondent's Answer to the Tenure Charges does not raise any *substantive* Constitutional defenses. (Respondent's Statement in Opposition to Charges, December 5, 2000)

[8] Under the Tenure Employees Hearing Act, a local board or district is limited to determining whether there is probable cause to credit the written charges and supporting evidence presented to it and, where the board or district "finds that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then it shall forward such written charge to the commissioner for a hearing***." *N.J.S.A.* 18A:6-11.

[9] Rather, the Prehearing Order identifies the following issues to be resolved at hearing: (1) Whether the District's evidence establishes that respondent engaged in conduct unbecoming a teacher or insubordination; (2) Whether the charges are procedurally defective as failing to set forth with specificity the conduct alleged; and (3) If the District proves the charges, what should be the penalty? (Prehearing Order, January 9, 2001 at 1)

The Commissioner, therefore, affirms the ALJ's conclusion that the District has proven Charges One, Two, Four, Five and Eight and has partially proven Charges Three and Seven, for the reasons set forth in the Initial Decision at pages 40-42.[10] Each of these charges establishes that respondent is guilty of conduct unbecoming a teaching staff member.

PENALTY

In affirming the conclusions of the ALJ, the Commissioner is ever mindful that this matter, as with many controversies that come before him, is fraught with grave consequences for respondent. *Tegnazian, supra*, 194 *N.J. Super.* at 440. However, the ALJ reaches the disturbing conclusion, and the Commissioner so affirms, that:

> The sustained charges showed that in at least the first, fifth and seventh period classes, Mr. Mujica routinely talked about sexual issues in the class and routinely made inappropriate sexual gestures and inappropriate sexual remarks over much of the school year. Such behavior sets a very poor example and demonstrates a lack of respect for the students in the class. (Initial Decision at 43)

The Commissioner has dismissed tenured teaching staff members for conduct largely centered on inappropriate comments of a sexual nature directed to students. *See In the Matter of the Tenure Hearing of Roberts, supra*, wherein respondent was found to have spoken openly about sex, at times crudely, to have discussed his personal experiences and probed the conduct of his students, to have initiated monologues about sex, and to have commented on the sex lives and physical features of his students; *In the Matter of the Tenure Hearing of Sheridan*, 92 *N.J.A.R.*2d (EDU) 257, *aff'd* State Board 92 *N.J.A.R* 2d (EDU) 393, wherein respondent was found to have used profanity in the presence of students, to have made derogatory remarks about women, to have made improper sexual references to students' bodies, and to have inferred that he was in a relationship with a student; and *In the Matter of the Tenure Hearing of Van Gilson*,

[10] The ALJ found, and the Commissioner concurs, that Charge Six was not substantiated and Charge Nine was properly dismissed. (Initial Decision at 41, 42) (Tr. (4/10/01) at 11)

93 *N.J.A.R.*2d (EDU) 378, 382, 385, *aff'd* State Board 93 *N.J.A.R.*2d (EDU) 630, wherein respondent was found to have verbally abused and ridiculed a classified pupil in class, to have made derogatory and belittling comments to students, to have commented about a seventh grader's "hooters" and said "If I were 30 years younger, I would be after you," to have used profanity when talking to a student, and to have discussed personal matters regarding his wife and their divorce with his students.

Indeed, the Commissioner has also dismissed tenured teaching staff members for conduct that included inappropriate comments, even where such comments were *not* necessarily of a sexual nature. *See In the Matter of the Tenure Hearing of Henry Komorowski, State-operated School District of the City of Jersey City, Hudson County*, decided by the Commissioner July 27, 2000, *aff'd* State Board December 6, 2000, wherein respondent was found to have engaged in graphic discussions with fifth grade students regarding torturing and killing one of the students in his class; and *In the Matter of the Tenure Hearing of Ward Campbell*, 93 *N.J.A.R.*2d (EDU) 196, *aff'd* State Board 93 *N.J.A.R.*2d (EDU) 604, *aff'd* App. Div. 95 *N.J.A.R.*2d (EDU) 211, wherein respondent was found, *inter alia*, to have made racist remarks to students in class, to have commented that "girls can be stupid" to a student, to have told students that he's been known "to hit kids," and to have engaged in a pattern of unprofessional conduct with parents, students and administrators generating numerous complaints, in spite of many prior warnings from administration. (93 *N.J.A.R.*2d (EDU) at 207, 208)

Here, respondent does not have an unblemished record, notwithstanding that he has received positive performance evaluations as a teacher.[11] Specifically, the record shows that

[11] Exhibits R-117 through R-121 are observation reports dating between February 5, 1997 and February 25, 1999, indicating that respondent received "good," "very good," and "excellent" ratings as a teacher.

in 1985, he was suspended by then Principal Joe Clark pending investigation of allegations of inappropriate "verbal and physical behavior" toward students. (Exhibit P-10) In 1994, allegations were again made against respondent, resulting in a letter from the Division of Youth and Family Services' Institutional Abuse Unit to respondent, dated June 28, 1995, indicating that, upon investigation, "sexual abuse was unsubstantiated with concerns." (Exhibit P-33, Letter from Antonio Villegas and Leonard Brazaitis at 1) Thereafter, by letter dated July 19, 1995, then Principal Charles Lighty, provided the following warning to respondent:

> The Paterson Public School District is in receipt of correspondence from D.Y.F.U.S. [sic] regarding the 1994 allegations against you.
>
> Based on the fact that this was not the first offense, let this letter serve as a warning that, if similar allegations are made against you again, you will be terminated for conduct unbecoming a teacher. (Exhibit P-11)

Under these circumstances, and based on a record before him which substantiates that respondent made not only unacceptable comments to his students, but also inappropriate gestures, the Commissioner concurs with the ALJ that respondent's conduct demonstrates unfitness to remain a teacher.[12]

Accordingly, the Initial Decision of the ALJ is affirmed for the reasons expressed therein and amplified above. Respondent is deemed dismissed from his tenured teaching position in the State-operated School District of the City of Paterson as of the date of this decision. In view of the nature of the charges, this matter is hereby referred to the State Board of

[12] *Contrast, In the Matter of the Tenure Hearing of Henry Allegretti, supra,* wherein respondent's lengthy and unblemished history mitigated against the extreme penalty of loss of his tenure.

Examiners for action against respondent's certificate as it deems appropriate.

IT IS SO ORDERED.[13]

COMMISSIONER OF EDUCATION

Date of Decision: 9|7|01

Date of Mailing: 9|10|01

[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.

295-01

IN THE MATTER OF JUDITH A. WIELAND,	:	
BOARD OF EDUCATION OF THE BOROUGH	:	COMMISSIONER OF EDUCATION
OF ALPHA, WARREN COUNTY.	:	DECISION
	:	

September 6, 2001

SCHOOL ETHICS COMMISSION	:	BEFORE THE
	:	SCHOOL ETHICS COMMISSION
v.	:	
	:	RESOLUTION
JUDY WEILAND,	:	
Alpha Board of Education	:	SEC Docket No.: T43-01
Warren 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, Judy Weiland was elected to serve a three-year term on the Alpha Board of Education in April 2000; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on December 1, 2000 and February 13, 2001; and

WHEREAS, the NJSBA conducted seven training sessions between April 2000 and April 2001 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held in March 2001; and

WHEREAS, the Commission issued an Order on April 9, 2001, directing her to Show Cause why she had not attended training up until that time; and

WHEREAS, she replied that she could not attend due to family obligations and schedule, but that she planned to attend a June 2001 session; and

WHEREAS, the Commission notified her that the Commission would discuss this matter at its June 26, 2001 meeting, that she had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission has considered the reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2000 to April 2001 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission would have accepted her attendance at the June session, but she failed to attend; and

WHEREAS, the Commission finds that if Ms. Weiland fails to attend by October, the Commission finds that it would be appropriate to have her removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ms. Wada violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend her until she attends, but remove her from the board if she fails to attend by the October training session.

Dated: July 12, 2001

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 River View 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 June 26, 2001.

Lisa James-Beavers, Executive Director

h/lisa/decisions/T4301.doc

AGENCY DKT. NO. 244-7/01

IN THE MATTER OF JUDITH A. WIELAND,	:	
BOARD OF EDUCATION OF THE BOROUGH	:	COMMISSIONER OF EDUCATION
OF ALPHA, WARREN COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission (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 Commission sent ample notice to the above-named Board member of her failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on April 6, 2001, 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 by letter dated April 17, 2001, that she had signed up for the March 10, 2001 training program but was unable to attend due to a last minute illness and has now signed up for the October 23, 2001 session; and

Whereas, the Commission voted on June 26, 2001 to recommend that the above-named Board member be suspended until she completes the required training; and

Whereas, the Commission further voted on June 26, 2001 that the above-named

Board member be removed from office if she fails to so attend a required training program by the end of October 2001 and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on July 12, 2001, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, the above-named Board member submitted a comment to the Commissioner which reported that she had delayed signing up for training until March 2001 because she believed she would best benefit from the training after she had some experience on the Board, and further advised that she had cancelled her registration for the October training, instead signing up for the weekend session offered in September, in order to assure timely compliance with the Commission's directive; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission recommending suspension and removal of the above-named Board member if the Board member fails to attend the required training by October, 2001; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing date of this decision, and shall remain suspended pending completion of the requisite training, and, in the event the Board member fails to complete the required training by

October 23, 2001, the above-named Board member is hereby summarily removed from office effective October 24, 2001.*

COMMISSIONER OF EDUCATION

Date of Decision: 9 6 01

Date of Mailing: 9 11 01

*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.

296-01 SEC

IN THE MATTER OF EDWARD DOWLING, :
BOARD OF EDUCATION OF THE BOROUGH :
OF ALLENHURST, MONMOUTH COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

September 6, 2001

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
EDWARD R. DOWLING, JR., Allenhurst Board of Education Monmouth County	:	**SEC Docket No.: T20-01**

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, Edward Dowling, Jr. was elected to serve a three-year term on the Allenhurst Board of Education in April 2000; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on December 1, 2000 and February 13, 2001; and

WHEREAS, the NJSBA conducted seven training sessions between April 2000 and April 2001 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held in March 2000; and

WHEREAS, the Commission issued an Order on April 9, 2001, directing him to Show Cause why he had not attended training up until that time; and

WHEREAS, he replied that he did not attend due to his work travel schedule and his family obligations, but that he planned to attend the October 2001 session; and

WHEREAS, the Commission granted an extension for all similarly situated board members to attend one of the June sessions; and

WHEREAS, the Commission notified him that the Commission would discuss this matter at its June 26, 2001 meeting, that he had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission has considered the reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2000 to April 2001 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that if Mr. Dowling fails to attend by October, the Commission finds that it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Dowling violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend him until he attends training, but remove him from the board if he fails to attend the October training session.

Dated: July 11, 2001

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 River View 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 June 26, 2001.

Lisa James-Beavers, Executive Director

e/lisa/decisions/T2001.doc

AGENCY DKT. NO. 246-7/01

IN THE MATTER OF EDWARD DOWLING, :	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH :	DECISION
OF ALLENHURST, MONMOUTH COUNTY. :	
:	

Whereas, the School Ethics Commission (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 Commission sent ample 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 April 6, 2001, 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 by letter dated June 21, 2001, that he had not attended training due to his work travel schedule and his family obligations, but that he planned to attend the October 2001 session; and

Whereas, the Commission voted on June 26, 2001 to recommend that the above-named Board member be suspended until he takes the required training program; and

Whereas, the Commission further voted on June 26, 2001 that the above-named Board member be removed from office if he fails to so attend a required training program by the

end of October 2001 and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, on July 12, 2001, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal; and

Whereas, the above-named Board member did not submit a response to the resolution; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission recommending suspension and removal of the above-named Board member if the Board member fails to attend the required training by October 2001; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing date of this decision, and shall remain suspended pending completion of the requisite training, and, in the event the Board member fails to complete the required training by October 23, 2001, the above-named Board member is hereby summarily removed from office effective October 24, 2001.*

COMMISSIONER OF EDUCATION

Date of Decision: 9|06|01

Date of Mailing: 9|11|01

*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.

297-01 SEC

IN THE MATTER OF GAIL TANNENHAUS,	:	
HARDWICK TOWNSHIP BOARD	:	COMMISSIONER OF EDUCATION
OF EDUCATION, WARREN COUNTY.	:	DECISION
_____	:	

September 6, 2001

SCHOOL ETHICS COMMISSION	:	BEFORE THE SCHOOL ETHICS COMMISSION
v.	:	
	:	RESOLUTION
GAIL TANNENHAUS, Hardwick Board of Education Warren County	:	SEC Docket No.: T44-01

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, Gail Tannenhaus was elected to serve a three-year term on the Hardwick Board of Education in April 2000; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on December 1, 2000 and February 13, 2001; and

WHEREAS, the NJSBA conducted seven training sessions between April 2000 and April 2001 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held in March 2001; and

WHEREAS, the Commission issued an Order on April 9, 2001, directing her to Show Cause why she had not attended training up until that time; and

WHEREAS, she replied that she could not attend due to family and work obligations, but that she planned to attend the October 2001 session; and

WHEREAS, the Commission notified her that the Commission would discuss this matter at its June 26, 2001 meeting, that she had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission has considered the reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2000 to April 2001 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission granted an extension for board members who had failed to attend within the year to attend the June session; and

WHEREAS, the Commission finds that if Ms. Tannenhaus fails to attend by October, the Commission finds that it would be appropriate to have her removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ms. Tannenhaus violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend her until she attends, but remove her from the board if she fails to attend by the October training session.

Dated: July 12, 2001

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 River View 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 June 26, 2001.

Lisa James-Beavers, Executive Director

e/lisa/decisions/T4401.doc

AGENCY DKT. NO. 258-7/01

IN THE MATTER OF GAIL TANNENHAUS,	:	
HARDWICK TOWNSHIP BOARD	:	COMMISSIONER OF EDUCATION
OF EDUCATION, WARREN COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission (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:28-6; and

Whereas the Commission sent ample notice to the above-named Board member of her failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on April 9, 2001, 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 by letter dated April 26, 2001 that she could not attend due to family and work obligations; and

Whereas, the Commission voted on July 12, 2001 to recommend suspension of the above-named Board member, and that she be removed from office if she fails to so attend a required training program by the end of October 2001 and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated July 12, 2001, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal if she does not attend a training session by October 2001; and

Whereas, no response was forthcoming; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing date of this decision, and shall remain suspended pending completion of the requisite training, and, in the event the Board member fails to complete the required training by October 23, 2001, the above-named Board member is hereby summarily removed from office effective October 24, 2001.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/6/01

Date of Mailing: 9/12/01

*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.

298-01

298-01SEC

IN THE MATTER OF STEVEN YOUNG,	:	
BOARD OF EDUCATION OF THE TOWN	:	COMMISSIONER OF EDUCATION
OF MONTCLAIR, ESSEX COUNTY.	:	DECISION
	:	

September 6, 2001

AGENCY DKT. NO. 255-7/01

IN THE MATTER OF STEVEN YOUNG,	:	
BOARD OF EDUCATION OF THE TOWN	:	COMMISSIONER OF EDUCATION
OF MONTCLAIR, ESSEX COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission (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:28-6; and

Whereas the Commission sent ample 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 April 9, 2001, 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 did not reply in writing, but informed the Commission that he planned to attend the September 2001 training session; and

Whereas, the Commission voted on July 11, 2001 to recommend suspension of the above-named Board member, and that he be removed from office if he fails to so attend a required training program by the end of October 2001 and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

SCHOOL ETHICS COMMISSION	:	BEFORE THE SCHOOL ETHICS COMMISSION
v.	:	
	:	RESOLUTION
STEPHEN YOUNG,	:	
Montclair Board of Education	:	**SEC Docket No.: T12-01**
Essex 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, Stephen Young was elected to serve a three-year term on the Montclair Board of Education in April 2000; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on December 1, 2000 and February 13, 2001; and

WHEREAS, the NJSBA conducted seven training sessions between April 2000 and April 2001 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held in March 2000; and

WHEREAS, the Commission issued an Order on April 9, 2001, directing him to Show Cause why he had not attended training up until that time; and

WHEREAS, he never replied in writing, but responded by telephone that he planned to attend the September 2001 session; and

WHEREAS, the Commission granted an extension for all similarly situated board members to attend one of the June sessions; and

WHEREAS, the Commission notified him that the Commission would discuss this matter at its June 26, 2001 meeting, that he had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission was not provided a reason for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2000 to April 2001 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that if Mr. Young fails to attend by October, the Commission finds that it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Young violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend him until he attends training, but remove him from the board if he fails to attend the October training session.

Dated: July 11, 2001

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 River View 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 June 26, 2001.

Lisa James-Beavers

Lisa James-Beavers, Executive Director

Whereas, by letter dated July 12, 2001, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal if he does not attend a training session by October 2001; and

Whereas, no response was forthcoming; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing date of this decision, and shall remain suspended pending completion of the requisite training, and, in the event the Board member fails to complete the required training by October 23, 2001, the above-named Board member is hereby summarily removed from office effective October 24, 2001.*

COMMISSIONER OF EDUCATION

Date of Decision: 9|6|01

Date of Mailing: 8|18|01

*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.

298-01

298-01+ SEC (AMENDED DECISION)

IN THE MATTER OF STEVEN YOUNG,	:	
BOARD OF EDUCATION OF THE TOWN	:	COMMISSIONER OF EDUCATION
OF MONTCLAIR, ESSEX COUNTY.	:	DECISION
_____	:	

September 21, 2001

AGENCY DKT. NO. 255-7/01

IN THE MATTER OF STEVEN YOUNG,	:	
BOARD OF EDUCATION OF THE TOWN	:	COMMISSIONER OF EDUCATION
OF MONTCLAIR, ESSEX COUNTY.	:	DECISION
	:	

On September 6, 2001, the Commissioner of Education (Commissioner) rendered a decision concurring with the recommendation of the School Ethics Commission (Commission) that the above-named Board member be suspended from office, effective upon filing of the Commissioner's decision, for failure to attend the Board member training sessions required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-6. Such suspension was to have remained in effect until training was completed, with summary removal to result, effective October 24, 2001, in the event the Board member failed to complete the required training by October 23, 2001.

However, by way of letter dated September 21, 2001, the above-named Board member informed the Commissioner that, in response to the Commission's recommendation, and without knowledge of the Commissioner's decision of September 6, 2001, which he had not yet received, he had arranged for, and fully intended to complete, the training session to be held on September 13-14, so as to eliminate any need for suspension. The Board member further advised the Commissioner that the offices of his employer, JP Morgan Chase, are located within 100 yards of the World Trade Center, and that, on September 11, 2001, as a senior executive of the firm, he was called upon in the wake of the tragedy that occurred that day to assist in both evacuation and subsequent disaster recovery efforts. In choosing to meet that obligation, and

unaware of the Commissioner's September 6, 2001 decision, the Board member did not attend the September 13-14 training as planned, opting instead to re-register for the next offered session in October. Upon his subsequent receipt of the Commissioner's decision suspending him from office pending completion of training, the Board member immediately contacted the Department to explain what had transpired, and it was confirmed that neither he nor his Board of Education could have received the Commissioner's decision prior to the occurrence of these events.

Accordingly, in light of the information today provided to the Commissioner, the Assistant Commissioner, to whom this matter has been delegated for determination in the absence of the Commissioner pursuant to N.J.S.A. 18A:4-34, hereby VACATES the Commissioner's decision of September 6, 2001 to the extent that it imposed a suspension of the above-named Board member pending completion of his requisite training, or through October 23, 2001, whichever came first. Instead, the Assistant Commissioner ORDERS that NO SUSPENSION OF THE BOARD MEMBER IS WARRANTED OR IMPOSED pending completion of the stated training, provided that this occurs on or before October 23, 2001. However, as before, in the event the Board member fails to complete the required training by October 23, 2001, the above-named Board member is hereby summarily removed from office effective October 24, 2001.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: September 21, 2001

Date of Mailing: September 21, 2001 (via fax)

299-00

299-01SEC

IN THE MATTER OF KARLHEINZ HAAS,	:	
RED BANK BOROUGH BOARD	:	COMMISSIONER OF EDUCATION
OF EDUCATION, MONMOUTH COUNTY.	:	DECISION

September 6, 2001

SCHOOL ETHICS COMMISSION	:	BEFORE THE
	:	SCHOOL ETHICS COMMISSION
v.	:	
	:	RESOLUTION
KARLHEINZ HAAS,	:	
Red Bank Board of Education	:	SEC Docket No.: T21-01
Monmouth 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, Karlheinz Haas was appointed in June 2000 to fill a vacant seat for ten months left on a three-year term and was elected to a three-year term on the Red Bank Board of Education in April 2001; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on December 1, 2000 and February 13, 2001; and

WHEREAS, the NJSBA conducted nine training sessions between June 2000 and June 2001 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held in June 2001; and

WHEREAS, the Commission, having been informed that he was elected in April 2001, issued an Order on April 9, 2001, directing him to Show Cause why he had not attended training up until that time; and

WHEREAS, he replied that he did not attend due to his belief that he would not run for election in April 2001, but that if he did, he would attend in June; however, he now planned to attend the October 2001 session; and

WHEREAS, the Commission granted an extension for all board members elected in April 2001 to attend one of the June sessions; and

WHEREAS, the Commission notified him that the Commission would discuss this matter at its June 26, 2001 meeting, that he had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission has considered the reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from June 2000 to June 2001 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that if Mr. Haas fails to attend by October, the Commission finds that it would be appropriate to have him removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Mr. Haas violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend him until he attends the October training session, but remove him from the board if he fails to attend the October training session.

Dated: July 20, 2001

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 River View 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 June 26, 2001.

Lisa James-Beavers, Executive Director

e/lisa/decisions/T2101.doc

AGENCY DKT. NO. 256-7/01

IN THE MATTER OF KARLHEINZ HAAS,	:	
RED BANK BOROUGH BOARD	:	COMMISSIONER OF EDUCATION
OF EDUCATION, MONMOUTH COUNTY.	:	DECISION

Whereas, the School Ethics Commission (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:28-6; and

Whereas the Commission sent ample 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 April 9, 2001, 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, by letter dated April 14, 2001, that he did not attend any of the scheduled trainings because he believed that he was not required to do so, inasmuch as he was appointed to the Board in June 2000 to fill a vacant seat and did not initially intend to run for reelection in April 2001, but that having determined to run, he would comply with training requirements if re-elected; and

Whereas the above-named Board member further informed the Commission by letter dated June 22, 2001 that he planned to attend the October 2001 training session; and

Whereas, the Commission voted on July 20, 2001 to recommend suspension of the above-named Board member, and that he be removed from office if he fails to so attend a required training program by the end of October 2001 and memorialized such decision through a

resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated July 20, 2001, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal if he does not attend a training session by October 2001; and

Whereas, the above-named Board member submitted comment to the Commissioner by letter dated July 26, 2001, indicating that he was registered to attend the September 14-16, 2001 training session and further attached a copy of the Board's purchase order indicating payment of the registration fee for that session; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing date of this decision, and shall remain suspended pending completion of the requisite training, and, in the event the Board member fails to complete the required training by October 23, 2001, the above-named Board member is hereby summarily removed from office effective October 24, 2001.*

COMMISSIONER OF EDUCATION

Date of Decision: 9|6|01

Date of Mailing: 9|18|01

*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.

IN THE MATTER OF ROBERT WILSON,	:	
BRANCHVILLE BOROUGH BOARD	:	COMMISSIONER OF EDUCATION
OF EDUCATION, SUSSEX COUNTY.	:	DECISION
	:	

September 6, 2001

AGENCY DKT. NO. 257-7/01

IN THE MATTER OF ROBERT WILSON,	:	
BRANCHVILLE BOROUGH BOARD	:	COMMISSIONER OF EDUCATION
OF EDUCATION, SUSSEX COUNTY.	:	DECISION
	:	

Whereas, the School Ethics Commission (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:28-6; and

Whereas the Commission sent ample 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 April 9, 2001, 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 by letter dated April 19, 2001 that he was unaware of the training requirement, but that he planned to attend as soon as he was provided the specifics regarding registration; and

Whereas, the Commission voted on July 12, 2001 to recommend suspension of the above-named Board member, and that he be removed from office if he fails to so attend a required training program by the end of October 2001, and memorialized such decision through a resolution forwarded to the Commissioner of Education, pursuant to *N.J.S.A.* 18A:12-29; and

Whereas, by letter dated July 12, 2001, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to said resolution recommending removal if he does not attend a training session by October 2001; and

Whereas, no response was forthcoming; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the Commission and concurs with and adopts as his own the recommendations of the Commission; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing date of this decision, and shall remain suspended pending completion of the requisite training, and, in the event the Board member fails to complete the required training by October 23, 2001, the above-named Board member is hereby summarily removed from office effective October 24, 2001.*

COMMISSIONER OF EDUCATION

Date of Decision: 9|6|01

Date of Mailing: 9|18|01

*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.

303-01

GERALD W. KOHN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the Board's termination of his employment as superintendent of schools and placement of him in the position of director for special projects with a reduction in salary, pursuant to his contract with the Board, asserting that the contractual provision and the Board's actions were contrary to statute and decisional law. The Board denied the charges and contended that petitioner was contractually bound to accept the termination and placement in a different position.

The ALJ determined that respondent must reinstate petitioner to the position of superintendent and provide him his full salary and emoluments, concluding that *N.J.S.A.* 18A:17-15 precluded the Board from reducing the contract term from five years to three years, and from reducing his compensation and benefits. The ALJ also rejected respondent's assertion that principles of waiver and equitable estoppel precluded petitioner from seeking reinstatement to the position of superintendent.

The Commissioner affirmed the decision of the ALJ. While agreeing with the Board that the legislative history relied upon by the ALJ pertained to a section of the law that was never adopted by the Legislature, the Commissioner concluded that the plain language of the applicable statute and relevant decisional law compelled a determination that petitioner is entitled to the position of superintendent for the full five-year term of the contract, unless he is dismissed pursuant to statute. The Commissioner also determined that the contract at issue is for a term of five years, not a contract for a minimum of three years as argued by respondent, and that petitioner is entitled to his full salary and benefits and is not required to mitigate his damages.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 8705-00

AGENCY REF. NO. 339-10/00

GERALD W. KOHN,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,

Respondent.

Maria M. Lepore, Esq., for petitioner

Louis J. Greco, Esq., for respondent

Record Closed: June 18, 2001 Decided: July 26, 2001

BEFORE **LILLARD E. LAW,** ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Gerald W. Kohn, asserts that the action by the Board of Education of the City of Vineland (Board) to terminate his employment as Superintendent of Schools on September 6,

2000 and placing him in the position of Director for Special Projects with a reduction in salary is illegal and void pursuant to *N.J.S.A.* 18A:17-20(b) and *N.J.S.A.* 18A:17-20.2.

The Board denies petitioner's allegations and contends that petitioner entered into a negotiated contract which provided, among other things, the Board's right to unilaterally terminate petitioner's employment as Superintendent with a reduction in salary and his appointment to the position of Director of Special Projects. (Certification of Robert A. DeSanto, Esquire, Exhibit O).

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 prehearing conference was conducted on March 26, 2001, where, among other things, the issues to be resolved by this administrative tribunal were agreed upon and set forth in a Prehearing Order dated March 28, 2001. The Prehearing Order also shows that the Board had filed its Notice of Motion for Summary Decision with its Brief, in accordance with *N.J.A.C.* 1:1-12.5. Petitioner was granted leave to file his cross-motion for Summary Decision. The last submission was received by this tribunal on June 18, 2001.

THE POSITION OF THE PARTIES

The Board's Position

These proceedings were commenced on or about October 4, 2000, by the filing of a Petition of Declaratory Ruling with the Commissioner of Education (Commissioner). A response was filed and, after review of the pleadings, the Commissioner declined to grant interim or emergent relief and transmitted the case to the Office of Administrative Law (OAL) as a contested case.

Petitioner seeks, inter alia, to have selected portions of his Superintendent's employment contract with respondent declared illegal and void. He also asks that respondent's actions taken in accordance with the express provisions of the contract be declared illegal and void, and that he be returned to active duty in the position of Superintendent for respondent school district.

Respondent seeks enforcement of the plain language of the contract, as written.

Statement of Facts

A comprehensive statement of the facts of the case, together with relevant exhibits, has been filed herewith in the form of a Certification of Robert A. DeSanto, Esquire. Mr. DeSanto is the regularly retained Solicitor to the respondent and has been for some time last past. He has intimate knowledge of the contract negotiations between petitioner and respondent.

A summary statement of facts, as explained in specific detail in the DeSanto Certification, indicates that petitioner and respondent commenced negotiations in or about April of 1997 with the goal of having petitioner become Superintendent of Schools of the City of Vineland School District. These negotiations culminated in the signing of an employment contract between the parties, which is dated July 1, 1997, and a copy of which is attached to the DeSanto Certification as Exhibit O.

Extensive negotiations took place between the parties prior to signing the final contract terms and conditions. The negotiations included meetings, telephone conferences, exchanges of contract drafts, exchanges of marked up and re-written contract clauses, offers, counter-offers, debate and discussion of perceived legal and contract issues, as well an array of additional negotiation activities between the parties. Each party was represented by legal counsel during the negotiation period. The details of the negotiation process are recounted in the DeSanto Certification and Exhibits and such detail will not be repeated in this summary statement of facts.

It became clear to the parties at the outset of these negotiations that there was a seemingly insurmountable obstacle between them. At the outset, it was made clear that petitioner would accept no less than a five-year employment contract, while respondent indicated that it would offer not more than a three-year term. In ostensible good faith each of the parties continued in the negotiations in an effort to reach resolution of this and other significant issues.

Eventually, agreement was reached on the proposition that petitioner would receive a contract by which he would be employed under tenure like circumstances for a three-year term. The contract provides for two or more years of employment, however, the contract language also gave respondent the right to change petitioner's employment position during these final two years, to reduce his compensation to a sum specified in the contract, and to place petitioner on a paid leave for any remaining time left in this two year period. The contract does not require any mitigation by petitioner against the reduced salary to be paid during the leave of absence. (DeSanto Certification, Exhibit 0, page 10, paragraph (d)).

Petitioner commenced duties pursuant to the contract on or about July 1, 1997. He served in the position of Superintendent of Schools for the three years required. Thereafter, on or about September 6, 2000, respondent voted to exercise it's right under the contract to change petitioner's position, reduce his compensation, and place him on leave of absence.

After being placed on leave, petitioner filed the legal proceedings now before the court and apparently takes the position that the contract language in question is "illegal and void" when measured against prior case decisions rendered by the Commissioner of Education (Commissioner), and that because of such perceived "illegality" petitioner is relieved of any obligation to honor the contract clause in question.

To be sure, the parties included specific discussion of this clause and its legal implications in the negotiations process, as explained in the DeSanto Certification. The clause was negotiated at arms length with each party represented by competent legal counsel. The contract was signed by each party. The question now before the Court is whether the clause can be enforced as written.

Discussion of Prior Case Law

Two prior Commissioner decisions of some import were specifically noted and discussed during the parties' contract negotiations. As is obvious from the contract language, from various items of correspondence, and from the respondent's appointing resolution, these decisions were

considered by both parties prior to contract signing. Does the contract accommodate the rulings of these decisions? That is the legal question now to be answered.

Each decision will be discussed in some detail as a prelude to specific school law and contract law issues to be set forth herein.

Robert M. Harrington v. Board of Education of the Township of Clinton, Hunterdon County, EDU 10750, Agency 342-9/93, decided February 16, 1995.

The Clinton Board of Education hired Harrington as its Superintendent of Schools. A dispute arose, and the Board voted to terminate Harrington's contract and to pay the remainder of salary otherwise due under the contract. Harrington filed an administrative petition for relief claiming that a Superintendent's contract can be terminated by a board of education only by way of filing tenure termination charges. The ALJ granted the Board's motion for summary decision, finding that the filing of tenure charges in not the only vehicle by which a board of education had choices to either allow the superintendent to remain on duty, file tenure charges, or to relieve the superintendent of his contract obligations. The ALJ specifically noted ". . .The statute does not say that buy-outs (consensual) or pay-outs (at the option of the board) are impermissible. It is silent on this issue . . . ."

The Commissioner held in his Final Agency Decision that the ALJ erred in the finding that the governing statutory scheme would permit a unilateral summary contract termination by a board of education. The Commissioner concluded that the statutory scheme enacted by the Legislature has elements of both contract and tenure protection for a Superintendent of Schools. He also noted the ALJ to be correct in finding that the employing board does have the options to allow the Superintendent remain on duty, to file tenure charges, or to relieve the Superintendent of duties, going to say, however, that this last option does not include a statutory right to unilaterally relieve the superintendent from duty and pay the remaining salary due under the contract. The Commissioner, specifically, based this conclusion on the notion that permitting unilateral contract termination by the board would negate the tenure attributes of the controlling legislation. However, of paramount importance to the case now before the court, the Commissioner stated the following:

> The Commissioner further notes petitioner's effective acquiescence to the Board's position by his acceptance of contractual terms that clearly contemplate, notwithstanding his protestations to the contrary in these proceedings, unilateral termination. Therefore, to the extent that petitioner may have been entitled to any relief beyond a finding that the Board should have retained him in its employ while relieving him of his duties rather than terminating his employment outright, the Commissioner declines to so order.

Thomas G. Dunn, Jr. v. Elizabeth Board of Education, EDU 7090-94, Agency 269-7/94, decided December 6, 1995.

In 1991 the Elizabeth Board of Education hired Dunn to serve as Superintendent of Schools for five years. On June 24, 1994 the Board voted not to renew Dunn's contract, terminated his services as superintendent, and directed him to perform duties as assistant superintendent with no salary reduction. The ALJ found that all other contracts benefits were retained thus permitting the unilateral reassignment of duties by the employing Board. The ALJ specifically noted that the employment contract ". . . contained no termination provision . . . ."

The Commissioner, however, noted in his review that, while the Board is free to unilaterally relieve Dunn of his duties for the remainder of the contract, the Board was not free to assign him the duties of assistant superintendent. However, in applying his interpretation of the hybrid contract-tenure rules for the position of superintendent of schools, the Commissioner noted the following critical analysis:

> It is axiomatic that, when entering into an employment contract with a superintendent, a board must expect to make a commitment to live and work with him or her during the term of the contract, and if the board in that time becomes dissatisfied, it cannot merely dismiss the superintendent, impose a *unilateral* 'buyout' or effectuate what amounts to an *involuntary* transfer to another position in the district. Rather, the board must conclude that the prospect of continuing the working relationship, for a period which by law cannot be more than 5 years and in reality is likely to be considerably less, is so untenable that, *in the absence of a mutual*

separation agreement, it warrants the serious step of either filing tenure charges or relieving the superintendent of the performance of his or her duties . . . ." (emphasis added)

Points of Legal Argument

1. Does the negotiated termination language contained in petitioner's employment contract satisfy the "mutual separation agreement" requirement of the *Harrington* and *Dunn* decisions?

We must now apply the applicable law to the facts before the court. As previously stated, the *Harrington* and *Dunn* decisions were specifically contemplated by the parties during their negotiations. This is obviously important on the issue of interpreting and applying these decisions, as well as on the issues of equitable estoppel and waiver, as will be discussed under other points of argument.

Simply stated, does the course of dealing between the parties, as ultimately expressed in the contract termination clause, constitute a mutually negotiated separation agreement such that the Commissioner's case decision requirements are satisfied? We think it does.

The Commissioner has noted the statutory scheme and has specifically held that it was intended by the legislature to contain some elements of tenure so as to lend stability to both the operation of the schools as well as to give superintendents a "reasonable degree of security." Of imports here is that the contract clause at issue does not offend either the stability or security contemplated by the legislature in enacting this law. To be sure, by any interpretation of the contract, the three-year minimum "tenure" term requirement of the statute has been satisfied and, ipso facto, the entire intent of the legislative scheme has been satisfied. Remember that the minimum three-year versus maximum five-year contract term was the specific basis for the negotiation of the clause in question between the parties. Since the contract provides for the minimum statutory requirement to be met, there can be no legal argument that the tenure aspect of the law has been violated.

Indeed, the Commissioner's requirement that termination of the superintendent's duties requires a "mutual separation agreement" is more than met in the contract language at hand. It cannot otherwise be argued in good faith in these proceedings. Even a cursory review of the arduous negotiations between the parties as explained in great detail in the DeSanto Certification can lead to no other conclusion than that the clause is one of mutuality between the parties. We contend that in the context of this case, the negotiated clause should be upheld and enforced since it satisfies the Commissioner's requirement of a mutual separation agreement. To reach any other conclusion would read too much into the tenure aspect of the governing law. It is merely prudent business, for both a superintendent and a school board, to negotiate the separation aspects of the employment contract "up front" rather than later, so long as the minimum statutory requirements have been met, which they have in this case. To hold otherwise would not only render these good faith and arms length negotiations to be meaningless, but would also lead to unnecessary controversy.

It seems now that petitioner is arguing that a superintendent of schools is entitled under the statute to insist on a five-year term. This is simply not the case. The statute requires the three-year minimum, which was given, but does not preclude the advance mutual termination language under review. This clause is no different in its purpose than any liquidated damages or early termination provision in any contract. The purpose and intent of such contract language is to avoid controversy, avoid litigation, fix the position of the parties in advance, and give clear notice of all possible outcomes to the contracting parties. Simply stated, the statute's plain language, as well as the interpreting case law to the date, presents no impediment to this contract language or its enforcement.

The respondent negotiated these terms and conditions in complete good faith and assumed the petitioner did likewise. The language under review also presents clear and reasonable interpretation of the case decisions to date. If the court finds a different result, equity would dictate that the clause nonetheless be enforced as between the present litigants.

2. Does the Doctrine of Equitable Estoppel and Waiver Bar Recovery by Petitioner?

For reasons stated in Point 1, *supra*, we contend that the termination language should be enforced as written as a simple matter of enforcing clear and unambiguous contract language. Petitioner contends that the language is "illegal" or somehow unenforceable. We disagree and contend relief should be granted to respondent based simply and solely on principles of contract law. Even if the court were to find, however, that the clause in question somehow violates a clear mandate of governing law, we nonetheless contend relief should be granted to respondent under the doctrine of waiver and equitable estoppel.

The written and signed contract between the parties present an exchange of express promises. It is the essential nature of a contract that it is a mutual promise. Since the three versus five year term of the contract was one of the central negotiations points, going through debate and revision, it can hardly be argued that the respondent did not rely on this aspect of petitioner's promise. Respondent obviously relied on the promise of petitioner to adhere to the contract, including the termination language under review. An outcome of respondent's direct reliance on this promise resulted in it's hiring of petitioner and approval and execution of the contract. Under these circumstances, is it now equitable to permit petitioner to repudiate this language as "illegal" and ask the court to give him more than he bargained for? We think not.

Waiver, or equitable estoppel as it sometimes described, is a legal doctrine applicable to the dealings between these parties. It is the relinquishment of a known and existing right. *13 Wililston on Contracts* 39:14; *Playmates Toys, Inc. v. Director, Division of Taxation,* 316 *N.J. Super.* 509 (*A.D.* 1998), *affirmed,* 162 *N.J.* 186 (1999). Waiver presupposes full knowledge of the right and an intentional surrender. *County of Morris v. Fauver,* 153 *N.J.* 80 (1998); *West Jersey Title and Guaranty Co. v. Industrial Trust Co.* 27 *N.J.* 144.

In the matter of *Belfer v. Merling,* 322 *N.J. Super.* 124 (*A.D.* 1999) the court described elements of the doctrine as follows:

> Waiver is the intentional relinquishment of a known right. It implies an election by a party to forego some advantage, which he might have otherwise demanded. It 'presupposes full knowledge of the right and an intentional surrender,' and it 'cannot be predicated on consent given under a mistake of fact' . . . . (citations omitted)

It is beyond dispute that petitioner was clearly and fully aware of his rights, real or imagined, at the time of the contract negotiation. Again, the three versus five year term was a central point of negotiations, and the specific clause under review was exchanged, debated, and revised numerous times in the dialogue between the parties. Armed with such knowledge of his perceived "rights," and proceeding to knowingly sign them away, is it equitable to now permit petitioner to repudiate? No. He is barred by the equitable principles of waiver and estoppel.

Certainly we expect petitioner to answer this argument with citations to prior case law standing for the principle that statutory tenure rights cannot be signed away or waived. Reliance on this principle will be misplaced. No superintendent has a statutory right to a five year contract term with tenure-like protection. The statute provides for a minimum term of three years and petitioner's argument would prevail only for a termination during this portion of the contract. Once we get past the three year minimum, both enforceable contract law principles as well as applicable equitable principles take over. The clause as written is enforceable. Tenure-like principles do not permit the repudiation sought by petitioner. At the time of the contract negotiation, petitioner was not in a legal position to demand a five year term as a matter of statutory right. Knowing that, he negotiated and signed the termination clause under review. He should be held to his promise.

3. Conclusion

The contract language signed by the parties is enforceable as a matter of basic contract law. It was negotiated at arms length, with assistance of counsel, does not include a waiver of a non-waivable statutory right, and was crafted based on a fully reasonable interpretation of the applicable statutory and interpreting case law in effect at the time. In addition, independent of respondent's right to a contract law remedy, principles of waiver and estoppel bar petitioner's requested relief.

Petitioner's Position

Preliminary Statement

The case before the court is a simple one which requires the resolution of one issue: is a provision in the superintendent's contract, which unilaterally permits the board to reduce his compensation, while he holds tenure during the term of his contract, illegal? In this case, the Vineland Board of Education (Board) transferred Dr. Kohn in the position of Director for Special Projects, placed him on leave from the district, and reduced his compensation during the term of his contract. Petitioner concedes that, of those actions, the only one, which is legal, is the Board's placing Dr. Kohn on leave.

In support of its conduct, the Board relies in large part on the Certification of Robert DeSanto, Esquire, and Solicitor for respondent. Mr. DeSanto's extensive Certification is submitted as virtually the only authority as to why the Board took its illegal action. Mr. DeSanto states in his Certification that he is "objectively and accurately setting forth the factual background of this dispute without any intension [sic] to advocate any position other than the truth." Petitioner contests this position. Mr. DeSanto does in fact, represent the respondent as its solicitor. By Mr. DeSanto's own admission, it was he who advised the Board as to how to unilaterally "buy-out" Dr. Kohn. It is disingenuous for Mr. DeSanto to suggest, in the interest of truth and objectivity that he also represented Dr. Kohn, when in fact, he was advising the Board as to how to take adverse employment action against him.

Additionally, to the extent Mr. DeSanto mischaracterizes the proposed contract as containing "terms and conditions beyond the typical language involving duties, compensation, and the usual public employment benefits package," that statement represents the opinion of Mr. DeSanto that is intended to prejudice the court. Petitioner disputes that mischaracterization. In fact, the initial proposal was based nearly verbatim, on the Model Contract for Chief School Administrators published by the New Jersey Association of School Administrators. That form is used extensively throughout the State by a large number of superintendents in New Jersey.

Additionally, Mr. DeSanto's opinion as to Dr. Kohn's financial demands is irrelevant to the present matter.

Moreover, throughout his lengthy Certification, Mr. DeSanto sets forth his version of the facts as they related to the extensive and prolonged negotiations between the parties prior to Dr. Kohn being appointed as superintendent. The factual information, as corroborated by the writings between the parties will not be disputed by the petitioner. However, these facts are largely irrelevant, and may not be considered by the court since the contract contains an integration clause. *See,* Legal Argument, Point II, *infra.* Nevertheless, petitioner submits to the court that, to the extent that Mr. DeSanto indicates or suggests that petitioner's counsel somehow assented to the contract, his comments are misleading. In fact, petitioner's counsel merely acted as a negotiator and drafted the contract in accordance with the negotiations as they proceeded. Petitioner's counsel is not a party to that contract. To the extent Mr. DeSanto attributes much of the assent or disagreement to the various proposals to petitioner's counsel, those characterizations are misleading and irrelevant, and should be disregarded by the court.

In addition, Mr. DeSanto attempts to portray petitioner and his counsel as devious, intimating that petitioner lured him and his client into agreeing to a contract petitioner intended to use against respondent. This is vigorously denied and disputed by petitioner. By Mr. DeSanto's own admissions contained throughout his Certification, it was, in fact, petitioner who brought the relevant cases to Mr. DeSanto's attention. Mr. DeSanto admits that counsel for the petitioner went so far as to fax the relevant cases to him, since he had never read them. At all times through the negotiations, it was Mr. DeSanto (and not petitioner or his counsel) who was responsible for advising respondent as to the legality of its actions.

Petitioner clearly informed Mr. DeSanto that the termination provision respondent insisted upon was illegal; Mr. DeSanto's own Certification confirms this. In fact, Mr. DeSanto acknowledges that he drafted the Resolution appointing Dr. Kohn which "acknowledges that the enforcement of buyout provisions under applicable statutory and decisional law has not yet been settled." DeSanto Certification at 11. It is troubling that Mr. DeSanto would claim that he was never told about the illegality of that provision, when the Board's Resolution, which he admittedly authored, acknowledges it.

Finally, respondent, through Mr. DeSanto's Certification, seeks to submit Mr. DeSanto's incorrect interpretation of the relevant laws as binding authority to uphold respondent's action. As the court is aware, the Board Solicitor's interpretation of relevant case law, whether it is correct or incorrect, cannot be binding legal authority on which respondent can base its defense.

Nevertheless, as will be discussed in the Legal Argument *infra,* the negotiations between the parties, as set forth in Mr. DeSanto's Certification, may not be considered in rendering a decision in this matter.

Jurisdictional Statement

This case was brought before the Commissioner, pursuant to *N.J.S.A.* 18A:17-15, *et seq.* which is the statutory scheme under which superintendents of schools are appointed to their positions in New Jersey. Under *N.J.S.A.* 18A:17-15, a superintendent of schools may be appointed for a term of "not less than three nor more than five years and expiring July 1 . . . ." Under *N.J.S.A.* 18A:17-20(b) and –20.2, a superintendent is tenured during the term of his contract and cannot be reduced in compensation except by bringing successful tenure charges, pursuant *N.J.S.A.* 18A:6-10 *et seq.* Pursuant to *N.J.S.A.* 18A:6-9, the Commissioner shall have jurisdiction to determine all disputes arising under the school laws. The issue before the court is whether Dr. Kohn's tenure rights were violated when the Board unilaterally reduced him in compensation, and placed him in another position, and whether the provision in his contract of employment which permits this action, is illegal under the tenure laws.

Statement of Facts

With the caveats set forth above, the relevant facts relative to the issue before the court are acknowledged in the Certification of Robert DeSanto, Esquire and set forth in respondent's Exhibit O. The only relevant facts are that the petitioner and respondent entered into a Employment Contract effective July 1, 1997. The contract is for a five year term beginning July 1, 1997 and ending June 30, 2002. Dr. Kohn and the Board are at the end of the fourth year of that contract as of the date of this brief. That contract was approved by respondent at its meeting

of April 24, 1997. A copy of that contract is set forth at respondent's Exhibit O. That contract was signed by Dr. Gerald W. Kohn and Joaquin Martinez, President of the Vineland Board of Education.

The contract states, in pertinent part:

> **(d) TERM**
>
> The board, in consideration of the promises herein of the Superintendent, hereby employs, and the Superintendent hereby accepts employment as Superintendent of Schools for a term commencing July 1, 1997 and expiring midnight June 30, 2002.
>
> * * * *
>
> **(e) TERMINATION**
>
> (d) During the 2000-01 and the 2001-02 school years, the Board may unilaterally elect to terminate Dr. Kohn's employment as Superintendent by a minimum of six affirmative votes of the Board. Should the Board do so, Dr. Kohn will be paid thirty-three and one-third percent (33?%) of the salary indicated in this contract for those years plus full health benefits, and he shall thus be appointed until July 1, 2002 to the position of Director for Special Projects. He shall be granted a paid leave of absence for the remainder of this contract.
>
> **(d) COMPLETE AGREEMENT**
>
> This Employment Contract embodies the entire agreement between the parties hereto and cannot be verified except by written agreement of the undersigned parties.
>
> * * *
>
> **(d) SAVINGS CLAUSE**
>
> If, during the term of this Employment Contract, it is found that specific clause of the contract is illegal in Federal or State law, the reminder of this Employment Contract not affected by such a ruling shall remain in force.

Respondent's Exhibit O-11.

On September 6, 2000, at a public meeting, respondent voted to "terminate" Dr. Kohn's employment. That resolution is not contained in the exhibits provided to petitioner by respondent. At that time, Dr. Kohn was placed in the position of Director of Special Projects, and was placed on a leave of absence. Since September 6, 2001, respondent has only paid Dr. Kohn one-third of his salary and provided his health benefits. Respondent has failed and refused to provide Dr. Kohn with any other benefits or emoluments, as expressly set forth in the contract since that date. The benefits which respondent has failed to pay are set forth in the Certification of Dr. Gerald Kohn, which is attached hereto. The Petition for Declaratory Action, which was transmitted to the Court, followed.

Legal Argument

Point I

Under *N.J.S.A.* 18A:17-20(b) and –20.2, a Superintendent of Schools In New Jersey is Tenured During the Term of his Contract and cannot Be reduced in Compensation Except upon a Finding by the Commissioner Of Education of Inefficiency, Incapacity or Other Just Cause

---

The Commissioner has held that, the Legislature has created a scheme by which superintendents enjoy the protection of tenure for the term of their contracts. The Commissioner recognized that, "the Legislature was equally mindful of the need to ensure a reasonable degree of security for superintendents, so that their employment status and professional integrity would not be subject to the whims of ever-changing boards which could summarily dismiss them for any reason." *Harrington v. Board of Educ. of Clinton Twp.*, 95 *N.J.A.R.* 2*d.* (EDU) 535, 540.

The statutes provide tenure to superintendents during the term of their contract, which shall be not less than three nor more than five years. This mandatory statute is set forth at *N.J.S.A.* 18A:17-15 *et seq.* *N.J.S.A.* 18A:17-20(b) states, in pertinent part:

> Any superintendent of schools who has not acquired tenure in the position of superintendent as of the effective date of . . . [*N.J.S.A.* 18A:17-20.2; August 24, 1991] but who holds tenure during the term of his employment contract pursuant to . . . (18A:17-20.2), shall be the chief executive and administrative officer of the boards of education employing him . . .

Moreover, *N.J.S.A.* 18A:17-20.2 provides:

> **Dismissal; reduction in compensation.** During the term of any employment contract with the board, a superintendent **shall not be dismissed or reduced in compensation** except for inefficiency, incapacity, or conduct unbecoming, or other just cause and then only in the manner prescribed by subarticle B or article 2 of chapter 6 of Title 18A of the New Jersey Statutes (18A:6-10, *et seq.*) (emphasis added)

The State Board of Education has also expressly stated "that a superintendent would hold tenure during the term of the contract **and could not be dismissed or reduced in compensation during the contract period except for inefficiency, incapacity, unbecoming conduct or other just cause.**" *West Village Civic Club, Inc. et als, v. Board of Education of the Township of Manchester, et al. State Board* #5-95, *slip op.* at 9 (June 5, 1996) (unreported decision) (citations omitted) (emphasis added). There is nothing, anywhere in this mandatory statute that provides that a board may dismiss or reduce its superintendent in compensation if his contract contains language saying the board may take that action. It is submitted by respondent in its motion for summary decision that the board dismissed the superintendent and did reduce him in compensation without bringing up tenure charges pursuant to *N.J.S.A.* 18A:6-10, *et seq.*

Throughout respondent's arguments, which are largely based upon common law and equity, respondent has ignored this critical point: as a superintendent of schools in New Jersey, Dr. Gerald Kohn is tenured for the term of his contract. Dr. Kohn's contractual term is **five years** and does not expire until June 30, 2002. Tenure protection is created by statute, and is **mandatory**. *Spiewak v. Board of Educ. of Rutherford,* 90 *N.J.* 63, 77 (1982) (emphasis added); *In the application of the Board of Education of the West Morris Regional High School District,* 1981 *S.L.D.* 723. As a result, all of respondent's common law contract and equity arguments do not apply. *Spiewak,* at 76.

A. An Employee with Tenure Cannot be Reduced In Compensation Except by an Order of the Commissioner of Education

Tenure protects an employee from dismissal or reduction in compensation without cause and without resort to the procedures set forth in the Tenure Employee Hearing Law, *N.J.S.A.* 18A:6-10 *et seq.* It is well-settled that tenure can **never** be waived by an employee: "[w]hether certain teachers are entitled to tenure never depends on the contractual agreement between the teachers and the board of education. Tenure is a 'statutory right imposed upon a teacher's contractual employment' . . . it may not be forfeited or waived. . . . ." *Spiewak v. Board of Educ. of Rutherford,* 90 *N.J.* 63, 77 (1982).

Here, respondent removed Dr. Kohn from the position of superintendent, placed him in a lesser position, and reduced his salary and other forms of compensation. No tenure charges were ever brought against him. This action is illegal and must be reversed:

B. Contractual Provisions which Waive Tenure in Advance are Illegal

The New Jersey Supreme Court has stated, unequivocally:

> It is now settled that public employees and employers may not agree to contractual terms that contravene a specific term or condition of employment set by a statute. If the Legislature establishes a specific term or condition of employment that leaves no room for discretionary action then negotiation on that term is fully preempted.

Spiewak v. Board of Educ. of Rutherford, 90 *N.J.* 63, 77 (1982) *citing In re IFPTE Local 95 v. State,* 88 *N.J.* 393, 403 (1982). The Legislature has provided, unequivocally, that a superintendent has tenure during the term of his contract. *N.J.S.A.* 18A:17-20(b) and –20.2. Tenure through the entire term of a superintendent's contract is a statutory right that "may not be forfeited or waived." *Spiewak* at 77. The clear terms of the statute provide that a superintendent may be reduced in compensation during the term of his contract only through the filing of tenure charges. *N.J.S.A.* 18A:17-20.2.

There is nothing that can be cited by respondent, anywhere in New Jersey Law, which provides that tenure may be waived in advance by a contractual provision or what respondent refers to as a "mutual separation agreement." The difference between a contractual waiver of tenure, entered into in advance, and a "mutual separation agreement" entered into in advance, is one of mere semantics for which there is legal authority.

More specifically, Dr. Kohn never submitted a resignation from his position. It is undisputed that the term of Dr. Kohn's Employment Contract is expressly stated to be five years. Thus, Dr. Kohn enjoys tenure protection as superintendent from July 1, 1997 until June 30, 2002.

The law, with respect to the contractual tenure for superintendents, is not new. The Commissioner has already ruled on this issue:

> . . . where the possibility of unilateral termination is expressly contemplated, the Commissioner holds that such provisions cannot take precedence over a statutory requirement for tenured employment. Such precedence would permit terms and conditions of employment to effectively negate a legislative entitlement, a perversion which is not only unacceptable as a matter of law, *Spiewak, supra.* but also inadvisable as a matter of educational policy, largely for the reasons expressed by petitioner.
>
> *Harrington v. Board of Educ. of Clinton Twp.,* 95 *N.J.A.R.* 2*d.* (EDU) 535, 541.

In *Harrington,* the board signed an employment contract with the superintendent, which provided that, in the event the board wished to terminate the superintendent's employment before the expiration of the contract, then the superintendent was required to use due diligence and find other employment. In the event the superintendent did find other employment, the board would be entitled to reduce the amount it paid Harrington by the amount he was receiving in his other employment. Just as it was in the case before the court, this provision was placed in the employment contract *before* the board decided to unilaterally terminate Harrington's employment. The Commissioner found that such a provision is an illegal abrogation of the superintendent's tenure rights and unenforceable. There was no finding that it was permissible to enter into a "mutual separation agreement" in advance. The court should disregard respondent's

argument that the contract before the court represents a mutual separation agreement is without any basis.

In fact, there are many cases decided by the Commissioner on the issue of whether an employee may "waive" tenure rights in a position in advance, either implicitly, or explicitly and knowingly. The reason for such a prohibition is simple – if tenure could be waived by an employee in a contract, boards of education would require all employees to sign contracts waiving tenure rights upon beginning employment (much like respondent attempted to do here). Such an action is an illegal attempt to subvert tenure rights which are granted to employees, including superintendents, by statute.

In *Carney v. Summit Board of Education,* 80 *S.L.D.* 1110, a teacher was found to have earned tenure after she was non-renewed after three years of service, and then rehired one-half year later. Her tenure was earned despite her "understanding" with the district that she was "disinterested" in tenure status and would not try to enforce tenure rights.

In *Yasson v. Weehawken Board of Education,* C.D. #322-89 (December 13, 1989) (unreported decision) the board attempted to settle its dispute with an assistant high school principal through an agreement by which the assistant principal agreed to forfeit tenure rights to the position of assistant principal. The principal signed that agreement to relinquish his tenure rights to the position of principal, knowingly and voluntarily, in an effort to settle a dispute with the board. This agreement was also "mutual" and acceptable to both the employee and the board. Nevertheless, the Commissioner held that such an agreement was invalid holding "tenure cannot be voluntarily relinquished." *Id. slip op.* at 6.

In another case, the Commissioner found that an agreement between a board of education and its principal, by which the principal agreed he would not claim tenure protection if his probationary period was extended, was unenforceable. In *In the Application of the Board of Education of the West Morris Regional High School District,* 1981 *S.L.D.* 723, Ronald Batistoni was not recommended for tenure as principal and was reassigned to the position of vice-principal, a position under which he was tenured. Mr. Batistoni and the board subsequently executed a Stipulation, whereby Mr. Bsatistoni agreed that he would relinquish all tenure rights

to the position of principal if his probationary period were extended. This agreement was entered into mutually by the parties in advance of the time by which Mr. Bastistoni would obtain tenure. The parties subsequently sought a declaratory ruling as to the legality of the agreement.

The Commissioner set aside the ALJ's decision, which approved the agreement between Bastistoni and the Board. In ruling that Bastistoni's agreement to waive tenure would be ineffective, even if made knowingly and willingly *in advance*, the Commissioner stated: "[t]he agreement reached between the board and Bastistoni, its professional employee, is not a valid one and may not be enforced." *Id.* at 734.

In fact, respondent's arguments sounding in breach on contract or equity based on the parties receiving the benefit of the bargain are not new. These same arguments have been made, unsuccessfully, by boards of the education in the past. As set forth throughout this brief, the New Jersey Supreme Court has already ruled that, with respect to tenured employees, such arguments are without any merit. In fact, the Supreme Court has noted that, the purpose of tenure is to prevent "school boards from abusing their superior bargaining power over teachers in contract negotiations." *Spiewak,* 90 *N.J.* 63, 73. The court should note, that superintendents are certified teaching staff members just as teachers, supervisors and principals are. The *Spiewak* case has been cited by the Commissioner and applied to the employment of superintendents. *Harrington,* 95 *N.J.A.R.* 2*d.* (EDU) at 541. Superintendents are subject to the same disadvantage bargaining position as the teachers – in fact more so. Teachers and in most instances, principals, can negotiate collectively with a board of education. There is only one superintendent in each school district and each must negotiate by himself against the school board. Thus, as noted in *Spiewak* and acknowledged by the Commissioner in *Harrington*, the contractual tenure protection afforded to superintendents is even more important.

Moreover, respondent's argument that the contract was legal because it amounted to a "mutual separation agreement" is without any basis. Petitioner never submitted a letter of resignation to respondent. One need only look at the title of the final agreement between parties to see it is a "Employment Contract" not a "Separation Agreement." In every one of the cases quoted above, and in *Harrington,* each board of education illegally attempted to obtain the

employee's waiver of tenure *before* the employee obtained tenure. A mutual separation agreement can never be entered into before an employee even begins employment.

In *Harrington,* the board required the superintendent to sign the contract containing the illegal unilateral termination clause *before* he began employment. There, such a clause was illegal. In fact, respondent cites no cases supporting its position and rests its arguments solely on passing *dicta* in the *Dawn* case. The reason is simple – here are no cases supporting the position that a "mutual separation agreement" can be put in place before the superintendent even begins employment. Here, it cannot be argued that the parties contemplated a separation in July 1997, more than three years before the board's illegal action of September 7, 2000. No separation was imminent. In fact, by the express terms of the contract, Dr. Kohn remained employed in the district after September 7, 2000, and still remains employed by the district. Accordingly, there is no basis by which the court can find, in light of the extensive case law on this point, that a board of education can subvert a superintendent's tenure rights in advance, under the ruse of a mutual separation agreement. Such an argument does in fact, create a fuse that cannot be upheld.

In respondent's brief, it attempts to argue a contrary position, while quoting a discrete portion of *Harrington.* The court should note that language critical to the accurate interpretation of that case has been omitted from the quote. The quote, in its entirety, actually indicated that the Commissioner found that ***the board did violate Harrington's tenure rights.*** However, the issue before him was one of first impression. The Commissioner ultimately ruled that since the Commissioner had never before interpreted the superintendent's tenure statute, he would in that instance, limit the amount of compensation over and above what Harrington would have ordinarily received had he been retained in his position. In short, Harrington was only to receive the compensation set forth in his contract with no damages or interest. The quote in its entirety, actually supports petitioner and not respondent. The Commissioner actually stated:

> ***However, notwithstanding that the Commissioner finds the board in this matter to have acted beyond the scope of its authority in unilaterally terminating petitioner's employment,*** the Commissioner notes that the controlling statute is a relatively new one which has not yet been interpreted by the Commissioner, the State of Board of Education, or the courts so as to have provided guidance to the board. The Commissioner further notes

> petitioner's effective acquiescence to the board's position by his acceptance of the contractual terms that clearly contemplate, notwithstanding his protestations to the contrary in these proceedings, unilateral termination. Therefore, to the extent that petitioner may have been entitled to any relief ***beyond*** a finding that the board should have retained him in his employ while relieving him of his duties rather than terminating his employment outright, the Commissioner declines to so order. *Harrington,* at 541 (emphasis added).

Thus, the Commissioner ***actually*** ruled in *Harrington* that the board violated the superintendent's contractual rights even though the superintendent agreed to a contract which permitted the board's actions. The Commissioner did hold, however, that the superintendent was entitled to be retained in his position, while being relieved of his duties, with the compensation and benefits due to him as superintendent – nothing more.

Harrington is directly on point to the case before the court. In this case, the board reduced the superintendent's salary and placed him in a position of Director for the remainder of the term of his contract. Here, just as it was in *Harrington* such action by the board was illegal. However, here, Dr. Kohn is not asking for any compensation beyond that to which he would have been entitled pursuant to his Employment Contract. Respondent cannot use its solicitor's misinterpretation of clear, unequivocal precedent as a shield to enable it to violate Dr. Kohn's tenure rights. Thus, as in *Harrington,* petitioner asks this court to rule that respondent action is illegal.

It should be noted that, in this case, respondent clearly contemplated that there was a possibility that the termination provision in the contract would be found to be illegal. First, respondent, in its appointing resolution, stated: "The board acknowledges that the enforcement of the buyout provisions under applicable statutory and decisional law has not yet been settled." DeSanto Certification at 11. Second, the parties included a "Savings Clause" in the Employment Contract. That Clause provides:

> **12. Savings Clause**
>
> If, during the term of this Employment Contract, it is found that a specific clause of the contract is illegal in federal or State law, the remainder of this Employment Contract not affected by such a ruling shall remain in force.

Respondent's Exhibit O-11. Under the express terms of the Savings Clause, once the Termination provision is found to be illegal, all other terms and conditions of the employment contract shall remain in full force and effect. As a result, the termination clause is illegal and should be stricken, but Dr. Kohn does maintain a contract for a five year term, with all the benefits and emoluments set forth herein.

Accordingly, petitioner hereby requests this court order that Dr. Kohn be immediately restored to the position of superintendent with the Vineland Board of Education. Moreover, petitioner requests this court order respondent to restore his salary and all benefits retroactive to September 7, 2000.

C. The Commissioner of Education has established that if a Board wishes to Terminate the Services of its Superintendent before the Expiration of His Contractual Term, it May Either Bring Tenure Charges or Relieve Him of His Duties with Full Compensation

In *Dunn v. Elizabeth Bd. of Educ.*, 96 *N.J.A.R.* 2*d.* (EDU) 279, 283, *aff'd* State Board 96 *N.J.A.R.* 2*d.* (EDU) 285, the Commissioner again stated "the statutory scheme governing the appointment of superintendent does not permit unilateral termination of a superintendent's employment, but rather requires either that employment be maintained for the duration of the contract or that tenure charges be brought pursuant to *N.J.S.A.* 18A:6-10 *et seq.*" The Commissioner also specifically stated in *Dunn*:

> . . . when entering into an employment contract with a superintendent, a board must expect to make a commitment to live and work with him or her during the term of the contract, and if the board in that time becomes dissatisfied, it cannot merely dismiss the superintendent, impose a unilateral "buyout" or effectuate what

> amounts to an involuntary transfer to another position in the district . . .

Dunn at 283.

Consistent with this, the Commissioner previously held in *Harrington v. Clinton Twp. Bd. of Educ.* 95 *N.J.A.R.* 2*d.* (EDU) 535:

> In the Commissioner's view, the scheme established by *N.J.S.A.* 18A:17-15 *et seq.* does not permit this result. Rather, the statute provides for a superintendent to be employed through one or more three to five year contracts, with employment following the initial contract to either continue via a succession of subsequent contract(s), or cease upon expiration of the current contract following due notice of non-renewal, or alternatively, upon dismissal through tenure proceedings. *N.J.S.A.* 18A:17-20 through 18A:17-20.2. There is neither mention of, nor place for, unilateral termination in this scheme.
>
> *Id.* at 541.

Again, even if there is a provision in Dr. Kohn's contract that provides to the contrary, respondent has no authority to unilaterally remove Dr. Kohn from the position of superintendent during the term of his contract. As set forth *supra*, longstanding case law has held that, a provision waiving tenure rights in a contract in advance is ineffective. Respondent cannot use it's solicitor's misinterpretation of clear, unequivocal precedent as a shield to enable it to violate Dr. Kohn's tenure rights. Thus respondent's action of removing Dr. Kohn from the position of superintendent, placing him in another position, and reducing his salary are illegal actions. Accordingly, petitioner asks the court to order the board restore Dr. Kohn to his position as superintendent, retroactive to September 7, 2000, together all benefits and emoluments for the entire period of his employment contract.

D. Respondent's Arguments that Tenure can be Subverted Because it is "Prudent Business" are without any Legal Authority or Basis and must be Disregarded

Respondent argues that it is "prudent business" to require a superintendent to waive his tenure rights in advance. Respondent argues "to reach any other conclusion would read too much in to the tenure aspect of the governing law." Respondent's Brief at 11. Moreover, respondent argues that permitting such a provision "is no different in its purpose than a liquidated damages or **early termination** provision in any contract." *Id.* at 12. (emphasis added) What is most interesting about this argument is an acknowledgement by respondent that the contract did in fact contain an early termination provision and not a mutual separation agreement.

Respondent has clearly missed the point. As set forth above, there is extensive statutory and case law that provides tenure to a superintendent of schools. Tenure is "mandatory" and "may not be forfeited or waived." *Spiewak v. Board of Educ. of Rutherford,* 90 *N.J.* 63, 72, 77. Respondent will be able to cite no law which permits a board of education to violate the tenure rights of a superintendent, or any other employee, because it is "prudent business." Moreover, there is no law that will support respondent's argument that a board should be entitled to "any liquidated damages or early termination provision in any contract." The employment of a superintendent is not "any contract." The employment of a superintendent is governed by an extensive, strict statutory scheme, which is supported by ample case law. Respondent may not agree with that law, just as it had misinterpreted the extensive case law on point, but it must obey the law.

Moreover, respondent's argument that, "if the court finds a different result, equity would dictate that the clause nonetheless be enforced . . . ." also must fail. The case before the court is not one of first impression. There is ample authority on point. The Legislative scheme is mandatory, not permissive. Thus, maxims and prayers of equity in fashioning a remedy cannot be applied in this matter.

Accordingly, respondent's attempts to abrogate tenure rights already afforded to its superintendent during the term of his contract must fail.

E. Because Tenure Rights are Mandatory, the Doctrines of Waiver and Estoppel Do Not Apply

Respondent likewise argues that it is entitled to relief under the doctrine of equitable estoppel and waiver. Again, such an argument ignores the extensive legislative scheme that makes tenure rights ***"mandatory."*** *Spiewak*, at 77. The New Jersey Supreme Court has already held, with respect to this issue: "The statute makes tenure a mandatory term and condition of employment. It, therefore, supersedes contractual terms." *Id.* at 77. Specifically, with respect to superintendents and their tenure rights during the term of their contracts, the Commissioner has held that contractual provisions "cannot take precedence over a statutory requirement for tenured employment." *Harrington v. Clinton Twp. Bd. of Educ.*, 95 *N.J.A.R.* 2*d.* (EDU) 535, 541.

The theories espoused by respondent might apply if respondent was a private entity, such as General Motors, which was entering into a contract with its new Chief Operating Officer. However, that is not the case here. Respondent is a public school board of education that is highly regulated, and is permitted to have only the powers and rights dictated to it by statute. A board of education has no right or authority to subvert the tenure of its superintendent. Quite the contrary, it is the superintendent, as well as other teaching staff members, that enjoy the protection of tenure. The protection is ***mandatory***, and cannot be waived.

It should be noted also, that respondent states clearly throughout its brief that respondent dealt at arm's length with Dr. Kohn throughout the contract negotiations. Mr. DeSanto makes it clear in his Certification, that he was providing legal advice and counsel to the board throughout respondent's offer of employment to Dr. Kohn, to its negotiation of the Employment Contract with him, to its illegal action of September 7, 2000. Respondent at all times had access to legal advise relative to tenure rights of Dr. Kohn as well as its other employees.

In fact, Mr. DeSanto acknowledges in his Certification that petitioner, through his counsel, went so far as to provide Mr. DeSanto with the research indicating that such a

contractual provision is illegal. Mr. DeSanto made an interpretation of that law and, by his own admission, provided that interpretation to the Board. Thus, the Board was clearly advised on this issue. However, that interpretation, if wrong, is not binding on the court in this proceeding. Petitioner, therefore, submits if respondent wishes to seek redress for entering into a contract under which it had no intention to be bound, it is not Dr. Kohn who should suffer a loss of tenure rights. In fact, under the mandatory nature of the statutory scheme of tenure, Dr. Kohn cannot suffer a loss of tenure for the board's actions.

POINT II

Respondent's Extensive Recitation of the Negotiations Between the Parties are Irrelevant and must be Disregarded as Parole Evidence

It is settled in New Jersey Law that "extrinsic evidence of one party's alleged contractual intent is not admissible to alter or contradict the express and unambiguous terms of a written agreement." *Saul v. Midlantic National Bank/South,* 240 *N. J. Super.* 62, 77 (*App. Div.* 1990). Parole evidence may not be considered to vary or contradict the term agreed upon where the term is so clear as to require no additional interpretation. *Flavorland Industries, Inc. v. Schnoll Packing Corp.,* 167 *N.J. Super.* 376, 381 (*D. Ct.* 1979); *Atlantic Northern Airlines, Inc. v. Schwimmer,* 12 *N.J.* 293, 302 (1953). "The only safe criterion of the completeness of a written contract as a full expression of the terms of the parties' agreement is the instrument itself." *Flavorland Industries,* 167 *N. J.* at 381. If it purports to contain the whole agreement, parole evidence to add to or vary the terms is not admissible. *Id.* "The essence of voluntary integration is the intentional reduction of the act to a single memorial; and where such is the case the law deems the writing to be the sole and indisputable repository of the intention of the parties." *Harker v. McKissock,* 12 *N.J.* 310, 321-22 (1953).

The Employment Contract between the parties provides, in pertinent part:

> **(10) Complete Agreement**
>
> This Employment Contract embodies the entire agreement between the parties hereto and cannot be varied except by written agreement of the undersigned parties.

Respondent's Exhibit O-11. Since the Employment Contract on its faced declared that it embodies the entire agreement or complete agreement between the parties, it is considered under New Jersey law to be an integration of all of the understanding of the parties. Therefore, parole evidence relative to the negotiations between the parties and their understandings may not be considered.

The Employment Contract also provides, in pertinent part:

> **(2) TERM**
>
> The board, in consideration of the promises herein of the Superintendent, hereby employs, and the Superintendent hereby accepts employment as Superintendent of Schools for a term commencing July 1, 1997 and expiring midnight June 30, 2002.

Respondent's Exhibit O-2. Clearly, it was the intent of the parties, as set forth by the express terms of contract itself, that the contract was an integration of the complete understandings of the parties. Those understandings as set forth clearly in the Employment Contract were that Dr. Kohn was to be superintendent for a five year term subject to the compensation and terms and conditions of employment expressly set forth in the contract. That contract also provided, as part of the "Savings Clause" (*See,* Respondent's Exhibits, O-11) that if any provision of the contract should be found to be illegal, the remainder of the contract should "remain in force."

Here, respondent is now urging the court to accept inadmissible parole evidence to vary the clearly expressed understanding of the parties to the contract. Respondent has included with its brief an extensive and detailed Certification from Robert DeSanto, Esquire, who is the solicitor for respondent. The parties agree that Mr. DeSanto was involved in all phases of the

negotiations of the Employment Contract and the drafting of the contract. Nevertheless, all of the details of the negotiations and the understandings of respondent, which respondent is attempting to utilize to vary the term of the contract, are inadmissible, and thus, cannot be considered in deciding the issues before the court.

Accordingly, petitioner respectfully requests that this court disregard the Certification of Robert DeSanto, Esquire to the extent that Certification is being offered to vary or change the express terms of the contract. Such evidence is parole evidence which cannot be considered. Petitioner, therefore, respectfully requests, pursuant to his arguments set forth at Point I *supra.*, that the court enforce Dr. Kohn's tenure rights as superintendent for a five year term beginning July 1, 1997 and ending June 30, 2002. Since Dr. Kohn is still within the term of his contract, petitioner requests this court to order that Dr. Kohn be immediately permitted to assume the position of superintendent, together with his full compensation and benefits retroactive to September 7, 2000.

POINT III

In the Event the Court Declines to Enforce Dr. Kohn's Tenure Rights, the Board has Illegally Failed to Provide Dr. Kohn with Benefits Negotiated in His Contract

This point being offered to the court only in the event that the court declines to enforce Dr. Kohn's tenure rights. In that event, as an alternative argument, Dr. Kohn submits that respondent has failed to provide him with benefits and other forms of compensation during his period of leave, as it is required to do under the Employment Contract.

The Employment Contract provides, in pertinent part:

> **11. TERMINATION**
>
> (d) During the 2000-01 and the 2001-02 school years, the board may unilaterally elect to terminate Dr. Kohn's employment as Superintendent by a minimum of six affirmative votes of the board. Should the board do so, Dr. Kohn will be paid thirty-three and one-third percent (33.3%) of the salary indicated in this contract for those years plus full health benefits, and he shall thus be appointed until July 1, 2002 to the position

> of Director for Special Projects. He shall be granted a paid leave of absence for the remainder of this contract.

Respondent's Exhibit O-10-11. Nowhere in the above provision, or elsewhere in the contract, is the Board permitted to cease providing Dr. Kohn with other benefits as set forth in his contract. Those benefits are numerous, as they are for most superintendents. These benefits include travel expenses, health benefits, expense reimbursement, tuition reimbursement, expenses in connection with the attendance of conferences and professional growth, and membership dues and fees to professional organizations. Of the benefits which respondent is required to provide Dr. Kohn for the life of the contract, it has provided him only with the health benefits. The specific terms which respondent has failed and refused to pay to date, together with their cost, are included in Dr. Kohn's Certification which is attached hereto and submitted in support of this Motion. The items set forth in Dr. Kohn's Certification are benefit items for which respondent did pay throughout the term of the contract prior to September 7, 2000.

Accordingly, because the Employment Contract provides that respondent will provide Dr. Kohn certain benefits during the life if its contract, the Board is obligated to provide these benefits. There is no language in the Employment Contract which provides that respondent is permitted to cease providing these benefits to Dr. Kohn. Dr. Kohn, therefore, asks this court to order respondent to immediately reimburse him for all expenses he incurred due to respondent's refusal to provide his benefits. Moreover, Dr. Kohn asks this court order that respondent continue to provide Dr. Kohn with all benefits for the remaining term of the contract.

Point IV

Petitioner is Entitled to Summary Judgment as a Matter of Law

A court shall grant a motion for summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *R.* 4:46-2. Summary judgment is designed to provide a prompt, businesslike and

inexpensive means of disposing of an action. *Judson v. Peoples Bank and Trust Co. of Westfield,* 17 *N.J.* 67, 73-74 (1954).

The New Jersey Supreme Court set forth the appropriate standard for the determination of summary judgment motions in *Brill v. Guardian Life Insurance of Company of America,* 142 of *N.J.* 520 (1955):

> [W]hen deciding a motion for summary judgment under *Rule* 4:46-2, the determination whether exists a genuine issue with respect to material fact challenged requires the motion judge to consider whether to competent evidential materials presented when viewed in the light most favorable to the non-moving party *in consideration of the applicable evidentiary standard,* are sufficient to permit a rational factor to resolve the alleged disputed issue in favor of the non-moving party. This assessment of the evidence is to be conducted in the same manner as that required under Rule 4:37-2(b). *Brill,* 142 *N.J.* 520, 523 (emphasis added).

All inferences of doubt are drawn against the movant in favor of the party opposing in motion. *Judson,* 17 *N.J.* at 75. However, if the opposing party presents only facts which are immaterial or insubstantial in nature, the court may, taking as true the statements of uncontradicted fact presented by the moving party, and such papers not otherwise showing the existence of controverted material fact, grant the moving party's request for summary judgment. *Brill,* 142 *N.J.* 520, 529-30.

Here, there are no material facts in dispute. Dr. Kohn and respondent entered into an Employment Contract for a five year term beginning July 1, 1997 and ending June 30, 2002. The overwhelming authority of statutory and case law provides that Dr. Kohn enjoys tenure protection in the position of superintendent for the entire term of that contract. The same authority provides that an employee who enjoys tenure rights cannot waive those rights in advance by contract. Therefore, respondent's action of placing Dr. Kohn in the position of Director, and reducing his salary and other forms of compensation during the term of his contract is illegal. Accordingly, Dr. Kohn asks the court to order that Dr. Kohn be restored to the position

of superintendent, and be provided with his salary and other benefits and emoluments, including those set forth in Dr. Kohn's Certification, retroactive to September 7, 2000.

Conclusion

It is submitted to the court that the only *facts* relevant to a ruling in this matter are those terms specifically set forth in the Employment Contract between the parties, and respondent's illegal action of September 7, 2000, by which it removed Dr. Kohn from his position, placed him in a lesser position, and provided him with a lower salary and fewer benefits and emoluments. All other facts as set forth in the Certification of Robert DeSanto, Esquire, offered as authority to justify respondent's illegal action, should not be considered.

When applying the overwhelming statutory and case law to the relevant facts of this matter, it is clear Dr. Kohn enjoyed tenure rights which were illegally violated. The remedy for an employee when his tenure rights are violated is restoration to his position with back pay and all benefits and emoluments. Dr. Kohn requests this court to so order.

The Board's Reply

Please accept this letter as my reply to the Summary Decision Motion filed in behalf of petitioner.

Let me preface my remarks by noting that I will not respond to the attacks made on respondent's solicitor in the moving papers. There are two reasons for this. First, both the substance and tone of the allegations are argumentative and immaterial to the legal issues pending. Second, the use of a personal attack on a witness has no place in litigation unless it's purpose is to address credibility on a critical factual issue. No such critical factual issue is at play in these proceedings.

There is a basic flaw in the legal argument put forth in petitioner's brief. The argument is bottomed on the erroneous assumption that the employment status of a superintendent of schools under *N.J.S.A.* 18A:17-15 is the functional equivalent of the tenure status granted to certificated

teaching staff members under other provisions of Title 18A. This proposition is an erroneous premise in the reasoning put forth to the court in petitioner's behalf. I think we can all agree that teaching staff tenure cannot be contractually waived, which is what case law cited by petitioner tells us. I will not argue against this conclusion. I agree with it.

The legal problem comes when petitioner cites this tenure case law and asks the court to apply it to the employment contract of a superintendent of schools. This equation fails simply because *N.J.S.A.* 18A:17-15 does *not* grant the same *tenure* status to a superintendent. The status of a superintendent under this statute is a *hybrid* of both tenure and contract principles. *Harrington v. Board of Education of the Township of Clinton, Hunderton County,* OAL EDU 10750-93, Agency 342-9/23, decided February 16, 1995. The statute itself specifically states that the board " . . . may, *by contract,* appoint, . . . a superintendent of schools . . . ." (emphasis added). The single limitation put on the contract relationship in this statute is that the term shall be ". . . not less than three nor more than five years . . . ." Thus, if the *tenure* relationship in the contract is established for "not less than three" years, the statute has been complied with, and no one has been asked to waive a statutory tenure right. That is exactly the case now before the court.

The contract between the parties, when read in its entirety, which the court must do when interpreting it, did *not* grant petitioner a five year *tenure* term. Any examination of the contract and facts set forth before the court can lead to no conclusion other than that the petitioner went into this employment relationship fully aware that his "no cut" *tenure* period of employment was for only three years – the statutory minimum requirement. The contract simply cannot be analyzed in any other fashion. For this reason, there simply can be no finding that the contract somehow asks petitioner to "waive" a statutory tenure entitlement. It does not.

Examine, if you will, paragraph 11 and Exhibit F to the DeSanto Certification. Petitioner's counsel is quoted in news articles as stating:

> Kohn signed the contract, Lepore said, because otherwise the board was not going to give him the job.
>
> The board insisted that they were not going to give a contract without this, Lepore said 'Kohn wanted the job.'

Thus it is obvious that both petitioner and his attorney were fully aware that the "no cut" *tenure*-like benefit period under the employment contract was for the three year statutory minimum only. It could not have been more clear. The requirements of the statute have been met. Concepts of tenure have not been violated or waived. Petitioner is bound by his contract.

Does the court erase the contract provisions relying on case law which addresses the statutory tenure of teachers? We think not. To do so would render the contract aspects of *N.J.S.A.* 18A:17-15 to be meaningless.

Petitioner's legal argument, if nothing else, asks that the court rule that a superintendent of schools is entitled to a five year employment term even when he knowingly signs a contract that makes clear that he's getting a protected term of only three years. There is no basis in either tenure law to reach such a conclusion in this case. Simply stated, petitioner signed the contract that he and his attorney bargained for. The terms of that contract do not violate either the letter or spirit of the statute. Petitioner is bound by his contract and is not entitled to relief of any kind of court.

CONCLUSIONS

The parties to the instant matter have cross-moved for summary decision as provided by *N.J.A.C.* 1:1-12.5. As petitioner observes, the standard for granting or denying summary judgment has been set forth in the matter of *Judson v. Peoples Bank & Trust Company of Westfield,* 17 *N.J.* 67 (1954). The standard was subsequently modified by the Court in *Brill v. Guardian Life Ins. Co of America,* 142 *N.J.* 520 (1995). The *Brill* Court held that the standard to be applied is now the same as the standard for determining motions for involuntary dismissal under *R.*4:40-1 (Motion for judgment at trial) and *R.* 4:40-2 (Reservation of Decision on Motion: Motion for judgment notwithstanding the verdict). The courts considering motions for summary judgment are not required to engage in the same type of evaluation and analysis, or sifting of evidential material in light of the burden of persuasion that applies as if the matter goes to trial. The *Brill* Court held that:

> 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 *R.*4:46-2. *Liberty Lobby, supra,* 477 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. 142 *N.J.* at 540.

Having carefully reviewed and considered the pleadings, the certifications, the briefs of law and the exhibits, I **FIND** and **CONCLUDE** that the instant matter may proceed to summary decision, pursuant to the holdings of our Courts and the regulations found at *N.J.A.C.* 1:1-12.5.

The statutes, *N.J.S.A.* 18A:17-15 to –23, must be read in harmony as a consequence of the New Jersey Legislature's action to revise the then existing laws which provided superintendents of schools with lifetime tenure, as provided by *N.J.S.A.* 18A:28-5. The statute, *N.J.S.A.* 18A:17-15, reads, in pertinent part, that:

> The board of education of a Type I district and of any Type II district, now having or hereafter authorized to have a superintendent of schools, may, by contract appoint, for a term of not less than three years nor more than five years and expiring July 1, a superintendent of schools by the recorded roll call majority vote of the full membership of the board.

Accompanying the statute is the New Jersey Assembly Education Committee (Committee) Statement which interprets the legislation and the intent of the Committee by stating, among other things, that the superintendent shall hold tenure in the position during the term of the contract and shall not be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct, or other just cause. The Committee Statement continues to state that:

> . . . The bill does, however, authorize the board of education to terminate the contract with the superintendent *upon paying to the superintendent the amount of compensation he would have received had he served the remainder of the contract period* and the period of any contract for which he is deemed to have been reappointed. (emphasis supplied)

Recognizing that the statute, *N.J.S.A.*18A:17-15, combines principles of contact and limited tenure, the termination clause in the statute speaks only of paying compensation to the superintendent in the amount he/she would have received had he/she served the remainder of the contract. There is no provision for a board of education to reduce the superintendent's compensation in the event the board unilaterally terminates the contract. The statue explicitly spells out the procedure the Board must follow in order to terminate the contract; *i.e.,* to file tenure charges with the Commissioner against petitioner. Here, the Board and petitioner entered into a five year contract. Notwithstanding the Board's position that the contract included the provision that it could unilaterally terminate the five year contract and reduce petitioner in position and salary after a three year period, the fact remains that it entered into a five year contract with petitioner.

Our Supreme Court has addressed the interpretation of our statues and held in the matter of *Duke Power Co. v. Patten,* 20 *N.J.* 42 (1955) that:

> . . .Where the wording of a statue is clear and explicit we are not permitted to indulge in any interpretation other than that called for by the express words set forth (citations omitted). . . . *Id.* at 48

And, in the matter of *Dacunzo v. Edgye,* 19 *N.J.* 443 (1955), the Court said:

> We must construe a statute as written, hence a statute should not be construed to permit it purpose to be defeated by evasion, *Grogan v. DeSapio,* 11 *N.J.* 308 (1953), and we must enforce the legislative will as written and not according to some unexpressed intention. *Hoffman v. Hock*, 8 *N.J.*397 (1952) *Id.* at 451

In the matter of *State v. Butler,* 89 *N.J.* 220 (1982), the Court said, at 226, that:

> As a general rule of statutory construction, we look first to the language of the statute. If the statute is clear and unambiguous on its face and admits of only one interpretation, we need delve no deeper than the act's literal terms to divine the Legislature's intent. (citations omitted)

I **CONCLUDE**, that for the purpose of terminating the contract between the Board and petitioner, the only interpretation to give *N.J.S.A.* 18A:17-15 is that the Board is required to pay petitioner for the remainder of the contract pursuant to the statute. There is no statutory provision for the Board to unilaterally convert a five year contract to a three year contract or to reduce his compensation and other benefits. The facts clearly demonstrate that petitioner and the Board entered into a five year contract, notwithstanding the Board's wish to offer only a three year contract.

I **CONCLUDE,** therefore, that the Board's action to terminate petitioner's employment contract was not pursuant to the statutory provisions of *N.J.S.A.* 18A:17-5, and must be reversed.

I **CONCLUDE** that Summary Decision should be entered on behalf of petitioner and that petitioner must be restored to his position of superintendent of schools until June 30, 2002, with all back pay, benefits and emoluments due to him under the terms of the five year contract.

ORDER

Accordingly, it is **ORDERED**, for the reasons expressed above, that Summary Decision is hereby entered on behalf of petitioner. It is **FURTHER ORDERED** that the Board of Education of the City of Vineland restore petitioner to his position as superintendent of schools with all back pay, benefits and emoluments due to him under the terms of the five year contract.

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

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

26 July 2001
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

7/31/01
DATE

Debbie Antanaitis /gp
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 1 2001
DATE

Jeff S. Mais
ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

OAL DKT. NO. EDU 8705-00
AGENCY DKT. NO. 339-10/00

GERALD W. KOHN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions and petitioner's reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4 and were duly considered by the Commissioner in reaching his determination.

In its exceptions, the Board avers, *inter alia,* that the portion of the Assembly Committee's Statement relied on by the Administrative Law Judge (ALJ) as the underpinning of his conclusion that the termination clause in the statute speaks of paying a terminated superintendent the amount he/she would have received if he/she had served the remainder of his/her contract, refers to language that was deleted from the bill during the legislative process. (Board's Exceptions at 2) Since the language relied on was not included in the bill enacted by the Legislature, the Board asserts, the ALJ's analysis is incorrect. (*Ibid.*) The significance of the deleted language, the Board posits, is that it clearly demonstrates the legislative intent that a board is not obligated to pay a full salary to a terminated superintendent. (*Ibid.*)

Additionally, the Board argues, the ALJ failed to recognize that the Board did not act to terminate petitioner, but instead acted in accordance with the provisions of petitioner's

contractual agreement when it changed petitioner's appointment to another position and paid him the agreed amount for that position. (*Id.* at 3) Emphasizing that petitioner's contract is a guarantee of three years in the office of superintendent, not a five-year contract for superintendent of schools, the Board contends that the contract guaranteeing petitioner three years in the office of superintendent satisfies the minimum statutory requirement and, thus, "the tenure like aspects of [the] statute have not been offended." (*Ibid.*)

With respect to the ALJ's conclusion that petitioner must be restored to the position of superintendent, the Board points to *N.J.S.A.* 18A:6-30.1 and *N.J.S.A.* 18A:17-18, contending that it is within the Board's discretion as to whether petitioner is permitted to continue to perform the duties of superintendent during the term of his contract, and that the plain language of superintendents' contract law does not disturb the Board's power in this regard. (*Id.* at 4) The Board also takes issue with the implication in the Initial Decision that there should be no mitigation. (*Id.* at 5) In support thereof, the Board points to the Court's interpretation of *N.J.S.A.* 40A:9-172 governing municipal employees, which it asserts contains identical language to that in *N.J.S.A.* 18A:6-30. (*Ibid.*) In interpreting *N.J.S.A.* 40A:9-172 in *White v. Township of North Bergen*, 77 *N.J.* 538 (1978), petitioner argues that the Court found that restoration of payment due to wrongfully terminated individuals is subject to mitigation (*Ibid.*) The Board also argues that in *Mullen v. Board of Education of the Township of Jefferson*, 81 *N.J. Super* 151 (App. Div. 1963), *N.J.S.A.* 18A:6-30 and 30.1 are found to be applicable to the office of superintendent of schools and *Mullen* also holds that the right to lost income is subject to mitigation. (*Ibid.*)

Finally, the Board seeks relief from the Commissioner, as follows:

1. A finding that there has been no contract termination and that the contract between the parties should be enforced as written since it does not violate the minimum requirements of N.J.S.A. 18A:17-15.

2. In the alternative, should the Commissioner find that the statute has been violated, a ruling that the doctrine of estoppel should be applied to petitioner due to the unique facts of this case, as briefed below, and requiring that the contract be enforced as written.

3. In the alternative, should the Commissioner find that the statute has been violated, a ruling confirming that [it] is solely within the discretionary power of the Board to determine if Petitioner should be returned to duty, *N.J.S.A.* 18A:6-30.1.

4. In the alternative, should the Commissioner find that the statute has been violated, a ruling noting that the obligation of mitigation applies to the calculation of damages, if any, as required by the State Supreme Court and other controlling judicial rulings. (*Id.* at 5-6)

In his reply, petitioner submits that *Dunn v. Elizabeth Bd. of Educ.*, 96 *N.J.A.R.*2d (EDU) 279, 283, *aff'd* State Board 96 *N.J.A.R.*2d (EDU) 285 holds that "[a] board of education has the right to relieve the superintendent of his duties, so long as he retains the position of superintendent, with all compensation, benefits and emoluments pursuant to the contract of employment." (Petitioner's Reply Exceptions at 4) Petitioner, therefore, agrees that the Board has the authority to determine whether a superintendent should actually perform the duties of his office or be placed on leave. (*Ibid.*) The problem herein, petitioner contends, is that the Board removed petitioner from the position of superintendent with its attendant compensation, benefits and emoluments and placed him in the position of a director at a lesser salary. (*Ibid.*)

Petitioner further argues that his contractual term is five years and that he, therefore, has tenure protection, pursuant to *N.J.S.A.* 18A:17-20.2, which provides that a superintendent shall not be dismissed or reduced in compensation during his contractual period except for inefficiency, incapacity, unbecoming conduct or other just cause. (*Id.* at 5) *Citing Spiewak v. Board of Educ. of Rutherford*, 90 *N.J.* 63, 76 (1982), petitioner avers that there is no mechanism in the mandatory statutes permitting a board to dismiss a superintendent or reduce his salary, thus waiving his tenure rights by virtue of a contractual provision entered into in advance, because an employee cannot forfeit or waive tenure by virtue of his contract. (*Id.* at 6)

Arguing that the Commissioner has already ruled on this issue, petitioner cites *Harrington v. Board of Educ. of the Township of Clinton*, 95 *N.J.A.R.*2d (EDU) 535, 541, wherein the Commissioner found that:

> [W]here the possibility of unilateral termination is expressly contemplated, the Commissioner holds that such provisions cannot take precedence over a statutory requirement for tenured employment. Such precedence would permit terms and conditions of employment to effectively negate a legislative entitlement, a perversion which is not only unacceptable as a matter of law, *Spiewak, supra*, but also inadvisable as a matter of educational policy***. (*Id.* at 8)

Citing numerous other cases, petitioner further maintains that the Commissioner has consistently held that employees may not waive tenure rights in advance, even where the employee does so "explicitly and knowingly." (*Id.* at 9)

The Board realized that there was a possibility that the termination provision in the contract was illegal, petitioner advances, as demonstrated initially by the fact that the appointing resolution acknowledges the fact that "the enforcement of the buyout provisions under applicable statutory and decisional law has not yet been settled." (*Id.* at 10) Secondly, petitioner points to the "Savings Clause" which provides that if it is found that a specific clause of the contract is contrary to law, the remainder of the contract shall remain in effect and will not be affected by such ruling. (*Ibid.*)

Finally, petitioner argues that the Board raises the issue of mitigation for the first time in its exceptions and that there are no facts on the record to support a finding for the Board on this issue. (*Id.* at 12) Thus, if the Commissioner determines that a ruling is required on mitigation, the matter should be remanded to the OAL for further proceedings. (*Ibid.*) *Citing Harrington, supra*, and *Dunn, supra*, petitioner submits that a superintendent removed from his position contrary to law is not required to mitigate his damages. (*Ibid.*)

Upon careful and independent review of the record, the Initial Decision, the exceptions and the reply thereto filed in this matter, the Commissioner determines to affirm the Initial Decision.

Although the Board correctly notes that the language in the Assembly Education Committee Statement relied on by the ALJ refers to a provision not included in the bill establishing contractual tenure for superintendents enacted by the Legislature, the Commissioner notes that there is ample case law which establishes the *principle* upon which the ALJ relied; *i.e.*, that a board that relieves a superintendent from his duties during the term of his contract must continue to pay the compensation and other emoluments the superintendent would have received as superintendent had he performed superintendent duties for the remainder of the contract period. *See Dunn, supra,* and *Harrington, supra.*

Moreover, the Commissioner agrees that the Board awarded petitioner a five-year contract as superintendent of schools, not a contract for a minimum of three years as argued by the Board. Item 1 in petitioner's contract states, as follows:

> The Board, in consideration of the promises herein contained of the Superintendent, hereby employs, and the Superintendent hereby accepts *employment as Superintendent of Schools for a term commencing July 1, 1997 and expiring midnight June 30, 2002.* (emphasis added) (Petitioner's Contract at 2)

Moreover, *N.J.S.A.* 18A:17-20.2 provides that:

> During the term of any employment contract with the board, a superintendent shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming a superintendent or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of Title 18A of the New Jersey Statutes.

Notwithstanding the contract provision that permits the Board to terminate petitioner's five-year contract as superintendent of schools after three years and reduce petitioner in position and salary, therefore, there is no statutory authority, absent the sustaining of tenure charges as indicated in *N.J.S.A.* 18A:17-20.2 above, for the Board to reduce petitioner's position

and salary during the term of his five-year contract. Moreover, it is well-settled that a teaching staff member cannot waive or forfeit tenure entitlement by virtue of a contract, nor is an improperly removed superintendent required to mitigate his damages. *See Spiewak, supra, Dunn, supra, and Harrington, supra.*

The Commissioner, therefore, concludes that petitioner is contractually tenured as the superintendent of schools of the Vineland School District through June 30, 2002 by virtue of the five-year contract entered into by the Board, and that petitioner must be restored to the position of superintendent with all back pay, benefits and emoluments due him as superintendent of schools.[1]

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

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 9|14|01

Date of Mailing: 9|14|01

[1] The Board may elect to relieve petitioner of his duties so long as he retains the position of superintendent during the relevant contractual period. *Dunn, supra.*

[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.

304-01

RUBIN GONZALEZ, PAUL J. O'DONOHUE, CLAUDE CRAIG AND STEVEN G. BLOCK,

PETITIONERS,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioners, employees of the Newark Board prior to takeover, argued they were terminated without notice, contrary to *N.J.S.A.* 18A:7A-44b and c. They sought reinstatement with back pay.

ALJ determined that petitioners' employment was terminated by the discretionary action of the State superintendent rather than abolishment of their positions pursuant to the takeover statute and, as at-will employees, they are not entitled to relief. Commissioner adopted findings and determination in initial decision as his own. Matter was dismissed.

The State Board reversed, holding that the State Superintendent did not have discretion to terminate petitioners under the circumstances of the case and that petitioners were entitled to the salary each would have earned from the time of termination until effectuation of reorganization, plus 60 days pay. The district appealed the State Board's determination to the Appellate Division and sought a stay of the State Board's decision, which was granted by the Court in December 2000. The Court also remanded the matter to the State Board for a calculation of damages within 30 days, the time for which was subsequently extended by the Court to October 5, 2001.

The case was sent to OAL for an initial calculation of damages pursuant to the directive of the State Board's remand decision issued in response to the Appellate Division decision. The ALJ determined the amounts due petitioners based on the proofs submitted by the parties.

The Commissioner affirmed the ALJ's decision with modification, noting that the lack of proofs and the time constraints imposed by the Appellate Division prohibited him from applying broader mitigation principles than those utilized by the ALJ. However, the Commissioner did reduce the award to petitioner Block by the amount of his salary earned while working for the Education Law Center during the period at issue.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1588-01
AGENCY DKT. NOS. 441-11/95, 442-11/95, 443-11/95 & 444-11/95
(OAL DKT. NOS. EDU 12388-95, 12390-95, 12391-95 & 12394-95 ON REMAND)

RUBIN GONZALEZ, Ed.D., PAUL J. O'DONOHUE, CLAUDE CRAIG, AND STEVEN G. BLOCK,
Petitioners,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,
Respondent.

Philip Elberg, Esq., for petitioners (Medvin & Elberg, attorneys)

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

Record Closed: August 8, 2001 Decided: August 17, 2001

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

PROCEDURAL HISTORY

On November 15, 1995, Ruben Gonzalez, Ed.D. (Gonzalez or petitioner), Paul J. O'Donohue (O'Donohue or petitioner), Steven G. Block (Block or petitioner), and Claude

Craig (Craig or petitioner) filed petitions with the State Department of Education (DOE), contesting the terminations of their employment by the State-Operated School District of the City of Newark (District or respondent). The DOE transmitted the cases to the Office of Administrative Law (OAL) in December 1995 for determination as contested cases pursuant to *N.J.S.A.* 52:14F-1 to -13, and they were subsequently consolidated.

Hearings were conducted in May 1997 and July 1998, and, subsequent to post-hearing proceedings, this judge issued an initial decision (*1999 Initial Decision*) on April 19, 1999. The Commissioner of the DOE (Commissioner) issued a decision on June 1, 1999, and the State Board of Education (State Board) issued a decision on May 3, 2000 (*May 3, 2000 Decision*).

The District appealed the State Board's decision to the Appellate Division of Superior Court and subsequently filed a motion seeking a stay of the State Board's decision. On December 8, 2000, the Appellate Division issued an order granting respondent's motion for a stay, pending determination of the appeal or further court order, and remanding the matter to the State Board for the computation of the amount of damages, with a directive that the remand be completed within thirty days. On February 2, 2001, the Appellate Division issued an order granting a motion by the State Board, extending the deadline to April 12, 2001.

On February 7, 2001, the State Board issued a decision (*Remand Decision*), directing "that the DOE determine the amount of mitigation for each petitioner and calculate the damages due each of them." *Remand Decision* at 5. The DOE transmitted the matter on remand to the OAL on February 14, 2001, for determination as a contested case.

On or about June 7, 2001, the State Board filed a motion with the Appellate Division for a further extension, and the deadline was extended to October 5, 2001.[1] Telephone conferences were conducted on April 26 and May 29, 2001, and a hearing

[1] Because of the illness, and subsequent death, of a member of this judge's family, the April 12, 2001, deadline was not met.

was conducted on June 4, 2001. The District subsequently advised that it would not be presenting any witnesses.

The parties subsequently filed initial and reply briefs. At my initiation, a telephone conference was conducted on July 23, 2001 to address this judge's concerns that the record was not sufficiently developed in respect to petitioners' arguments based on *Caponegro v. State-Operated School District of the City of Newark*, 330 *N.J. Super.* 148 (App. Div. 2000) (*Caponegro*). The parties were given the options of stipulating facts in that respect, without prejudice to their positions, and filing letter memoranda clarifying their positions. The District was also given the option of presenting evidence. Respondent filed a supplemental memorandum on August 1, 2001. Petitioners filed a response to that document on August 8, 2001.

NATURE OF THE CASE

On July 12, 1995, the DOE removed the Newark Board of Education (Board) and created a State-Operated School District, pursuant to *N.J.S.A.* 18A:34 *et seq.*, commonly referenced as the "Takeover Statute." Petitioners were employees of the Board prior to the takeover, and respondent terminated their employment on August 17, 1995. Petitioners argued that they were terminated without notice, contrary to *N.J.S.A.* 18A:7A-44 and *N.J.S.A.* 18A:27-4.1, and that they therefore should be reinstated, with back pay. The District argued that those provisions were not applicable, that petitioners were "at will employees," before and after the takeover, and that they were not entitled to notice.

Respondent filed motions for summary decision, and petitioners filed a cross-motion for summary decision. This judge issued an order on January 10, 1997, denying the motions and determining that a hearing should be conducted regarding the questions of whether petitioners fell within *N.J.S.A.* 18:7A-44(a) or 44(c), whether respondent implemented a reorganization of central and administrative supervisory staff, pursuant to *N.J.S.A.* 18A:7A-44(b), and what relief should be granted to petitioners if they prevailed. I found that section 44 of the Takeover Statute does not, as respondent argued, apply only to individuals having tenure prior to a reorganization.

The Commissioner issued a decision on the motions, on interlocutory review, on February 11, 1997. Although agreeing that *N.J.S.A.* 18A:7A-44 applies to both tenured and non-tenured employees, the Commissioner held that if petitioners' positions were not abolished pursuant to *N.J.S.A.* 18A:7A-44(a), nor 44(c), but that if their individual employment were terminated by discretionary action of the State Superintendent, they would be entitled to no relief. With that decision controlling, and as set forth in the *1999 Initial Decision*, this judge subsequently concluded that petitioners were not entitled to relief pursuant to *N.J.S.A.* 18A:7A-44 nor *N.J.S.A.* 18A:27-4.1 and that their petitions should be dismissed. In his June 1, 1999, decision, the Commissioner concurred with this judge's findings and conclusions and adopted the *1999 Initial Decision*, for the reasons stated therein.

In its *May 3, 2000 Decision*, the State Board affirmed the conclusion that *N.J.S.A.* 18A:27-4.1 is not applicable in the current matter but reversed the Commissioner's determination that petitioners were not entitled to relief pursuant to *N.J.S.A.* 18A:7A-44. However, the State Board also concluded that petitioners' relief was

> limited to the salary that each would have earned from the time of termination until effectuation of the reorganization, plus 60 days' pay.
>
> [*May 3, 2000 Decision* at 2.]

The State Board held that the State District Superintendent did not have the discretion to terminate petitioners under the circumstances of the case.

The issue, at this time, broadly, is the relief to which petitioners would be entitled if they prevail. The period in question is from August 17, 1995, the date of termination of their employment with respondent, until July 19, 1996, effectuation of the reorganization of the District's central office, plus sixty days.

In its *Remand Decision*, the State Board denied petitioners' requests for pre-judgment interest. *Remand Decision* at 3-4. That determination is binding. Additionally, during the May 29, 2001, telephone conference, this judge ruled that the

question of mitigation by petitioners is limited to any income during the period in question, not efforts by petitioners to secure alternate employment, or any efforts that petitioners arguably should have undertaken in that respect. That ruling was memorialized in an order issued on May 30, 2001. The parties did not file interlocutory appeals, pursuant to *N.J.A.C.* 1:1-14.10, and that ruling is also binding, at this time.

FINDINGS OF FACT

The Commissioner and the State Board did not disturb, in their June 1, 1999, and May 3, 2000, decisions, respectively, the findings of fact set forth in the *1999 Initial Decision*. Those findings are hereby incorporated and, to the extent relevant to the current matter, set forth hereinafter. Petitioners supplemented the record on remand at the June 4, 2001, hearing, and the findings of fact are also based upon a review of the record in that respect.

Based upon a review of the entire record, I **FIND** the following to be facts.

Petitioners were previously at-will employees of the Board. O'Donohue was appointed by the Board to the position of Director of Purchasing and Warehousing, effective September 1, 1980, and he served in that position until August 17, 1995. Craig was employed by the Board effective May 4, 1973, and he held various provisional positions under civil service status from that date through June 1, 1989. The Board appointed Craig to the unclassified civil service position of Executive Director of Personnel, effective June 1, 1989, and he was terminated from that position effective August 23, 1991. The Board provisionally appointed Craig to the position of Hearing Officer, effective August 23, 1991, and he remained in that position until August 17, 1995. Block was appointed by the Board to the position of Executive Director, in the Office of Accountability and Quality Assurance, effective October 31, 1994. Gonzalez was employed by the Board from 1979 until 1982. From 1979 through 1982, he served as the Board's Director of the English as a Second Language program and Bilingual Education. He was appointed to the position of Executive Superintendent, effective July 1, 1993.

Dr. Beverly Hall (Hall) was appointed as the State District Superintendent after the State Board removed the Board and created a State-Operated School District. The State assumed control on July 12, 1995, at which time Hall was appointed as Acting Superintendent for up to one year. The Board was eliminated upon the takeover of the district. Respondent terminated petitioners' employment effective August 17, 1995. In July 1996, the District engaged in a reorganization of the central office. The reorganization was implemented on July 19, 1996.

At the time of the termination of his employment with respondent, O'Donohue's annual salary was $88,766. Subsequently, for the balance of 1995, O'Donohue had no "W-2 income," *i.e.*, income from employment. Tr., 6/14/01, at 14. He received a pension from the United States Army (Army) in 1995 and 1996. He received total unemployment compensation benefits of $4,602 and $9,204 in 1995 and 1996, respectively. O'Donohue received no earned income during 1996. O'Donohue did not find employment subsequent to his termination by respondent.

In addition to his Army pension, O'Donohue also receives Social Security benefits. Based upon his understanding of communications with Social Security Administration personnel, O'Donohue believes that if he had been employed by respondent for an additional thirteen months, he would receive "approximately" $10 additional monthly in Social Security benefits. *Id.* at 18. O'Donohue also receives a pension related to his prior employment with the District. At some point, O'Donohue contacted State pension personnel, requesting a calculation of what pension he would have been entitled to if he had been employed for an additional eleven months and received 60 days' "severance pay" by respondent. *Id.* at 18-19. He had not received any response as of June 4, 2001. At the time of the termination of his employment with respondent, O'Donohue was fifty-nine years of age.

At the time of the termination of his employment by respondent, O'Donohue had accrued a total of 79.5 vacation days, 38 sick days, and three "personal" days and he was not "paid" for any of them. *Id.* at 16. As an employee of the Board/District, O'Donohue received 20 vacation days, 15 sick days, 3 personal days, and 19 "paid holidays" annually. O'Donohue believes that, pursuant to "contract," he would have

accumulated additional vacation, sick, and personal days if he had been employed an additional year by respondent. *Id.* at 19. Part of applicable insurance premiums were paid by him, and part by the Board/District. He also had the right to purchase medical insurance. O'Donohue has "military medical" benefits. *Id.* at 32. Upon the termination of his employment by respondent, O'Donohue "immediately" lost medical and dental coverage and life insurance. He continued the dental coverage, for "one period," approximately one year, at a cost to him of $600. *Id.* at 20. He had previously had life insurance equal to two and one-half times his salary. He was not a member of a union at the time of the termination of his employment.

At the time of the termination of his employment by respondent, Gonzalez's annual salary was $89,000. Gonzalez did not subsequently become employed until February 1998, when he was hired by the New Brunswick Board of Education, at an annual salary of $85,000.

During 1995, he received total unemployment compensation benefits of $4,956. He had no "W-2 income," *i.e.*, earned income, during 1995 subsequent to the termination of his employment by respondent. Subsequent to the termination of his employment, Gonzalez engaged in some consulting activities. He had no "consulting income" during 1995, although he attempted to obtain such. *Id.* at 36. During 1996, Gonzalez received total unemployment compensation benefits in the amount of $4,248. He received no "W-2 income" during 1996. *Id.* at 37. Gonzalez was involved in two business activities during 1996 and earned income from them, during approximately the "second half" of the year. *Id.* at 38. One business in which he was involved was R.G./L.G. Enterprises (R.G./L.G.), via which he was "available" for consulting work for school districts in the New Jersey/New York/Connecticut region. *Id.* at 39. Gonzalez, in fact, performed consulting work for the Hartford, Connecticut, School District. His 1996 income tax returns, which were filed as joint returns with his wife, reflected gross income in that respect of $26,392 and income after the deduction of expenses of $19,520. Gonzalez was also involved in another business, the sale of merchandise and gifts, *i.e.*, an import business, obtaining pottery from Mexico and transporting it into, and selling it in, the United States. Any income from that business was earned during the "tail end" of 1996 and in early 1997. *Id.* at 41. The pertinent 1996 tax returns reflected

that there was no income from the receipt of sales from that business and expenses of $11,534. At the time of the termination of his employment, he needed two additional years in the pertinent pension system to vest his pension.

During 1995, Gonzalez owned a rental property in Belleville, New Jersey (Belleville). The pertinent 1995 tax returns reflected rent received totaling $9,003 from rental property in Staten Island, New York, a two-story house. Gonzalez resided in one apartment, and he rented the other. The tax return rental property for the property in Belleville was listed as $28,620.

At the time of the termination of his employment, Gonzalez had accrued "about" 45 sick days, which he "lost," *i.e.*, he was not paid for them. He was entitled to three personal days annually. He had not utilized, to his knowledge, a total of nine, although he is not sure if he could accumulate days from year to year. However, it was his understanding that he could accrue vacation days and sick days, without limit. He received 20 vacation days and 15 sick days annually. He also received pension and health insurance benefits. Subsequent to the termination of his employment, at his request, Gonzalez received a lump-sum pension check in the amount of a "little less" than $6,000, and he utilized credit available to him, to the maximum amount. *Id.* at 44. He was not a member of a union at the time of the termination of his employment.

At the time of the termination of his employment by respondent, Craig's annual salary was $65,000. He also had pension and health benefits. He obtained employment with the Newark Housing Authority on September 30, 1997, at an annual salary of $50,000. He received no earned income during 1995 and 1996. Craig received a total of $6,372 and $7,434 in unemployment compensation benefits in 1995 and 1996, respectively. Prior to the termination of his employment, Craig formed a corporation to facilitate efforts to conduct a consulting business. He received no consulting income in 1995 and 1996.

Craig was employed a total of 22 years and 3 months by the Board/District. In June 1996, he withdrew the funds in his pension, thereby losing the "potential" for life insurance and health benefits "for life" upon retirement. Pursuant to his prior pension,

he was eligible for a "full" pension after 25 years of service and attaining the age of 55, *i.e.*, one-half of his three highest years of income. *Id.* at 71-72. Based upon communications with pension fund personnel, Craig's understanding is that if his employment had not been terminated, his pension "would have been" $40,000 annually. *Id.* at 72. Craig's pension from the Board/District was vested after ten years of employment. He withdrew $55,000 from his pension fund, and he is therefore not eligible to receive a pension. No individual required that Craig withdraw monies from his pension as a condition of filing a letter of resignation with the District.

At the time of the termination of his employment, Craig had "approximately" 15 "uncompensated" sick days. *Ibid.* To his understanding, sick days could be accrued without limit. If his employment had not been terminated, he would have been entitled to additional vacation days during an additional 13 months of employment, as well as health benefits. He received 3 personal days a year, which, to his understanding, had to be utilized within a given year. Prior to the takeover, there was also an "unwritten policy" that vacation days could not be accumulated in excess of "two years of vacation time," which might periodically be extended. *Id.* at 79. If he had retired at the age of 55, with 25 years of service, he would have received medical benefits. Craig will be 55 years of age in December 2001, and if his employment with the District had continued during that time, he would have been employed for 28 years. Craig was not a member of a union.

At the time of the termination of his employment by respondent, Block's annual salary was $77,000. Block began as a "volunteer" at the Education Law Center (ELC) in approximately November 1995. *Id.* at 89. On January 1, 1996, he commenced employment with the ELC, at an annual salary of $60,000. He is currently the Director, School Reform Initiatives, at the ELC, and his annual salary increased to $66,000, as of September 9, 1998. Block was not a member of a union while employed by the Board/District.

Block is currently married. He filed individual tax returns for 1995. Block received unemployment compensation benefits totaling $3,540 in 1995, and none in 1996. He did not receive any "W-2 income" during 1995. *Id.* at 84.

Block's 1995 and 1996 tax returns reflected consulting income. Block's spouse "owns a business." In 1995 and in 1996, their accountant advised them that Block could be a "legal tax shelter" for his wife because they regularly discuss her "business affairs," and he "advised her" regarding "a number of matters." His wife's business relates to "educational publishing," an area pertinent to which he has "expertise." Their accountant advised that it would be "perfectly proper" for Block's spouse to pay him a "consulting fee" as a way of reducing her "tax obligation" for the two years in question, 1995 and 1996. *Id.* at 85. Any time spent resulting in that income did not make Block "unavailable" for his employment at the ELC. *Id.* at 86. In his judgment, if his employment with the District had continued for the balance of 1995, he would have received the same amount of consulting income; that income related to his "wife's situation," not his. *Id.* at 87. Block received no other consulting income during 1995 and 1996.

During 1995 he gave his wife "advice" regarding her "business affairs and educational matters," which assisted her in developing a business that was "growing rapidly" at that point. *Id.* at 89-90. Block and his wife were initially married in 1970, for a year, and apparently were remarried in 1993. Although he gave her "advice," apparently, continuously, after their remarriage, he was not "compensated" for such until 1995 and 1996 because of the "income" and "tax implications." *Id.* at 90. Block received lump-sum checks at the end of those years. For 1995, he received a check in the amount of $75,000, "probably" in December. *Id.* at 91. For 1996, he also received a check in the amount of $75,000.

If Block had been employed with the District for the remainder of 1995, to his belief, he would have accumulated additional vacation and sick days pertinent to ten months' additional employment. He also apparently had accumulated some vacation and sick days prior to his termination. He received 20 vacation days and 15 sick days annually. To his belief, if he had not been terminated in 1995, he would have accumulated $^5/_6$ of those days.

DISCUSSION

As reflected hereinabove, the period of time in issue is from August 17, 1995, until July 19, 1996, plus an additional sixty calendar days, thus terminating the time period on September 17, 1996.

Petitioners' arguments in their post-hearing submissions reflect their positions generally throughout the proceedings. Petitioners, more specifically, argue that pursuant to *N.J.S.A.* 18A:7A-44, individuals not hired by a reorganized State-operated school district shall be given sixty days' notice of termination or sixty days' pay and that such constitutes severance pay, which should not be subject to any mitigation. Petitioners therefore calculate the sixty days as an amount equal to $^1/_6$ of their annual salaries. Petitioners also argue that they were entitled to be paid for the eleven months between August 17, 1995, and July 19, 1996 and that they have not calculated the benefit of any salary increase during that time. Petitioners' arguments in that respect are hereby rejected. The controlling law at this time is as set forth by the State Board in the *Remand Decision* and its *May 3, 2000 Decision*. I also note that the OAL only acquires jurisdiction over a matter after it has been determined to be a contested case by the agency head. *N.J.A.C.* 1:13-.2.

Petitioners also argue that respondent is not entitled to credit for any unemployment benefits received by them. However, that position is also contrary to the parameters set forth by the State Board and is rejected. Petitioners consider, and conclude to the contrary, the possibility that they arguably might have an obligation to repay the State Department of Labor for any back pay awards they receive. However, those issues are not before me, and the DOE would not have jurisdiction to make a determination in that respect, which petitioners apparently acknowledge.

Petitioners' calculations of damages do not reflect any unemployment compensation benefits or consulting or other income they received. Petitioners' response to the District's discovery arguments, which were made during the hearings, argued delay involved in litigating the current matter, as well as the prior proceedings, and discovery issues. However, it is clear that the State Board contemplated that

petitioners would be forthcoming in providing pertinent documents, including income tax returns, and I am persuaded that petitioners did not provide such in a timely fashion.[2] Notwithstanding, as noted hereinabove, the findings of fact are based on the evidence produced at the hearing.

Petitioners argue, specifically referencing O'Donohue and Craig's situations, that they had no income even arguably subject to mitigation. Gonzales argues, in that respect, that petitioners' right to back pay ends in mid-July 1996, essentially the end of the first half of that year, and that respondent is not entitled to the benefit of any income earned by him during the second half of 1996. Block argues that his consulting income should not be deemed to be mitigation because it was not related to the work he performed during regular business hours and he would have had the income in question even if his employment were not terminated by the District. Block acknowledges that his employment with the ELC, commencing in 1996, should be deducted from any award of back pay.

Relying on *Caponegro, supra*, 330 *N.J. Super.* 148, petitioners also argue that they were entitled to vacation, sick, and personal days upon the termination of their employment and that they should be entitled to an increase in their awards of back pay of 25 percent to reflect the value of fringe benefits lost as a result of their termination. In petitioners' reply brief, O'Donohue modified his position to claim entitlement for uncompensated vacation time, which, he argues, can be based on an adverse inference against respondent because of a failure by it to provide documentation in that respect. More specifically, O'Donohue includes in his calculations 60 vacation days, calculated by dividing his annual salary by 240 and multiplying by 60 days.

---

[2] Petitioners' counsel, by letter dated May 15, 2001, advised that petitioners' 1995 and 1996 tax returns would be provided as soon as a Protective Order was executed, but that petitioners would not answer any other interrogatories without an order. Petitioners' counsel confirmed that position in a letter dated May 29, 2001, to this judge. By letter dated May 24, 2001, to this judge, respondent's counsel stated, in part, that petitioners had declined to respond to discovery requests for tax returns. By letter dated May 30, 2001, to petitioners' counsel, respondent's counsel, referencing prior correspondence from petitioners, indicated receipt of the 1995 and 1996 federal tax returns, but the absence of W-2 forms. Subsequent to discussion of the issue during telephone conferences, this judge issued a Protective Order regarding petitioners' tax returns on May 30, 2001.

O'Donohue claims total damages of $142,411.50; Gonzalez, $120,520.88; Block, $63,645.88; and Craig, $88,020.88. Petitioners calculate those figures as follows:

O'Donohue:

2 months @ $7,398.00	$ 14,896.00
11 Months @ $7,398.00	81,378.00
	$ 96,174.00
25% value of benefits lost	24,043.50
	$120,217.50
$88,776/249 x 60	22,194.00
	$142,411.50

60 days of unpaid vacation leave

Gonzalez:

2 months @ $7,416.67	$14,833.34
11 months @ $7,416.77	81,583.37
	$96,416.71
25% value of benefits lost	24,104.17
	$ 120,520.88

Block:

2 Months @ $6,416.67	$ 12,833.34
11 Months @ $6,416.67	70,583.38
	$ 83,416.71

Deductions:

6.5 months @ $5,000 month ($60,000 annual salary)	$ 32,500.00
	$50,916.00
25% value of benefits lost	12,729.17

	$ 63,645.88

Craig:

2 Months @ $5,416.67	$ 10,833.34
11 Months @ $5,416.67	59,583.37
	$ 70,416.71
25% value of benefits lost	17,604.17
	$ 88,020.88

The District avers that petitioners would arguably be entitled to the following base salary amounts, subject to mitigation:

O'Donohue – $97,312.11, reflecting 57 weeks at $1,707.23/week

Craig – $71,250, reflecting 57 weeks at $1,250/week

Gonzalez – $97,557.78, reflecting 57 weeks at $1,711.54/week

Block – $84,403.89, reflecting 57 weeks at $1,480.77/week

Respondent argues, referencing discovery issues, that in the absence of documentation to the contrary, all income received by petitioners should proportionately apply towards mitigation. However, as reflected in the above findings of fact, petitioners testified regarding their income, referencing their 1995 and 1996 income tax returns, which documents were made available to the District. The District did not establish, through cross-examination or documentary evidence, that petitioners' testimony was not credible, nor that the income tax returns reflected data contrary to their testimony. The District argues, however, that in the absence of specific documentation setting forth the dates when income was earned, at a minimum, a percentage of income earned in 1996 should count towards mitigation. The District more specifically argues that petitioners are potentially entitled to damages for $28^{5}/_{7}$ weeks in 1996, approximately 55.22 percent of the year, and that in the absence of documentation regarding when income was

earned in 1996, 55.22 percent of all income earned by petitioners during that year should count towards mitigation.

Consistent with that position, and noting that Gonzalez did not provide documentation regarding when in 1996 he earned income from R.J./L.G., respondent calculates that 55.22 percent of that gross income, or $14,871.85, should offset any potential award to him. Respondent's position is that in light of that income, as well as his unemployment benefits, Gonzalez's potential damages should be reduced by $24,075.85.

The District argues, pertinent to Block, that it is entitled to a minimum offset of his salary at the ELC for 55.22 percent pertinent to 1996, or $33,132. Noting that there is no evidence that Block consulted prior to 1995, respondent also argues that a pro-rated portion of Block's income in 1995 and 1996 from consulting services to his wife should offset any potential damages to him. Averring that there are $19^{3}/_{7}$ weeks, or 37.36 percent, of 1995 in issue, respondent argues that the prorated fee for consulting in 1995 is $28,020. Similarly, the District argues that the prorated rate for $28^{5}/_{7}$ weeks, or 55.22 percent of the year, at issue in 1996 results in a pro rata portion of consulting income for that year offsetting potential damages totaling $41,415. Reflecting Block's unemployment compensation benefits, his employment at the ELC, and his consulting income, the District argues that his potential damages should be offset by $106,107, thereby establishing that Block did not suffer from his discharge and is not entitled to any damages.

The District argues that Craig's damages should be reduced by $13,806, the total amount of his unemployment compensation benefits in 1995 and 1996. Similarly, it argues that O'Donohue's potential damages should be offset by $13,806, the total amount of unemployment compensation benefits he received in those years.

The District's overall position is that if the State Board's decision is affirmed, without modification, and if this judge's ruling regarding mitigation is upheld, petitioners' damages are as follows:

O'Donohue:	$83,506.11 ($97,312.11 - $13,806.00)
Craig:	$57,444 ($71,250.00 - $13,806.00)
Gonzales:	$73,481.93 ($97,557.78 - $24,075.85)
Block:	$0 ($84,403.89 - $106,107.00)

The District further agues that the State Board's decisions awarded petitioners relief limited to the salary each would have earned during the time in question subject to mitigation, as calculated by respondent. The District therefore argues that no other monetary relief can be granted at this point.

In its supplemental filing, as well as in its initial brief, respondent addresses issues regarding accrued time entitlements. The District argues that any such issues were not part of the proceedings before the State Board and not addressed in the State Board's decisions and therefore are not before this judge on remand. Respondent additionally avers that whatever claims to accrued leave petitioners may have had existed at the time of their actual termination of employment, August 1995, and that if petitioners believed that they did not receive something to which they were entitled in that respect, they should have made a claim for such at that time pursuant to the District's procedures and should have filed a claim with the Commissioner within the applicable 90-day time limit. Respondent characterizes the State Board decisions, in that respect, as extending the date of petitioners' terminations until July 1996 and asserts that the fact that the State Board did so does not now provide for additional, and untimely, claims to be considered relative to entitlements upon actual termination of employment. Finally, the District argues that if the Appellate Division ultimately reverses the State Board's decision and upholds the Commissioner's decision that petitioners were properly terminated in August 1995, their petitions would be dismissed and there would be no separate, and pending, claims relating to accrued leave payments at the time of termination.

In their August 8, 2001, filing, petitioners argued that respondent's August 1, 2001, filing advances an entirely new position, that their initial pleadings were sufficiently broad to raise issues regarding accrued leave time, that respondent should be required to produce evidence to calculate petitioners' accrued time, and that the District's position is "mean spirited."

I am persuaded that unemployment compensation benefits received by petitioners should be treated as mitigation of damages. Such was clearly contemplated by the State Board. *Remand Decision* at 4. Additionally, as respondent argues, such benefits were received in lieu of any salaries petitioners would have received from the Division. I am not persuaded by petitioners' arguments that unemployment compensation benefits should not be deemed as mitigation because the District violated State law in terminating their employment. Although respondent arguably may have violated certain procedural requirements, there is no ruling, at this time, that petitioners are entitled to reinstatement.

I am not, however, persuaded that any consulting and rental income should be treated as mitigation. As petitioners argue, there is nothing in the record to support a conclusion that they could not, and would not, have received consulting or rental income even if their employment were not terminated. This is especially so regarding Block and Gonzalez. The fact that Block received consulting income during 1996, when he was employed full time by the ELC, lends support to his argument in that respect. I am persuaded that such income should not be deemed mitigation.

The question of whether petitioners' relief should include any accumulated sick, vacation, and/or personal leave time is a more difficult one. The State Board's emphasis on petitioners' entitlements to their "salaries" supports respondent's argument that the State Board did not intend that petitioners receive compensation for any accrued time. *May 3, 2000 Decision* at 5.

It is not clear if the State Board determined that petitioners are entitled to relief pursuant to *N.J.S.A.* 18A:7A-44(a) or -44(c), although it is reasonable to infer that it concluded that the latter provision is applicable. *Id.* at 2-5. Such distinction is not, however, determinative of the issue.

The pertinent statutory provisions, *N.J.S.A.* 18A:7A-44(a) and (c), read as follows:

> a. Notwithstanding any other provision of law or contract, the positions of the district's chief school administrator and those executive administrators responsible for curriculum, business and finance, and personnel shall be abolished upon creation of the State-operated school district. The affected individuals shall be given 60 days' notice of termination or 60 days' pay. The notice or payment shall be in lieu of any other claim or recourse against the employing board or the school district based on law or contract. Any individual whose position is abolished by operation of this subsection shall be entitled to assert a claim to any position or to placement upon a preferred eligibility list for any position to which the individual may be entitled by virtue of tenure or seniority within the district. No individual whose position is abolished by operation of this subsection shall retain any right to tenure or seniority in the positions abolished herein.
>
> . . . .
>
> c. Notwithstanding any other provision of law or contract, the positions of the central administrative and supervisory staff, instructional and noninstructional, other than those positions abolished pursuant to subsection a. of this section, shall be abolished upon the reorganization of the State-operated school district's staff. The State district superintendent may hire an individual whose position is so abolished, based upon the evaluation of the individual and the staffing needs of the reorganized district staff. These individuals shall be hired with tenure if they had tenure in their prior position. If they did not have tenure in their prior position, they may obtain tenure pursuant to the provisions of *N.J.S.* 18A:28-6. Individuals hired as State assistant superintendents shall not be hired with tenure and shall not acquire tenure. Employees or officers not hired for the reorganized staff shall be given 60 days' notice of termination or 60 days' pay. The notice or payment shall be in lieu of any other claim or recourse against the employing board or the school district based on law or contract. Notwithstanding this limitation, nothing herein shall preclude an individual from asserting upon separation from service any legal contractual right to health care coverage, annuities, accrued vacation days, accrued sick leave, insurance and approved tuition costs. Any employee whose position is abolished by operation of this subsection shall be entitled to assert a claim to any position or to placement upon a preferred eligibility list for any position to which the employee may be entitled by virtue of tenure or seniority within the district. No employee whose position is abolished by operation of this subsection shall retain any right to tenure or seniority in the positions abolished herein.

Subsection (c) clearly provides that an individual whose employment is terminated pursuant thereto can claim a right to accrued leave time. Although subsection (a) does not, on its face, contain such a provision, the court in *Caponegro, supra*, held that

depriving a board's auditor and certain administrators of their earned vacation and sick leave, upon termination of their employment pursuant to *N.J.S.A.* 18A:7A-44(a), would unconstitutionally impair the obligation of contracts.

The petitioners in that case were former senior staff members whose positions were abolished as a result of the takeover of the district, one by reason of *N.J.S.A.* 18A:7A-42(a)(3), and four by reason of *N.J.S.A.* 18A:7A-44(a). They had been at-will, non-union employees. All petitioners, except one, who received a letter dated November 21, 1995, were advised on July 12, 1995, of the abolition of their positions and their immediate termination. *Caponegro, supra*, 330 *N.J. Super.* at 152. Subsequent to their terminations, they appealed to the Commissioner, asserting, among other claims, that they were entitled to payment for their respective accumulated vacation, sick, and personal days. Petitioners also argued that the 60 days' pay provided in *N.J.S.A.* 18A:7A-44(a) should have been calculated on the basis of working days, not calendar days. *Id.* at 151-52. The DOE transmitted the matter to the OAL, and the ALJ rejected all of the petitioners' assertions. The Commissioner generally concurred with the ALJ, and the State Board affirmed. The Appellate Division held that petitioners' "contractual right" to payment, on termination, for accumulated vacation or sick days was not abrogated by *N.J.S.A.* 18A:7A-44(a) and remanded to the Commissioner for calculation of the monies to which petitioners were entitled. The court affirmed in all other respects. *Id.* at 151.

The court emphasized that there is a distinction between "a prospectively effective contract nullification" and "the abrogation of previously vested property rights," concluding that petitioners were entitled to the same "deferred compensation," that is, their accumulated vacation and sick days, that they would have received had they terminated their employment voluntarily. Such compensation could not be constitutionally withheld, and the court did not construe the pertinent statutory provisions to so intend. *Id.* at 155. Whether or not before it, the court noted that *N.J.S.A.* 18A:7A-44(c), applicable to former staff not rehired for the restructured staff, other than those individuals subject to subsection (a), also were entitled to 60 days' notice or 60 days' pay, but that individuals so separated from their employment could assert any legal contractual rights to certain benefits. The court, more particularly, construed subsection (c) as conferring not only the benefits of accumulated vacation days and sick leave, *i.e.*, "deferred compensation," but "prospective

benefits," *i.e.*, continuing health care coverage, insurance benefits, annuities, and tuition. The petitioners in *Caponegro* did not claim "prospective benefits." However, the court determined: "But the benefits of accumulated vacation days and sick leave stands on an altogether different footing." The court held that the petitioners were entitled to receive "a contractual right to comparable accumulated leave," "deferred compensation" payments, "to the extent the pre-takeover contracts of employment of these petitioners require payment ... upon termination of employment," as if their employment had been "voluntarily terminated." *Id.* at 156 (citation omitted).

The court then considered the question of exactly which accumulated vacation days and sick leave benefits the petitioners were entitled to. It disposed of any claims to compensation for unused personal days, noting that the testimony had established that petitioners were entitled to three personal days annually, but that such were lost if they were not used in the year earned. *Id.* at 157. The court considered, pertinent to vacation and sick leave, evidence regarding the prior board's written policy and procedural manual relevant to the issues, although such was not introduced into evidence *per se*. *Id.* at 158. The evidence indicated that petitioners were accorded 20 vacation days annually and were permitted to accumulate a total of 60 days and that they were permitted to receive compensation, at their option, for accumulated, unused sick leave days at a certain specified rate of compensation. Evidence had also been introduced regarding the board's past policies and practices regarding compensation for accumulated vacation and sick days upon termination of employment pertinent to the 1994-95 school year. However, there was a dispute in the evidence regarding vacation entitlement for the 1995-96 school year. *Id.* at 158-59. One issue was whether any entitlement to vacation days translated into compensation for employees terminated during the school year, and whether vacation days were prorated. *Id.* at 159-60. They were prorated in accordance with that portion of the year actually worked. Finally, the court determined that petitioners' claims that the 60-day severance compensation in subsection 44(a) of the Takeover Statute intends compensation for 60 calendar days. *Id.* at 161. The court reversed the State Board's decision to the extent it denied compensation for accumulated vacation and sick days and remanded for reconsideration and calculation of such benefits in accordance with the board's policies and procedural manual and, as appropriate, the board's past practices. *Id.* at 162.

Respondent's arguments regarding accrued time have some merit. A petition shall be filed with the Commissioner no later than the ninetieth day from the date of receipt of a notice of final order, ruling, or other action by a district board of education, individual party, or agency which is the subject of a requested contested case hearing. *N.J.A.C.* 6A:3-1.3(d). That requirement has been applied to claims for accrued leave time. *See, e.g., Romanoli v. Willingboro Township Bd.*, 95 *N.J.A.R.*2d (EDU) 81. *Scotch Plains-Fanwood Ass'n v. Scotch Plains-Fanwood Bd. of Educ.*, 5 *N.J.A.R.* 175 (1980). Petitioners initially filed their petitions with the DOE within 90 days of the termination of their employment. Although the specific relief requested in the petitions is not clear, petitioners contested the termination of their employment and requested that they be reinstated, "with back pay." *1999 Initial Decision* at 1-2.[3] A request for an award of back pay is sufficiently broad to include a claim for accrued leave time. Although the State Board's decisions can be construed as contemplating that petitioners are entitled only to salary, not accrued leave time, I am persuaded that those decisions should be interpreted as intending to be consistent with any applicable case law. In this case, the principles articulated in *Caponegro, supra*, 330 *N.J. Super.* 148, are applicable. I am therefore persuaded that the relief to which petitioners would be entitled if they ultimately prevail should be calculated as set forth by respondent, without mitigation for consulting and rental income, but subject to enhancement of petitioners' claims for the monetary value of any accrued leave time.[4]

However, there is insufficient information in the record upon which to calculate the relief to which petitioners would be entitled pertinent to accrued leave time. Additionally, I am persuaded that petitioners' methodology should be rejected.

---

[3] The DOE did not transmit the petitions to the OAL with the case file on remand.

[4] Parenthetically, I am not persuaded by petitioners' argument that respondent's initial position in this case did not raise arguments pertinent to the 90-day rule. The District's position was sufficiently broad to include the argument that requested relief was not filed timely, and in any event, the rule was applicable. In addition, petitioners did not demonstrate that respondent's position is "mean spirited," and petitioners' argument in that respect is, in any event, irrelevant.

The record does not reflect sufficient, nor reliable, information regarding any relevant personnel manuals utilized by the Board/District, practices and procedures of the Board/District, including whether the different categories of leave time could be accrued, or even the number of sick, personal, or vacation days accrued by each petitioner at the time of his termination or that would have been accrued during the period in question. The evidence offered by petitioners in that respect, as reflected in the above findings of fact, was ambiguous and non-specific, and as noted hereinabove, respondent did not present any evidence.

Petitioners rely on census data regarding fringe benefits, not data specific to petitioners or respondent.[5] In addition, petitioners' positions relate to arguments regarding other "damages," for example, Craig's loss of the possibility of receiving the benefit of his pension and Gonzalez's incurrence of credit card interest debt. Petitioners cite no authority for the assumption that the DOE has the authority to award such relief, and I am not persuaded that it does. I am also not persuaded by petitioners' arguments that in light of the time involved in these cases, any award is inadequate because petitioners still are obliged to pay for their legal expenses. Petitioners do not provide any legal authority for the proposition that the DOE has authority to provide such relief, including an implied award of counsel fees and costs, and I am not persuaded that it does.

Petitioners did not support any claims to fringe benefits, *i.e.*, deferred compensation, other than, possibly, to accrued leave time. The evidence regarding pension benefits was vague and, at least in part, hearsay. Petitioners presented no evidence that they were not offered any options of continuing medical and life insurance benefits to which they may have been entitled, and in fact, as found, O'Donohue did so for a period of time. The fact that Craig may have lost the right to collect a pension because he withdrew pension funds, for whatever reason, does not entitle him to any additional benefits. *Caponegro* does not support a conclusion that petitioners, whose positions were

[5] More specifically, petitioners rely upon data set forth in a United States Department of Commerce publication.

eliminated pursuant to the Takeover Statute, are entitled to enhanced pension benefits based on what they would have received if their employment had not been terminated.

Respondent's argument that even if petitioners were entitled to relief for accrued leave time, such should be based on accrued time as of the date of the termination of their employment is persuasive and consistent with the pertinent statutory provisions. However, for purposes of this proceeding, I am persuaded that it is reasonable that the period in question be the same as set forth by the State Board relevant to petitioner's relief pertinent to their salaries, *i.e.*, the date of termination until effectuation of the reorganization, plus 60 days.

In order to expedite the matter, and to facilitate compliance with the Appellate Division's mandate regarding the deadline for the issuance of a Final Agency Decision, I am persuaded that the parties should be required to file information with the Commissioner sufficient to calculate the monetary value of any accrued leave time to which petitioners would have been entitled during the period in question, including, but not limited to, respondent's records regarding its policies and practices regarding the awarding and accruing of leave time, the number of days accrued by petitioners in each category of leave time as of the date of the termination of their employment, any applicable contracts, and any pertinent manuals or other documents. The parties are urged to attempt to stipulate the relevant facts in that respect.

Pursuant to the parameters set forth by the State Board, and for the foregoing reasons, I am persuaded that, if they ultimately prevail, petitioners are entitled to relief in the amounts of $83,506.11, $57,440.00, $88,353.78, and $80,863.89, pertinent to O'Donohue, Craig, Gonzalez, and Block, respectively, subject to increases for the monetary value of any accrued leave time, or time that would have been accrued, during the period in question.

These figures are calculated as follows:

O'Donohue	$97,312.11 - $13,806 ($4,602 + $9,204)
Craig	$71,250.00 - $13,806 ($6,372 + $7,434)
Gonzalez	$97,557.78 - $9,204 ($4,956 + $4,248)
Block	$84,403.89 - $3,540

CONCLUSIONS

I **CONCLUDE** that if petitioners ultimately prevail, they are entitled to relief in the amounts of $83,506.11, $57,444.00, $88,353.98, and $80,863.89, pertinent to O'Donohue, Craig, Gonzalez, and Block, respectively.

ORDERS

It is hereby **ORDERED** that if petitioners ultimately prevail, they be awarded relief in the amounts of $83,506.11, $57,444.00, $88,353.98, and $80,863.89, pertinent to O'Donohue, Craig, Gonzalez, and Block, respectively.

It is also **ORDERED** that the parties file with the Commissioner, no later than September 7, 2001, information and/or any stipulations reached by the parties sufficient for the Commissioner to calculate the monetary value of any accrued time, including time that would have been accrued, by petitioners during the period in question.

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

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

DATE

DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

8/01/01

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 23 2001

DATE

OFFICE OF ADMINISTRATIVE LAW

mvh\pb\al

APPENDIX

Witnesses:

For Petitioners:

Rubin Gonzalez

Paul J. O'Donohue

Claude Craig

Steven G. Block

OAL DKT. NOS. EDU 1588-01, 12388-95, 12390-95,
12391-95 AND 12394-95
AGENCY DKT. NOS. 441-11/95, 442-11/95,
443-11/95 AND 444-11/95

RUBIN GONZALEZ, PAUL J. O'DONOHUE, CLAUDE CRAIG AND STEVEN G. BLOCK,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	
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 are duly noted as submitted in accordance with *N.J.A.C.* 1:1-18.4.[1]

Petitioners' exception arguments contend that: (1) respondent should not have been credited for unemployment benefits paid to petitioners; (2) the failure to award petitioners post-judgment interest for the period after May 3, 2000, the date upon which the State Board of Education determined that they were entitled to relief, is "incomprehensible;" and (3) petitioners are entitled to reinstatement in their former positions with the District. (Petitioners' Exceptions at 1-3)[2]

[1] The District's submission consists primarily of what it termed "cross-exceptions." However, upon review, the Assistant Commissioner finds that the District's arguments do not counter issues raised by petitioners' exceptions, but, instead, take exception to the ALJ's factual findings and conclusions of law. Therefore, they should have been filed in accordance with *N.J.A.C.* 1:1-18.4(a), and must be rejected as untimely. Accordingly, these arguments are neither summarized nor considered herein.

[2] Petitioners additionally object to the ALJ's dicta on page 12 of the Initial Decision, in which she opines that petitioners submitted pertinent documents to the record in an untimely fashion. In its single reply exception, the District notes its agreement with the ALJ's characterization.

Upon careful and independent review, the Assistant Commissioner, to whom this decision was delegated pursuant to *N.J.S.A.* 18A:4-34c, determines to affirm the Initial Decision of the ALJ, with modification, as set forth below.

As a preliminary matter, the Assistant Commissioner notes that the ALJ's Interlocutory Order of May 30, 2001 limits the question of mitigation by petitioners in this matter to any income during the period in question, but does not consider efforts by petitioners to secure alternative employment, or any efforts that petitioners arguably should have undertaken in this regard. (Initial Decision at 4-5) The ALJ bases her order upon her interpretation of the State Board of Education's Decision on Remand, issued on February 7, 2001, also finding that "*Goodman* [*v. London Metals Exchange, Inc.*, 86 *N.J.* 19 (1981)] involved a civil rights matter, and I am not persuaded that the principles articulated therein, regarding mitigation efforts, are applicable to education matters." (Interlocutory Order, May 30, 2001 at 2) Although the Assistant Commissioner does not take issue with the ALJ's reliance upon her reading of the State Board's remand decision to support her order, he is compelled to note that, indeed, broader mitigation principles have been applied in education matters involving the award of back pay.[3] However, while the Assistant Commissioner is mindful of his power to review, and, if necessary, reverse the ALJ's Order pursuant to *N.J.A.C.* 1:1-14.10(j),[4] he is, in this instance, constrained by

---

[3] *See, West Orange Supplemental Instructors Assoc., et al., v. Bd. of Ed. of the Township of West Orange*, 92 *N.J.A.R.*2d (EDU) 287, 298, wherein the Commissioner determined that: "(1) an individual must exercise reasonable diligence and ordinary care to mitigate damages, (citation omitted); (2) honest attempts to mitigate should be liberally construed; (3) the burden of the facts in mitigation of damages rests with the breaching employer, (citation omitted); and (4) the amount of an award to a wrongfully discharged employee is also subject to mitigation by the amount which could have been earned by the employee, (citation omitted)." (*West Orange, supra* at 298) As to the fourth finding, the State Board of Education elucidated: "[I]f it is shown that any of the Petitioners could have secured other employment by reasonable efforts, but did not, then the Board is entitled to have such Petitioners' back pay awards *reduced* by the salary they should have earned had they exercised the required diligence. (citation omitted)" (emphasis in text)

[4] The Initial Decision states, "[t]he parties did not file interlocutory appeals, pursuant to *N.J.A.C.* 1:1-14.10, and that ruling is also binding, at this time." (Initial Decision at 5) However, the Assistant Commissioner underscores that, in accordance with *N.J.A.C.* 1:1-14.10(j), and except as limited by *N.J.A.C.* 1:1-14.10(m):

the Appellate Division's impending deadline in this matter[5] to avoid a remand to the OAL to consider broader mitigation principles.[6] In any event, as the ALJ noted, neither party appealed her interlocutory order when it was issued, nor does any party take exception to that order at this stage of the proceedings. Therefore, the District can fairly be said to have conceded to the ALJ's decision to limit mitigation in this matter.

The Assistant Commissioner adopts as final the relief calculated by the ALJ at pages 23 and 24 of the Initial Decision,[7] with one exception. As petitioner Block concedes, respondent clearly should be credited for the money Block earned working at the Education Law Center (Petitioners' Exceptions at 1), during the period at issue. Therefore, the Assistant Commissioner concludes that Block's award shall be reduced by $32,500. (Initial Decision at 13)

As to the issue of petitioners' entitlement to compensation for accumulated sick, vacation and/or personal leave, even assuming petitioners' request for the award of back pay may fairly encompass such a claim, and further assuming that petitioners are legally entitled to this relief, like the ALJ, the Assistant Commissioner finds that "there is insufficient information in the record upon which to calculate the relief to which petitioners would be entitled pertinent to

---

> [A]ny order or ruling reviewable interlocutorily is subject to review by the agency head *after the judge renders the initial decision in the contested case*, even if an application for interlocutory review: 1. Was not made; 2. Was made but the agency head declined to review the order or ruling; or 3. Was made and not considered by the agency head within the established time frame. (*N.J.A.C.* 1:1-14.10(j)) (emphasis added)

[5] The Appellate Division's Order of June 29, 2001 extends this time for decision in this matter by the Commissioner and the State Board of Education to October 5, 2001. Oral argument in the Appellate Division is set for October 22, 2001.

[6] The Assistant Commissioner notes in this connection that the Initial Decision was delivered to him August 21, 2001; the file followed thereafter on August 31, 2001. Additionally, the ALJ's recommended decision left the record open until September 7, 2001 (see *infra*). Thus, the time for review of this matter has been compressed and, indeed, *cannot* even extend to the 45 days that he is ordinarily accorded by law. *N.J.S.A.* 52:14B-10.

[7] The Assistant Commissioner notes in this connection that petitioners' awards were properly reduced by their respective amounts of unemployment compensation. (*See, West Orange, supra* at 301)

accrued leave time." (Initial Decision at 21) In this regard, the Assistant Commissioner specifically notes that the ALJ permitted the record to remain open through September 7, 2001 to accommodate additional submissions directly to the Commissioner relative to this issue, but that neither party made a submission in response to this opportunity. (Initial Decision at 24)

Finally, the Assistant Commissioner finds that petitioners are not entitled to an award of postjudgment interest subsequent to May 3, 2000, where conclusions on *specific* damages were not reached in the State Board's May 3, 2000 decision, where the Appellate Division subsequently issued an order on December 8, 2000 granting the District's motion for stay of the State Board's decision (Initial Decision at 2) and where the "precise amount of such claim" remained to be established in the record before the Commissioner, pursuant to *N.J.A.C.* 6A:3-1.17

Accordingly, the Initial Decision of the ALJ is affirmed with modification as set forth herein.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 9|14|01

Date of Mailing: 9|14|01

~~172-99~~
304-01

EDU # 12388-95, 12390-95, 12391-95 and 12394-95 (consolidated)
C # 172-99
SB # 29-99
App. Div. # A-5434-99T5
App. Div. # M-1209-00
App. Div. # M-2527-00
EDU # 1588-01
C # 304-01

RUBEN GONZALEZ, PAUL J. O'DONOHUE, CLAUDE CRAIG AND STEVEN G. BLOCK,

PETITIONERS-APPELLANTS,

V.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION ON REMAND

Decided by the Commissioner of Education, June 1, 1999

Decided by the State Board of Education, May 3, 2000

Remanded by the Appellate Division, December 8, 2000

Order on motion by the Appellate Division, February 2, 2001

Remanded by the State Board of Education, February 7, 2001

Order on motion by the Appellate Division, June 29, 2001

Decision on remand by the Assistant Commissioner of Education, September 14, 2001

For the Petitioners-Appellants, Medvin & Elberg (Philip Elberg, Esq., of Counsel)

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

The petitioners, who were employed by the Board of Education of the City of Newark at the time of the creation of a State-operated school district, claimed that their employment was terminated on August 17, 1995 without notice contrary to N.J.S.A. 18A:7A-44 and N.J.S.A. 18A:27-4.1, and they sought reinstatement with back pay. On May 3, 2000, the State Board of Education reversed the determination of the Commissioner of Education that the petitioners were not entitled to relief under N.J.S.A. 18A:7A-44, concluding that the State District Superintendent did not have the discretion to terminate the petitioners' employment under the facts presented by this case. Under the circumstances, however, we limited their relief to the salary that each of the petitioners would have earned from the date of their termination in August 1995 until effectuation of the reorganization on July 19, 1996, plus 60 days' pay in lieu of notice as provided for by N.J.S.A. 18A:7A-44(c).

On December 8, 2000, the Appellate Division granted the State-operated District's motion for a stay, pending determination of the appeal or further order of the Court, and remanded the matter to the State Board for computation of the amount of damages. The Court directed that the remand be completed within 30 days.[1]

On February 7, 2001, we remanded the matter to the Commissioner with the direction that he determine the amount of mitigation for each petitioner and calculate the damages due each of them. We indicated in so doing that:

> As set forth in their proposal, petitioners contend that, as a matter of law, the damages in this case should be decided solely on the basis of the record that was developed before the Office of Administrative Law. According to petitioners, on that basis, they would be entitled to be paid at least the difference between what they actually earned prior

[1] The deadline was subsequently extended until October 5, 2001.

to September 17, 1996, which was sixty days after the reorganization became "official," and what they would have earned had they not been terminated....

It is the District's position that the issue of damages was not settled during the proceedings before the Administrative Law Judge ("ALJ"). Although the District does not take issue with the annual salaries earned by petitioners at the time of their termination as set forth in the record that has been developed thus far, it does dispute whether there has been mitigation. It is the District's position that calculation of damages must include consideration of all alternative income received, as evidenced by tax returns and supporting documentation, and that because the record does not include the necessary information, it must be expanded in order to justify an award of any relief beyond payment in lieu of sixty days' notice....

Further, review of the record that was developed during the proceedings before the ALJ shows that it does not provide a sufficient basis upon which to calculate the damages that are due petitioners. Tr. 5/9/97 at 86-24 through 89-15; Tr. 7/7/98 at 99-21 through 102-19. Although the record indicates that petitioners did receive other income during the relevant period before they secured permanent employment, tr. 5/9/97 at 86-12, 88-16, 89-6; tr. 7/7/98 at 101-6, it does not include the information necessary to establish the total amount of income each received following his termination. In this respect, we stress that although the certification submitted by each petitioner after the close of hearing sets forth the amount of his salary prior to termination and the date and the salary of any permanent employment, none of the certifications include any information pertaining to other income, such as amounts received in the form of unemployment benefits. [Footnote omitted.] Consequently, although we did not specifically order petitioners to produce their tax returns when they submitted their proposal, we anticipated that counsel for petitioners would include this information along with some form of supporting documentation to evidence the accuracy of the information. Counsel, however, did not do so, and included instead only the certifications that were put into the record in September 1998 and his letter of November 20, 1998 to the ALJ setting forth his calculation of damages based on those certifications.

> In short, the submissions of the parties reflect that there is a dispute between them concerning whether petitioners received income during the pertinent period in addition to the salary amounts set forth in their certifications that must be considered in calculating any damages. We find that the record establishes that petitioners did receive such income and conclude that the amounts that they received must be considered in calculating the damages to which they are entitled. Goodman v. London Metals Exchange, Inc., 86 N.J. 19 (1981). We further find that because the record before us does not establish the amount of additional income that each petitioner received, we are unable to calculate the damages without further development of the record.

State Board's Decision, slip op. at 3-5.

On August 17, 2001, the ALJ, following an additional hearing, concluded that if the petitioners ultimately prevailed, they were entitled to relief in the following amounts: O'Donohue–$83,506.11; Craig–$57,444; Gonzalez–$88,353.98; and Block–$80,863.89. In arriving at such computations, the ALJ offset the petitioners' damages by the full amount of unemployment compensation which they each had received in 1995 and 1996.

On September 14, 2001, the Assistant Commissioner adopted with modification the computation established by the ALJ. The Assistant Commissioner reduced the damages to which petitioner Block would be entitled by an additional $32,500, finding that, as Block conceded, the State-operated District should have been credited for money he had earned while working at the Education Law Center following the termination of his position.

After a thorough review of the record, including all of the exceptions filed with the Assistant Commissioner, we affirm the decision of the Assistant Commissioner as modified herein.

Like the Assistant Commissioner, we stress that the broad mitigation principles applied in Goodman v. London Metals Exchange, Inc., 86 N.J. 19 (1981), have been held to be applicable to education matters. West Orange Supplemental Instructors Association v. Board of Education of the Township of West Orange, decided by the State Board of Education, April 1, 1992 [previous and subsequent agency history omitted], aff'd, Docket #A-4864-96T1 (App. Div. 1998). However, as the Assistant Commissioner correctly observed, it would not be appropriate to remand this matter at this point for the purpose of applying those principles even if we were not faced with the Appellate Division's impending deadline. The State-operated District did not file an appeal from the ALJ's interlocutory order limiting the question of mitigation to any income earned by the petitioners during the period at issue, nor has it challenged that determination in the instant appeal or provided any evidence relevant to broader mitigation principles.

We also concur with the Assistant Commissioner's determination that the record does not permit the computation of the accrued leave time to which the petitioners claim entitlement. Although the ALJ provided the petitioners with ample opportunity to submit information to the Assistant Commissioner that would be sufficient to calculate the monetary value of such leave time, they failed to do so. Nor have they offered any such information to the State Board, despite being given the opportunity to file an additional submission.[2]

---

[2] By letter dated September 14, 2001, the Director of the State Board Appeals Office, noting the "severe time limitations" imposed by the Appellate Division, provided the parties with the opportunity to make any additional submissions to the State Board by September 25, 2001. In a letter dated September 19, 2001, Philip Elberg, Esq., counsel for the petitioners, indicated that he was not able to comply with that request,

However, we find that the petitioners' damages should not be reduced by unemployment benefits which were paid to them for any period after September 17, 1996. It is axiomatic that the damages to which the petitioners are entitled would be offset under mitigation principles only by earnings, including unemployment benefits, during the period in which they were entitled to damages. In our decision of May 3, 2000, we expressly limited the petitioners' relief to the salary that each of them would have earned from the date of their termination on August 17, 1995 until effectuation of the reorganization on July 19, 1996, plus 60 days' pay in lieu of notice as provided for by N.J.S.A. 18A:7A-44(c). Consequently, the period for which the petitioners would be entitled to damages ended on September 17, 1996. Similarly, any earnings, including unemployment compensation, for any period after that date cannot be used by the State-operated District to offset the amount of the petitioners' damages under mitigation principles.

Unfortunately, the petitioners did not provide any documentation or other evidence during the proceedings on remand before the ALJ that would be sufficient to establish how much, if any, of the unemployment compensation they received represented payments for the period subsequent to September 17, 1996.[3] Nor did the

---

stating, "...I think it is unfair to ask me to put other matters and clients aside to handle this on an emergent basis. In the absence of a legal basis for such a requirement, I will not do it."

Nonetheless, on October 1, Mr. Elberg submitted a letter brief on behalf of the petitioners in which he maintained, inter alia, that the lack of adequate information resulted from the State-operated District's "refusal to provide that information and not anything the petitioners' [sic] have done. The petitioners had no additional information they could provide."

[3] Pursuant to their testimony and as documented on their tax returns, the petitioners received the following amounts as unemployment compensation in 1996: O'Donohue–$9,204; Craig–$7,434; and Gonzalez–$4,248. During his testimony, Craig indicated that his unemployment benefits had been received "throughout the year 1996." Tr. 6/4/01, at 69. Block did not receive any unemployment benefits in 1996 since he was working full-time.

State-operated District elicit information regarding the specific amounts of unemployment benefits that represented payments for the period prior to that date that could be used to offset the petitioners' damages. Hence, the record does not permit us to compute the exact amount of the unemployment benefits received by petitioners Gonzalez, O'Donohue and Craig which could be used to reduce their damages under mitigation principles.

In addition, we reject the State-operated District's contention that the consulting income earned by petitioner Block in 1995 and 1996 should reduce the amount of damages to which he might otherwise be entitled. Block testified that his wife, who operated an educational publishing business, paid him a consulting fee in 1995 and 1996 on the advice of her accountant as a way to reduce her tax obligation. According to Block, the accountant had advised them that he could be a legal tax shelter for his wife since they regularly discussed tax matters and since he advised her on a number of matters with regard to her business. Tr. 6/4/01, at 85-87, 89-92. The ALJ found that the State-operated District had failed to establish that Block's testimony was not credible or that his tax returns reflected data contrary to his testimony. Under these particular circumstances, we conclude that such payments, which were designed to provide a tax shelter for his wife, do not constitute earned income for purposes of mitigation. See Ford v. Board of Review, 287 N.J. Super. 281 (App. Div. 1996). Thus, since Block did not receive any unemployment compensation in 1996, we agree with the Assistant Commissioner's computation of his damages.

The State-operated District also argues that any damages to which petitioner Gonzalez might be entitled should be reduced by the consulting income he received in

1996. Gonzalez testified that he had performed consulting work for the Hartford, Connecticut school district during the second half of 1996. Tr. 6/4/01, at 38, 40, 43, 52. As with the other petitioners, the ALJ found that the State-operated District had failed to establish that the testimony of Gonzalez was not credible or that his tax returns reflected data contrary to his testimony. Under the circumstances – in which we had directed that the petitioners be compensated for the salary that each of them would have earned in the State-operated District from the date of their termination in August 1995 until effectuation of the reorganization in July 1996, and the State-operated District has provided no evidence to counter the ALJ's credibility determination regarding Gonzalez's testimony that his consulting income had been received in the second half of 1996 – we conclude that only the consulting income received by Gonzalez prior to September 17, 1996 could be used to offset any damages to which he might be entitled. Again, however, we are not able to calculate on the basis of the record before us the amount of the consulting income earned by Gonzalez prior to September 17, 1996.

We recognize that the Court, in remanding this matter, charged us with the task of computing the amount of damages. However, as reflected in our decision, the record established by the parties in the Office of Administrative Law does not permit us to calculate with specificity 1) the amount of unemployment benefits received by petitioners Gonzalez, O'Donohue and Craig which represented payments for the period prior to September 17, 1996, and 2) whether Gonzalez had earned any consulting income prior to that date which could be used to offset his damages. Therefore, we cannot calculate the exact amount of damages to which those petitioners might be entitled. Ordinarily, we would remand this matter to the Commissioner for further

305-01

305-01 SEC

IN THE MATTER OF LISA KAZAWIC,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF WHARTON, MORRIS	:	DECISION
COUNTY.	:	

September 6, 2001

SCHOOL ETHICS COMMISSION	:	BEFORE THE SCHOOL ETHICS COMMISSION
v.	:	
	:	RESOLUTION
LISA KAZAWIC,	:	
Wharton Borough Board of Education	:	SEC Docket No.: T24-01
Morris 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, Lisa Kazawic was elected to serve a three-year term on the Wharton Borough Board of Education in April 2000; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on December 1, 2000 and February 13, 2001; and

WHEREAS, the NJSBA conducted seven training sessions between April 2000 and April 2001 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held in March 2001; and

WHEREAS, the Commission issued an Order on April 9, 2001, directing her to Show Cause why she had not attended training up until that time; and

WHEREAS, she replied that she could not attend due to a severe illness that required surgery, but that she planned to attend a September 2001 session; and

WHEREAS, the Commission notified her that the Commission would discuss this matter at its June 26, 2001 meeting, that she had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission has considered the reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2000 to April 2001 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission would have accepted her attendance at the June session, but she failed to attend; and

WHEREAS, the Commission finds that if Ms. Kazawic fails to attend by October, the Commission finds that it would be appropriate to have her removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ms. Kazawic violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend her until she attends, but remove her from the board if she fails to attend by the October training session.

Dated: July 12, 2001

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 River View 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 June 26, 2001.

Lisa James-Beavers, Executive Director

c/lisa/decisions/T2401.doc

AGENCY DKT. NO. 253-7/01

IN THE MATTER OF LISA KAZAWIC,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF WHARTON, MORRIS	:	DECISION
COUNTY.	:	

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 ample notice to the above-named Board member of her failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on April 9, 2001 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 replied that she could not attend due to a severe illness that required surgery, but that she planned to attend a September 2001 session; and

Whereas, the Commission voted on June 26, 2001, to recommend suspension of the above-named Board member until she attends a training session, and to remove her from the Board if she fails 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 July 12, 2001, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to the Commission's resolution recommending suspension, pending attendance at training, and removal, if the Board member fails to so attend by October 2001; and

Whereas, no response was forthcoming from her; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission recommending removal of the above-named Board member if she fails to attend a training session by October, 2001; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing date of this decision, and shall remain suspended pending completion of the requisite training, and, in the event the Board member fails to complete the required training by October 23, 2001, the above-named Board member is hereby summarily removed from office effective October 24, 2001.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/6/2001

Date of Mailing: 9/17/2001

*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.

306-01

IN THE MATTER OF THE TENURE HEARING	:	
OF PAULA GOLDBERG, SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF PLEASANTVILLE,	:	DECISION
ATLANTIC COUNTY.	:	

September 14, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2015-01

AGENCY DKT. NO. 56-2/01

IN THE MATTER OF THE TENURE HEARING OF PAULA GOLDBERG, BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF PLEASANTVILLE ATLANTIC COUNTY,

---

Michael Damm, Esq., for petitioner (Selikoff & Cohen, attorneys)

Joseph Morano, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: July 26, 2001 Decided: July 26, 2001

BEFORE **LILLARD E. LAW,** ALJ:

This matter was transmitted to the Office of Administrative Law on March 26, 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.

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.

26 July 2001
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

7/31/01
DATE

Debbie Antonatto
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 1 2001
DATE

J. J. Main
ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lmh

SELIKOFF & COHEN, P.A.
307 Fellowship Road, Suite 314
Mount Laurel, New Jersey 08054-1233
(856) 778-6055
Attorneys for Respondent Paula M. Goldberg

IN THE MATTER OF THE TENURE HEARING OF PAULA GOLDBERG

CITY OF PLEASANTVILLE BOARD OF EDUCATION, ATLANTIC COUNTY

BEFORE THE COMMISSIONER OF EDUCATION
STATE OF NEW JERSEY
AGENCY DKT. NO.: 56-2/01

JOINT REQUEST FOR APPROVAL OF SETTLEMENT PROVIDING FOR WITHDRAWAL OF TENURE CHARGES

Counsel for the Board of Education for the City of Pleasantville and counsel for its tenured employee Paula Goldberg, join in moving for an Order finding that the annexed Settlement Agreement between the parties meets the requirements of N.J.A.C. 1:1-19.1, and recommending that the Settlement Agreement be adopted by the Commissioner of Education and that on condition that the Commissioner approves the Settlement Agreement without modification, that for the reasons more specifically set forth in the Agreement, that it be implemented and the tenure charges filed be withdrawn.

SELIKOFF & COHEN, P.A.
Attorneys for
Paula Goldberg

MICHAEL C. DAMM

Dated: 6/19/01

SCHWARTZ, SIMON, EDELSTEIN, CELSO & KESSLER
Attorneys for City of Pleasantville Board of Education

Joseph R. Morano

JOSEPH R. MORANO

Dated: 7/25/01

SETTLEMENT AGREEMENT REGARDING ACTION PENDING BEFORE THE COMMISSIONER OF EDUCATION

This Settlement Agreement is entered into by and between the City of Pleasantville Board of Education ("Board") and its tenured employee Paula Goldberg ("Goldberg").

WHEREAS, Ms. Goldberg has been continuously employed by the Board as a secretary since in or about May, 1987; and,

WHEREAS, on February 27, 2001, the Board certified tenure charges against Ms. Goldberg to the Commissioner of Education under the Tenure Employees Hearing Law, which charges were captioned:

IN THE MATTER OF THE TENURE
HEARING OF PAULA GOLDBERG,
CITY OF PLEASANTVILLE
BOARD OF EDUCATION
ATLANTIC COUNTY
AGENCY DKT. NO.: 56-2/01

WHEREAS on March 20, 2001 Ms. Goldberg filed an Answer contesting the tenure charges; and,

WHEREAS, the aforesaid tenure charges were listed for hearing before the Honorable Lillard E. Law, A.L.J.; and,

WHEREAS, the parties have agreed to a means of resolving this dispute in a manner consonant with the public interest, the Board having had an opportunity to review Ms. Goldberg's medical records concerning her physical disabilities; and in view of that medical documentation indicating that her attendance difficulties resulted from physical incapacities caused by medical circumstances beyond her control; and based on this it appearing to the Board that Ms. Goldberg is totally and permanently disabled and no longer able to perform her job duties; and, whereas, in view of her pending application to the New Jersey Division of Pensions and Benefits for Disability Retirement benefits; and given the fact that her performance as a secretary was never at issue, but rather her attendance; and,

WHEREAS, it is understood that this Agreement is contingent upon the approval of the Office of Administrative Law and the Commissioner of Education; nothing in this Agreement is intended to prevent the Commissioner of Education from exercising his exclusive authority to decide tenure matters;

NOW THEREFORE, the matter in dispute having been amicably adjusted by and between the parties and based on the foregoing having fulfilled the public interest, it is hereby stipulated a

agreed as follows:

1. Ms. Goldberg, for and in consideration of the undertakings of the Board set forth herein, and intending to be legally bound, does hereby remise, release and forever discharge the Board and its officers, members, employees and agents, and their respective successors and assigns, heirs, executors and administrators, of and from any and all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, which she ever had, now has, or hereafter may have, or which her heirs, executors or administrators hereafter may have by reason of her employment relationship and/or the termination of her employment relationship and/or affiliation with the Board, with the following exception: claims arising in connection with her right to receive pension/disability retirement benefits.

2. The Board, for and in consideration of the undertakings of Ms. Goldberg set forth herein, and intending to be legally bound, does hereby remise, release and forever discharge Ms. Goldberg 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 and/or agents, and their respective successors and assigns, heirs, executors or administrators hereafter may have by reason of her employment relationship and/or the termination of her employment relationship and/or affiliation with the Board.

3. The Board agrees to withdraw and dismiss all of the tenure charges with prejudice subject to the approval by the Administrative Law Judge and the Commissioner of Education of this agreement.

4. Unless mandated by law or otherwise requested by Ms. Goldberg or anyone acting on her behalf, the Board shall take no further action in connection with Ms. Goldberg's employment.

5. Ms. Goldberg agrees to resign from her employment by reason of disability effective on the approval of this agreement by the Commissioner of Education or upon approval of her application for Disability Retirement Benefits whichever occurs sooner. In that regard, she will execute the attached Exhibit "A". Ms. Goldberg understands that this decision is irrevocable. The Board agrees to release her from any contract responsibilities in this regard without penalty.

6. The Board, inasmuch as it is not opposed to Ms. Goldberg's application for disability retirement, will cooperate with her in connection with that application to the Division of Pensions and Benefits by promptly completing and forwarding to the Division all necessary forms and information including any corrected forms and information. Prior to sending any documents to the Division of

Pensions a copy of the proposed submission shall be sent to Ms. Goldberg's attorneys, Selikoff and Cohen, P.A. for Ms. Goldberg to review for accuracy.

7. Should the Commissioner fail to approve this Settlement Agreement, the parties agree to make every reasonable effort to reform the Agreement to meet his objections.

8. Inasmuch as Ms. Goldberg's performance as a secretary was never at issue, the Board agrees that it will provide Ms. Goldberg with a letter of reference in the form attached as Exhibit "B". Said letter will be provided to Ms. Goldberg within ten (10) days of the approval of this Agreement by the Board.

9. Neither the Board nor its agents or employees will say or write anything negative concerning Ms. Goldberg's work performance with the Board. Inquiries concerning her employment record, shall be met with a response in the form attached as Exhibit "B".

10. In the event for some reason that Ms Goldberg's application for Disability Retirement is not approved, the Board will provide Ms. Goldberg with such benefits allowed by law to any separated Board employee to the extent of Ms. Goldberg's eligibility under the law for same including if applicable, COBRA benefits.

11. Within thirty (30) days of the approval of this Agreement by the Board, the Board will pay to Ms. Goldberg at her applicable salary rate, 6.5 days of pay, which represents vacation days due to Ms. Goldberg. No deductions shall be made other than those normally taken for federal, state and/or local authorities for taxes, social security etc.

12. Other than as set forth herein, Ms. Goldberg shall seek nothing further from the Board in terms of employment benefits.

13. The Parties agree to be bound by a covenant of good faith and fair dealing with respect to the terms of this agreement.

14. This Agreement may be enforced in any court or other tribunal having jurisdiction in New Jersey.

15. Ms. Goldberg agrees that she has been fairly and adequately represented and advised at all stages of these proceedings, that she is fully satisfied with the services of counsel and that she is voluntarily and without coercion with a full understanding of her rights and the ramifications of this settlement agreement entering into it on her own accord and with the specific understanding that it is subject to the approval of the Office of Administrative Law and the Commissioner of Education.

16. The parties agree that this represents the full and complete agreement between them.

17. By signing this Agreement, each signatory represents that she or he is a party or has been duly authorized by a party to sign on the party's behalf. The parties agree that this Agreement may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

Intending to be legally bound, the parties execute the foregoing Agreement on the date(s) indicated below.

SELIKOFF & COHEN, P.A.
Attorneys for
Paula Goldberg

MICHAEL C. DAMM

Dated: 6/19/01

SCHWARTZ, SIMON, EDELSTEIN, CELSO & KESSLER
Attorneys for City of Pleasantville Board of Education

JOSEPH R. MORANO

Dated: 6/25/01

WITNESS:

Dated: 6-19-01

PAULA GOLDBERG

WITNESS:

Richard L. Mills
BOARD SECRETARY

Dated: 7/18/01

CITY OF PLEASANTVILLE BOARD OF EDUCATION,

EXHIBIT "A"

June 14, 2001

Paula Goldberg
36 Glenwood Drive
Lindenwold, New Jersey 08021
(856) 627-1355

City of Pleasantville Board of Education
115 West Decatur Avenue
Pleasantville, New Jersey 08232

Re: Letter of Resignation

Dear Board Members:

Please be advised that effective on approval of the settlement agreement by the Commissioner of Education or the approval of my application for disability retirement benefits whichever occurs first, I resign from my position with the Board. This resignation is subject to the Board's full performance of its obligations under the Agreement and General Release signed by me and dated June 19, 2001. I realize that this decision is irrevocable.

I take with me many fond memories of the students who I have come into contact with over the years.

Paula Goldberg

Pleasantville Public Schools

Email: carrington.andrew@pleasantville.k12.nj.us

Dr. Andrew T. Carrington
Superintendent

Phone: (609) 677-8101
Fax: (609) 677-8122

June 5, 2001

To Whom It May Concern:

This will confirm that Paula Goldberg was employed with the City of Pleasantville Board of Education as a Child Study Team secretary from approximately May 1987 through May 2001 when she resigned for medical reasons. Her last salary was $29,956. During her active employment with the Board she performed her secretarial duties proficiently in all respects.

Sincerely,

Andrew T. Carrington
Superintendent

900 West Leeds Avenue • P.O. Box 960 • Pleasantville, New Jersey 08232-0960

OAL DKT. NO. EDU 2015-01
AGENCY DKT. NO. 56-2/01

IN THE MATTER OF THE TENURE HEARING	:	
OF PAULA GOLDBERG, SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF PLEASANTVILLE,	:	DECISION
ATLANTIC COUNTY.	:	

The record, Settlement Agreement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 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. The matter is hereby dismissed subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

Date of Decision: 9|14|01

Date of Mailing: 9|17|01

307-01 SEC

IN THE MATTER OF EVELYN WILLIAMS, :

STATE-OPERATED SCHOOL DISTRICT : COMMISSIONER OF EDUCATION

OF THE CITY OF NEWARK, ESSEX COUNTY. : DECISION

September 6, 2001

SCHOOL ETHICS COMMISSION	:	BEFORE THE
	:	SCHOOL ETHICS COMMISSION
v.	:	
	:	RESOLUTION
EVELYN WILLIAMS,	:	
Newark Board of Education	:	SEC Docket No.: T14-01
Essex 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, Evelyn Williams was elected to serve a three-year term on the Newark Advisory Board of Education in April 2000; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on December 1, 2000 and February 13, 2001; and

WHEREAS, the NJSBA conducted seven training sessions between April 2000 and April 2001 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held in March 2000; and

WHEREAS, the Commission issued an Order on April 9, 2001, directing her to Show Cause why she had not attended training up until that time; and

WHEREAS, she replied that she could not attend due to periodontal surgery and painful post-surgical recovery, but that she planned to attend a January 12, 2002 session; and

WHEREAS, her doctor's note indicates that her surgery and follow-up appointments were scheduled between October 2000 and December 2000; and

WHEREAS, the Commission notified her that the Commission would discuss this matter at its June 26, 2001 meeting, that she had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission has considered the reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2000 to April 2001 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

WHEREAS, the Commission finds that if Ms. Williams fails to attend by **October 2001**, the Commission finds that it would be appropriate to have her removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ms. Williams violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend her until she attends, but remove her from the board if she fails to attend by the October training session.

Dated: July 11, 2001

Paul C. Garbarini /c
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 River View 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 June 26, 2001.

Lisa James-Beavers /c
Lisa James-Beavers, Executive Director

e/lisa/decisions/T1401.doc

AGENCY DKT. NO. 254-7/01

IN THE MATTER OF EVELYN WILLIAMS, :

STATE-OPERATED SCHOOL DISTRICT : COMMISSIONER OF EDUCATION

OF THE CITY OF NEWARK, ESSEX COUNTY. : 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 ample notice to the above-named Board member of her failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on April 9, 2001 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 replied that she could not attend due to periodontal surgery and painful post-surgical recovery, but that she planned to attend a January 12, 2002 session; and

Whereas, her doctor's note indicates that her surgery and follow-up appointments were scheduled between October 2000 and December 2000; and

Whereas, the Commission voted on June 26, 2001, to recommend suspension of the above-named Board member until she attends a training session, and to remove her from the Board if she fails 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 July 12, 2001, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to the Commission's resolution recommending suspension, pending attendance at training and removal, if the Board member fails to so attend by October 2001; and

Whereas, no response was forthcoming; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission recommending removal of the above-named Board member if she fails to attend a training session by October, 2001; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing date of this decision, and shall remain suspended pending completion of the requisite training, and, in the event the Board member fails to complete the required training by October 23, 2001, the above-named Board member is hereby summarily removed from office effective October 24, 2001.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/6/2001

Date of Mailing: 9/17/2001

*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.

308-01 SEC

IN THE MATTER OF JUDITH MURCH,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF STILLWATER,	:	DECISION
SUSSEX COUNTY.	:	
	:	

September 6, 2001

SCHOOL ETHICS COMMISSION	:	BEFORE THE
	:	SCHOOL ETHICS COMMISSION
v.	:	
	:	RESOLUTION
JUDITH MURCH,	:	
Stillwater Twp. Board of Education	:	SEC Docket No.: T36-01
Sussex 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, Judith Murch was elected to serve a three-year term on the Stillwater Township Board of Education in April 2000; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on December 1, 2000 and February 13, 2001; and

WHEREAS, the NJSBA conducted seven training sessions between April 2000 and April 2001 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held in March 2001; and

WHEREAS, the Commission issued an Order on April 9, 2001, directing her to Show Cause why she had not attended training up until that time; and

WHEREAS, she replied that she could not attend due to her husband's illness; and

WHEREAS, the Commission notified her that the Commission would discuss this matter at its June 26, 2001 meeting, that she had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission has considered the reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2000 to April 2001 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission granted an extension to similarly situated board members to attend one of the June sessions; and

WHEREAS, the Commission finds that if Ms. Murch fails to attend by October, the Commission finds that it would be appropriate to have her removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ms. Murch violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend her until she attends, but remove her from the board if she fails to attend by the October training session.

Dated: July 12, 2001

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 River View 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 June 26, 2001.

Lisa James-Beavers, Executive Director

h/lisa/decisions/T2701.doc

AGENCY DKT. NO. 252-7/01

IN THE MATTER OF JUDITH MURCH,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF STILLWATER,	:	DECISION
SUSSEX COUNTY.	:	
	:	

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 ample notice to the above-named Board member of her failure to attend such training sessions; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on April 9, 2001 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 replied that she could not attend due to her husband's illness; and

Whereas, the Commission voted on June 26, 2001, to recommend suspension of the above-named Board member until she attends a training session, and to remove her from the Board if she fails 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 July 12, 2001, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to the Commission's resolution recommending suspension, pending attendance at training, and removal if the Board member fails to so attend by October 2001; and

Whereas, no response was forthcoming; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission recommending removal of the above-named Board member if she fails to attend a training session by October, 2001; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing date of this decision, and shall remain suspended pending completion of the requisite training, and, in the event the Board member fails to complete the required training by October 23, 2001, the above-named Board member is hereby summarily removed from office effective October 24, 2001.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/6/2001

Date of Mailing: 9/17/2001

*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.

309-01 SEC

IN THE MATTER OF BRUCE WHITE,	:	
EWING TOWNSHIP BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, MERCER COUNTY.	:	DECISION
	:	

SYNOPSIS

This matter arose from a complaint alleging that respondent, former member of the Ewing Township Board, violated *N.J.S.A.* 18A:12-24(c) of the School Ethics Act (Act) when, as a member of that Board, he voted on the payment of tuition to the Mercer County Vocational School Board, where he was employed as a principal.

The School Ethics Commission (Commission) concluded that respondent did have an indirect financial involvement that a reasonable person could perceive as impairing his objectivity or independence of judgment since respondent's employer acquired funds from the tuition payment that the Ewing Board paid. Thus, his conduct of voting on the payment 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 to censure respondent was an appropriate penalty.

IN THE MATTER	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
OF	:	
	:	**Docket No.: C01-01**
BRUCE WHITE,	:	
EWING TOWNSHIP BOARD OF ED.	:	**DECISION**
MERCER COUNTY	:	
	:	

PROCEDURAL HISTORY

The above-captioned complaint was filed on January 26, 2001. It alleged that Bruce White violated the School Ethics Act by being employed by the Mercer County Vocational School District as a Principal and being a member of the Ewing Township School Board and by voting on the payment of tuition to the Mercer County Vocational School. The complainant alleged that Mr. White's conduct violated N.J.S.A. 18A:12-24(h). On February 21, 2001, in its cover letter to Mr. White enclosing the complaint, the Commission notified Mr. White that the Commission would also consider whether the conduct alleged would violate N.J.S.A. 18A:12-24(b) or (c).

At its meeting of April 24, 2001, the School Ethics Commission found probable cause to credit the allegation that Bruce White violated the School Ethics Act when, as a member of the Ewing Board, he voted on the payment of tuition to the Mercer County Vocational School Board, where he is employed as a Principal. Specifically, the Commission found probable cause to exist under N.J.S.A. 18A:12-24(c). The Commission found no probable cause to credit the allegation that Mr. White violated N.J.S.A. 18A:12-24(b) or (h). Although the complainant also alleged that Mr. White had an inherent conflict of interest in being employed as a Principal by the Mercer County Vocational School and serving as a member of the Ewing Township Board, the Commission did not find probable cause to credit this allegation.

The Commission found the material facts of the case to be undisputed regarding the conduct on which it found probable cause and invited Mr. White to submit a written statement within 30 days setting forth why he should not be found in violation of N.J.S.A. 18A:12-24(c) of the Act. On June 18, 2001, Mr. White responded that he was waiving his right to submit any further information to the Commission, including taking a position with respect to any penalty to be imposed by the Commission. The complainant submitted correspondence on June 21, 2001 disagreeing with the Commission's decision finding no probable cause on the issue of Mr. White's employment constituting a conflict and arguing that Mr. White should be given the maximum penalty, including preventing him from running for office again. Mr. Ferrante noted that Mr. White was found guilty of

a violation of the Act on two prior occasions and that he displays a cavalier attitude toward the Commission's rulings.

The Commission now finds that Mr. White violated N.J.S.A. 18A:12-24(c) of the School Ethics Act by voting on the tuition payment to the school at which he works. The Commission recommends that the Commissioner censure Mr. White for this violation. The Commission will not reconsider its finding of no probable cause on the allegation that Mr. White violated the School Ethics Act by being employed as a Principal with the Mercer County Vocational Schools and serving as a Ewing Township Board Member.

FINDINGS 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, Respondent Bruce White was a member of the Ewing Township Board of Education. Mr. White lost the election in April 2001 and is currently not a member of the Board. Also, at all times relevant to the allegations in this Complaint, Mr. White was a Principal at the Mercer County Vocational School District's Assunpink Center Vocational School.

The Mercer County Vocational School District is the local education agency (LEA) for the Thomas J. Rubino Alternative School, which is physically located on the campus of the Mercer County Community College. The Mercer County Vocational School District has an agreement with Comprehensive Education Resources (CER) to serve as the contractor of the county alternative education program. A tuition fee of $11,400 per student is charged to the participating sending school district. The total tuition received from all the districts includes a rental fee to the Mercer County Community College for use of their facilities, an administrative fee to the Mercer County Vocational School District and reimbursement to CER for educational costs. The formula for fund distribution is as follows: 36 students (the minimum enrollment base) x $11,400 = $410,400. Of that $410,400, $10,000 is submitted to the community college as a rental fee; $396,000 is submitted to CER for program costs; and $4,400 is retained by the school district for central administrative costs.

Each year, the Mercer County Vocational School District sends out an articulation agreement to each of the participating sending school districts. This agreement allows the sending school district to reserve a number of slots in the alternative education program for the school year. The Ewing Township Board reserves slots at the Alternative School for its students. On January 22, 2001, the Ewing Township School Board voted to approve a list of checks including the tuition payment to Mercer County Vocational School Board in the amount of $2,280.00. Mr. White seconded the motion and voted in favor of that item along with the other Finance items including the Financial Reports of the Secretary and Treasurer. At meetings of the Ewing Township School Board, all financial items are voted on as a block. However, an individual Board member may

abstain on any items that he or she asks to be addressed separately. Mr. White did not ask whether he should vote; nor was he told by anyone present that he should not vote.

The Ewing Township Board retains discretionary authority in terms of where to send students warranting an alternative education program. According to Ewing's Board Secretary/Business Administrator, the choices include an in-district school.

CONCLUSIONS OF LAW

The Commission found probable cause that Mr. White violated N.J.S.A. 18A:12-24(c), which 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.

Mr. White has no personal involvement with the Thomas J. Rubino Alternative High School. The sending of pupils from the Ewing Township School District to the Alternative High School does not directly impact his employment or compensation. The involvement that he has is that the Mercer County Vocational School District administers the alternative school program and keeps an administrative fee from the tuition payments received for doing so. Mr. White is not a member of the central administrative staff, so the administrative fees are not calculated based on his salary, but the salaries of the Vocational School superintendent and business administrator. As a practical matter, however, the fees go to the general fund of the vocational school. For these reasons, the Commission concludes that Mr. White does not have a personal involvement with the tuition that the Ewing Board pays to the Mercer County Vocational School District.

However, the Commission concludes that Mr. White does have an indirect financial involvement that a reasonable person could perceive to impair his objectivity or independence of judgment. Mr. White's employer, the Mercer County Vocational School, acquires funds from the tuition payment that the Ewing Board pays. The funds are not specifically earmarked for any particular purpose although the administrative fees charged to the district are derived from the salaries of administrators who do not include Mr. White. The fees go into the general fund of the Vocational School. Based on the above facts, the Commission finds that Mr. White's conduct violated N.J.S.A. 18A:12-24(c).

For the foregoing reasons, the Commission concludes that respondent Bruce White had an indirect financial involvement that would reasonably be expected to impair his objectivity in violation of N.J.S.A. 18A:12-24(c) when he voted for the Ewing Board to pay the tuition to the Mercer County Vocational Technical School.

PENALTY

The Commission is mindful of the fact that Mr. White has previously been found to have violated the School Ethics Act in ***In the Matter of Bruce White,*** C18/C22-99 (March 28, 2000), Commissioner's sanction (June 1, 2000), appeal dism'd, State Board of Education (September 6, 2000). The fact remains however, that Mr. White is no longer a member of the Board. Therefore, the penalties of suspension and removal are rendered moot by that fact. The Commission finds that the appropriate penalty for Mr. White'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. Since the Commission does not have statutory authority to prevent a school official from running for the school board in the future, this penalty requires a public statement of his 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.

Paul C. Garbarini
Chairperson

Resolution Adopting Decision -- C01-01

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof and has considered the testimony of the parties; 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 respondent chose not to submit a written submission in response to the Commission's finding of probable cause; and

Whereas, the Commission concludes that respondent's conduct violated N.J.S.A. 18A:12-24(c) of the School Ethics Act; and

Whereas, the Commission has reviewed the proposed decision of its staff setting forth the reasons for its conclusion; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission adopts the proposed decision referenced as its decision in this matter finding Bruce White in violation of N.J.S.A. 18A:12-24(c) of the Act and recommending a sanction of censure.

Paul C. Garbarini, Chairman

I hereby certify that the School
Ethics Commission adopted this decision
at its public meeting on July 24, 2001.

Lisa James-Beavers
Executive Director

c0101.doc

AGENCY DKT. NO. 270-7/01

IN THE MATTER OF BRUCE WHITE,	:	
EWING TOWNSHIP BOARD OF	:	COMMISSIONER OF EDUCATION
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 upon Respondent Bruce White, 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, as a member of the Ewing Township Board of Education, he voted on the payment of tuition to the Mercer County Vocational School Board, where he is employed as a principal.

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, in large measure, deal with objecting to the standard utilized by the Commission in finding him guilty of a School Ethics Act violation and complaints regarding the individual who initiated the charge against him. He additionally challenges the authority of the Commission to impose a sanction on him since he is

no longer a board member and has retired, as of August 1, 2001, as principal of the Assunpink Center at the Mercer County Technical Schools. [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 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 inadvertently or knowingly violated the School Ethics Act, and to weigh the effects of aggravating and mitigating circumstances.[2] Therefore, the Commission's recommended penalty in this matter will not be disturbed.

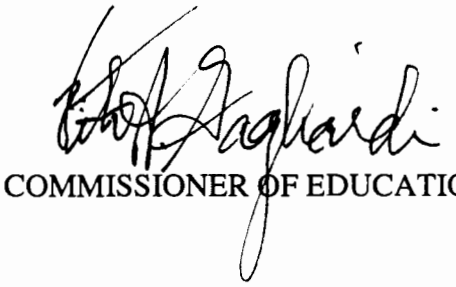
---

[1] It is noted that a comment was also filed by Frank Ferrante, the original complainant in this matter. As a complainant has no standing to appeal either the Ethics Commission's finding of an Ethics Act violation or the appropriate penalty (*see In the Matter of Frank Pannucci, Board of Education of Brick Township, Ocean County*, decided by the State Board January 19, 2000), such comment was not considered.

[2] Respondent's challenge to the Commission's authority to impose a penalty on him, since he is no longer a board member nor principal of Assunpink Center at the Mercer County Technical Schools, is deemed meritless, inasmuch as the recommended penalty is for an action taken when he *was* a sitting board member.

Accordingly, IT IS hereby ORDERED that Bruce White be censored as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[3]



COMMISSIONER OF EDUCATION

Date of Decision: 9/10/2001

Date of Mailing: 9/17/2001

[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:2-1.1 *et seq.* Commissioner decisions are deemed filed three days after the date of mailing to the parties.

310-01 SEC

IN THE MATTER OF CATHERINE L. WADA,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF BERGENFIELD, BERGEN	:	DECISION
COUNTY.	:	
	:	

September 6, 2001

SCHOOL ETHICS COMMISSION	:	BEFORE THE
	:	SCHOOL ETHICS COMMISSION
v.	:	
	:	RESOLUTION
CATHERINE WADA,	:	
Bergenfield Board of Education	:	**SEC Docket No.: T02-01**
Bergen 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, Catherine Wada was elected to serve a three-year term on the Bergenfield Board of Education in April 2000; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on December 1, 2000 and February 13, 2001; and

WHEREAS, the NJSBA conducted seven training sessions between April 2000 and April 2001 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held in March 2000; and

WHEREAS, the Commission issued an Order on April 9, 2001, directing her to Show C why she had not attended training up until that time; and

WHEREAS, she replied that she could not attend due to family obligations and schedule, b that she planned to attend a June 2001 session; and

WHEREAS, the Commission notified her that the Commission would discuss this matter a June 26, 2001 meeting, that she had the right to attend, and could be found in violation of School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission has considered the reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2000 to April 2001 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission would have accepted her attendance at the June session, but she failed to attend; and

WHEREAS, the Commission finds that if Ms. Wada fails to attend by October, the Commission finds that it would be appropriate to have her removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ms. Wada violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend her until she attends, but remove her from the board if she fails to attend by the October training session.

Dated: July 11, 2001

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 River View 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 June 26, 2001.

Lisa James-Beavers, Executive Director

h/lisa/decisions/T0201.doc

AGENCY DKT. NO. 249-7/01

IN THE MATTER OF CATHERINE L. WADA,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF BERGENFIELD, BERGEN	:	DECISION
COUNTY.	:	
	:	

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 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 ample notice to the above-named Board member of her failure to attend such training; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on April 9, 2001 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 replied to the Commission, indicating that her non-attendance at training was not intentional and assuring that she was not trying to shirk any responsibility; and

Whereas, the Commission voted on June 26, 2001, to recommend suspension of the above-named Board member until she attends the required training, and to remove her from the Board if she fails to timely attend such training 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 July 12, 2001, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to the Commission's resolution recommending suspension, pending attendance at training and removal, if she fails to so attend in October 2001; and

Whereas, on July 26, 2001 the above-named Board member responded to the Commissioner, informing him that she could not attend the June 2001 training since it was an extremely busy month because her two children were graduating from their respective schools, and requesting that the Commissioner not suspend her because she has already registered to attend a September 2001 training session and she works diligently on behalf of the children of Bergenfield; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission recommending suspension and removal of the above-named Board member if she fails to attend a training session by October 2001; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing date of this decision, and shall remain suspended pending completion of the requisite training, and, in the event the Board member fails to complete the required training by October 23, 2001, the above-named Board member is hereby summarily removed from office effective October 24, 2001.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/6/2001

Date of Mailing: 9/18/2001

*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.

311-01

311-01 SEC

IN THE MATTER OF PAULA SCHAMP,	:	
BOARD OF EDUCATION OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF ELSINBORO, SALEM COUNTY.	:	DECISION
	:	

September 6, 2001

SCHOOL ETHICS COMMISSION	:	BEFORE THE
	:	SCHOOL ETHICS COMMISSION
v.	:	
	:	RESOLUTION
PAULA SCHAMP,	:	
Elsinboro Board of Education	:	SEC Docket No.: T27-01
Salem 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, Paula Schamp was elected to serve a three-year term on the Elsinboro Board of Education in April 2000; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on December 1, 2000 and February 13, 2001; and

WHEREAS, the NJSBA conducted seven training sessions between April 2000 and April 2001 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held in March 2001; and

WHEREAS, the Commission issued an Order on April 9, 2001, directing her to Show Cause why she had not attended training up until that time; and

WHEREAS, she replied that she could not attend due to family obligations and the location of the sessions, but that she planned to attend the October 2001 session; and

WHEREAS, the Commission notified her that the Commission would discuss this matter at its June 26, 2001 meeting, that she had the right to attend, and could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission has considered the reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2000 to April 2001 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission granted an extension to similarly situated board members to attend one of the June sessions; and

WHEREAS, the Commission finds that if Ms. Schamp fails to attend by October, the Commission finds that it would be appropriate to have her removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ms. Schamp violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend her until she attends, but remove her from the board if she fails to attend by the October training session.

Dated: July 12, 2001

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 River View 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 June 26, 2001.

Lisa James-Beavers, Executive Director

h/lisa/decisions/t2701.doc

AGENCY DKT. NO. 250-7/01

IN THE MATTER OF PAULA SCHAMP,	:	
BOARD OF EDUCATION OF THE TOWNSHIP	:	COMMISSIONER OF EDUCATION
OF ELSINBORO, SALEM COUNTY.	:	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 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 ample notice to the above-named Board member of her failure to attend such training; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on April 9, 2001 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 replied that she could not attend due to child care considerations and the need to attend training in southern New Jersey; and

Whereas, the Commission voted on June 26, 2001, to recommend suspension of the above-named Board member until she attends the required training, and to remove her from the Board if she fails to timely attend the training 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 July 12, 2001, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to the Commission's resolution

recommending suspension, pending attendance at training and removal, if she fails to so attend in October 2001; and

Whereas, no response was forthcoming; and

Whereas, the Commissioner of Education has carefully considered the record of this matter and the decision of the School Ethics Commission recommending suspension and removal of the above-named Board member if she fails to attend the required training by October, 2001; now therefore

IT IS ORDERED that the above-named Board member is suspended from office as of the filing date of this decision, and shall remain suspended pending completion of the requisite training, and, in the event the Board member fails to complete the required training by October 23, 2001, the above-named Board member is hereby summarily removed from office effective October 24, 2001.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/6/2001

Date of Mailing: 9/18/2001

*This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appea' 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 d of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

315-01

IN THE MATTER OF THE TENURE HEARING	:	
OF THERESA AGUGLIARO, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF NORTH BERGEN, HUDSON	:	DECISION
COUNTY.	:	

September 17, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7554-00

AGENCY DKT. NO. 256-7/00

IN THE MATTER OF THE TENURE HEARING OF THERESA AGUGLIARO, SCHOOL DISTRICT OF NORTH BERGEN, HUDSON,

---

Jack Gillman, Esq., for petitioner
(Hanly and Ryglicki, attorneys)

Gregory T. Syrek, Esq., for respondent
(Bucceri & Pincus, attorneys)

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

BEFORE **STEPHEN G. WEISS**, ALJ:

STATEMENT OF THE CASE

This custodial tenure case was transmitted by the Department of Education to the Office of Administrative Law (OAL) in August 2000, as a result of the filing of charges of excessive absenteeism, etc., against respondent. Plenary hearings were scheduled for November 2000. However, the parties were able to agree shortly before

the start of the hearings that the matter could be resolved in an amicable fashion. Thus, the hearings were adjourned.

Following lengthy discussions thereafter, a Stipulation of Settlement was prepared and has been submitted to me for review which is attached hereto and made part hereof. The parties have agreed that respondent will tender her resignation from her tenured employment as a custodian, effective October 31, 2001, and shall remain on unpaid leave with medical benefits until then. The parties also recognize in the agreement that resolution of the case in this fashion is in their interest, as well as the public, since its obviates the need for protracted litigation and the consequent time and expense involved therewith.

I have reviewed the attached settlement agreement and the terms contained therein and I **FIND** as follows:

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.

July 26, 2001
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

8/1/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

AUG - 3 2001
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

SETTLEMENT AGREEMENT

This Agreement is made by and between **THERESA AGUGLIARO**, residing at 5912 Meadowview Avenue, Apartment 10B, North Bergen, New Jersey 07047 (hereinafter referred to as "Ms. Agugliaro") and the **NORTH BERGEN BOARD OF EDUCATION**, with offices located at 7317 Kennedy Boulevard, North Bergen, New Jersey 07047 (hereinafter "the Board"). In consideration of the mutual promises and undertakings contained in this Agreement, and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned state:

WHEREAS, Ms. Agugliaro is a tenured custodial worker employed by the Board; and,

WHEREAS, certain tenure charges based on allegations of excessive absenteeism were filed against Ms. Agugliaro by certain members of the Board's administrative and supervisory staff; and,

WHEREAS, the parties wish to come to a full an final resolution of the tenure charges proceedings in lieu of any further processing of the charges in accordance with the New Jersey Tenure Employees Hearing law, N.J.S.A. 18A:6-10 et seq.

IT IS AGREED ON THIS _____DAY OF _____2001, that:

1. Ms. Agugliaro agrees to tender her resignation now from her tenured employment as a custodial worker, to become effective October 31, 2001. For the intervening period, Ms. Agugliaro will be on unpaid leave with medical benefits at the same level of benefit. This resignation is expressly conditioned upon the Board's execution of this Agreement and compliance with its terms. This resignation will be rendered null and void if the Board does not comply with the terms of this Agreement or fails to approve it or if this Agreement is not approved by the Administrative Law Judge hearing this matter or the Commissioner of Education.

2. The parties agree that the resolution of this matter upon the terms set forth herein is both in their interests and in the public interest for the following reasons:

   (a) Ms. Augliarc's resignation obviates the need for protracted litigation over these issues and the time and expense involve therewith.

   (b) It avoids disruption of the school district as the result of the need for its employees to testify during these proceedings.

3. Ms. Augliaro acknowledges that she has been advised that she has the right to consult with an attorney or a representative of here own choosing prior to signing this Agreement, and has done so, and that she signs this Agreement as her own voluntary act and deed, and that she fully understands the duties and obligations enumerated herein.

4. The undersigned representatives of the Board hereby acknowledge that they agree to the terms and conditions of this Agreement and have the authority to bind the Board to its terms.

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.

6. The parties acknowledge that the their agreement to dismiss the tenure charges is subject to the approval of the office of Administrative Law and the Commissioner of Education. If such approval is not given, this Agreement and all of the stipulations, releases and acknowledgements, as well as, Ms. Augliaro's resignation, shall be rendered null and void and the parties shall be returned to the status quo existing prior to this Agreement.

7. Nothing in this Agreement shall be deemed to constitute past practice or precedent as to the rights or liabilities of any employee, other than Ms. Augliaro or the Board.

8. The parties agree that their respective covenants and entry into this Agreement does not constitute an admission of wrongdoing or guilt on the part of either party.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

WITNESS

Gregory T. Syrek, Esq.

Theresa Agugliaro

Dated:

WITNESS:

NORTH BERGEN BOARD OF EDUCATION

Jack Gillman, Esq.

BY: **Board President**

Board Secretary

OAL DKT. NO. EDU 7554-00
AGENCY DKT. NO. 256-7/00

IN THE MATTER OF THE TENURE HEARING	:	
OF THERESA AGUGLIARO, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF NORTH BERGEN, HUDSON	:	DECISION
COUNTY.	:	

The record, Settlement Agreement and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 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. The matter is hereby dismissed subject to compliance with the terms of the settlement.

COMMISSIONER OF EDUCATION

Date of Decision: 9/17/2001

Date of Mailing: 9/20/2001

312-01 SEC

IN THE MATTER OF PATRICIA COLACCI,	:	
BOARD OF EDUCATION OF THE TOWN	:	COMMISSIONER OF EDUCATION
OF GUTTENBERG, HUDSON COUNTY.	:	DECISION
	:	

September 12, 2001

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**RESOLUTION**
PATRICIA COLACCI, Guttenberg Board of Education Hudson County	:	**SEC Docket No.: T16-01**

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, Patricia Colacci was elected to serve a three-year term on the Guttenberg Board of Education in April 2000; and

WHEREAS, the New Jersey School Boards Association (NJSBA) advises prospective board members of the training requirement in the "candidate kit"; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on December 1, 2000 and February 13, 2001; and

WHEREAS, the NJSBA conducted seven training sessions between April 2000 and April 2001 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held in March 2000; and

WHEREAS, the Commission issued an Order on April 9, 2001, directing her to Show Cause why she had not attended training up until that time; and

WHEREAS, she replied that she could not attend due to a serious heart condition and an extensive recuperation, but that she planned to attend as soon as her health improves; and

WHEREAS, she did not submit a doctor's note indicating the length of her treatment; and

WHEREAS, the Commission discussed this matter at its June 26, 2001 meeting,

WHEREAS, the Commission has considered the reasons for failing to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that this failure to attend board member training from April 2000 to April 2001 constitutes a violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission granted an extension for similarly situated board members to attend one of the June training sessions; and

WHEREAS, the Commission finds that if Ms. Colacci fails to attend by **October 2001**, the Commission finds that it would be appropriate to have her removed from the board;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ms. Colacci violated N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education suspend her until she attends, but remove her from the board if she fails to attend by the October training session.

Dated: July 11, 2001

Paul C. Garbarini /c
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 River View 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 June 26, 2001.

Lisa James-Beavers /c
Lisa James-Beavers, Executive Director

e/lisa/decisions/T1601.doc

AGENCY DKT. NO. 248-7/01

IN THE MATTER OF PATRICIA COLACCI,	:	
BOARD OF EDUCATION OF THE TOWN	:	COMMISSIONER OF EDUCATION
OF GUTTENBERG, HUDSON COUNTY.	:	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 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 ample notice to the above-named Board member of her failure to attend such training; and

Whereas, pursuant to *N.J.A.C.* 6A:28-1.6(e), on April 9, 2001 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 replied that she could not attend due to serious health issues; and

Whereas, the Commission voted on June 26, 2001, to recommend suspension of the above-named Board member until she attends the required training, and to remove her from the Board if she fails to timely attend such training 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 July 12, 2001, the above-named Board member was afforded an opportunity to submit to the Commissioner a response to the Commission's resolution

recommending suspension, pending attendance at training, and removal if she fails to so attend in October 2001; and

Whereas, on July 20, 2001, the above-named Board member sent a facsimile transmission to the School Ethics Commission stating that she had resigned from the Guttenberg Board of Education; and

Whereas, the above-named Board member's resignation has been confirmed; now therefore

It is determined that the within matter has been rendered moot by the above-named Board member's resignation from the Guttenberg Board of Education and it is, accordingly, dismissed.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/6/2001

Date of Mailing: 9/18/2001

* 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.

316-01

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

September 17, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9212-98
AGENCY DKT. NO. 378-8/98

JOHN CASH,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY,

Respondent.

Wayne J. Oppito, Esq., for petitioner

Ken Iwama, Assistant General Counsel, for respondent
(Charlotte Kitler, General Counsel, attorney)

Philip Feintuch, Esq., for Belinda Mays-Stokes, intervener
(Feintuch, Porwich & Feintuch, attorneys)

Robert M. Schwartz, Esq., for Linda Daniels, Maria Bustillo, Michelle Christie, and Cathy Marsella, interveners

Record Closed: July 12, 2001 Decided: July 25, 2001

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

On August 11, 1998, petitioner filed a petition with the State Department of Education (DOE) seeking relief from respondent. Respondent filed an answer, and the

DOE transmitted the matter to the Office of Administrative Law on September 25, 1998 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to 13.

Telephone conferences were conducted in March, April, August, and September 1999. Hearings scheduled in September 1999 were adjourned at the requests of the parties. Hearings were subsequently scheduled for June 26, 27, and 28, 2001.

Petitioner, a tenured employee of respondent, averred that his tenure and/or his seniority rights were violated when he was not appointed to a Supervisor, Principal, or Director position subsequent to the abolishment of his position on July 8, 1998. Count One of his petition addressed petitioner's claims to a supervisory position; Count Two, to a Principal position; and Count Three, to a Director position. During the course of the proceedings, respondent filed a motion for partial summary decision on Counts Two and Three. On November 21, 2000, this judge issued an order granting the motion and dismissing Counts Two and Three. The parties did not file requests for interlocutory review. Also during the proceeding, various individuals whose positions could be affected by petitioner's claims intervened in the matter.

The parties appeared for the hearings which were to commence on June 26, 2001, which hearings were to address Count One of the petition. At the requests of the parties, settlement conferences were conducted on June 26 and 27, 2001, and petitioner and respondent executed a Stipulation of Settlement on June 27, 2001. The hearing scheduled on June 28, 2001 was adjourned.

By letters dated July 2 and July 10, 2001, which were received on July 6 and July 12, 2001, respectively, counsel for interveners advised that they had no objections to the Stipulation of Settlement agreed to by petitioner and respondent. The record is deemed closed on July 12, 2001.

Having reviewed the terms of the Settlement Agreement, I **FIND** that petitioner and respondent voluntarily agreed to the terms and conditions of the settlement as evidenced by the signatures contained thereon, that interveners do not object to the settlement, and that the settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **ORDER** that petitioner and respondent comply with the terms of the settlement 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.

DATE

DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

8/1/01

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

AUG - 3 2001

DATE

OFFICE OF ADMINISTRATIVE LAW

\mvh

John Cash
Petitioner

v.

State Operated School District
of
Jersey City
Respondent

Agency Ref No. 378-8/98

OAL Docket # EDU 09212-98

Stipulation of Settlement

In consideration of the mutual promises and undertakings contained in this Stipulation of Settlement, the parties herein agree to resolve the above matter as follows:

1. The parties agree that this settlement represents a compromise of disputed claims and is not an admission of liability, negligence or wrong doing by either party. This Settlement was reached by the parties as a business judgment bearing in mind the cost, disruption and uncertainty of litigation

2. Petitioner withdraws, with prejudice, any and all claims set forth in the Petition OAL Docket # EDU 09212-98N, Agency Ref # 378-8/98 and waives any and all claims arising from the abolishment of his supervisor of Adult Continuing position on or about July 8, 1998 and/or his subsequent reassignment to the position of Teacher of Art on or about Sept 1, 1998

3. The District agrees to appoint Mr. Cash to either a position of vice principal or supervisor effective September 1, 2001. Mr. Cash shall be informed of his specific assignment as soon as practical.

4. If Mr. Cash is appointed to a vice principal position, his salary will be on the 3rd step of the H.S. Vice Prin Pay Table 15A (MA+32) for the 2001-2002 school year, the salary being $95,074, plus any longevity he may be entitled in the "Contract Agreement between the State Operated School District of Jersey City and the Administrators and Supervisors Association"

5. If Mr. Cash is appointed to a position of supervisor, the salary shall be on the 3rd step of the Supervisors Pay Table 21A (MA+32), school year that salary being $92,234 plus any longevity he may be entitled to by the Contract Agreement as noted in paragraph 4.

6. Mr. Cash agrees to waive any claims to any and all other positions so long as he is employed as a vice principal or supervisor. However, Mr. Cash may apply for any position which may become available.

7. The parties to this settlement acknowledge that they have been represented by independent legal counsel of their own choice throughout these proceedings and are satisfied with their representation. The parties and/or their

EDU 9212-98

representatives acknowledge that they have carefully read and understand all of the provisions herein and they have voluntarily executed same without coercion and duress.

8. 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 the parties.

9. This Settlement shall be effective only upon the final approval of the Commissioner of Education.

KEN IWAMA
ASS'T GENERAL COUNSEL
FOR
RESPONDENT

JOHN CASH
PETITIONER

WAYNE J. OPPITO
ATTORNEY FOR
PETITIONER

DATE: 6/27/01

OAL DKT. NO. EDU 9212-98
AGENCY DKT NO. 378-8/98

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

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

Upon review, the Commissioner approves the settlement terms and adopts the 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: 9/17/01

Date of Mailing: 9/20/01

317-01

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

September 20, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3803-99
AGENCY DKT. NO. 399-9/98

CATHERINE HARRIS,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY,

Respondent.

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

Ken Iwama, Assistant General Counsel, for respondent

Record Closed: August 1, 2001 Decided: August 3, 2001

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

Initially, this matter was one of thirty-one consolidated cases filed with the Commissioner of Education ("Commissioner") on August 31, 1998. The multi-count petition alleged the wrongful withholding of the increment of petitioner, Catherine Harris ("Harris"). On September 21, 1998, the District filed its answer. Subsequently, on October 29, 1998, the Commissioner forwarded all thirty-one case to the Office of Administrative Law ("OAL") for hearing as a contested case under OAL Dkt. No. EDU 9812-98.

A telephone prehearing conference was held on all thirty-one cases on March 9, 1999. During that conference, the issues were isolated. Since each petitioner's situation involved different factual circumstances and different witnesses, the consolidated cases were divided into separate cases for convenience of hearing.

A hearing was scheduled in the Harris case, designated OAL Dkt. No. EDU 3803-99 on December 20 and 21, 1999. After several adjournments of scheduled hearing dates due to possible resolution of this matter, it was rescheduled for a telephone conference on October 30, 2000. Settlement conferences were held, and during the telephone conference, the parties indicated that a settlement had been reached.

The parties have agreed to settle this matter and have prepared the attached Stipulation 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.

August 3, 2001
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

AUG 13 2001
DATE

OFFICE OF ADMINISTRATIVE LAW

al

RECEIVED
STATE OF NEW JERSEY
AUG 1 4 42 PM '01

KEN IWAMA
Assistant General Counsel
State-Operated School District
of Jersey City
346 Claremont Avenue
Jersey City, New Jersey 07305
(201) 915-6231 Fax (201) 915-6230
Attorney for Respondent
State-Operated School District of
Jersey City

CATHERINE HARRIS, Petitioner, v. STATE OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY AGENCY REF. NO. 399-9/98 OAL DKT. NO. EDUOA 03803-99N STIPULATION OF SETTLEMENT

In consideration of the mutual promises and undertakings contained in this Stipulation of Settlement (hereinafter "Settlement") the Petitioner, Catherine Harris, and Respondent, State-Operated School District of Jersey City (hereinafter "District"), 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. This Settlement was reached by the parties as a business judgment bearing in mind the cost, disruption and uncertainty of litigation.

2. Catherine Harris withdraws, with prejudice, her appeal of the District's withholding of her

salary increment for the 1998-1999 school year for less than satisfactory performance during the preceding 1997-1998 school year, bearing Agency Reference Number 399-9/98 and OAL Docket Number EDUOA 03803-99N.

3. Catherine Harris, 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 District, its successors and assigns, and its past, present or future officers, directors, agents or employees, from all claims, including those unknown to petitioner and/or those not mentioned in this Settlement, based upon the withholding of her salary increment for the 1998-1999 school year.

4. As set forth in Article 11-5 of the 1998-2001 Collective Bargaining Agreement between the State-Operated School District of Jersey City and the Jersey City Education Association (teachers), Catherine Harris would have been entitled to appeal to the State District Superintendent three (3) years after the withholding of her salary increment, September 1, 2001, for the prospective restoration of same. Article 11-5 of the Collective Bargaining Agreement is attached as exhibit 1.

5. Pursuant to this Settlement, Catherine Harris shall have the right to appeal to the State District Superintendent on February 1, 2001, for the restoration of her salary increment pursuant to the terms and conditions set forth in Article 11-5 of the Collective Bargaining Agreement attached as exhibit 1.

6. The parties to this Settlement acknowledge that they have been represented by independent legal counsel of their own choice throughout all of the negotiations that preceded the execution of the Settlement and that they are satisfied with their representation. The parties and/or their representatives acknowledge that they have carefully read and understand all of the provisions herein and that they have voluntarily executed same without coercion and duress. The parties and/or their representatives further acknowledge that they are not taking any medication nor are they suffering

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

7. 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.

8. This Settlement shall be effective only upon the final approval of the State District Superintendent and upon the final approval of the Commissioner of Education should same be required.

Ken Iwama
Assistant General Counsel for
Respondent State-Operated School
District of Jersey City

Date: 4/6/01

Philip Feintuch
Attorney for Petitioner
Catherine Harris

Date: 3/20/01

Catherine Harris
Petitioner

Date: 2/28/01

11-5. If the increment of a teacher is withheld, the teacher shall have the right to request a review after three (3) years of performance for the prospective restoration of the increment. The appeal shall be made to the State District Superintendent or designee. The State District Superintendent or designee shall review the three (3) years performance of the teacher. If the teacher's performance has been fully improved to a level of acceptable or better in all areas, the increment may be restored prospectively at the sole discretion of the State District Superintendent or designee.

OAL DKT. NO. EDU 3803-99
AGENCY DKT. NO. 399-9/98

CATHERINE HARRIS,	:	
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. Because the proposed order does not meet the requirements for settlements set forth at *N.J.A.C.* 6A:3-1.13 and given that petitioner has agreed to withdraw with prejudice the instant appeal, the Commissioner shall consider the matter withdrawn.

The Commissioner, therefore, approves the withdrawal, and determines that this matter shall be dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/20/01

Date of Mailing: 9/21/01

318-01

DARIENNE T. FRANKS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, retired music teacher, sought payment of her salary without the loss of sick leave for an illness allegedly sustained during the course of her employment. The Board denied it had improperly charged petitioner sick leave.

Initially, the ALJ also concluded that petitioner's acceptance of a lump-sum workers' compensation settlement did not preclude the within claim. The ALJ then determined that petitioner was not entitled to sick leave for her six-week absence, as she failed to demonstrate an illness with objective medical evidence, or that the illness arose from her employment.

The Commissioner affirmed the Initial Decision for the reasons set forth therein.

September 20, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7423-97
AGENCY DKT. NO. 115-4/97

DARIENNE T. FRANKS,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE,
Respondent.

Gail Oxfeld Kanef, Esq., for petitioner
(Oxfeld Cohen, LCC, attorneys)

Marvin L. Comick, Esq., for respondent
(Love & Randall, attorneys)

Record Closed: April 24, 2001 Decided: August 6, 2001

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal by a retired music teacher who contends that her former employer, the Board of Education of the City of East Orange ("Board"), failed to credit her with sick leave for absences "caused by an accident arising out of and in the course of [her] employment." *N.J.S.A.* 18A:30-2.1. Petitioner Darienne T. Franks ("Franks") contends that her six-week absence commencing in November 1996 was due to a "psychological injury" attributable to the stress of her heavy work schedule. A threshold

issue is whether Franks is barred from seeking relief by virtue of her acceptance of a lump-sum settlement in a related disability claim before the Division of Workers' Compensation. Mainly, however, the Board maintains that Franks has failed to establish a causal connection between her injury and her work duties by sufficiently credible evidence.

Procedural History

On April 3, 1997, Franks filed a verified petition of appeal with the Commissioner of Education seeking a determination that she was entitled to sick-leave injury benefits under *N.J.S.A.* 18A:30-2.1. Respondent filed its answer on July 22, 1997, raising lack of primary jurisdiction as an affirmative defense. Subsequently, on July 29, 1997, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

By letter dated November 26, 1997, petitioner's counsel requested that the matter be placed on inactive status pending resolution of Franks' claim "for benefits for work-related injuries" pending before the Division of Workers' Compensation.[1] Consequently, the OAL issued a series of orders placing the case on inactive status for successive six-month intervals until receipt of notice on July 18, 2000 that the workers' compensation matter had been settled "for the total amount of $7,500." Thereafter, the OAL restored this case to its active calendar. The OAL held a hearing on March 9, 2001. Witnesses and exhibits are listed in the appendix. Both parties filed post-hearing briefs on or before April 24, 2001.

[1] Inquiry revealed that Franks had not yet filed a claim in the Division of Workers' Compensation, so that the delay continued while she pursued her claim in that forum.

Findings of Fact

Except for the disagreement over whether the injuries were job-related, the pertinent facts are largely undisputed. Hired in or about 1975, Franks had taught in the district for over twenty years. She retired in July 1998. Throughout most of her career, she served as a teacher of vocal music at a single school. In September 1996, however, the Board assigned her to teach half day at the high school and half day at an elementary school. During the morning, she taught four periods at East Orange High School. Then she had a regular lunch period. She was allotted thirty-minutes travel time to get to Franklin Elementary School, where she taught three additional periods. It took fifteen to twenty minutes for her to travel by car from one school to the other.

Generally, her eight-hour workday, including lunch, began at 7:00 a.m. and ended at 2:45 or 3:00 p.m. Each period lasted forty to forty-five minutes. Her course load in prior years consisted of seven or eight periods, including one period for preparation time. In the 1996-97 academic year, she lost her daily preparation period. Instead, she had to cover two vocal ensemble classes for another music teacher, who was "fatally ill." Her new assignment required her to carry books from one building to the other and to climb additional stairs. Other teachers also pitched in to cover the absent teacher's remaining classes. Insofar as the record discloses, none of these other teachers had a schedule split between two schools. Frequently her department chairperson assigned her to work overtime to cover other teachers' classes. She received compensation at a higher rate of pay for such overtime services. Although Franks conferred with the president of her bargaining unit regarding such extra assignments, she never filed a formal grievance.[2]

[2] A teacher's working hours are the classic "terms and condition" of employment subject to collective bargaining. *Englewood Bd. of Educ. v. Englewood Teachers Ass'n,* 64 *N.J.* 1 (1973).

Franks testified about a number of vague symptoms, which she believed were aggravated by her increased workload that year. She described feeling "tense" and "muscularly tight," especially in her shoulder and neck area. Her back and hip gave her unspecified "problems."[3] In addition, she was "crabby" with family members and experienced sleeping difficulties. Due to perceived resentment over her treatment, she felt "angry" and exhibited "hysteria" at home (but apparently not at school). According to Franks, she became "a nervous wreck." In or about November 18, 1996, she saw her primary-care physician, Dr. Paul Arts, who "may have put [her] on tranquilizers for three or four weeks."[4] Dr. Arts further recommended that she go for counseling.

Following her doctor's advice, Franks went to see Mr. Jack Eagan, whom she inaccurately identifies as a licensed "clinical psychologist."[5] Previously, she had consulted Mr. Eagan regarding other stressful events in her life, such as a fire in her house, a divorce and the loss of a loved one.[6] On this particular occasion, she went for counseling twice a week for an indeterminate length of time. She also was seen by a chiropractor for an ill-defined course of treatment lasting an unknown number of sessions.

During this time, Franks was absent from work for a six-week period from November 21, 1996 to January 3, 1997. Franks told school officials that she would be out sick for "a stress-related injury." She received full pay during this entire period, but the absences were deducted from her accumulated sick leave. [7] As a result, she

---

[3] Franks had preexisting back and hip problems, which arose before her workload was increased. In 1991 she underwent surgery to relieve her prior condition.

[4] Since Franks has asthma, Dr. Arts also prescribed an inhaler to relieve her "coughing attacks."

[5] Franks admits that Mr. Eagan does not hold a doctorate-level degree in psychology. New Jersey statutes governing the practice of psychology mandate that a licensed psychologist must have received a doctoral degree in psychology or a closely allied field. *N.J.S.A.* 45:14B-17. The official Directory maintained by the State Board of Psychological Examiners contains no listing for any licensed psychologist by the name of "Eagan." http://www.state.nj.us/lps/ca/medical.htm

[6] Mr. Eagan had formerly been a priest and, at least part of the time, Franks consulted him in his capacity as a spiritual advisor.

[7] \

exhausted her accumulated sick days and did not receive pay for a subsequent illness later in 1997. Utilizing salary stubs, she estimates her loss at about $1,300.

Significantly, Franks does not offer any medical evidence to connect her alleged illness to any incident occurring at the workplace. She failed to present an authoritative diagnosis of her supposed condition, much less any proof that it was caused by her working conditions. Rather, the only suggestion that the two were related is her own subjective "feeling, belief [or] understanding" that her illness was stress-induced.

I **FIND** that the proofs do not establish a causal connection between any injuries from which Franks may have been suffering and any accident arising out of or in the course of her employment.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that Franks is not entitled to sick-leave injury benefits for her six-week absence from work in November 1996.

At the outset, the Board maintains that Franks' appeal to the Commissioner is precluded by the settlement reached in the related compensation matter, wherein a Compensation Judge approved a dismissal constituting "a complete and absolute surrender and release of all rights arising out of this/these claim petitions." Such order was entered pursuant to *N.J.S.A.* 34:15-20, which permits parties to enter into a lump-sum settlement of a claim "seeking compensation by reason of accident, injury or occupational disease of any employee." Appellate courts have held that the Division of Workers' Compensation possesses "primary jurisdiction" over claims for work-related injuries and that the function of *N.J.S.A.* 18A:30-2.1 "is to complement compensation benefits for a strictly limited time period." *Forgash v. Lower Camden Cty. Sch.*, 208 *N.J. Super.* 461, 466 (App. Div. 1985). *Accord, Theodore v. Dover Bd. of Educ.*, 183 *N.J. Super.* 407, 416 (App. Div. 1982). Consequently, the State Board of Education has

instructed the Department of Education to refrain from considering claims for sick-leave injury benefits until the Division of Compensation has had an opportunity to determine the parallel compensation claim. *Verneret v. Elizabeth Bd. of Educ.*, 95 *N.J.A.R.*2d (EDU) 134 (St. Bd. 1991).

Recently, the State Board clarified that a settlement of the compensation claim without any findings on the underlying merits does not necessarily bar a petitioner from litigating a sick-leave injury claim before the Commissioner. *Marino v. Willingboro Twp Bd. of Educ.*, SB 25-99 (St. Bd. March 1, 2000) http://www.state.nj.us/njded/legal/content.html Of course, a claimant can always waive a statutory entitlement to benefits "by the intentional relinquishment of a known right." *Marino*, slip op. at 6. Here, however, Franks insists that she never intended to give up her sick-leave claim when she accepted the settlement of her compensation claim. Under the circumstances, she did not knowingly and intelligently waive her rights and the Commissioner has jurisdiction to decide her school-law claim.

N.J.S.A. 18A:30-2.1 provides, in pertinent part:

> Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by *an accident arising out of and in the course of his employment,* his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in sections 18A:30-2 and 18A:30-3. (Emphasis added).

The phrase "accident arising out of and in the course of his employment" in *N.J.S.A.* 18A:30-2.1 was intended to have precisely the same meaning as it does in the context of the Compensation Act. *Theodore*, 183 *N.J. Super.* at 415. Therefore, in interpreting such statutory language for school-law purposes, the Commissioner must apply the same standard applicable in compensation cases.

While psychiatric disabilities are compensable under workers' compensation law, an award of benefits "must be based on demonstrable objective medical evidence."

Saunderlin v. E.I. Dupont Co., 102 *N.J.* 402, 408 (1986). Objective medical evidence is understood to mean evidence exceeding the subjective statement of the petitioner. *Saunderlin*, at 411. It is insufficient for a claimant to rely solely on her own subjective statements of her condition or on the mere parroting of such statements by her doctor. Rather, the requirement is to interpose a professional medical judgment between the subjective statement of the petitioner and the award of disability benefits. *Saunderlin*, at 412. Satisfaction of this enhanced standard of proof necessitates expert testimony. Thus, in *Saunderlin*, at 417, the New Jersey Supreme Court instructed:

> [I]n all instances the psychiatric expert [should] be allowed to relate to the court exactly how he reached his opinion and what were the sources of his information. He should be required to describe in fairly precise terms his own process of evaluating his source material: What information did he accept, and what did he reject; what sources did he place great weight upon, and what sources did he minimize; and why did he evaluate the clinical material in these ways.

Moreover, an employer is entitled to cross-examine an adversary's medical experts to probe the quality of their opinions. *Saunderlin*, at 417. Even where petitioner offers expert opinion, courts routinely scrutinize the record to assure that the professional's conclusions are adequately supported by proven facts. *See, e g., Goyden v. State of New Jersey*, 256 *N.J. Super.* 438 (App. Div. 1991) (rejecting psychiatric testimony that petitioner's depression was due to verifiable working conditions, including an unusual backlog of work, staff shortages and the vindictiveness of his supervisor. *See also*, *Saunderlin* (discounting psychiatric testimony as nothing more than uncritical repetition of the patient's description of his symptoms).

In addition, appellate courts have consistently held that the issue in stress disorder cases is whether there is objective evidence, realistically viewed, which sustains petitioner's burden of proving that his mental disorder is "due in a material degree" to the repetitive work-place exposure. *Wernowski v. Continental Can Co.*, 261 *N.J. Super.* 269, 274 (App. Div. 1993). It is not enough for a worker simply to show that the working conditions were generally stressful, such conditions must be "peculiar to the particular work place." *Goydon*, 256 *N.J. Super.* at 445. Put in conventional terms, the

mental illness must arise out of the employment. That is, it must be due in some realistic and material degree to a risk reasonably incidental to the employment. *Williams v. Western Elec. Co.*, 178 *N.J. Super.* 571, 585 (App. Div. 1981). Compensation does not exist where the evidence consists primarily of petitioner's subjective, neurotic reaction to the demands of his job. *Wernowski*, at 274.

Here, of course, the record is totally devoid of any expert testimony and Franks' claim must necessarily fail on that ground alone. Insofar as the record reveals, it is unclear whether Franks suffered from any genuine mental disorder and, if so, the nature and extent of that illness. Correct diagnosis of the type and degree of mental illness is critical to a determination of eligibility for benefits. Certain comparatively minor psychiatric conditions, such as generalized anxiety disorder, do not materially affect working conditions or substantially interfere with the ordinary pursuits of life and, therefore, are excluded from the definition of permanent partial disability. *Saunderlin*, at 419. Amendments to the Workers' Compensation Act, enacted in 1979, were designed "to eliminate awards for minor permanent partial disabilities so as to increase the awards for the more seriously disabled workers." *Id.*

Furthermore, Franks failed to establish that her psychological distress was "peculiar" to the particular workplace. Many, if not most, jobs have fluctuating workloads and periods of greater or lesser activity. Franks received extra work when another music teacher in the district suffered a terminal illness. She had to travel between two schools located within close proximity in the same community. However, it is not uncommon for workers to commute considerable distances to their job sites. As an experienced music teacher, she was capable of coping with the temporary loss of her preparation period. While she was asked to teach some of the classes formerly taught by the absent music teacher, other teachers in the district also took over his classes. Accordingly, the additional work for a limited period of time was not unusually onerous or substantially different from what any employer might reasonably expect in an emergency situation. Although such added responsibilities undoubtedly contributed to Franks' feelings of stress and overwhelm, they do not represent a condition "peculiar" to the workplace.

Order

It is **ORDERED** that Franks' request for sick-leave injury credit 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.

Aug. 6, 2001
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 13 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

Dariene T. Franks

List of Exhibits

No.	Description
J-1	Copy of workers' compensation order approving settlement with dismissal, entered on July 11, 2000

OAL DKT. NO. EDU. 7423-97
AGENCY DKT. NO. 115-4/97

DARIENNE T. FRANKS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent review of the record, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that petitioner has failed to sustain her burden of establishing that her absences from work were the direct result of a compensable injury or illness arising during the course of her employment and she is, therefore, not entitled to the restoration of sick days/reimbursement she seeks pursuant to *N.J.S.A.* 18A:30-2.1.

Accordingly, the Initial Decision of the OAL is affirmed for the reasons clearly stated therein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/20/01

Date of Mailing: 9/21/01

* 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.

319-01

IN THE MATTER OF THE TENURE	:	
HEARING OF JEFFREY BENNETT,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
ELIZABETH, UNION COUNTY.	:	DECISION
_____	:	

September 21, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1927-01
Agency Dkt. No. 51-2/01

I/M/O THE TENURE HEARING OF JEFFREY BENNETT, BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY.

Mary E. Hennessy, Esq., for Elizabeth Board of Education
(Murray, Murray & Corrigan, attorneys)

Louis P. Bucceri, Esq., for Jeffrey Bennett

Record Closed: July 23, 2001 Decided: August 6, 2001

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law on March 20, 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 entered into an agreement and have prepared a stipulation of settlement which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidence 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.

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

August 6, 2001
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 13 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

cb

RESOLUTION

JUL 23 2 [illegible] '01

WHEREAS, the Elizabeth Board of Education certified charges against Jeffrey Bennett, a tenured teacher, to the Commissioner of Education,

WHEREAS, the parties have reached a recommended settlement as memorialized in the Stipulation of Settlement between the Elizabeth Board of Education and Jeffrey Bennett which is in the public interest.

NOW THEREFORE BE IT RESOLVED that the Board of Education requests that the Commissioner of Education approve the attached Stipulation of Settlement between the Board and Jeffrey Bennett.

Meeting: July 19, 2001

Linda G. King, Board Secretary

BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(973) 773-5665
Counsel for Respondent

IN THE MATTER OF THE TENURE :	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
HEARING OF JEFFREY BENNETT, :	AGENCY REF. NO. 51-2/01
ELIZABETH BOARD OF EDUCATION:	OAL DKT. NO. EDU 1927-01N

STIPULATION OF SETTLEMENT

This Stipulation of Settlement is made this 19th day of July 2001, by and between Jeffrey Bennett, who resides at 1309 Woodlock Avenue, Wanamassa, New Jersey 07712 (hereinafter referred to as "Mr. Bennett" or "respondent"), and the Board of Education of the City of Elizabeth, with its principal offices located at 500 North Broad Street, Elizabeth, New Jersey 07208 (hereinafter the "Board" or "petitioner").

WHEREAS, an administrative action was instituted by the Board, pursuant to N.J.S.A. 18A:6-11 et seq., certifying to the Commissioner of Education three (3) charges of unbecoming conduct and one (1) charge of insubordination against Bennett; and,

WHEREAS, respondent filed an Answer denying those charges in compliance with N.J.S.A. 18A:6-16; and,

WHEREAS, prehearing discovery has been diligently pursued by both parties; and,

WHEREAS, an order for production of reports by the Division of Youth and Family Services ("DYFS") was issued by the Honorable Mumtaz Bari-Brown, A.L.J., pursuant to N.J.S.A. 9:6-8.10a(b)(6) and (14) after *in camera* review of same by the Judge; and,

WHEREAS, the process of discovery, interviewing of witnesses and the review of the DYFS reports as to the incidents set forth in the charges has established no evidence of abuse or corporal punishment by respondent; and,

WHEREAS, these facts lead to the conclusion that respondent's dismissal from his employment would not be warranted under the circumstances.

NOW THEREFORE, the parties stipulate and agree as follows:

1. As to Charge 1 - This charge alleges an incident on March 14, 2000 and another incident on May 23, 2000 involving an allegation of inappropriate physical contact. As to March 14, 2000, the allegation is that respondent hit a student in the stomach. District medical records establish that no bruise was found, although the child complained of pain.

Discovery indicates the contact was due to an accidental collision with no indication of force or intent to make contact by respondent. No evidence exists that the child was injured. No DYFS investigation was conducted as to this incident.

As to May 23, 2000, the allegation is that Mr. Bennett screamed at two students who were "play fighting" and grabbed one by the neck and held him down. Discovery has shown that no incident took place on May 23, 2000 as alleged in the charges. An incident did occur on May 22, 2000. There was an investigation by DYFS as to this incident. That investigation found that the student was not injured and that intervention by respondent was justified because the students were acting in a manner which posed a danger to each other. It was found that no excessive force was used but that the manner of intervention by respondent was inappropriate. There was no indication that respondent "screamed" at the students. Instead it was found that he correctly tried to stop the fight by verbal commands prior to intervening.

Respondent acknowledges that his hold on the student, near the neck area, was ill advised. He attributes his action to the emergent nature of the situation and the resistance of the student. He denies any intent to harm or choke the student.

The location of his hold was inadvertent. DYFS found abuse to be unsubstantiated and recommended counseling and monitoring upon respondent's return to work. Respondent has been removed from the classroom since May 23, 2000 and was not returned prior to his suspension on tenure charges.

Based on interviews with students and discovery, petitioner no longer finds that probable cause exists to conclude that Charge 1 would result in petitioner's termination.

2. As to Charge 2 - The allegation is that on March 29, 2000, respondent called a student a "bastard." When originally filed, petitioner understood that a teacher had heard this remark. Discovery establishes that this was not the case. A student reported this allegation to a teacher, but the teacher did not hear it. Respondent denies the remark was ever made. The student is no longer enrolled in the district and cannot be located. There were no other witnesses to support this allegation. Based on these facts, petitioner no longer finds probable cause exists to conclude that Charge 2 would result in respondent's termination.

3. As to Charge 3 - The allegation alleges an incident in 1997-98 in which respondent held a plastic bat which made contact with a student. A DYFS investigation was conducted

as to this incident and the charge of abuse was declared unfounded. Physical intervention was found to be justified. The student presented a danger to himself because he was outside of school without permission sitting on a railing over a 10 to 15 foot stairwell. Respondent attempted verbal intervention. The student reacted by swearing and throwing objects at respondent. The student came towards respondent and respondent held a hollow plastic bat between himself and the student to ward him off. The student intentionally walked into the end of the bat and then claimed he was struck by it. DYFS found that no excessive force was utilized and the child was at no appreciable risk of harm. No injuries consistent with the student's claim of being hit with the bat were found.

Based on these facts, petitioner no longer finds probable cause exists to conclude that Charge 3 would result in petitioner's termination.

4. As to Charge 4 - Charge 4 alleges that Mr. Bennett failed to attend an activity and classroom management workshop in March 1999. The facts establish that there was no directive to Mr. Bennett with regard to a workshop in March 1999. Respondent agrees to comply with any request for him to participate in training or workshops which petitioner may make.

As to a request to attend workshops made on March 31, 2000, there is no evidence of any intentional refusal to follow orders by Mr. Bennett. Based on these facts, petitioner no longer finds probable cause exits to conclude that Charge 4 would result in petitioner's termination.

5. Petitioner agrees to withdraw and dismiss, with prejudice, the tenure charges of unbecoming conduct which it certified to the Commissioner of Education and which form the basis of the above-captioned matter, with no loss of tenure by respondent.

6. In return, respondent agrees to waive and abandon any and all rights and claims to back salary for the period of his suspension without pay.

7. The parties agree that the pursuit of this litigation through plenary hearing is not in the best interests of the students, parents or the community of the petitioner school district because litigation would entail testimony by students and the expending of public funds, with the most probable result being, at most, a loss of 120 days pay or an increment withholding based on evidence which can, at worst, establish poor judgment in an emotionally charged situation. Rather, this settlement is in the best interests of all

concerned, and in particular, is in the public interest. The parties agree that the standards set forth in In the Matter of the Tenure Hearing of Frank Cardonick, 1982 S.L.D. ___ (Comm. Ed. April 7, 1982), aff'd. 1983 S.L.D. ___ (St.Bd. 4/6/83) (reported at 1990 S.L.D. 842, 846, and N.J.A.C. 6A:3-5.6 have been met.

8. Both parties have each had independent legal representation. They both fully understand the terms and conditions set forth in this Agreement, as well as their respective rights to litigate the issues in this case with a final decision to be made by the Commissioner of Education as an alternative to settlement. The decision to enter into this Agreement rather than to avail themselves of the right to litigate has been made of their own free will without duress or coercion.

9. The parties acknowledge that this settlement must be recommended by the Honorable Mumtaz Bari-Brown, A.L.J., and approved by the Commissioner of Education. In the event such approvals are not forthcoming, the parties will resume the tenure charge process with all claims, charges, rights and defenses preserved, and this Agreement shall be null and void.

10. The stipulations and agreements set forth in this document are made as part of this settlement. In the event this settlement is not approved by the appropriate authorities, it is agreed that nothing set forth herein may be used as evidence in any subsequent proceedings.

11. All terms of this Stipulation of Settlement are deemed material and shall be controlled by the laws of the State of New Jersey. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

12. The parties signing below hereby acknowledge that they have been duly authorized to sign this Stipulation of Settlement. A copy of the Board's resolution adopting this Agreement is attached hereto.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

WITNESS:

FOR THE ELIZABETH BOARD OF EDUCATION

By: Mary E. Hennessy
Mary E. Hennessy, Esq.

Dated: 7/19/01

FOR RESPONDENT, JEFFREY BENNETT

Jeffrey Bennett

Dated: 7/2/01

Louis P. Bucceri, Esq.

Dated: 7/2/01

OAL DKT. NO EDU 1927-01
AGENCY DKT. NO. 51-2/01

IN THE MATTER OF THE TENURE	:	
HEARING OF JEFFREY BENNETT,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
ELIZABETH, 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*, 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.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/21/01

Date of Mailing: 9/21/01

320-01

THERESA ALFIERI,	:	
AND	:	
THERESE MEZAK,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

In consolidated matters, petitioners, two tenured, part-time, hourly, supplemental teachers, alleged the Board violated their tenure and seniority rights by reducing their employment and compensation in the 1998-99 school year while retaining full-time nontenured teachers. Petitioners sought: 1) employment as full-time elementary teachers; 2) an award of back pay representing the difference between the salary they actually earned in their part-time positions and the amount they would have earned as full-time teachers; 3) pre- and post-judgment interest; and 4) retroactive full-time seniority credit beginning with the 1998-99 school year.

The ALJ determined that neither tenure nor seniority rights were implicated since there was simply no reduction in force. The ALJ concluded that a reallocation of hours of work and numbers of students among part-time teachers does not constitute a reduction in force, and noted that the number of part-time teachers was not reduced, nor were positions abolished or transfers to other positions effectuated.

The Commissioner affirmed the decision of the ALJ with clarification. After noting that acquisition of tenure does not differ based on full-time or part-time status, the Commissioner agreed that petitioners were not subjected to a reduction in force or adverse employment action that would trigger petitioners' tenure and seniority rights. The Commissioner rejected the notion that a reduction in hours of a part-time employee automatically triggers tenure and seniority rights, and noted that petitioners accepted employment that did not guarantee a minimum number of hours of work. Petitions were dismissed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11677-98
AGENCY DKT. NO. 485-10/98
OAL DKT. NO. EDU 1161-99
AGENCY DKT. NO. 516-11/98
(CONSOLIDATED)

THERESA ALFIERI

AND

THERESE MEZAK,

Petitioners,

v.

SADDLE BROOK BOARD

OF EDUCATION,

Respondent.

Gregory T. Syrek, Esq., for petitioners
(Bucceri & Pincus, attorneys)

Anthony N. Gallina, Esq., for respondent

Record Closed: April 23, 2001 Decided: July 23, 2001

BEFORE **STEPHEN G. WEISS,** ALJ:

PROCEDURAL HISTORY

These are consolidated cases which were transmitted to the Office of Administrative Law by the Department of Education in late 1998 and early 1999, respectively and a telephone prehearing conference was held on July 9, 1999. The

issue raised is whether respondent had deprived either petitioner, part-time hourly teachers, of their statutory tenure and/or seniority rights and, if so, to what relief would they be entitled. Hearings originally scheduled for October 1999 had to be adjourned from time to time for a variety of reasons. Ultimately, the matter was heard in June 2000 and concluded in August 2000. Posthearing proposed findings of fact and conclusions of law were later filed. The case also has been the subject of a number of Orders of Extension arising out of a variety of circumstances.

At the outset of the hearing, counsel agreed to a joint stipulation of facts setting forth the essential underlying circumstances (Joint Exhibit J).

(a) Petitioner, Theresa Alfieri ("Alfieri") holds an Instructional Certificate with endorsements for Elementary School Teacher (J-1) and Nursery School (J-2). Alfieri has been properly certified for her employment throughout her employment history with the respondent.

(b) Petitioner, Therese Mezak ("Mezak"), formerly DiMarco, holds an Instructional Certificate with an endorsement as an Elementary School Teacher (J-3). Mezak has been properly certified for her employment throughout her employment history with the respondent.

(c) Alfieri was appointed as a part-time Early Training Program teacher effective March 14, 1994. (J-4). Copies of her available monthly timesheets for this school year are attached hereto as Exhibit J-5.

(d) (a) Alfieri was reappointed as a part-time Early Training Program teacher for the 1994-95 school year.

a. Mezak was appointed as a part-time Basic Skills teacher effective October 1994. She continued in that capacity through the end of the 1994-95 school year.

5. (a) Alfieri was reappointed as a part-time Early Training Program teacher for the 1995-96 school year. Copies of her available monthly timesheets are attached hereto as Exhibit J-6.

(a) Mezak was appointed as a part-time Basic Skills teacher for the 1995-96 school year. She received a letter dated October 16, 1995 advising her of her appointment as a Title I Math teacher (J-7).

6. (a) Alfieri was reappointed as a part-time Early Training Program teacher for the 1996-97 school year. (J-8). She received a letter dated August 28, 1996 notifying her of this appointment (J-9). Copies of her available monthly timesheets are attached hereto as Exhibit J-10.

(a) Mezak was reappointed as a part-time Basic Skills teacher for the 1996-97 school year. (J-8) She received a letter dated August 28, 1996 notifying her of this appointment. (J-11).

7. (a) Alfieri was reappointed as a part-time Early Training Program teacher for the 1997-98 school year. (J-12). Copies of her available monthly timesheets for this school year are attached hereto as Exhibit J-13.

(a) Mezak was reappointed as a part-time Basic Skills teacher for the 1997-98 school year. (J-12). Copies of her available monthly timesheets for this school year are attached hereto as Exhibit J-14.

8. (a) Alfieri was reappointed as a part-time Early Training Program teacher for the 1998-99 school year. (J-15) she received a letter dated September 3, 1998 advising her of this appointment. (J-16). Copies of her available monthly timesheets for this school year are attached hereto as Exhibit J-17.

(a) Mezak was reappointed as a part-time Early Training Program teacher for the 1998-99 school year. (J-15). She received a letter dated September 3, 1998 notifying her of this appointment. (J-18). She actually worked as a Chapter I Math teacher. Copies of her available monthly timesheets for this school year are attached hereto as Exhibit J-19.

9. (a) A copy of Alfieri's teaching schedule for the 1997-98 school year is attached hereto as Exhibit J-20.

(a) A copy of Alfieri's teaching schedule at the start of the 1998-99 school year is attached hereto as Exhibit J-21.

(b) A copy of Alfieri's teaching schedule issued on or about October 19, 1998 is attached hereto as Exhibit J-22.

10. (a) A copy of Mezak's teaching schedule for the 1997-98 school year is attached hereto as Exhibit J-23.

(a) A copy of Mezak's teaching schedule for the 1998-99 school year is attached hereto as Exhibit J-24.

11. The respondent employed the following nontenured individuals as full-time elementary grade teachers for the 1998-99 school year: Amy Abate, Carolyn Pagoumian and Kimberly Wagner. Jeffrey Roem and Thomas Kievit were full-time non-tenured teachers employed as Middle School teachers under Elementary certificates.

12. By letter dated May 25, 1999, Alfieri applied for an open elementary teaching position in respondent's school district. (J-25). Her application was acknowledged by the Superintendent of Schools in a letter dated May 27, 1999. (J-26). She did not receive the position in question. Alfieri was reappointed as a Early Training Program teacher for the 1999-2000 school year. She received a letter dated July 23, 1999 advising her of this appointment. (J-27).

13. By letter dated May 26, 1999, Mezak applied or an elementary teaching position for September 1999. (J-28). Her letter was acknowledged by the Superintendent of Schools in a letter dated May 27, 1999. (J-29). By letter dated June 15, 1999, Mezak was notified that she was rejected for the position (J-30) Mezak was reappointed as an Early Training Program teacher for the 1999-2000 school year. She received a letter dated July 23, 1999

advising her of this appointment. (J-31). She has actually been working as a Chapter I Math teacher.

14. The respondent has employed nontenured full-time elementary teachers for the 1999-2000 school year. The individuals in question are Amy Abate, Carolyn Pagoumian and Kimberly Wagner. (J-32). Four additional non-tenured, full-time elementary teachers have also been employed by the Board. They are Maryann Gelenius, Danielle Ransom, Michael Barcadepone and Nicole Silva.

15. The following documents are attached hereto:

    (a) 1993-94 ETP/Basic Skills Payroll Records, including Alfieri (J-33);

    (b) 1994-95 ETP/Basic Skills Payroll Records, including Alfieri and Mezak (J-34);

    (c) 1995-96 Basic Skills Payroll Records, including Alfieri and Mezak (J-35);

    (d) 1996-97 Basic Skills Payroll Records, including Alfieri and Mezak (J-36);

    (e) Memo, dated January 22, 1999 (J-37);

    (f) Letter, dated June 15, 1999 (J-38).

TESTIMONY

Both petitioners' testified on their own behalves. Testimony on behalf of the respondent was received from Harry A. Groveman, Superintendent of Schools since May 1998, Joan Slywka, a teacher familiar with the "programs in which the petitioners were involved, Carol Ann Schonberger, another teacher familiar with the program, Jack C. Wasdyke, a retired principal and Dorthea Gorman, also a principal in.

Mezak's testimony first dealt with her employment history in the district and the types of positions she held into the 1999-2000 school year. Basically, she tracked

much of the information that was contained in the Joint Stipulation, including the number of students she taught and her hours per week which varied from year to year. Pertinently, in 1998-99, a new policy was introduced by senior administrative whereby no group of students less than three would be allowed unless special permission to do so was received. Mezak did receive permission to break-up a group of five pupils into three and two. Mezak was paid on a hourly basis following her submission of timesheets. Her pay fluctuated, of course, because of holidays or other nonschool days during any particular school year.

Alfieri, too, testified as to her background, largely tracking the Joint Stipulation as well. Between 1995-96 and 1997-98 she worked, she believed, an average of 18½ to 19½ hours per week. In 1998-99, she was cut back to about 10 hours per week. Until that school year, she would prepare her own schedule. In 1998, when her hours were reduced, she was given a schedule that she had to follow and she, too, was told there would be no group of less than three pupils without special approval. In 1999-2000, her number of hours were increased to 19½ per week.

Testimony on behalf of the respondent, as noted, was received from the superintendent, teachers and two principals, former and current. The first witness, Superintendent Groveman, described the Early Training Program taught by the petitioners' (ETP) as a remedial one designed for children with moderate deficiencies in order to help them "keep up". For 1998-99, he determined to require that no group less than three students should be taught unless special permission was received. This was due to the fact that the hourly teachers, of which there were six, had disparate work loads. For example, Schonberger had 38 students and Slywka had 31 students, whereas Alfieri had only 14 students. Groveman met with his principals prior to the start of the 1998-99 school year and determined there was simply too much one-on-one instruction causing an ineffective use of time and leading to the disparate caseload. Thus, it was determined to have a three student minimum unless there was a request to have less for some pressing reason. He believed that change had the largest impact on Alfieri, less so on Mezak.

Joan Slywka testified that she began teaching in the ETP program in 1987 to small groups of students in grades 8 through 12. Prior to 1998-99, the selection largely was done by teacher screening. She, like the other ETP teachers, including the petitioners, were paid hourly and worked less than 19½ hours per week. Usually, they began their employment in the third week of school starting, since pupils had to be tested and schedules prepared in conjunction with a master schedule.

Schonberger testified she has been teaching in the ETP program since 1979. She, too, noted that those teachers were paid on an hourly basis and worked no more than 19½ a week. Over the years, on overage, she taught between 33 and 40 students each school year.

The next witness, Jack C. Wasdyke retired as principal of Smith School at the end of 1999. He participated in discussion over was involved with the change implemented in 1998-99 by Superintendent Groveman concerning the minimum number of students to be taught per class. He recalled it was believed that groups of only one or two pupils was not an inefficient way to deliver the services. Thus, the three student minimum was prescribed unless the superintendent approved any change.

The last witness, Dorothy Gosman has been a principal for over 25 years in Saddle Brook. She, too, described the ETP program and how it worked and, like Wasdyke, described the selection process and explained that the number of children taught each year by each of the part-time teachers would vary. She, too, commented on the change put into effect by Superintendent Groveman in the beginning of the 1998-99 school year – that a minimum of three students was more appropriate for efficiency purposes. If a teacher wanted to have a class of less than three, she would have to notify Groveman and receive approval for it. In response to testimony by Alfieri, Gosman said that she could not recall Groveman ever telling her never to approve a class of less than three students and she never told Alfieri that Groveman said that.

DISCUSSION

Petitioners' assert, and respondent does not dispute, that whether certified teaching staff members acquire tenure depends upon compliance with the statutory requirements and there is no room for discretion in that respect. *Spiewak v. Rutherford Board of Educ.*, 91 *N.J.* 63 (1982). Petitioners' argue that the requirements of the statute are met in this case since both were duly certified, appointed to teaching positions requiring a certificate and served for the requisite time period set forth in the statute. Thus, according to petitioners, the express language of *N.J.S.A.* 18A:28-5 vest them with tenure protection and their reduction in compensation because their number of hours worked was reduced in 1998-99 cannot stand. Furthermore according to petitioners, the Board violated their seniority rights by reducing their hours of work beginning in 1998-99 while, at the same time, hiring nontenured teachers in positions within the scope of the certifications and endorsements they held. Since the Board therefore hired these nontenured teachers in violation of the their seniority rights, the petitioners maintain they now are entitled to the full-time employment held by those nontenured teachers. See, e.g., *Lichtman v. Board of Education of Ridgewood*, 93 *N.J.* 362 (1983). Thus, claiming that the Board blatantly violated their tenure and seniority rights, petitioners' seek a determination that they are entitled to: (1) employment as full-time elementary teachers; (2) an award of back-pay representing the difference between the salary they actually earned by the in their part-time positions and the amount they would have earned as full-time teachers; (3) pre- and post-judgment interest. In addition, petitioners' seek retroactive full-time seniority credit beginning with the 1998-99 school year.

The Board, in response, argues that neither the tenure nor the seniority rights, if any, of the petitioners' was negatively impacted by any Board action during the school years in question. What happened, instead, was simply the implementation of a directive by senior administrative staff designed to effect a more efficient operation in the remediation areas in which petitioners taught. Group instruction of smaller than three students, or one on one, was determined to be less than optimal since it created

substantial imbalances with respect to allocation of work among the several part-time hourly instructors who were providing the services. Also, it was felt that the development by teachers of their own schedules was potentially troublesome in regard to supervision over their activities.

Equally important, according to the Board, is the fact that neither the tenure nor the seniority rights of the petitioners were implicated here because there simply was no "reduction in force". All that happened was that the number of hours of part-time teachers were reduced as a result of a floor being placed on the number of students to be instructed at any one time. Since no one was dismissed, no tenure or seniority rights are involved.

In my view, the position taking by the respondent is correct one. Reduced to its essence, this case simply involves a determination by the administration to more equitably allocate the number of hours among the half dozen or so part-time teachers providing the services involved, as well as to make sure there was greater administrative supervisory control over their activities, especially in the area of scheduling. The fact that the petitioners' hours were reduced from close to 20 to less than that legally is insignificant. None of the cases cited by petitioners compel a different result. Tenured part-time remedial instructors like Alfieri and Mezak do not have statutory entitlement to full-time positions. Their tenure is with respect to their part-time activities only. The claim that they have a right to be appointed to full-time employment as elementary teachers has no sound basis in the law.

Nor is there any support for the proposition that seniority is involved. Neither petitioner is entitled to a full-time position. I agree with the Board that there was no "reduction in force" within the plain meaning of that term. A reallocation of the number of hours worked among part-time teachers, and the number of students for whom they are responsible, does not give rise to any claim that the "force" has been "reduced". As point out by the Board, the number of part-time hourly teaching staff members was not reduced, nor were their positions abolished. Nor were any transferred to other positions. The administration, and hence the Board, had every reason to exercise its discretion with respect to establishing a minimum number of students per group.

Moreover, it was uncontradicted that a part-time hourly instructor can teach a group of less than three with administrative approval – there was no blanket prohibition against it.

In light of my determination, there is no need to discuss, the questions of prejudgment or post judgment interest, or county superintendent oversight of the Board's activities. To the contrary, based upon the stipulated facts and the testimony adduced at the hearing, it is clear that no tenure and/or seniority rights of these part-time hourly instructors were violated. Accordingly, the consolidated verified petitions are dismissed.

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

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

July 23, 2001
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

8/1/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG - 3 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

sej

APPENDIX

Witnesses:

For Petitioner:

Theresa Mezak
Theresa Alfieri

For Respondent:

Harry A. Groveman

Joan Slywka

Carole-Ann Schonberger

Jack C. Wasdyke

Dorthea Gosman

Exhibit:

J-1 Joint Stipulation of Facts with Attached Exhibits

P-1 Mezak's timesheets (1999-00)

P-2 1999-00 timesheets (except June 2000)

P-3 Collective Negotiations Agreement

R-1 Memorandum to Mofet to Groveman, October 9, 1991

R-2 Letter from Mezak to Groveman, June 19, 1997

R-3 Class schedule for hourly employees

R-4 Payroll records for hourly employees

R-5 Letters of appointment for hourly employees

R-6 Salary analysis

R-7 For Identification: Mezak's Answer to Interrogatory Number 8.

R-8 ETP schedules for Slywka's, Alfieri & Schonberger (1997-98).

OAL DKT. NOS. EDU 11677-98 AND 1161-99 (CONSOLIDATED)
AGENCY DKT. NOS. 485-10/98 AND 516-11/98

THERESA ALFIERI,	:	
AND	:	
THERESE MEZAK,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) in this consolidated matter have been reviewed. Petitioners' exception and the Board's reply thereto were timely filed pursuant to the requirements of *N.J.A.C.* 1:1-18.4.

Initially, petitioners argue that the Initial Decision contains a series of legal conclusions without any supporting citations to case law, statute or regulation, a factor they believe is significant because it is their contention that the decision is contrary to existing law. More specifically, petitioners aver that the following conclusions are without basis:

> 1. The conclusion that the reduction in petitioners' hours and compensation "from close to 20 to less than that is legally insignificant." (Initial Decision at 9.)
>
> 2. The statement, without analysis or explanation, that "None of the cases cited by petitioners compel a different result." (Initial Decision at 9.)

3. The resurrection of a distinction between part-time remedial and full-time tenure for teachers. (Initial Decision at 9.)

4. The conclusion that an administrative decision "establishing a minimum number of students per group," which results in a reduction in hours and compensation, does not constitute a reduction in force. (Initial Decision at 9.)

5. The assertion that "Tenured part-time remedial instructors like Alfieri and Mezak do not have statutory entitlement to full-time positions." (Initial Decision at 9) (Petitioners' Exceptions at 1-2)

Petitioners next reiterate their position and legal arguments that the reduction in their work hours and compensation, while the Board employed nontenured teachers in positions within the scope of their certifications and endorsements, invoked their tenure rights. In support of their position petitioners cite *Klinger v. Cranbury Tp. Bd. of Ed.*, 190 *N.J. Super.* 354, 357 (App. Div. 1982), *certif. den.* 93 *N.J.* 277 (1983); *Avery et al. v. Board of Education of the City of Trenton, Mercer County*, decided by the State Board of Education July 10, 2001; *Ackerman et al. v. Board of Education of the Borough of Oakland, Bergen County,* 1986 *S.L.D.* 2191; *Von Schalscha v. Board of Education of the Borough of Tenafly, Bergen County*, decided by the Commissioner September 2, 1983; *Laufenberg v. Board of Education of Ramapo Indian Hills Regional High School District*, 1991 *S.L.D.* 2447; *Lichtman, supra.*

Petitioners also argue that, contrary to the Initial Decision, a part-time teacher whose rights are violated may claim a full-time position, citing in support *Lichtman, supra; Ackerman, supra; Gainer v. Wayne Township Board of Education,* 94 *N.J.A.R.*2d (EDU) 222 (State Board of Education); *Greiner v. Board of Education of the Township of Shamong, Burlington County,* decided by the State Board of Education September 5, 1984.

Petitioners further aver that that fact that there may have been an administrative justification for the reduction in their hours is irrelevant and that "administrative efficiency and flexibility do not trump tenure rights." (Petitioners' Exceptions at 6) Of this, petitioners state:

> The argument put forward by the respondent and accepted in the Initial Decision is a throwback to the argument that, at one time, was used to deny tenure status to part-time remedial teachers. In *Point Pleasant Beach Teachers' Ass'n v. Callam*, 173 *N.J. Super.* 11 (App. Div. 1979), *certif. den.* , 84 N.J. (1980), the court held that such teachers were not teaching staff members in the meaning of N.J.S.A. 18A:1:1 and under N.J.S.A. 18A:28-5, in part, because the program in which they were employed required "flexibility in operation which would be impeded if its instructors were granted tenure." *Point Pleasant Beach*, supra at 18, citing *Capella v. Camden County Voc. Tech. Sch. Bd. of Ed.*, 145 N.J. Super. 209, 214-215 (App. Div. 1976). *Point Pleasant Beach,* supra, was expressly overruled by the Supreme Court in [*Spiewak, supra*]. Issues of flexibility and administrative convenience have no place in determining whether tenure is acquired. If the terms of N.J.S.A. 18A:1-1 and N.J.S.A. 18A:28-5 are met, tenure, and all of its protections, exists. *Spiewak, supra.* (*Id.* at 7)

Lastly, petitioners argue that, in light of the Board's violation of the petitioners' tenure status, a complete remedy must issue, including back pay; pre-and post-judgment interest; seniority credit; assignment to a full-time elementary position; restoration of other benefits and emoluments; and referral to the county superintendent's office for oversight.

The Board's exceptions reiterate its position that petitioners' tenure rights were not invoked because it did not effectuate a reduction in force for the 1998-1999 academic year; *i.e.*, the Board did not reduce the number of part-time hourly teaching staff members; it did not abolish any of those positions or dismiss any of them; and it did not transfer any petitioner to other positions. Rather, the only change that occurred was an administrative directive requiring the part-time hourly staff to teach students in groups of at least three, absent permission for an exception. In support of its position, the Board cites *Carpenito v. Board of Education of the*

Borough of Rumson, Monmouth County, decided by the Commissioner August 21, 1996, *rev'd* State Board February 4, 1998, *rev'd* New Jersey Superior Court, 322 *N.J. Super.* 522 (App. Div. 1999).

The Board also argues that petitioners' reliance upon *Avery, supra,* is misplaced because the holding in that matter is distinguishable from the instant matter since the petitioners' positions in *Avery* were abolished and their terms of employment reduced from 12 months to 10 months. Moreover, the Board urges that the other cases cited by petitioners herein, including *Von Scalscha, supra,* and *Laufenberg, supra,* are distinguishable as well, because no reduction in force occurred in the instant matter. As such, the Board urges that the Administrative Law Judge (ALJ) correctly held that absent a reduction in force, petitioners' tenure and seniority rights are not implicated and that tenured, part-time, remedial instructors like petitioners do not have statutory entitlement to full-time positions, absent a reduction in force that affects their positions or employment. Lastly, the Board avers that the Initial Decision is not based upon administrative efficiency but on a finding that a reduction in force did not take place and the additional remedies sought by petitioners are not warranted by the evidence.

Upon review of the record, including the exceptions and reply exceptions submitted by the parties, the Commissioner agrees with the ALJ's recommended decision to dismiss the Petitions of Appeal with the following clarification. Initially, the Commissioner emphasizes that as determined by the New Jersey Supreme Court in *Spiewak, supra,* tenure acquisition is not in any way distinguished or differentiated by one's employment on a part-time versus a full-time basis; *i.e.*, once an individual fulfills the statutory requirements for tenure acquisition, that individual is tenured in the position of teacher, irrespective of the fact that the position filled may be part-time, as opposed to full-time. Moreover, "a tenured part-time

teaching staff member with proper certification can claim, as against a nontenured applicant, seniority rights in seeking appointment to a full-time position that is within the specific categories covered by the certification and that has responsibilities identical to those of the part-time position in which employment was actually held.***" *Lichtman, supra,* 93 *N.J.* at 364.

Notwithstanding such holdings by the Court, the Commissioner is in agreement with the ALJ that the cases cited by petitioners in support of their claims in the instant matter do not compel a result granting the relief they seek because, upon review of the factual circumstances herein, the Commissioner concurs with the ALJ's determination that petitioners were not subject to a reduction in force or other adverse employment action which would trigger their tenure and seniority rights. It is undisputed that petitioners knowingly entered into employment with the Board in positions having fluid hours, not to exceed 19 or 19.5 hours per week, based on the needs of its students for remedial instruction. (J-7, J-16, J-18, J-27, J-31) Further, petitioners' employment hours fluctuated from year to year, even pay period to pay period, based on those needs. (J-33 to J-36) Consequently, the Commissioner agrees with the Board that, given the structure of the programs in which petitioners were employed and the terms of their employment agreements, they never had any tenure entitlement to a minimum number of hours worked per year. Therefore, while petitioners' hours of employment were fewer in the 1998-1999 school year than in the previous year, tenure and seniority protections were not triggered because their employment from its inception was intended to be flexible in terms of the precise number of hours to be worked. To accept petitioners' position would mean that if *at any point* their schedule required fewer hours than in the previous year, or portion of a year, then they would be able to invoke their tenure and seniority rights. In this regard, the Commissioner fully concurs with the Board when it states:

In the 1997-1998 school year, which is the immediate year preceding the year which is the subject of the petitions, Alfieri's gross monthly compensation decreased in consecutive months 5 times during the academic year. (R-4a). Likewise, Mezak's gross monthly compensation decreased in consecutive months 6 times during the academic year. (R-4a).

***

Given the structure of the programs in which the part time hourly staff were employed, these teachers never had a "tenure entitlement" to a minimum number of hours worked per year. The administrative directive implemented during the 1998-1999 school year did not abolish a part time hourly position such that there were less number of part time hourly teachers employed in the district, nor did the directive "transfer" any of the part time hourly staff as a result of declining enrollment or for reasons of economy. All the administrative directive attempted to do is to give the administration greater control over the development of the schedules for the part time hourly staff.[1]***

Under petitioners' theory of the case, upon attaining tenure, the moment their monthly or annual gross compensation would decline, or they would work less hours [than] the month before, they would suffer a "reduction" in employment so as to trigger their tenure and seniority rights and thereby enable them to "bump" a full time nontenured teacher. This would occur without a formal reduction in force by the Board. The nature of petitioners' positions is such that their hours would fluctuate from month-to-month and from year-to-year. Petitioners' contractual hourly rate of pay was never reduced by the Board.

Petitioners were not "reduced" in employment because they were employed in positions that did not require a fixed number of hours of instruction from year-to-year. Their positions do not involve a fixed teaching schedule, and compensation, which could only be reduced as a result of a reduction in force if enrollment declines but rather, involves positions which require a teaching schedule (and therefore teacher contact time), and compensation, to vary from year-to-year. A reduction in force with respect to the part time hourly staff would be seen in the reduction of the number of part time hourly positions or the transfer of staff and/or combining of schedules and a resulting loss of hours and reduction in

[1] The Commissioner notes that prior to the 1998-1999 school year, part-time hourly teachers were allowed to develop their own schedules.

compensation. None of that took place during the 1998-1999 school year. (Board's Memorandum of Law at 17-18)

Finally, the Commissioner concludes that the cases cited by petitioners, and which the ALJ found inapposite in the instant matter, do not have a fact pattern such as is present herein, where each year petitioners knowingly accepted employment which did not guarantee a minimum number of hours of work. Therefore, it is determined that petitioners did not suffer an adverse employment action within the meaning of a reduction in force expressed by the Court in *Carpenito, supra.*

Accordingly, the petitions are hereby dismissed for the reasons set forth in the Initial Decision as clarified herein.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 9/17/01

Date of Mailing: 9/21/01

[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.

321-01

BARBARA CISSONE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOODBINE, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

September 24, 2001

OAL DKT. NO. EDU 8173-98
AGENCY DKT. NO. 353-7/98

BARBARA CISSONE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOODBINE, CAPE MAY 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 Kuncetti

ACTING ASSISTANT COMMISSIONER

Date of Decision: 9|24|01

Date of Mailing: 9|24|01

322-01

SHARON A. KOPMANN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ROCKAWAY, MORRIS COUNTY, THOMAS C. PARCIAK AND ERICA NIXON,	:	DECISION
RESPONDENTS.	:	
	:	

September 24, 2001

OAL DKT. NO. EDU 7555-00
AGENCY DKT. NO. 246-7/00

SHARON A. KOPMANN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ROCKAWAY, MORRIS COUNTY, THOMAS C. PARCIAK AND ERICA NIXON,	:	DECISION
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 Rucci

ACTING ASSISTANT COMMISSIONER

Date of Decision: 9|24|01

Date of Mailing: 9|24|01

323-01

H.A.G., on behalf of minor child, D.R.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

September 24, 2001

OAL DKT. NO. EDU 502-99
AGENCY DKT NO. 563-12/98

H.A.G., on behalf of minor child, D.R.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, 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.

Maria Mucciolo

ACTING ASSISTANT COMMISSIONER

Date of Decision: 9|24|01

Date of Mailing: 9|24|01

324-01

MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 24, 2001

OAL DKT. NO. EDU 4552-99
AGENCY DKT. NO. 71-4/99

MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, 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 Nuciletto

ACTING ASSISTANT COMMISSIONER

Date of Decision: 9|24|01

Date of Mailing: 9|24|01

325-01

L.L. and S.L., on behalf of minor child, J.L.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE EASTERN CAMDEN COUNTY REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 24, 2001

OAL DKT. NO. EDU 6797-00
AGENCY DKT. NO. 325-9/00

L.L. and S.L., on behalf of minor child, J.L.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE EASTERN CAMDEN COUNTY REGIONAL SCHOOL DISTRICT, 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.

Maria Mascitelli

ACTING ASSISTANT COMMISSIONER

Date of Decision: 9|24|01

Date of Mailing: 9|24|01

326-01

EARLY INTERVENTION PROGRAMS OF MONMOUTH AND OCEAN COUNTIES, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

September 24, 2001

OAL DKT. NO. EDU 6572-96
AGENCY DKT. NO. 259-7/96

EARLY INTERVENTION PROGRAMS OF MONMOUTH AND OCEAN COUNTIES, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Stipulation of Dismissal have been reviewed. Noting that the parties have agreed to dismissal of this matter, with prejudice and without costs to either party, the Commissioner shall consider this matter a withdrawal, pursuant to *N.J.A.C.* 1:1-19.2.

The Assistant Commissioner, to whom this responsibility has been delegated pursuant to *N.J.S.A.* 18A:4-34c, therefore, approves the withdrawal and determines that this matter shall be dismissed with prejudice.

IT IS SO ORDERED.

ACTING ASSISTANT COMMISSIONER

Date of Decision: 9|24|01

Date of Mailing: 9|24|01

327-01

#327-01

IN THE MATTER OF THE TENURE HEARING OF STEPHEN FORD, SCHOOL DISTRICT OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,	:	ORDER OF CONSOLIDATION AND PREDOMINANT INTEREST
AND	:	
STEPHEN H. FORD,	:	
COMPLAINANT,	:	
V.	:	
WILLINGBORO BOARD OF EDUCATION,	:	
RESPONDENT.	:	

September 14, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INTERLOCUTORY ORDER FOR CONSOLIDATION AND PREDOMINANT INTEREST

IN THE MATTER OF THE TENURE HEARING OF STEPHEN FORD, BOARD OF EDUCATION OF WILLINGBORO, BURLINGTON COUNTY,

and

STEPHEN H. FORD,

Complainant,

v.

WILLINGBORO BOARD OF EDUCATION,

Respondent.

OAL DKT. NO. EDU 00885-01S
AGENCY DKT. NO. 45-2/01

OAL DKT. NO. CRT 02367-01S
AGENCY DKT. NO. EC38WE-46177A

BEFORE **JEFF S. MASIN**, ACTING CHIEF ALJ:

A previous Interlocutory Order for Consolidation and Predominant Interest was withdrawn with the consent of the Director ("Director") of the Division on Civil Rights ("DCR") and the Commissioner of Education ("Commissioner"). The parties to these contested cases have filed additional arguments regarding these issues. Based upon these arguments and the case law, especially *Balsley v. North Hunterdon Regional School District Board of Education*, 117 *N.J.* 434 (1990), I **CONCLUDE** that the cases shall be consolidated as they each involve the same or similar facts and the interlocking legal issues are such that separation of the cases is not appropriate. In addition, I **CONCLUDE** that the Commissioner of Education has the predominant interest, as while both the Commissioner and the Director have jurisdiction over the

discrimination aspects of the consolidated case, the Commissioner's expertise in regard to the interests of the students who might be impacted by determinations as to Mr. Ford's continued employment supports his primary interest. In this case there is no dispute as to the existence of a handicap and the nature thereof, or that the conduct complained of was a manifestation of the handicapping condition. As the accommodation sought by Mr. Ford is apparently limited to time during which he would transition from one medicine regimen to another, and as there is apparently no dispute that, but for Mr. Ford's epilepsy and the unfortunate manifestations thereof that he has experienced the Board would not be seeking to remove his tenure, the question as to whether Mr. Ford can be relieved of his tenure despite the protections afforded by the Law Against Discrimination ("LAD") appears to depend on an assessment of the "safety defense" raised by his employer, an analysis which must follow the standards set forth by the New Jersey Supreme Court in *Jansen v. Food Circus Supermarkets, Inc*, 110 *N.J.* 363 (1988). In short, the Board bases its position that, despite the LAD protections, it can lawfully remove tenure (through the process established by the Tenure Law), on its contention that Mr. Ford's continued employment by the Board in a teaching capacity poses such potential for unacceptable consequences to the students who might be exposed to similar manifestations that the LAD will not compel the Board to continue his tenure. While it is recognized that in cases involving other employment situations where the "safety defense" is raised, the Director would generally be the predominate determiner of the issue of whether the employer has succeeded in meeting its burden to demonstrate that the employee can be discharged, I **CONCLUDE** that under the unique facts of this case and in the context of the employment of an educator in a school workplace where the "safety" issue specifically implicates concerns about students who are generally minors and issues of educational policy, impact and student welfare that *may* be involved in the decision, the Commissioner, who bears the charge to both consider issues of discrimination in the schools as well as the charge to provide students with a thorough, efficient and safe education, has the predominant interest. *Balsley, Id.* at 439, citing *Hinfey v. Matawan Regional Bd. of Education*, 77 *N.J.* 514, 520 (1978) (and recognizing Hinfey's adjuration that the Commissioner did not necessarily always have the predominant interest *vis a vis* the Director in every case involving school problems.)

The Commissioner of Education shall therefore first determine whether, under all the circumstances, including the student safety issue raised by the Board, the Board may remove Mr.

Ford's tenure. Depending upon the outcome, the Director shall then consider any additional remedial relief, penalties or other remedies unique to the DCR's jurisdiction.

This order may be adopted, modified or rejected by the **DIRECTOR OF THE DIVISION ON CIVIL RIGHTS** and the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law are authorized to make a final decision in this matter. The Director of the Division on Civil Rights and the Commissioner of the Department of Education are encouraged to consult and coordinate with each other before issuing a final order. If the **DIRECTOR OF THE DIVISION ON CIVIL RIGHTS** and the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** do not adopt, modify or reject this order within forty-five (45) days and unless such time limit is otherwise extended, this recommended order shall be deemed adopted by the **DIRECTOR OF THE DIVISION ON CIVIL RIGHTS** and the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**.

July 26, 2001

DATE

JEFF S. MASIN, ACTING CHIEF ALJ

mjm

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,	:	ORDER OF CONSOLIDATION AND PREDOMINANT INTEREST
AND	:	
STEPHEN H. FORD,	:	
COMPLAINANT,	:	
V.	:	
WILLINGBORO BOARD OF EDUCATION,	:	
RESPONDENT.	:	

The Commissioner has reviewed the initial order of the Administrative Law Judge (ALJ) filed on July 30, 2001, together with the exceptions filed by Respondent/Petitioner Ford and the reply of the Board of Education.

Upon such review, the Commissioner fully agrees that the above-captioned matters should be consolidated for hearing and initial decision. However, he cannot agree that primary jurisdiction in the consolidated matter rests with him rather than with the Director of the Division on Civil Rights (DCR).

The ALJ notes, and the parties do not dispute, that there is no question as to the existence of a handicapping condition or the fact that the conduct forming the basis of the tenure charges is a manifestation of that condition. Thus, as properly concluded by the ALJ, whether

Mr. Ford can be removed from employment will primarily rest on assessment of a "safety defense," that is, on the validity of the Board's contention that respondent's continued employment as a teacher poses such unacceptable consequences for students that the Board cannot be compelled to continue such employment notwithstanding the protections afforded by the Law Against Discrimination.

The Commissioner fully concurs with the ALJ and the Board that, as a general proposition, the Commissioner's special expertise and interest uniquely qualify him to assess a teacher's behavior in terms of impact on students and the school environment; without doubt, the Commissioner would ordinarily have the predominant interest in a tenure matter. However, under the unique circumstances of this matter, the Commissioner is compelled to conclude that he cannot adequately make such an assessment without benefit of the expertise and prior assessment of the DCR in evaluating respondent's claims of discrimination, retaliation for filing a complaint with DCR and failure by the Board to make reasonable accommodation of his condition as requested. Therefore, the Commissioner declines to exert primary jurisdiction over this consolidated matter, notwithstanding that tenure charges are integral to it.

Instead, the Commissioner finds it more appropriate that, upon issuance of an initial decision recommending comprehensive findings of fact and conclusions of law, the Director of DCR shall first review the decision and render a final determination on Mr. Ford's claims of discrimination, retaliation and failure to accommodate. Thereafter, the Commissioner shall determine, in light of the DCR's holdings, whether under all the circumstances of this matter, the Board's tenure charges have been proven and, if so, whether dismissal from employment is warranted as a result.

Accordingly, the initial order of the ALJ is set aside with respect to the determination that the Commissioner of Education has primary jurisdiction to decide these

consolidated matters. Primary jurisdiction shall instead rest with the Director of the Division on Civil Rights, who shall, subsequent to review of the initial decision, forward the matter to the Commissioner for determination on the tenure charges in light of the Director's holdings.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 9/14/01

Date of Mailing: 9/24/01

331-01

HELEN MEANS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 25, 2001

OAL DKT. NO. EDU 01150-99
AGENCY DKT. NO. 482-10/98

HELEN MEANS,	:	
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 Rivera

ACTING ASSIST. COMM. OF EDUCATION

Date of Decision: 9/25/01

Date of Mailing: 9/25/01

333-01

ELLEN PRESSMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WALDWICK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 25, 2001

OAL DKT. NO. EDU 03902-99
AGENCY DKT. NO. 77-4/99

ELLEN PRESSMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WALDWICK, 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.

ACTING ASSIST. COMM. OF EDUCATION

Date of Decision: 9/25/01

Date of Mailing: 9/25/01

332-01

332-01

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	
SEAN D. PASCADLO, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF MILFORD BOROUGH,	:	DECISION
HUNTERDON COUNTY.	:	

September 25, 2001

OAL DKT. NO. EDU 354-00
AGENCY DKT. NO. 27-1/00

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	
SEAN D. PASCADLO, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF MILFORD BOROUGH,	:	DECISION
HUNTERDON COUNTY,	:	

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 Kuncelli

ACTING ASSIST. COMM. OF EDUCATION

Date of Decision: 9/25/01

Date of Mailing: 9/25/01

334-01

BRIAN VILLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MARTIN AROCHO, BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK. MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 25, 2001

OAL DKT. NO. EDU 08864-99
AGENCY DKT. NO. 210-7/99

BRIAN VILLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MARTIN AROCHO, 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 Acting 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 Marcotte

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 9|25|01

Date of Mailing: 9|25|01

335-01

LINDA WEIKEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

September 25, 2001

OAL DKT. NO. EDU 8348-98
AGENCY DKT NO. 383-8/98

LINDA WEIKEL,	:	
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 Acting 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 Tuttle

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 9|25|01

Date of Mailing: 9|25|01

336-01

ISMAEL QUINTANA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 25, 2001

OAL DKT. NO. EDU 2125-99
AGENCY DKT. NO. 23-2/99

ISMAEL QUINTANA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, 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 Acting 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 Titus

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 9|25|01

Date of Mailing: 9|25|01

337-01

C.L., on behalf of minor child, B.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 25, 2001

OAL DKT. NO. EDU 11829-99
AGENCY DKT. NO. 304-10/99

C.L., on behalf of minor child, B.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF 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 Acting 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 Kuncetto

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 9|25|01

Date of Mailing: 9|25|01

328-01

328-01

MIKE GUNTHER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ROBERT ALBERTI, BOARD OF EDUCATION OF THE TOWNSHIP OF HOWELL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 25, 2001

OAL DKT. NO. EDU 8783-99
AGENCY DKT. NO. 269-9/99

MIKE GUNTHER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ROBERT ALBERTI, BOARD OF EDUCATION OF THE TOWNSHIP OF HOWELL, 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.

ACTING ASSIST. COMM. OF EDUCATION

Date of Decision: 9/25/01

Date of Mailing: 9/25/01

329-01

RANDALL DUNHAM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

September 25, 2001

OAL DKT. NO. EDU 00748-00
AGENCY DKT. NO. 7-1/00

RANDALL DUNHAM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, 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.

Maria Rucoletto

ACTING ASSIST. COMM. OF EDUCATION

Date of Decision: 9/25/01

Date of Mailing: 9/25/01

330-01

V.S.., on behalf of minor child, J.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

September 25, 2001

OAL DKT. NO. EDU 12109-99
AGENCY DKT. NO. 315-10/99

V.S., ON BEHALF OF MINOR CHILD, J.S.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST 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 ASSIST. COMM. OF EDUCATION

Date of Decision: 9/25/01

Date of Mailing: 9/25/01

338-01

RICHARD DI MARCO,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF MANCHESTER, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

September 25, 2001

OAL DKT. NO. EDU 10055-99
AGENCY DKT. NO. 295-9/99

RICHARD DI MARCO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MANCHESTER, 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 Acting 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 Nunnetta

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 9|25|01

Date of Mailing: 9|25|01

339-01

FRANCES S. NUSBAUM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

September 25, 2001

OAL DKT. NO. EDU 3696-96
AGENCY DKT. NO. 111-3/96

FRANCES S. NUSBAUM,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, 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 Acting 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 Nuzzolillo

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 9|25|01

Date of Mailing: 9|25|01

343-01

L.F. AND S.F.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 26, 2001

OAL DKT. NO. EDU 11157-99
AGENCY DKT. NO. 211-8/99

L.F. AND S.F.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, 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 Acting 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 Kuncatte

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 9/26/01

Date of Mailing: 9/26/01

342-01

A.M., on behalf of minor child, G.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

September 26, 2001

OAL DKT. NO. EDU 1360-00
AGENCY DKT NO. 34-1/00

A.M., on behalf of minor child, G.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, 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 Acting 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 Marcotte

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 9/26/01

Date of Mailing: 9/26/01

340-01

RUPERT SMITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

September 26, 2001

OAL DKT. NO. EDU 08581-98
AGENCY DKT NO. 364-8/98

RUPERT SMITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, 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 Acting 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 Ruscitto

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 9/26/01

Date of Mailing: 9/26/01

341-01

BOARD OF EDUCATION OF THE BOROUGH OF COLLINGSWOOD, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION AND FRANK TRAVALINE AND VICKI TRAVALINE,	:	DECISION
RESPONDENTS.	:	

September 26, 2001

OAL DKT. NO. EDU 2585-93
AGENCY DKT NO. 27-2/93

BOARD OF EDUCATION OF THE BOROUGH OF COLLINGSWOOD, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION AND FRANK TRAVALINE AND VICKI TRAVALINE,	:	DECISION
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 Acting 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 Thomas

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 9/26/01

Date of Mailing: 9/26/01

344-01

MAUREEN J. MALECKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF MAPLE SHADE, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 26, 2001

OAL DKT. NO. EDU 08002-99
AGENCY DKT. NO. 232-8/99

MAUREEN J. MALECKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF MAPLE SHADE, 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 Acting 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 Kirkitelli

ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 9/26/01

Date of Mailing: 9/26/01

345-01

JOSEPH CASTIGLIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 26, 2001

OAL DKT. NO. EDU 01504-00
AGENCY DKT. NO. 378-12/99

JOSEPH CASTIGLIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD 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.

Maria Kucuk

ACTING ASSISTANT COMMISSIONER

Date of Decision: 9|26|01

Date of Mailing: 9|26|01

346-01

C.S.B., on behalf of minor child, B.S.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 26, 2001

OAL DKT. NO. EDU 10791-99
AGENCY DKT. NO. 311-10/99

C.S.B., on behalf of minor child, B.S.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, 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

Date of Decision: 9|26|01

Date of Mailing: 9|26|01

347-01

C.G., on behalf of minor child, K.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF SPARTA TOWNSHIP, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

September 26, 2001

OAL DKT. NO. EDU 7402-00
AGENCY DKT. NO. 195-6/00

C.G., on behalf of minor child, K.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF SPARTA TOWNSHIP, 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.

Maria Mucciotti

ACTING ASSISTANT COMMISSIONER

Date of Decision: 9|26|01

Date of Mailing: 9|26|01

348-01

EARLY INTERVENTION PROGRAMS OF MONMOUTH AND OCEAN COUNTIES, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JOHN ELLIS, COMMISSIONER, NEW JERSEY DEPARTMENT OF EDUCATION, JEFFREY OSOWSKI, DIRECTOR, DIVISION OF SPECIAL EDUCATION AND JAMES A. JONES, PRESIDENT, NEW JERSEY STATE BOARD OF EDUCATION,	:	DECISION
RESPONDENTS.	:	

September 26, 2001

OAL DKT. NO. EDU 04244-95
AGENCY DKT. NO. 404-12/90

EARLY INTERVENTION PROGRAMS OF MONMOUTH AND OCEAN COUNTIES, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JOHN ELLIS, COMMISSIONER, NEW JERSEY DEPARTMENT OF EDUCATION, JEFFREY OSOWSKI, DIRECTOR, DIVISION OF SPECIAL EDUCATION AND JAMES A. JONES, PRESIDENT, NEW JERSEY STATE BOARD OF EDUCATION,	:	DECISION
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.

ACTING ASSISTANT COMMISSIONER

Date of Decision: 9|26|01

Date of Mailing: 9|26|01

349-01

ROBERT CELANTANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASCACK VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

September 26, 2001

OAL DKT. NO. EDU 5790-00
AGENCY DKT. NO. 220-6/00

ROBERT CELANTANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASCACK 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.

Maria Rinetti

ACTING ASSISTANT COMMISSIONER

Date of Decision: 9|26|01

Date of Mailing: 9|26|01

351-01

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	
DR. FRANK SAVAGE, BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION OF THE CITY OF ASBURY	:	DECISION
PARK, MONMOUTH COUNTY.	:	
	:	

September 28, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2962-01

AGENCY DKT. NO. 141-5/01

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF DR. FRANK SAVAGE, ASBURY PARK BOARD OF EDUCATION, MONMOUTH COUNTY

Nicholas Celso, III, Esq., for petitioner, Asbury Park Board of Education (Schwartz, Simon, Edelstein, Celso and Kessler, attorneys)

Frank F. Savage, respondent, *pro se*

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

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

The Asbury Park Board of Education asked the Commissioner of Education to suspend the teaching certificate of Frank F. Savage because Savage allegedly abandoned his position by failure to give notice of intention to resign as required by *N.J.S.A.* 18A:28-8; Savage denied the charge.

The matter was opened before the Commissioner of Education by the Asbury Park Board of Education and transmitted to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 through –13.

The allegations are and I **FIND** that on or about September 8, 2000, the Board sent to Savage a letter advising that he had been appointed to a teacher position at the ten month salary of $62,705, prorated, effective September 8, 2000 through June 30, 2001, subject to successful criminal history review and approval by the County Superintendent of Schools of a request for emergent hiring. Savage accepted and these things were accomplished. He commenced his teaching duties. On March 8, 2001, Savage failed to report for duty and failed to notify the Board of his absence. On the following day, he submitted his resignation, effective immediately, contrary to the terms of *N.J.S.A.* 18A:28-8. This action followed.

The matter was transmitted to the Office of Administrative Law on June 6, 2001. This judge conducted a prehearing conference on July 16, 2001. Among other things, hearing was set for October 25, 2001 and the parties agreed to discuss settlement.

Under cover of August 6, 2001, the parties announced agreement and submitted a stipulation 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.

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

N.J.S.A. 18A:28-8 provides that notice of intention to resign must be provided to an employing board of education at least sixty days prior to the last day of service unless the Board shall approve of a release on shorter notice. The statute further provides that if a teaching staff member fails to give such notice, he shall be deemed guilty of unprofessional conduct and the

Commissioner may suspend his certificate for not more than one year. I **FIND** and **CONCLUDE** that Frank F. Savage conducted himself unprofessionally in this matter and thereby violated the statute. A one-year suspension of his certificate is therefore appropriate. I further **CONCLUDE** that, with the one-year suspension, this agreement meets the requirements of *N.J.A.C.* 1:1-19.9 and should be approved. I approve the settlement and one-year suspension and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded. I note that the parties have agreed to waive the right to file exceptions and cross-exceptions to this initial decision.

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

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

AUG 1 3 2001
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

8-14-01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 1 5 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/cad

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLP
Ten James Street
Florham Park, New Jersey 07932
(973) 301-0001; FAX (973)301-0203
Attorneys for Petitioner
Asbury Park Board of Education

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF DR. FRANK SAVAGE, ASBURY PARK BOARD OF EDUCATION, MONMOUTH COUNTY	STATE OF NEW JERSEY BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. EDUOR 02962-01S AGENCY DKT. NO.: 141-5/01 Hon. Bruce C.Campbell, ALJ

STIPULATION OF SETTLEMENT

1. In or about August 2000, respondent was interviewed for a vacant position as teacher of chemistry at the Asbury Park High School.

2. On or about September 8, 2000, a letter was sent to respondent informing him that he had been appointed to the position at the ten-month salary of $62,705, prorated, effective September 8, 2000 through June 30, 2001, subject to successful criminal history review and approval by the County Superintendent of a request for emergent hiring.

3. Respondent accepted the appointment, and commenced his teaching duties.

4. On March 8, 2001, respondent failed to report to his assigned post, and failed also to notify petitioner of his absence.

5. On March 9, 2001, respondent submitted his resignation, effective immediately.

6. Soon thereafter, petitioner commenced the within action seeking an Order to Show Cause why respondent's teaching certificate should not be suspended for failure to provide timely notice of termination and to withhold salary for failure to provide services. The Commissioner signed the Order to Show Cause and forwarded same to petitioner for service upon respondent, on or about April 24, 2001.

7. Petitioner was served with the Order to Show Cause, on or about May 1, 2001.

8. Respondent, filed an action in the Superior Court seeking payment of his withheld salary. That action was dismissed due to respondent's failure to appear.

9. The within matter was transmitted to the Office of Administrative Law on or about June 3, 2001.

10. A prehearing conference was held on June 16, 2001.

11. Thereafter, the parties engaged in settlement discussions and have agreed upon the following, subject to approval by the Court and the Commissioner:

A. The parties agree to release, remise, abdicate and abandon any and all claims they may have against one another as a result of their employment relationship, now and forever, in any court or agency. Dr. Savage releases the Board and its agents, individually and collectively.

B. Dr. Savage agrees that he improperly abandoned his teaching position with the Asbury Park Public Schools without proper notice, as set forth above.

C. Dr. Savage hereby agrees to surrender his teaching certificate to the Commissioner and/or State Board of Examiners for whatever period of time shall be deemed by them to be appropriate.

D. The Board agrees to remit to Dr. Savage one week's salary, less all normal payroll deductions, upon approval of this settlement by the Commissioner of Education.

For the Asbury Park Board of Education

08-01-01
DR. FRANK SAVAGE (Date)

8.2.01
NICHOLAS CELSO, III. (Date)
Interim Board Counsel

OAL DKT. NO. EDU 2962-01
AGENCY DKT. NO. 141-5/01

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	
DR. FRANK SAVAGE, BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION OF THE CITY OF ASBURY	:	DECISION
PARK, MONMOUTH COUNTY.	:	
	:	

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. The parties having agreed that Dr. Savage is guilty of unprofessional conduct, pursuant to *N.J.S.A.* 18A:26-10, for abandoning his teaching position without proper notice, the Commissioner determines to suspend the teaching certificate of Dr. Savage for a period of one year, which period shall 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 the within suspension. This 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: 9|28|01

Date of Mailing: 9|28|01

352-01

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,
(IN THE MATTER OF THE DISTRICT EARLY CHILDHOOD AID APPLICATION)

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

September 28, 2001

OAL DKT. NO. EDU 5356-99
AGENCY DKT. NO. 61-3/99

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
(IN THE MATTER OF THE DISTRICT 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: 9|28|01

Date of Mailing: 9|28|01

353-01

IN THE MATTER OF THE TENURE	:	
HEARING OF STEVEN ELWELL,	:	COMMISSIONER OF EDUCATION
LOWER CAPE MAY REGIONAL	:	DECISION
SCHOOL DISTRICT, CAPE MAY	:	
COUNTY.	:	

October 1, 2001

AGENCY DKT. NO. 167-6/01

IN THE MATTER OF THE TENURE	:	
HEARING OF STEVEN ELWELL,	:	COMMISSIONER OF EDUCATION
LOWER CAPE MAY REGIONAL	:	DECISION
SCHOOL DISTRICT, CAPE MAY	:	
COUNTY.	:	

For the Board, Bruce M. Gorman, Esq. (Gorman and Rauh)

This matter having been opened before the Commissioner of Education on June 11, 2001[1] through certification of tenure charges of conduct unbecoming a teacher by the Board of Education of the Lower Cape May Regional School District; and

The Commissioner having directed respondent, via both certified and regular mail on July 13, 2001 to file an Answer to the tenure charges against him; 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

[1] Although tenure charges were certified to the Commissioner on June 11, 2001, the Board did not, on that date, present proof that the charges were duly served upon the respondent, as required by *N.J.A.C.* 6A:3-5.3(a). Such proof of service was not received until July 12, 2001; accordingly, respondent's opportunity to answer the charges was calculated from the latter date.

In that no reply has been received from respondent in response to the Board's charges, each count of the charges against respondent is deemed to be admitted; and

The Commissioner's review of the tenure charges certified against respondent by the Board and the statement of evidence in support of those charges indicating that respondent engaged in sexual intercourse with a minor female student known as A.J. while he served as a coach for the Board's wrestling team and A.J. served as manager of the team, and the evidence further indicating that respondent pled guilty to second degree sexual assault pursuant to criminal charges brought in connection with his actions; and

Deeming such charges to be admitted, and noting that respondent has chosen not to deny the specific allegations contained therein, the Commissioner finds that respondent's actions constituted unbecoming conduct sufficient to warrant his dismissal from his tenured position; now, therefore

IT IS ORDERED this _____ day of September 2001 that summary decision shall be granted to the Board, and Steven Elwell shall be dismissed from his tenured position as a teacher in the Board's employ as of the date of this order.[2] This matter shall be referred to the State Board of Examiners pursuant to *N.J.A.C.* 6:11-3.6 for action against respondent's certificate as it deems appropriate.[3]

9/27/01

COMMISSIONER OF EDUCATION

Date of Decision: 10/1/01

Date of Mailing: 10/1/01

[2] Notwithstanding the above, the Commissioner notes that if an order of forfeiture is entered pursuant to *N.J.S.A.* 2C:51-2 which results in the termination of respondent's employment *prior* to the date of this decision, then respondent's employment shall be deemed terminated as of the earlier date.

[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.

354-01

BOARD OF EDUCATION OF THE CITY OF IRVINGTON, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

October 1, 2001

OAL DKT. NO. EDU 5358-99
AGENCY DKT. NO. 53-3/99

BOARD OF EDUCATION OF THE CITY OF IRVINGTON, ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this matter, including the 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 and a copy of a notification sent to petitioner by OAL on July 26, 2001, providing ten 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: 10/1/01

Date of Mailing: 10/1/01

* 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 the date of mailing to the parties.

355-01

OLIVIA C. HOWARD,

PETITIONER,

V

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL HISTORY REVIEW AND NEW JERSEY STATE BOARD OF EXAMINERS,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, applicant for teacher certification through the Alternate Route Program, challenged respondent's determination that she is disqualified from school employment pursuant to *N.J.S.A.* 18A:6-7.1 based on her conviction for "death by auto."

The ALJ determined that petitioner's 1990 conviction under *N.J.S.A.* 2C:11-5, which was a third degree crime at that time, constituted a disqualifying offense because the crime is "substantially equivalent" to the second degree crime of vehicular homicide in the amended *N.J.S.A.* 2C:11-5. Moreover, the elements of petitioner's crime involved both the use and threat of force upon a person.

The Commissioner affirmed the decision of the ALJ for the reasons set forth therein.

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

October 1, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 10197-00

AGENCY DKT. NO. 300-8/00

OLIVIA C. HOWARD,

Petitioner,

v.

CARL H. CARABELLI, DIRECTOR, STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT, and IDA B. GRAHAM, SECRETARY, STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,

Respondents.

Robert T. Pickett, Esq., for petitioner

Allison Colsey Eck, Deputy Attorney General, for respondents,
(John J. Farmer Jr., Attorney General of New Jersey, attorney)

Record Closed: July 10, 2001 Decided: August 13, 2001

BEFORE **EDITH KLINGER**, ALJ:

PROCEDURAL HISTORY

On August 14, 2000, petitioner filed a Petition of Appeal with the Commissioner of Education requesting the reversal of respondents' decisions to deny her certification as a teacher and certification as a county substitute teacher on the basis of her prior criminal history. On November 2, 2000, respondents filed their answer and affirmative defenses. On December 20, 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.

During the course of a series of telephone conferences with the parties, it was determined that the material facts in this matter were not in dispute and the hearing could proceed upon cross-motions for summary decision based upon the applicable statute, *N.J.S.A.* 18A:6-7.1.

THE FACTS AS STATED BY PETITIONER

1. In or about February 2000, petitioner made application for teacher certification through the Alternate Route Program to the New Jersey Department of Education ("Department").

2. In or around the same period of time, petitioner also made application to be certified as a county substitute teacher to the Department.

3. Petitioner passed the National Teacher Examination and moved forward with her application for teacher certification through the Alternate Route Program with the Department.

4. Petitioner completed all requirements necessary to be certified as a county substitute teacher in the state of New Jersey with the Department.

5. The application process for teacher and county substitute teacher certification in the state of New Jersey requires that applicants, including petitioner, complete a criminal history review form and be fingerprinted in accordance with *N.J.S.A.* 18A:6-7.1.

6. Petitioner complied with the requirements by submitting her fingerprints and completed criminal history review form to the Department.

7. On May 11, 2000, petitioner received a letter from respondent Carabelli, dated May 8, 2000, in which Carabelli indicated that petitioner is "permanently disqualified from employment in any position with a school or other educational institution under the supervision of the Department of Education or with a contracted service provider under contract with said school or educational facility," pursuant to *N.J.S.A.* 18A:6-7 *et seq.*, *N.J.S.A.* 18A:39-17 *et seq.*, or *N.J.S.A.* 18A:4-13 *et seq.*

8. Carabelli's letter indicated that a fingerprint search conducted by the New Jersey State Police and Federal Bureau of Investigation revealed that petitioner had been convicted of "felony neg./homicide/manslaughter motor vehicle."

9. Petitioner, by letter dated May 18, 2000, advised Carabelli that his citation of the criminal charge "felony neg./homicide/manslaughter motor vehicle" was in error and challenged the accuracy of the criminal history record. She submitted documentation from the Superior Court of New Jersey, Law Division (Essex County), to support her claim of error in the criminal record within fourteen days from the date of the notice of disqualification.

10. On May 12, 2000, petitioner faxed to Frank Masterson, first assistant to respondent Carabelli, (1) a certified copy of the Essex County Superior Court Judgment of Conviction, (2) petitioner's letter dated April 27, 2000, to respondent Graham, as Director of the Office of Licensing and

Credentials, and (3) a completed "Information Regarding Conviction Form." The transmission challenged the accuracy of the information contained in the aforementioned disqualification notice and sought reconsideration of the decision.

11. The aforementioned Judgment of Conviction indicated that the conviction in controversy was for "death by auto" pursuant to *N.J.S.A.* 2C:11-5, a third-degree offense at the time of the conviction in December 1990. A jury found the petitioner culpable of "reckless operation of a motor vehicle."

12. Petitioner noted in her submission to the Board of Examiners, "I was attempting to drive into a parking lot to get my disabled vehicle off the street. According to the State's witness, my spouse moved in front of my moving vehicle as I was reaching to close an open door on the driver's side while looking in another direction."

13. In February 1991, as a result of the "death by auto" conviction, petitioner was sentenced to five years' probation, 500 hours of community service, two years' suspension of her driving and automobile registration privileges and a monetary fine.

14. The judgment stated that it was unlikely the offense would occur again.

15. On or about May 18, 2000, petitioner formally requested that the controversy be considered a contested matter and forwarded to the Office of Administrative Law for a full hearing and adjudication on the merits.

16. Petitioner received a letter dated June 1, 2000, from Deborah Antanaitis, director, Bureau of Controversies and Disputes, acknowledging petitioner's intent to appeal respondents' determination to disqualify her

from holding any permanent position with a public school entity in the state of New Jersey pursuant to *N.J.A.C.* 6A:1-1 *et seq.*

17. On June 16, 2000, petitioner received a letter from respondent Graham, secretary of the State Board of Examiners, dated May 8, 2000, in which Graham indicated that the "Board unanimously voted to deny county substitute teacher certification to Ms. Howard based on her permanent disqualification from employment in any school or institution under the supervision of the Department of Education, by the Office of Criminal History Review."

THE APPLICABLE STATUTE

N.J.S.A. 18A:6-7.1 provides, in relevant part, that an individual is permanently disqualified from employment as a teacher or substitute teacher

> if the individual's criminal history record check reveals a record of conviction for any crime of the first or second degree; or
>
> . . . .
>
> c. (1) A crime involving the use of force or the threat of force to or upon a person or property including, but not limited to, robbery, aggravated assault, stalking, kidnapping, arson, manslaughter and murder; or
>
> . . . .
>
> d. For the purposes of this section, a conviction exists if the individual has at any time been convicted under the laws of this State or under any similar statutes of the United States or any other state for a substantially equivalent crime or other offense.
>
> e. Notwithstanding the provisions of this section, an individual shall not be disqualified from employment or service under this act on the basis of any conviction disclosed by a criminal record check performed pursuant to this act without an opportunity to challenge the accuracy of the disqualifying criminal history record.
>
> . . . .

> g. This section shall first apply to criminal history record checks conducted on or after the effective date of P.L.1998, c.31 (C.18A:6-4.13 et al.). . . .

RESPONDENTS' MOTION FOR SUMMARY DECISION

On February 15, 1991, petitioner was convicted by a jury of death by auto, *N.J.S.A.* 2C:11-5, then a crime of the third degree. In 1995, this statute, entitled "death by vehicular homicide," was changed to raise the crime to a second-degree offense. It defines criminal homicide as "vehicular homicide when it is caused by driving a vehicle or vessel recklessly."

Respondents argue that, in 1991, Howard was convicted of a crime of the third degree which is "substantially equivalent" to the present *N.J.S.A.* 2C:11-5, a crime of the second degree, and, pursuant to *N.J.S.A.* 18A:6-7.1(d), this permanently disqualifies her from employment as a teacher or substitute teacher.

Respondents further argue that Howard's crime was one involving the "the use of force or the threat of force to or upon a person" and this further permanently disqualifies her from employment as a teacher and substitute teacher pursuant to *N.J.S.A.* 18A:6-7.1(c)(1).

PETITIONER'S MOTION FOR SUMMARY DECISION

Petitioner's position is that the criminal record is inaccurate and Howard actually caused the death of her husband as the result of a tragic accident. She denies that the crime of which she was found guilty was "substantially equivalent" to the present version of *N.J.S.A.* 2C:11-5.

Likewise, she argues that the act of which she was convicted was the product of negligence or carelessness and so cannot be considered one which involved the use or threat of force. As a result, she cannot be permanently disqualified pursuant to *N.J.S.A.* 18A:6-7.1(c)(1) either.

DISCUSSION

The precise questions raised here were already decided by the Supreme Court of New Jersey in *In re Howard*, 143 *N.J.* 526 (1996). This opinion was issued in the professional disciplinary proceeding brought against petitioner, Olivia C. Howard, as a result of her criminal conviction in the death of her husband. It is, therefore, the authority to which the undersigned must look for guidance in interpreting *N.J.S.A.* 2C:11-5 and determining the validity of the parties' positions.

With respect to the nature of the crime of which petitioner was convicted in 1991, the Supreme Court clearly equates the substance of the offense throughout its opinion with the present *N.J.S.A.* 2C:11-5, the only difference between the statute as amended and the prior version being the following:

> The Legislature has recently upgraded *N.J.S.A.* 2C:11-5 to make a violation of that statute a second degree offense with a presumption of imprisonment of five to ten years.
>
> [*Howard, supra*, 143 *N.J.* at 531.]

The substance of the crime remained unchanged.

In like manner, the Supreme Court dealt fully with the elements of the crime of which the jury found Howard guilty:

> Although respondent characterizes this tragedy as an accident, she was convicted of "criminal homicide" caused by driving a vehicle recklessly. *N.J.S.A.* 2C:11-5. Under this statute, a person acts recklessly when she consciously disregards a substantial and unjustifiable risk that her driving will result in someone's death. The disputed conduct must involve a "gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation." *N.J.S.A.* 2C:2-2b(3). Thus despite her contention to the contrary, the jury found that respondent disregarded a substantial and unjustifiable risk that her conduct would kill her husband.
>
> [*Ibid.*]

Howard's characterization of her crime in her applications for certifications and in this forum is the same one clearly rejected by the jury that found her guilty and by the New Jersey Supreme Court in the disciplinary proceeding that followed. For these reasons it can have no persuasive value here either.

Consequently, I **CONCLUDE** that respondents are entitled to summary decision in this appeal as a matter of law. The only possible factual dispute, the circumstances of the crime, has already been resolved by a jury after a full trial. The elements of petitioner's crime have been fully explained by the Supreme Court of New Jersey and they clearly involve both the use and threat of force upon a person. The crime, which is now one of the second degree, is "substantially equivalent" to the third-degree crime of which Howard was convicted in 1991. Therefore, I **CONCLUDE** that petitioner is permanently disqualified from employment as a teacher or substitute teacher as a matter of law pursuant to *N.J.S.A.* 18A:6-7.1(c)(1) and (d).

Howard proposed to raise the issue of rehabilitation should she be found disqualified for employment. I **CONCLUDE**, however, that this is not an avenue available to her under *N.J.S.A.* 18A:6-7.1 as amended in 1998. The former version of section *N.J.S.A.* 18A:6-7.1(e), describing the factors to be considered in determining rehabilitation, was amended. The amendment allows only those individuals whose criminal record was discovered as the result of a criminal history check conducted before the effective date of the amendment to demonstrate rehabilitation. *N.J.S.A.* 18A:6-7.1(g). Those individuals, like Howard, whose background checks were performed after 1998 are now given only the right to "challenge the accuracy of the disqualifying criminal record." *N.J.S.A.* 18A:6-7.1(e).

For this reason, I **CONCLUDE** that all issues in this appeal are disposed of and petitioner is entitled to no relief in this forum. Therefore, I **CONCLUDE** that respondents are entitled to summary decision.

ORDER

It is **ORDERED** that summary decision is hereby **GRANTED** to respondents and the petition herein is **DISMISSED WITH PREJUDICE**. It is further **ORDERED** that petitioner's motion for summary decision 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, 225 East State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 13, 2001
DATE

EDITH KLINGER, ALJ

8/17/01
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

AUG 20 2001
DATE

Mailed to Parties:
ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cb

OAL DKT. NO. EDU 10197-00
AGENCY DKT. NO. 300-8/00

OLIVIA C. HOWARD,	:	
PETITIONER,	:	
V		COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL HISTORY REVIEW AND NEW JERSEY STATE BOARD OF EXAMINERS,	:	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 determines to affirm the Initial Decision of the Administrative Law Judge. Accordingly, the Initial Decision is adopted as the final decision for the reasons expressed therein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10|01|01

Date of Mailing: 10|02|01

* 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.

356-01

VIVIAN DE WITT, CONSTANCE HARDING, PATRICIA MUHAMMAD, FRANCES QUINONES, FIDELIA N. UZOUKWU, DEBBY VENABLE, DEBONY VENABLE AND LORI WILLIAMS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION AND STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioners, residents of Newark, challenged the amount of State funding for the Newark School District's early childhood program for the 1999-2000 school year. After the matter was transmitted to the OAL, 15 "global issues" common to this and other "Abbott" cases were resolved by the Chief ALJ.

After resolution of the global issues, the ALJ twice requested that the parties identify any outstanding local issues. No outstanding issues were identified by the parties. Rather, petitioners sought that the matter be placed in abeyance until the Supreme Court issues a decision in the global issues appeal. The ALJ dismissed the appeal as moot, noting that it pertains to a past school year and that any relief ultimately obtained by petitioners would be prospective. The appeal was also dismissed based on petitioners' failure to comply with the order of a judge.

The Commissioner affirmed the decision of the ALJ for the reasons set forth therein.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION –
DISMISSAL OF CONTESTED CASE
OAL DKT. NO. EDU 7158-99
AGENCY DKT. NO. 100-5/99

VUVUAB DeWITT, CONSTANCE HARDING, PATRICIA MUHAMMAD, FRANCES QUINONES, FIDELIA N. UZOUKWU, DEBBY VENABLE, DEBONY VENABLE, and LORI WILLIAMS,
Petitioners,

v.

NEW JERSEY DEPARTMENT OF EDUCATION and STATE-OPERATED SCHOOL DISTRICT OF NEWARK,
Respondents.

David G. Sciarra, Esq., for petitioners
(Education Law Center, attorneys)

Michael C. Walters, Deputy Attorney General, for respondent New Jersey Department of Education (John J. Farmer, Jr., Attorney General of New Jersey, attorney)

Steven B. Hoskins, Esq., for respondent State-Operated School District of Newark (McCarter & English, attorneys)

Record Closed: July 12, 2001 Decided: August 14, 2001

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an "Abbott" appeal brought by various residents of the City of Newark challenging the funding of the 1999-2000 preschool program of the State-Operated School District of Newark ("District"). By letter dated August 23, 2000, the Education Law Center ("ELC") identified fifteen "global issues" common to a number of separate appeals filed on behalf of various special-needs school districts in New Jersey. Petitioners in the Newark appeal participated in that bifurcation between "global" and "local" issues.

On April 20, 2001, Chief Administrative Law Judge Jeff S. Masin issued an initial decision resolving the common global issues and ordering that any petitioner wishing to pursue local funding issues or other matters for the 1999-2000 school year should notify the judge assigned within twenty days. Thereafter, on June 4, 2001, the Commissioner of Education ("Commissioner") issued a final decision reversing and modifying various findings and recommendations in the global case. ELC has filed a motion in aid of litigant's rights, which is currently pending before the New Jersey Supreme Court.

The only issues remaining involve specific local concerns, if any, that were unique to the District for the 1999-2000 school year.

Procedural History

On May 10, 1999, petitioners filed a verified petition seeking relief, including adequate funding for its preschool program for the 1999-2000 school year. Respondents New Jersey Department of Education ("Department") and the District filed their answers on June 1, 1999 and June 22, 1999 respectively. Subsequently, on June 24, 1999, the Commissioner transmitted this matter to the OAL for hearing as a contested case. With the consent of both parties, the local issues were held in abeyance pending resolution of all global issues in a consolidated proceeding.

Findings of Fact

I **FIND** the following relevant facts:

On April 20, 2001, Chief Administrative Law Judge Jeff S. Masin issued an initial decision resolving the common global issues and ordering that any petitioner who wishes to pursue local funding issues for the 1999-2000 school year should notify the judge assigned within twenty days. Both ELC and the District failed to respond to this directive within the required twenty days.

Consequently, on May 24, 2001, I sent a letter to the parties inquiring whether the local issues had become moot and requesting notification of any local issues that are still outstanding. (A copy of this letter is annexed as Exhibit A.) One month later, on June 28, 2001, I sent a second letter to the parties renewing the request for identification of any remaining local issues. (A copy of this letter is annexed as Exhibit B.)

In response, on July 6, 2001 the ELC filed a written request that the present matter continue in abeyance pending a ruling by the Supreme Court on the motion brought by the global plaintiffs. Without substantiation, ELC contended that, "Until such time as the 2000-01 'global issues' are finally resolved, it cannot be determined what district-specific issues remain to be resolved in the above-captioned appeals." (A copy of this letter is annexed as Exhibit C.)

By letter dated July 9, 2001, the Department set forth its opposition to the ELC's request. Pointing out that petitioners had agreed that any relief regarding the global issues must be prospective, the Department urged that any specific funding issues regarding the 1999-2000 school year "will not be affected by the Supreme Court's determination on the Global Issues." Accordingly, the Department demanded that petitioners "should immediately identify any remaining issues or withdraw their case." (A copy of this letter is annexed as Exhibit D.)

ELC's written response, dated July 10, 2001, merely reiterated its request that the hearing concerning district-specific issues for the 1999-2000 school year be delayed. Acknowledging that any relief ordered by the Supreme Court with respect to the global issues "must be prospective," ELC nonetheless argued that "it would be inefficient to order relief in the upcoming school year for past district-specific violations before the Supreme Court decides the pending motion[.]" Without specifying exactly why or how, ELC concluded that "any such relief will undoubtedly be affected by the Supreme Court's order for 2001-2002." (A copy of this letter is annexed as Exhibit E.) Implicitly, ELC recognizes that whatever relief may be fashioned to remedy any past wrongs would necessarily be prospective in nature.

Meanwhile, the Department continues to insist that any relief to be ordered by the Supreme Court with respect to the global issues "is irrelevant to the present case." (A copy of this letter is annexed as Exhibit F.)

The District does not take any position with regard to this issue.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the petition should be dismissed for mootness and for failure to comply with an order of a judge.

It is now more than two years since petitioners instituted this litigation in May 1999. Most of the three and four-year-olds who were eligible for the preschool program at that time are now old enough to attend regular school. Those of petitioners' children who are still eligible for the preschool program will benefit from any prospective relief that may be awarded as a result of litigation. Obviously, litigation must be pursued to define the rights of New Jersey children in special-needs districts to a preschool education, but that litigation will not be of direct benefit to children who are no longer of preschool age.

WILLIAM OSWALD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE COUNTY OF WARREN TECHNICAL SCHOOL DISTRICT, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

October 3, 2001

OAL DKT. NO. EDU 09390-99
AGENCY DKT. NO. 228-8/99

WILLIAM OSWALD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE COUNTY OF WARREN TECHNICAL SCHOOL DISTRICT, 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 Acting 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 Ruggiero
ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 10/3/01

Date of Mailing: 10/3/01

359-01

M.A.D., on behalf of minor child, C.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

October 3, 2001

OAL DKT. NO. EDU 5311-00
AGENCY DKT. NO. 135-5/00

J.P., on behalf of minor child, M.A.G.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST 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 Acting 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 Kuncelle
ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 10/3/01

Date of Mailing: 10/3/01

361-01

C.M., on behalf of minor children, E.G., A.G. and C.M.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

October 3, 2001

OAL DKT. NO. EDU 4587-00
AGENCY DKT. NO. 179-5/00

M.McG., on behalf of minor child, S.Z.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, 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 Acting 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 Kuncitis
ACTING ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 10/3/01

Date of Mailing: 10/3/01

365-01

P. D' A. AND S. D' A., on behalf of minor child, B. D' A.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, MORRIS COUNTY, ANGELO GUILIANA, WILLIAM CLEARY AND JOY PASSALACQUA,	:	DECISION
RESPONDENTS.	:	

October 4, 2001

OAL DKT. NO. EDU 09133-99
AGENCY DKT. NO. 140-6/99

P. D' A. AND S. D' A., on behalf of minor child, B. D' A.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, MORRIS COUNTY, ANGELO GUILIANA, WILLIAM CLEARY AND JOY PASSALACQUA,	:	DECISION
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 Nuccitelli

ACTING ASSISTANT COMMISSIONER

Date of Decision: 10/4/01

Date of Mailing: 10/4/01

366-01

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

October 4, 2001

OAL DKT. NO. EDU 03816-99
AGENCY DKT. NO. 399-9/98

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.

Maria Rucinski

ACTING ASSISTANT COMMISSIONER

Date of Decision: 10/4/01

Date of Mailing: 10/4/01

367-01

N.D.H. on behalf of minor children, D.H. AND D.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

October 4, 2001

OAL DKT. NO. EDU 4269-00
AGENCY DKT. NO. 124-4/00

N.D.H. on behalf of minor children, D.H. AND D.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, 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

Date of Decision: 10/4/01

Date of Mailing: 10/4/01

368-01

ARTHUR J. KENNEDY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

October 4, 2001

OAL DKT. NO. EDU 7569-96
AGENCY DKT. NO. 127-4/96

ARTHUR J. KENNEDY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, 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 Ruggiero

ACTING ASSISTANT COMMISSIONER

Date of Decision: 10/4/01

Date of Mailing: 10/4/01

369-01

H.M. on behalf of minor child, J. S.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

October 4, 2001

OAL DKT. NO. EDU 1503-00
AGENCY DKT. NO. 376-12/99

H.M. on behalf of minor child, J. S.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, 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.

Maria Rucciutti

ACTING ASSISTANT COMMISSIONER

Date of Decision: 10/4/01

Date of Mailing: 10/4/01

370-01

370-01

PETER LONGO, DENISE REALE, BARBARA NAFASH, SANDRA CZARKOWSKI, SONIA KO AND GERRY WHITE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PALISADES PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

October 4, 2001

OAL DKT. NO. EDU 5325-98
AGENCY DKT. NO. 78-3/98

PETER LONGO, DENISE REALE, BARBARA NAFASH, SANDRA CZARKOWSKI, SONIA KO AND GERRY WHITE,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PALISADES 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.

ACTING ASSISTANT COMMISSIONER

Date of Decision: 10/4/01

Date of Mailing: 10/4/01

373-01

IN THE MATTER OF THE TENURE :
HEARING OF JAMES KENNEY, :
PRINCETON REGIONAL BOARD OF :
EDUCATION, MERCER COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

October 10, 2001

OAL DKT. NO. EDU 80-00
AGENCY DKT. NO. 382-12/99

IN THE MATTER OF THE TENURE HEARING OF JAMES KENNEY, PRINCETON REGIONAL BOARD OF EDUCATION, MERCER COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

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, it is noted that, although the record does not contain a settlement agreement, the Board's letter withdrawing the tenure charges states, in pertinent part:

> please be advised that we are withdrawing the tenure charges filed against James Kenney *pursuant to the settlement entered into by the parties and based on Mr. Kenney's retirement.* (emphasis added) (Board's Letter, dated August 21, 2001)

The Commissioner notes that the charges of unbecoming conduct and insubordination certified against respondent in this matter are of an extremely serious nature, involving the charge of jeopardizing the health and welfare of the District and students by the use of provocative subject matter, belittling of students, invasion of the female dressing area, disparate treatment of minority students, use of foul language and sexual materials, and conduct inducing students to withdraw from class. (Statement of Charges, Charge 1, and Statement of Evidence, Affidavit of John Kazmark at 5) In the absence of the parties' submission of the settlement agreement for review, pursuant to *N.J.A.C.* 1:1-19.1 and *N.J.A.C.* 6A:3-5.6, the Commissioner is compelled to reject the Board's request to withdraw the tenure charges. In so

doing, the Commissioner is mindful of his exclusive authority to decide tenure matters, which authority necessarily entails his scrutiny, evaluation and approval of proposed settlements. *See In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board of Education April 6, 1983, 1990 *S.L.D.* 842, 849.

Moreover, it is well-established that, having once undertaken the burden of tenure charges, the Board may not lay it down without setting forth on the record a reasonably specific explanation as to why such charges need no longer be pursued or why it is now in the public interest not to pursue them. As emphasized by the Commissioner in *In the Matter of the Tenure Hearing of Corey Younger, State-operated School District of the City of Jersey City, Hudson County*, decided September 7, 1999 and *In the Matter of the Tenure Hearing of Elmena Jean, State-operated School District of the City of Newark, Essex County*, decided October 4, 1999, the mere fact that a proposed settlement in a tenure matter calls for the teaching staff member's resignation, in and of itself, does not assure that the *Cardonick* standards have been met, because the Commissioner's concern for the public interest extends beyond the boundaries of the particular district certifying the tenure charges.[1]

While the Commissioner does not preclude the possibility of settlement in this matter, he stresses that in order for him to meet his obligation to the schools and children of New Jersey, he must be assured that any settlement is consistent with appropriate standards for setting aside tenure matters as expressed in *Cardonick, supra.*

---

[1]Assuming, *arguendo*, that the settlement agreement satisfies the *Cardonick* standards so as to negate the prosecution of tenure charges against respondent, it does not prevent the processing of charges to revoke respondent's certification or prevent the Board of Trustees of the Teachers' Pension and Annuity Fund from making a determination with respect to the truthfulness of the allegations, and the effect, if any, on respondent's continued pension eligibility. *See N.J.S.A.* 43:1-4 and *N.J.S.A.* 43:1-5 and *In the Matter of the Tenure Hearing of Loretta Palumbo, School District of the Borough of Old Tappan, Bergen County*, decided February 20, 2001.

Accordingly, the Commissioner directs that this matter be remanded to the OAL for expansion of the record to include the settlement agreement to which the Board refers and for the Administrative Law Judge's review of such agreement. If the parties are unwilling or unable to provide a settlement agreement that meets the *Cardonick* standards, the matter shall proceed to plenary hearing.

IT IS SO ORDERED. [2]

COMMISSIONER OF EDUCATION

Date of Decision: 10/10/2001

Date of Mailing: 10/10/2001

[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.* 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.

374-01

S.K., on behalf of minor child, J.K., AND D.G., on behalf of minor child, L.G., AND BOARD OF EDUCATION OF THE LOWER CAPE MAY REGIONAL SCHOOL DISTRICT, CAPE MAY COUNTY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION *ET AL.*,	:	DECISION
RESPONDENTS.	:	

October 10, 2001

OAL DKT. NO. EDU 2648-00
AGENCY DKT. NO. 53-3/98L

S.K., on behalf of minor child, J.K., AND D.G., on behalf of minor child, L.G., AND BOARD OF EDUCATION OF THE LOWER CAPE MAY REGIONAL SCHOOL DISTRICT, CAPE MAY COUNTY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION *ET AL.*,	:	DECISION
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.

ACTING ASSISTANT COMMISSIONER

Date of Decision: 10|10|01

Date of Mailing: 10|10|01

375-01

D.G., on behalf of minor children, T.G. AND Z.G., AND BOARD OF EDUCATION OF LOWER TOWNSHIP, CAPE MAY COUNTY,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION *ET AL.*,	:	
RESPONDENTS.	:	

October 10, 2001

OAL DKT. NO. EDU 2647-00
AGENCY DKT NO. 53-3/98K

D.G., on behalf of minor children, T.G. AND Z.G., AND BOARD OF EDUCATION OF LOWER TOWNSHIP, CAPE MAY COUNTY,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION *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.

ACTING ASSISTANT COMMISSIONER

Date of Decision: 10|10|01

Date of Mailing: 10|10|01

376-01

PATRICIA C. FLEMING,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF HADDON TOWNSHIP, CAMDEN COUNTY	:	
RESPONDENT,	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
PATRICIA C. FLEMING,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF HADDON TOWNSHIP, CAMDEN COUNTY,	:	
RESPONDENT.	:	

October 12, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6841-00
AGENCY DKT. NO. 217-6/00

PATRICIA C. FLEMING,
Petitioner,
v.
BOARD OF EDUCATION OF HADDON TOWNSHIP, CAMDEN COUNTY,
Respondent,
and
PATRICIA C. FLEMING,
Petitioner,
v.
HADDON TOWNSHIP BOARD OF EDUCATION,
Respondent.

OAL DKT. NO. CRT 737-01
AGENCY DKT. NO. ED11WE-46105-E

Michael C. Damm, Esq., for petitioner (Selikoff & Cohen, attorneys)

Kim C. Belin, Esq., for respondent (Capehart & Scatchard, attorneys)

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

BEFORE **M. KATHLEEN DUNCAN**, ALJ:

These matters were transmitted to the Office of Administrative Law on September 22, 2000, (EDU 6841-01) and on March 7, 2001 (CRT 737-01) 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. A joint order of consolidation and determination of predominant interest was issued by the agency heads on May 10, 2001, determining that the Commissioner of the Department of Education would exercise the predominant interest.

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** and the **DIRECTOR OF THE DIVISION ON CIVIL RIGHTS** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision on all issues within the scope of his predominant interest. 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 on all of the issues within the scope of predominant interest shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Pursuant to *N.J.A.C.* 1:1-17.8, upon rendering his final decision the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** shall forward the record, including this recommended decision and his final decision, to the **DIRECTOR OF THE DIVISION ON CIVIL RIGHTS** who may subsequently render a final decision on any remaining issues and consider any specific remedies which may be within the Division's statutory grant of authority.

Upon transmitting the record, the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** shall, pursuant to *N.J.A.C.* 1:1-17.8(c) request an extension to permit the rendering of a final decision by the **DIRECTOR OF THE DIVISION ON CIVIL RIGHTS** within forty-five (45) days of the predominant agency decision. If the **DIRECTOR OF THE DIVISION ON CIVIL RIGHTS** does not render a final decision within the extended time, this recommended decision on the remaining issues and remedies shall become the final decision.

Sept 6, 2001
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

Receipt Acknowledged:

9/10/01
DATE

Debbie Gutanerte/ps
COMMISSIONER OF THE
DEPARTMENT OF EDUCATION

9/11/01
DATE

Gloria McGee
DIRECTOR OF THE DIVISION ON
CIVIL RIGHTS

Mailed to the Parties:

SEP 12 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

2001 SEP -6 A 10: 01

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

PATRICIA FLEMING,

Petitioner/
Complainant

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF HADDON, COUNTY OF CAMDEN,

Respondent.

BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY

OAL DKT. NO. EDUCR 06841-00S
AGENCY REF. NO. 217-6/00

BEFORE THE DIVISION ON CIVIL RIGHTS OF THE STATE OF NEW JERSEY

DOCKET NO. ED 11 WE-46105
EEOC CHARGE NO. 17EA00917

JOINT REQUEST FOR APPROVAL OF SETTLEMENT

INTRODUCTION

The Petitioner/Complainant, Patricia Fleming (Fleming) and counsel for the Respondent, Haddon Township Board of Education (Board) join in moving for an Order (1) 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; (2) recommending that said Settlement Agreement be approved by the Commissioner of Education as well as the Director of the Division on Civil Rights (DCR) without modification; and (3) Ordering that the Settlement Agreement be implemented and that these matters be dismissed with prejudice.

PROCEDURAL STATEMENT

On June 19, 2000, Fleming, a tenured teacher employed by the Board, filed a Petition of Appeal under OAL Dkt. No. EDUCR06841-00S, Agency Ref. No. 217-6/00 alleging *inter alia* that her tenure rights had been violated by her being assigned to a part-time position. On July 20, 2000, the Board filed an Answer to those charges denying the allegations.

On July 28, 2000, Fleming filed a Verified Complaint with the DCR, Docket No. ED 11

WE46105, alleging that the Board discriminated against her on the basis of handicap and age and refused to fully accommodate her handicap by returning her to a full-time teaching position from a leave and part-time position taken due to illness. Fleming simultaneously filed a charge with the Equal Employment Opportunity Commission (EEOC) under Charge No. 17EA00917 alleging that the Board in doing this also violated Title VII of the Civil Rights Act of 1964, 42 U.S.C., §2000(E2)(A)(1) et seq., and the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq. The Board filed an Answer dated January 26, 2001 with the DCR, denying those allegations.

On February 2, 2001, Fleming sought transfer of the Civil Rights matter to the Office of Administrative Law pursuant to N.J.S.A. 10:5-13.

On February 8, 2001, Fleming filed a motion to consolidate for purposes of hearing the Education and the Civil Rights matters, pursuant to N.J.A.C. 1.1-17.1 to 17.8, as well as for summary decision. The Board by correspondence dated February 26, 2001, filed opposition to the motion and a cross-motion.

On March 26, 2001, the Honorable M. Kathleen Duncan, A.L.J. entered an Order consolidating these matters and determining predominant interest.

On May 10, 2001, upon review by the respective agency heads, a Joint Order was entered modifying the Order of Judge Duncan with respect to predominant interest

On May 21, 2001, the Honorable M. Kathleen Duncan, A.L.J., entered an Order granting partial summary decision in favor of Fleming.

The parties have now reached a settlement expressly conditioned upon the approval of the Commissioner of Education and the Director of the DCR.

CONCLUSION

The parties have been fully informed of their respective rights in connection with these proceedings, including those standards for the approval of Settlement Agreements. The parties are satisfied with the Settlement Agreement (Exhibit "A") and believe that it fulfills the public interest with respect to these matters. For these reasons, they assert that the Settlement meets the requirements of N.J.A.C. 1:1-19.1, and request that the Settlement Agreement be adopted

without modification by the Commissioner of Education, as well as the Director of the DCR. In this regard, it is requested that an order be entered directing that the Settlement Agreement be implemented and that the Petition of Appeal pending before the Department of Education and the Verified Complaint pending in the DCR be dismissed with prejudice.

Respectfully submitted,

CAPEHART & SCATCHARD, P.A.
Attorneys for the Haddon
Township Board of Education

BY: _____
KIM C. BELIN

SELIKOFF & COHEN, P.A.
Attorneys for Patricia Fleming

BY: _____
MICHAEL C. DAMM

EXHIBIT 'A'

SETTLEMENT AGREEMENT AND RELEASE REGARDING ACTIONS PENDING BEFORE THE COMMISSIONER OF EDUCATION AND THE DIVISION ON CIVIL RIGHTS/EEOC

This Settlement Agreement is entered into by and between the Haddon Township Board of Education (Board) and its tenured employee, Patricia Fleming (Fleming).

WHEREAS, Fleming has been continuously employed by the Board as an art teacher since in or about March 1987; and,

WHEREAS, on June 19, 2000, Fleming filed a Petition of Appeal with the Commissioner of Education against the Board, alleging a violation of her tenure rights and captioned Patricia C. Fleming v. Board of Education of the Township of Haddon, County of Camden, OAL Dkt. No. EDUCR06841-00S, Agency Ref. No. 217-6/00; and,

WHEREAS, on July 20, 2000, the Board filed an Answer contesting certain of the allegations contained in the Petition of Appeal; and.

WHEREAS, on July 28, 2000, Fleming filed a Verified Complaint against the Board with the Division on Civil Rights (DCR) and Equal Employment Opportunity Commission (EEOC), captioned Patricia C. Fleming v. Haddon Township Board of Education, Docket No. ED 11 WE-46105, EEOC Charge No. 17EA00917; and,

WHEREAS, the Board filed an Answer dated January 26, 2001, contesting the Verified Complaint filed by Fleming before the DCR/EEOC; and,

WHEREAS, the aforesaid Verified Complaint to the DCR/EEOC was transferred to the

Office of Administrative pursuant to N.J.S.A. 10:5-13, and consolidated for purposes of hearing before the Honorable M. Kathleen Duncan, A.L.J.; and,

WHEREAS, in consideration for the mutual promises contained herein, the parties intend to resolve all matters in dispute in these proceedings and in connection with Fleming's employment by the Board; and

NOW, THEREFORE, the matter in dispute having been amicably adjusted by and between the parties and based on the foregoing having fulfilled the public interest, IT IS hereby STIPULATED and AGREED, as follows:

1. The parties will seek approval from the aforesaid respective agencies of this Agreement without modification and ask that the Petition of Appeal, as well as the Verified Complaint with the DCR be withdrawn and dismissed with prejudice.

2. Should either agency fail to approve this Agreement without modification, the parties have agreed to make every reasonable effort to reform this Agreement to meet any objections.

3. Fleming, for and in consideration of the undertakings of the Board set forth in paragraph #4 herein, and intending to be legally bound, does hereby remise, release and forever discharge the Board and its officers, members, employees and agents, and their respective successors and assigns, heirs, executors and administrators, of and from any and all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, which are the subject of a Petition of Appeal captioned Patricia C. Fleming v. Board of Education of the Township of Haddon, County of Camden, OAL Dkt. No. EDUCR06841-00S, Agency Ref. No. 217-6/00, as well as a Verified Complaint filed by her with the DCR/EEOC captioned Patricia C. Fleming v. Haddon Township Board of Education, Docket No. ED 11 WE-46105, EEOC Charge No. 17EA00917. Fleming agrees that on approval of this agreement by the Commissioner of Education and Director of DCR, she shall execute whatever documents are necessary to withdraw/dismiss those matters with prejudice. This includes the withdrawal/dismissal of the EEOC charge. Fleming shall not pursue any other actions in any other forum with respect to the allegations set forth in the aforesaid Petition of Appeal and/or the

Verified Complaint.

4. The Board, for and in consideration of the undertakings of Fleming as set forth herein:

a. Will pay to Fleming as wages the difference between what she actually earned as a part-time art teacher during the 2000-2001 school year and what she would have earned as a full-time art teacher during that year under the applicable collective bargaining agreement and any applicable subsequent agreements for that year had she been a full-time art teacher, at the appropriate step which Fleming calculates to be 20P, with a B.A. degree. Normal and appropriate deductions shall be made out of this for taxes, pension contributions, etc. The Board shall provide the Division of Pensions with all appropriate documentation indicating Fleming's resulting adjusted salary for the 2000-2001 school year and the correct amount of pension contribution based upon that adjusted salary. The Board will also forward to the Division of Pensions, the additional pension contribution amount due. The aforesaid salary adjustments shall be accomplished within thirty (30) days of the approval of this agreement.

b. The Board agrees to place Fleming in a full-time teaching position for the 2001-02 and 2002-03 school years at the appropriate step on the salary guide. In this regard, Fleming shall be placed in a .6 elementary art position at the Stoy and Jennings Schools, and .4 art position at the high school level for these school years. In no event shall Fleming's employment as a teacher be anything but full-time during those school years.

In the absence of appropriate classroom space, Fleming shall be assigned the cafeteria at the Stoy and Jennings Schools to conduct art classes which is consistent with the past and is where she has taught art for the past few years. At the high school level, her art classes shall be conducted in one of the classrooms dedicated to the teaching of art so that Fleming will have access to art supplies, as well as an environment which is conducive to art activities.

c. Any in-servicing of Fleming in connection with her assignments during the 2001-02 and 2002-03 school years shall be at Board expense in accordance with in-service scheduling for the teaching staff generally.

d. Fleming shall receive the preparation time allotted under the applicable collectively negotiated agreement pro rated with regard to her .6 elementary art position and .4 position at the high school level.

e. In the event there is an opening for a full-time elementary level art teacher or a vacancy in such position as a result of the current holder being transferred or relinquishing said position, Fleming will be given the right of first refusal/option of taking that assignment, provided it does not violate the seniority rights of any other teaching staff member.

f. Fleming has expressed concern about being involuntarily transferred from the .6 elementary art .4 high school position to some other position in the future, and has requested that she not be involuntarily transferred for the duration of her employment with the Board. In recognition thereof, the Board represents and agrees that it shall not involuntarily transfer Fleming arbitrarily or capriciously. In no event shall any dispute over this provision result in nullifying or voiding this Agreement. However, in the event of a breach of this paragraph or any other, Fleming shall be permitted to file legal action to enforce the terms thereof, and/or seek appropriate monetary damages on account of any such breach.

g. Fleming agrees in light of the fact that even prior to this agreement it has been her intention to retire upon attaining 25 years of service, that she will in fact resign her employment with the Board and retire at the end of the school year in which she obtains twenty-five (25) years of service, provided that she serves as a full-time teacher during the 2001-02 and 2002-03 school years, as promised by the Board in this agreement. Fleming calculates that to be at the end of the 2002-2003 school year. Accordingly, Fleming agrees that her employment relationship with the Board will be permanently and irrevocably severed as of July 1, 2003, and that the Board will not have any obligation, contractual or otherwise, to hire, rehire, or re-employ her in the future. Fleming acknowledges that she is relinquishing all future rights to employment and re-employment with the Board after that date. If it is determined by the Division of Pensions at that time that Fleming is not eligible for retirement with at least 25 years of service, the Board shall continue to employee Fleming as a full time art teacher provided she faithfully carries out of her professional responsibilities as a teaching staff member until such time as she becomes

eligible for retirement with at least 25 years of service.

h. Fleming, upon her resignation and retirement, shall be entitled to the same rights under the negotiated collective bargaining agreement or Board policy and any other applicable subsequently negotiated agreement or adopted Board policy as any other full-time tenured staff member in her position who retires effective that date.

i. The Board agrees to cooperate with Fleming in connection with her application for retirement to the Board of Trustees of the Teachers' Pension and Annuity Fund to the extent necessary for her to be eligible for and receive pension benefits based on her years of service credit pursuant to N.J.S.A. 18A:66-1, et seq.

j. Should the Board fail to pay monies due Fleming directly or to be paid on her behalf under this agreement as said monies become due, Fleming shall be entitled to have any arrearage reduced to judgement against the Board on the filing of appropriate documents with any tribunal having jurisdiction.

5. This agreement is the result of a compromise in order to buy the parties peace. It is expressly understood and agreed that nothing contained in this agreement is intended to be construed as, and/or to be an admission or determination of, wrongdoing or liability on the part of the Board as to any claims made in this action.

6. The parties recognize that they are in an ongoing employer-employee relationship. As such, this agreement does not release the Board from liability for any act or omission which may take place after the date of this agreement, including any allegation that the Board has breached this agreement, nor does it release Fleming from good faith evaluations or from the faithful carrying out of her professional responsibilities as a teaching staff member.

7. The parties agree that a covenant of good faith and fair dealing applies to all provisions of this agreement.

8. By signing this agreement and general release each signatory represents that she or he is a party or has been duly authorized by a party to sign on the parties' behalf. The parties agree that this agreement and release may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

9. Should any provision of this agreement be declared or be determined by any court or administrative agency of competent jurisdiction to be illegal or invalid, the validity of the remaining parts, terms, and provisions shall not be affected, thereby and said illegal or invalid part, term, or provision shall be deemed not to be a part of this agreement. The parties agree in such circumstances to make a good faith effort to reform that portion of the agreement so that the intent of the parties as set forth in the illegal or invalid provision(s) can be accomplished.

10. This agreement contains the sole, complete, and entire agreement and understanding of the parties concerning the subject matter hereof. This agreement, including this paragraph, may not be altered, modified, or changed in any manner, except by a writing duly executed by all the parties hereto. This agreement shall be binding upon and inure to the benefit of the parties, their heirs, executors, administrators, successors and assigns.

11. This agreement shall be construed according to the laws of the State of New Jersey.

12. Both parties agree that from this point forward neither one of them will publicize or publish the contents of the agreement or voluntarily disclose the agreement to other parties except their attorneys and in the case of Fleming her immediate family, tax advisor/preparer and union representatives. The parties understand that the file and this agreement will remain part of the public record and therefore available to members of the public, including the press.

13. Both parties having read the terms of this agreement and release state that they have had an opportunity to discuss it with counsel, that they are fully satisfied with the services of their attorneys. The parties further acknowledge that they are executing this agreement and release of their own volition, with full understanding of its terms and effects without any coercion. It is understood that this agreement is contingent upon the approval of the Commissioner of Education and the Director of the DCR.

This Agreement was considered and approved by the Board at its meeting of August 16, 2001.

IN WITNESS WHEREOF, and intending to be legally bound, the Parties have set their hands and seals on the respective date(s) set forth below.

WITNESS:

Michael C. Damm

DATED: 8/15/01

PATRICIA FLEMING

WITNESS:

BOARD PRESIDENT

DATED: 8-24-01

HADDON TOWNSHIP
BOARD OF EDUCATION

BOARD SECRETARY

PATRICIA C. FLEMING,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF HADDON TOWNSHIP, CAMDEN COUNTY	:	
RESPONDENT,	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
PATRICIA C. FLEMING,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF HADDON TOWNSHIP, CAMDEN COUNTY,	:	
RESPONDENT.	:	

The record, Joint Request for Approval of Settlement, Settlement Agreement and Release, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1 and *N.J.A.C.* 1:1-17.8(b), have been reviewed. Upon review, the Commissioner of Education, the agency with predominant interest in this consolidated matter, approves the settlement terms and adopts the settlement as the final agency decision on those issues within the scope of its jurisdiction. The matter is hereby dismissed as to its education law claims, subject to compliance with the terms of the settlement, and the Initial Decision and full record herein shall

be transmitted to the Division on Civil Rights for review by that agency pursuant to *N.J.A.C.* 1:1-17.8(b) and (c).

COMMISSIONER OF EDUCATION

Date of Decision: 10/12/01

Date of Mailing: 10/12/01

377-01

IN THE MATTER OF THE TENURE	:	
HEARING OF RICHARD H. DAVIS,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF WYCKOFF, BERGEN	:	DECISION
COUNTY.	:	

SYNOPSIS

The Board certified tenure charges of unbecoming conduct against respondent Board Secretary/Business Administrator for embezzlement of funds and numerous other irregularities in the performance of his duties. On May 2, 2001, respondent entered a guilty plea, admitting, among other things, that he and a co-conspirator commenced an embezzlement scheme in July 1993 to embezzle funds from the Board by submitting for payment numerous fraudulent invoices for either maintenance supplies never delivered or for landscaping services never rendered.

The ALJ found that the undisputed evidence proved the charges in question. In light of respondent's admissions at his guilty plea to embezzling $1.7 million from the Board, the ALJ found the evidence overwhelming that petitioner engaged in conduct unbecoming a public official. The ALJ concluded that the Board demonstrated respondent's unbecoming conduct by a preponderance of credible evidence and concluded that dismissal of respondent from his tenured position was the appropriate penalty given the enormity of respondent's crime. The ALJ ordered the tenure charges upheld and respondent dismissed from his tenured position.

The Commissioner adopted the findings and determination in the Initial Decision as his own and referred the matter to the State Board of Examiners for action against respondent's certificate as it deems appropriate.

October 12, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1536-01

AGENCY DKT. NO. 14-1/01

IN THE MATTER OF THE TENURE HEARING OF RICHARD H. DAVIS, SCHOOL DISTRICT OF THE TOWNSHIP OF WYCKOFF, BERGEN COUNTY,

---

Mark G. Sullivan, Esq., appearing for petitioner, Wyckoff
(Sullivan & Sullivan, attorneys)

Paul E. Griggs, Esq., appearing for respondent, Richard H. Davis
(McConnell, Lenard & Griggs, attorneys)

Record Closed: June 14, 2001 Decided: August 24, 2001

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Board of Education of the Township of Wyckoff (Board) decided to request the Commissioner of Education to hear and determine tenure charges against respondent Richard H. Davis, then Board Secretary and Business Administrator, on January 2, 2001. On January 9, 2001, those charges were filed with the Commissioner of Education. On January 26, 2001, respondent filed an answer denying the

allegations. The Department of Education transmitted the matter to the Office of Administrative Law (OAL) on February 9, 2001. The matter was assigned to the undersigned administrative law judge (ALJ) on February 20, 2001, for a hearing. The ALJ held a telephone prehearing scheduling conference with the parties on February 27, 2001. The matter was set down for a hearing in April 2001 but the time was extended for additional discovery at the request of the parties. The matter was then scheduled for a hearing to begin June 15, 2001.

On June 5, 2001, respondent Board filed a motion for summary decision. The petitioner filed no answer but submitted a letter dated June 12, 2001, indicating that he was irrevocably resigning from his position. Hence, the summary decision motion is unopposed.

FACTS

Based on the undisputed evidence submitted by the Board, I **FIND** the following **FACTS**.

Respondent Richard H. Davis had been the Board Secretary and Business Administrator of the Wyckoff Township Board of Education since July 1, 1983. On October 3, 2000, representatives of the Internal Revenue Service (IRS) and the United States Attorney's Office executed a search warrant on Mr. Davis' office in conjunction with an investigation as to whether Mr. Davis was embezzling funds from the Board for his personal use. Subsequently, the Board employed an investigator to review Mr. Davis' activities. Thereafter the Board uncovered numerous irregularities in the performance of Mr. Davis' duties, despite the fact that virtually all the evidence had been removed by the federal agencies. Accordingly, the superintendent of schools certified 32 tenures charges against Mr. Davis warranting his removal from office. Included in the 32 charges were the following:

Charge 1

That Mr. Davis improperly and in violation of *N.J.S.A.* 18A:19-1 made expenditures of funds to certain individuals and/or corporations or other entities, which were not authorized by the Board.

Charge 6

That Mr. Davis violated *N.J.S.A.* 2C:30-2(a) in that he, with purpose to obtain a benefit for himself or another or to deprive another of a benefit, committed an act relating to his office as business administrator/board secretary which constituted an unauthorized act, knowing that such act was unauthorized or that he was committing it in an unauthorized manner.

Charge 7

That Mr. Davis violated *N.J.S.A.* 2C:30-2(b) in that he knowingly refrained from performing a duty imposed upon him by law or clearly inherent in the nature of his office by issuing payment for claims which were not disclosed to the Board or were not authorized to be paid by the Board.

Charge 15

That Mr. Davis violated Board Policy 3320.1-R by not following the New Jersey statutory bidding process in certain instances including but not limited to his issuing payments based upon purchase orders supplied or apparently supplied by Arbor Industries, Inc., and/or Co-Main-Co and/or Districtwide Maintenance and/or I. Scott Chemical, Inc. and/or Consolidated Industries.

Charge 16

That Mr. Davis violated Board Policy 3320.2 by extending favoritism to vendors including but not limited to Arbor Industries, Inc., and/or Co-Main-Co and/or Districtwide Maintenance and/or I. Scott Chemical, Inc. and/or Consolidated Industries.

Charge 17

That Mr. Davis violated Board policy 3320.2 by failing to audit bills supplied by vendors including but not limited to

Arbor Industries, Inc., and/or Co-Main-Co and/or Districtwide Maintenance and/or I. Scott Chemical, Inc. and/or Consolidated Industries.

Charge 21

That Mr. Davis violated Board policy 4015 regarding the Code of Ethics for Administrators by failing to fulfill his professional responsibilities with honesty and integrity (section 2).

Charge 22

That Mr. Davis violated Board Policy 4015 regarding the Code of Ethics for Administrators by failing to obey local, state and national laws (section 4).

Charge 26

That Mr. Davis improperly issued advance payment for purchase orders produced for Arbor Industries, Inc., and/or Co-Main-Co and/or Districtwide Maintenance and/or I. Scott Chemical, Inc. and/or Consolidated Industries.

Charge 27

That Mr. Davis improperly issued payment via issuance of "hand checks" in lieu of the typical, approved purchase order procedure to Arbor Industries, Inc., and/or Co-Main-Co and/or Districtwide Maintenance and/or I. Scott Chemical, Inc. and/or Consolidated Industries.

On or about April 18, 2001, the U.S. Attorney for the District of New Jersey filed a two count information charging Mr. Davis with one count of embezzlement of money from Wyckoff Board of Education in violation of 18 U.S.C. § 666(a)(1)(A). The information alleged that Mr. Davis with co-conspirators invoiced the Board using six different company names and prepared payment vouchers for each fraudulent invoice causing the Board to issue checks in the amount the fraudulent invoices. After delivering the checks to the co-conspirator who cashed the checks, the co-conspirators divided the proceeds. The information also charged Mr. Davis with one count of conspiracy to structure financial transaction to avoid reporting requirements in violation of 31 U.S.C. § 5234(a)(3)&(c)(2). On April 18, 2001, Mr. Davis and his attorney

executed a plea agreement with the U.S. Attorney dated April 13, 2001. In the agreement Mr. Davis agreed to plead guilty to the two counts of the information and agreed to make restitution to the Board for the $1.7 million loss.

The U.S. Attorney wrote to Honorable Dickinson R. Debevoise on April 30, 2001, setting forth the information in which Mr. Davis had agreed to plead guilty. To establish the underlying facts, the U.S. Attorney provided a list of question to be asked which established the facts of the crimes and the knowing nature of the crime. On May 3, 2001, Mr. Davis entered a guilty plea to the two-count information before Judge Debevoise. At the time he entered such plea, he also answered in the affirmative all the questions set forth in Exhibit C, numbered 1 through 33. Essentially Mr. Davis admitted that he and a co-conspirator commenced an embezzlement scheme in July 1993 to embezzle funds from the Board by submitting for payment numerous fraudulent invoices for either maintenance supplies never been delivered or for landscaping services never rendered. Mr. Davis also admitted that he and his co-conspirator had attempted to arrange with a checking cash establishment to cash $24,000 worth of checks without filing the federally required currency transaction report.

LEGAL DISCUSSION AND CONCLUSION

The Board moved for summary decision pursuant to *N.J.A.C.* 1:1-12.5 on the basis that there is no genuine issue as to any material facts and the Board is entitled to prevail as a matter of law. I **FIND** that there are no disputed facts as no evidence has been submitted by Mr. Davis in opposition to the facts presented by the Board. Additionally, while Mr. Davis in his answer alleged procedural defects, he did not defend on that basis.

The Board argued that the truth of charges one, six, seven, fifteen, sixteen, seventeen, twenty-one, twenty-two, twenty-six, and twenty-seven are established by respondent's guilty plea and that such charges, given the enormity of respondent's crime, are sufficient in themselves to amount to conduct unbecoming a public employee warranting Mr. Davis' removal from office. I **FIND** that the undisputed evidence proves

the charges in question, which in substance allege that Mr. Davis improperly and illegally made unauthorized and fraudulent expenditure of Board funds to benefit himself rather than the Board and improperly submitted and audited the accounts.

Unbecoming conduct is defined broadly as "any conduct which has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services. *Karins v. Atlantic City*, 152 *N.J.* 532, 554 (1998). In light of Mr. Davis' admissions at his guilty plea to embezzling $1.7 million from the Board, I **FIND** the evidence overwhelming that petitioner has engaged in conduct unbecoming a public official. I **CONCLUDE** that the Board has demonstrated respondent's unbecoming conduct by a preponderance of the credible evidence. Further I **CONCLUDE** that dismissal of respondent from his tenured position is the appropriate penalty under the egregious circumstances here whereby Mr. Davis has demonstrated that he is unfit to discharge the duties of his position. See *In the Matter of the Tenure Hearing of Alan Morton, Sch. Dist. of the City of Trenton, Mercer County, OAL Dkt. Nos. EDU* 1957-93, 9331-92N, 10944-93, aff'd by State Board 96 *N.J.A.R.* 2d (EDU) 444.

ORDER

Accordingly, I **ORDER** that the tenure charges against Richard H. Davis be **UPHELD** and that Mr. Davis be and hereby is **DISMISSED** from his tenured 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.

August 24, 2001
DATE

MARGARET M. HAYDEN, ALJ

Receipt Acknowledged:

8/28/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 30 2001
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

OAL DKT. NO. EDU 1536-01
AGENCY DKT. NO. 14-1/01

IN THE MATTER OF THE TENURE	:	
HEARING OF RICHARD H. DAVIS,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF WYCKOFF, BERGEN	:	DECISION
COUNTY.	:	

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

Upon careful and independent review of the record in this matter, the Commissioner determines to affirm the Initial Decision for the reasons expressed therein. Accordingly, respondent is dismissed from his tenured position as a teacher in the Board's district.[1] This matter is hereby referred to the State Board of Examiners for action against respondent's certificate as it deems appropriate.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 10/12/01

Date of Mailing: 10/12/01

[1] The record shows that, by letter dated June 13, 2001, respondent submitted to the Board his "irrevocable resignation from the position of School Business Administrator/Board Secretary to the Township of Wyckoff Board of Education." (Letter of Richard H. Davis) However, there is no indication in the record that this resignation has been acted upon by the Board. Therefore, even if the Board has, in fact, acted, prior to the date of this decision, to accept respondent's resignation, it is reminded of the chief school administrator's responsibility to cooperate with the State Board of Examiners in accordance with the provisions of *N.J.A.C.* 6:11-3.5.

[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.* 6:2-1.1 *et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.

378-01

STEPHANIE I. RYAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY *ET AL.*,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner, retired teacher, alleged the Trenton Board of Education failed to follow New Jersey guidelines in its implementation of the Special Review Assessment (SRA). The Department investigated the allegations and issued a report which concluded that the allegations were without merit. In light of this report, the Board asked that the matter be dismissed.

The ALJ found that petitioner failed to meet the administrative code definition of interested person in a controversy. *N.J.A.C.* 6A:3-1.2 defines interested persons as persons who will be substantially, specifically and directly affected by the outcome of a controversy. The ALJ concluded that petitioner did not have legal standing to bring the present petition and that, even if she did, there was no relief that he might order. Petition was dismissed.

In lieu of exceptions, petitioner submitted a motion to amend her pleadings. Finding no legal authority for pleading amendment subsequent to the issuance of an initial decision and, even if such lack was not in and of itself dispositive, that interests of efficiency, expediency and the prevention of undue prejudice preclude acceptance of amendment of pleadings at such a late stage, the Commissioner denied petitioner's motion. The Commissioner adopted the findings and determination in the Initial Decision as his own. The Commissioner, however, found it appropriate that petitioner's materials be reviewed by the Special Committee he recently convened to review the SRA process statewide, since they may provide a perspective on some of the issues and problems potentially associated with that process.

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.

October 15, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 104-01
AGENCY DKT. NO. 401-11/00

STEPHANIE I. RYAN,
Petitioner,
v.
TRENTON BOARD OF EDUCATION,
Respondent.

Stephanie I. Ryan, petitioner, *pro se*
Sharon D. Larmore, Board Counsel, for respondent

Record closed: August 6, 2001 Decided: August 27, 2001

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

Stephanie I. Ryan, petitioner, filed a petition of appeal before the Commissioner of Education alleging that the respondent Trenton Board of Education had failed to follow State guidelines in its implementation of the Special Review Assessment II (SRA). The New Jersey Department of Education investigated the petitioner's allegations and issued a report, dated September 15, 2000, which concluded that the allegations were without merit. The respondent

Board filed an answer denying the petitioner's allegations on January 2, 2001. In light of the final report issued by the State Department of Education, the Board asks that the matter be dismissed.

On January 30, 2001, Ryan filed a letter opposing the motion to dismiss. The letter deals almost entirely with procedural matters. After acknowledging receipt of the Board's counsel's letter, the petitioner states:

> I hereby oppose her reasons. I must quote the following sentences from a letter dated October 12, 2000, from Robert A. DeSando, Special Assistant for External Affairs for the Commissioner of Education: "In response to the issues raised in your letter, I must advise that Assistant Commissioner Schechter's report represents the Department of Education's final investigative findings in this matter, and that, while you may believe that the report is inaccurate and incomplete, the Department cannot be of further assistance to you outside the mechanism, established by statute and rule for hearing of school law disputes by the Commissioner. That mechanism, initiated through a petition of appeal set forth at *N.J.A.C.* 6A:3, provides for a strictly prescribed administrative hearing process where the Commissioner acts as an impartial adjudicator in deciding whether violations of school law have occurred and remedial directives are warranted."
>
> After contacting Governor Whitman's office on the morning of October 16, because Assistant Commissioner Schecter did not return my phone calls concerning inquiries about my report, I received a call at 11:56 that same day from Commissioner Schechter. At that time, Ms. Schechter acknowledged to me that she, "Did not get any other documents and did not interview any other teachers or students" even though I had provided her with 160 pages of documentation supporting allegations against the Trenton Board of Education. Ms. Schechter then stated that she had gleaned all information for her final report, which was more than a month late, and which exonerated Trenton from all allegations, based solely on a July 11 meeting held in Dr. Lytle's office at the Trenton Board of Education, and that she had not investigated any of my allegations set forth in my lengthy documentation. On November 8, taking the advice of Special Assistant Robert A. Desando, I filed an appeal as set forth in *N.J.A.C.* 6A:3. against the Trenton Board of Education for

> noncompliance of New Jersey State Statutes and New Jersey Administrative Codes.
>
> In light of my letter dated September 23, 2000, and Mr. DeSando's letter dated October 12, 2000, I hereby oppose the respondent's reasons for dismissing Docket No.: EDU 104-01.

The Board's motion rests on uncomplicated grounds. The Board states that Ryan filed a petition alleging failure to adhere to State guidelines in implementation of the SRA. The Department looked into the matter and issued a comprehensive report. Among its conclusions were that the petitioner's allegations were without merit. The respondent Board filed an answer denying the allegations and the Department of Education report of September 15, 2001, disposes of all issues.

DETERMINATION AND ORDER

Pursuant to the statutory definition, a matter is a contested case where, by virtue of a statutory or constitutional requirement, a hearing is required before a State agency to determine rights, duties, obligations, privileges, benefits or other legal relations of specific parties. The required hearing must be preeminently adjucatory and judicial in nature and not informational or intended to provide a forum for the expression of public sentiment on a proposed or accomplished agency action. Nor is a matter which is susceptible of administrative resolution a contested case. In order for a matter to be a contested case, it must be heard by a judge and:

1. A hearing must be required by statute or constitutional provision;

2. The matter must not be susceptible of informal resolution on the administrative level, and

3. The required hearing must be designed to result in an adjudication concerning the rights, duties, obligations, privileges, benefits or other legal relations of specific parties over which there exists disputed questions of fact, law, or disposition.

In order to be a party, a person or group must be affected by the outcome of the matter substantially, specifically and directly. The petitioner here fails to meet these standards. First, there is no order I can make that will affect her rights, duties, obligations, privileges, or benefits. There is no order I can make that will affect the petitioner substantially, specifically and directly.

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. *Board of Regents v. Roth*, 408 *U.S.* 564 (1972). Under *Flast v. Cohn*, 392 *U.S.* 83 (1968), the gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which courts so largely depend for illumination. New Jersey courts have followed this line of thinking. In *Frazier v. Liberty Mutual Insurance Co.*, 15 *N.J. Super.* 123 (Law Div. 1977), the court stated at 127 "plaintiff must show a personal stake in the outcome of the litigation or controversy in an adversarial context and in a form historically reviewed as capable of judicial resolution."

A tribunal or a court will not do, or require the doing of, a vain or useless thing; it will not use its powers to accomplish a useless purpose, nor will it grant a decree which does not confer a benefit, which is impractical as concerns enforcement, which is not enforceable, or which is ineffectual because compliance is impossible.

Reading the pleadings in the light most favorable to the petitioner, I **FIND** that she has failed to establish that she is an interested person as contemplated in the foregoing discussion. I further **FIND** that there is no relief I can order that would confer any recognizable benefit upon her. Accordingly, I **CONCLUDE** that the petition of appeal herein is without merit and should be **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.

AUG 27 2001
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

8/29/01
DATE

Debbie Antamarian
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 29 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

OAL DKT. NO. EDU 104-01
AGENCY DKT. NO. 401-11/00

STEPHANIE I. RYAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY *ET AL.*,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner filed no exceptions but, rather, submitted a "Request for Motion to File an 'Amended Initial Complaint.'" In reply, the Board filed an objection to such request. Petitioner tendered a rejoinder to the Board's responsive submission.

Preliminarily, the Commissioner determines that petitioner's request to amend her pleadings, at this late stage in these proceedings, must be denied. It is noted that authorization for amendment of pleadings is derived from two specific rules, *N.J.A.C.* 6A:3-1.7 and *N.J.A.C.* 1:1-6.2, whose respective applicability is determined by the stage of the proceedings. First, *N.J.A.C.* 6A:3-1.7 specifies:

> *Prior to the transmittal of any matter to the OAL*, the Commissioner may order the amendment of any petition or answer, or any petitioner may amend the petition, and any respondent may amend the answer; provided, however, that once an answer or other responsive pleading is filed, an amendment to a petition may be made only with the consent of each adverse party or by leave of the Commissioner upon written application.***(emphasis supplied)

Subsequent to the transmittal of a matter to the OAL, amendment of pleadings is governed by *N.J.A.C.* 1:1-6.2(a) which states:

> Unless precluded by law or constitutional principle, pleadings may be freely amended when, in the judge's discretion, *an amendment would be in the interest of efficiency, expediency and the avoidance of over-technical pleading requirements and would not create undue prejudice.* (emphasis supplied)

While both of these provisions clearly contemplate pleading revisions during the course of the proceedings of a contested case, there is no corresponding regulatory authority for amendment subsequent to an OAL hearing and the issuance of an Initial Decision. Even assuming, *arguendo*, that this absence of legal authority is not, in and of itself, dispositive, the Commissioner finds and concludes that interests of efficiency, expediency and the prevention of undue prejudice preclude a process which would essentially operate as a vehicle for all unsuccessful litigants to cure deficiencies and relitigate their cases. Consequently, petitioner's request to amend her pleadings, submitted in lieu of exceptions to the Initial Decision, is hereby denied.

Turning to the substance of the matter before him, upon careful and independent review of the record, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that the within petitioner lacks the requisite legal standing to maintain this action as a contested case.

However, notwithstanding this result, and fully recognizing that information brought to the record here remains unproven, the Commissioner of Education cannot ignore the implications of petitioner's allegations as they pertain to his concerns about the efficacy of the Special Review Assessment (SRA) methodology as an alternative means of measuring student achievement in New Jersey's public schools. At the October 3, 2001 meeting of the State Board

of Education, the Commissioner announced his formation of a Special Committee in this regard, explaining:

> As we prepare to launch a new high school proficiency assessment this year, it's only appropriate that we take a long, hard look at the Special Review Assessment (SRA). While the SRA has merit, I am becoming increasingly concerned about the number of students who receive a diploma through this process. I recently convened a special committee to review the SRA process. Serving on this committee are county superintendents, teachers, district superintendents, test coordinators and high school principals. Their mission is to recommend by the end of the year a course of action that will guarantee that diplomas awarded as a result of the SRA process are as meaningful as those earned by passing the regular High School Proficiency Assessment.

In view of his broader concerns in this regard, the Commissioner finds it appropriate that petitioner's materials be reviewed by the recently convened special committee, since they may provide a perspective on some of the issues and problems potentially associated with the SRA process, thereby contributing to the committee's thinking in charting a course of action, as the Commissioner has directed, that will ensure the integrity of the SRA process statewide.

Accordingly, the Initial Decision of the OAL dismissing the instant Petition of Appeal is affirmed for the reasons stated therein, and a copy of the record of this matter will be submitted to the special committee.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10/15/01

Date of Mailing: 10/15/01

* 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.

379-01

STEPHANIE I. RYAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DR. THOMAS J. RUBINO, COUNTY SUPERINTENDENT, DAVID HESPE, COMMISSIONER, ELLEN SCHECHTER, ASSISTANT COMMISSIONER,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner, retired teacher, alleged respondents failed to enforce New Jersey mandates by allowing the Trenton Board of Education to breach Special Review Assessment guidelines in its administration of the program.

The ALJ found that petitioner failed to meet the administrative code definition of interested person in a controversy. *N.J.A.C.* 6A:3-1.2 defines interested persons as persons who will be substantially, specifically and directly affected by the outcome of a controversy. The ALJ concluded that petitioner did not have legal standing to bring the present petition and that, even if she did, there was no relief that he might order. Petition was dismissed.

In lieu of exceptions, petitioner submitted a motion to amend her pleadings. Finding no legal authority for pleading amendment subsequent to the issuance of an initial decision and, even if such lack was not in and of itself dispositive, that interests of efficiency, expediency and the prevention of undue prejudice preclude acceptance of amendment of pleadings at such a late stage, the Commissioner denied petitioner's motion. 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.

October 15, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10411-00

AGENCY DKT. NO. 402-11/00

STEPHANIE I. RYAN,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, DR. THOMAS J. RUBINO, COUNTY SUPERINTENDENT, DAVID HESPE, COMMISSIONER, AND ELLEN SCHECHTER, ASSISTANT COMMISSIONER,

Respondents.

Stephanie I. Ryan, petitioner, *pro se*

Keith Robert Hemming, Deputy Attorney General, for respondent (John J. Farmer, Jr., Attorney General of New Jersey, attorney)

Record closed: August 27, 2001 Decided: August 27, 2001

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

Stephanie I. Ryan, petitioner, alleges the respondents failed to enforce State mandates by permitting the Trenton Board of Education to bypass, thwart or fail to comply with Special Review Assessment II (SRA) guidelines. The New Jersey Department of Education denies the allegations.

The matter was opened before the Commissioner of Education, *N.J.S.A.* 18A:6-9, and transmitted to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to –13.

The respondents moved for summary decision and the petitioner objected. The short answer is that a motion for summary decision may be made at any time after a case is determined to be a contested case. *N.J.A.C.* 1:1-12.5.

The motion to dismiss must be granted for the following reasons. First, the petitioner is without standing to bring this case. Second, the petitioner has failed to state a claim upon which relief can be granted.

The prerequisite of standing is meant to ensure real adverseness with respect to the litigation and to ensure that there is a substantial likelihood some harm will occur in the event of an unfavorable outcome. *New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Commission*, 82 *N.J.* 57 (1980); *See also Kenwood v. Montclair Board of Education*, OAL DKT. NO. EDU 8858-81 (April 23, 1982), adopted, Comm'r of Ed. (June 14, 1992), aff'd, St. Bd. (Sep. 8, 1982). Further, *N.J.A.C.* 6A:3-1.2 defines interested persons as persons who will be substantially, specifically and directly affected by the outcome of the controversy.

The petitioner cannot meet the standards of standing. She has not alleged a sufficient stake, a real adverseness or that there is a substantial likelihood some harm will occur to her in the event of an unfavorable decision.

In a similar case, *Lobis v. Bd. of Ed. of Maple Shade*, OAL DKT. NO. EDU 3630-79 (June 11, 1980), adopted, Comm'r of Ed. (Aug. 11, 1980), Aff'd St. of Bd. (Nov. 5, 1980), a similar petition was filed alleging that the respondent was not providing equal educational opportunities under the Public School Education Act of 1975. *See also*, *D.K. v. Bd. of Ed. of Clifton*, 93 *N.J.A.R.* 2d (EDU) 71.

Riccardelli v. Bd. of Ed. of Newark, OAL DKT. No. EDU 1904-79 (Sep. 26, 1979), adopted, Comm'r of Ed. (Nov. 16, 1979), provides perhaps the clearest instruction. The petitioner, a resident of Newark, alleged that the Executive Superintendent had illegally transferred personnel, a power by law vested in the board of education. The initial decision, affirmed and adopted by the Commissioner of Education, found the petitioner failed to meet the administrative code definition of interested person in a controversy.

Despite the petitioner's sincerity and earnestness, I **FIND** and **CONCLUDE** that she does not have standing to bring the present petition and that, even if she did, there is no relief that I may order.

A court or tribunal will not do, or require the doing of, a vain or useless thing; it will not use its powers to accomplish a useless purpose, nor will it grant a decree, which does not confer a benefit, which is impractical as concerns enforcement, which is not enforceable, or which is ineffectual because compliance is impossible.

In consideration of the foregoing, I **CONCLUDE** that the petition of appeal must be **DISMISSED** for the reasons asserted by the respondent Department of Education. 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.

AUG 27 2001
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

8/29/01
DATE

Debbie Christantis/pp
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 29 2001
DATE

ACTING DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cc

OAL DKT. NO. EDU 10411-00
AGENCY DKT. NO. 402-11/00

STEPHANIE I. RYAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DR. THOMAS J. RUBINO, COUNTY SUPERINTENDENT, DAVID HESPE, COMMISSIONER, ELLEN SCHECHTER, ASSISTANT COMMISSIONER,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner filed no exceptions but, rather, submitted a "Request for Motion to File an 'Amended Initial Complaint.'" In reply, the Board filed an objection to such request. Petitioner tendered a rejoinder to the Board's responsive submission.

Preliminarily, the Commissioner determines that petitioner's request to amend her pleadings, at this late stage in these proceedings, must be denied. It is noted that authorization for amendment of pleadings is derived from two specific rules, *N.J.A.C.* 6A:3-1.7 and *N.J.A.C.* 1:1-6.2, whose respective applicability is determined by the stage of the proceedings. First, *N.J.A.C.* 6A:3-1.7 specifies:

> *Prior to the transmittal of any matter to the OAL*, the Commissioner may order the amendment of any petition or answer, or any petitioner may amend the petition, and any respondent may amend the answer; provided, however, that once an answer or other responsive pleading is filed, an amendment to a petition may be made only with the consent of each adverse party or by leave of the Commissioner upon written application. ***(emphasis supplied)

Subsequent to the transmittal of a matter to the OAL, amendment of pleadings is governed by *N.J.A.C.* 1:1-6.2(a) which states:

> Unless precluded by law or constitutional principle, pleadings may be freely amended when, in the judge's discretion, *an amendment would be in the interest of efficiency, expediency and the avoidance of over-technical pleading requirements and would not create undue prejudice.* (emphasis supplied)

While both of these provisions clearly contemplate pleading revisions during the course of the proceedings of a contested case, there is no corresponding regulatory authority for amendment subsequent to an OAL hearing and the issuance of an Initial Decision. Even assuming, *arguendo*, that this absence of legal authority is not, in and of itself, dispositive, the Commissioner finds and concludes interests of efficiency, expediency and the prevention of undue prejudice preclude a process which would essentially operate as vehicle to allow unsuccessful litigants to cure deficiencies and relitigate their cases. Consequently, petitioner's request to amend her pleadings, submitted in lieu of exceptions to the Initial Decision, is hereby denied.

Turning to the substance of the matter before him here, upon careful and independent review of the record, the Commissioner concurs with the findings and conclusion of the Administrative Law Judge that the within petitioner lacks the requisite legal standing to maintain this action.

Accordingly, the Initial Decision of the OAL is affirmed for the reasons stated therein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10/15/01

Date of Mailing: 10/15/01

* 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.

380-01

IN THE MATTER OF THE TENURE HEARING :

OF MICHELE HERNANDEZ, SCHOOL :

DISTRICT OF THE CITY OF ELIZABETH, :

UNION COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The Board filed tenure charges against respondent, a secretary in the Board's employ, alleging excessive absenteeism, incapacity, unbecoming conduct, abandonment of position and abuse of sick leave. An answer denying the charges was filed on behalf of respondent.

At the OAL, respondent's attorney, who had been retained by her union, sought to be relieved as counsel for respondent because, from the inception of this case, he has been unable to contact respondent or communicate with her. The motion was granted on the adjourned hearing date and, despite being forwarded notice of the hearing, respondent failed to respond or appear. The ALJ, based on the *ex parte* proofs submitted by the Board at the hearing, determined that the Board had sustained its charges of excessive absenteeism and incapacity, and recommended dismissal of respondent.

The Commissioner affirmed the decision of the ALJ for the reasons set forth therein.

October 15, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3126-01
AGENCY DKT. NO. 50-2/01

IN THE MATTER OF THE TENURE HEARING OF MICHELLE HERNANDEZ, SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY

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

No appearance for respondent

Record closed: July 24, 2001 Decided: August 24, 2001

Before **ROBERT J. GIORDANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Respondent, Michele Hernandez, is a tenured secretary with the petitioner Elizabeth Board of Education. On January 25, 2001, tenure charges were filed against respondent alleging excessive absenteeism, incapacity, unbecoming conduct, abandonment of position and abuse of sick leave. Petitioner certified the tenure charges on February 22, 2001 (P-4). On February 26, 2001, counsel for petitioner attempted to serve respondent with a copy of the charges, Certificate of Determination

and Board Resolution by certified mail. This mailing was returned undelivered on March 7, 2001 (P-2). On March 7, 2001, counsel for petitioner served respondent with a copy of the charges, Certificate of Determination and Board Resolution via first class mail and airborne express (P-1).[1]

The New Jersey Education Association retained counsel to represent respondent in this tenure charge matter. Through the retained counsel, an answer to the charges was filed on behalf of respondent with the Commissioner of Education on March 16, 2001. The matter was transmitted to the Office of Administrative Law as a contested case on March 27, 2001. A prehearing conference was conducted and the matter was set down for hearing for June 26 and June 27, 2001.

On May 31, 2001, Gregory T. Syrek, Esq., counsel for respondent, filed a motion to be relieved as counsel for respondent. Counsel for petitioner advised that petitioner did not oppose the motion. Respondent had not contacted Mr. Syrek by the scheduled hearing date, June 26, 2001. The hearing was adjourned in the matter to June 28, 2001. At that time, the undersigned entered an order relieving the firm of Bucceri and Pincus as counsel for respondent.

Thereafter, counsel for petitioner requested *ex parte* proofs be taken in the matter. Petitioner submitted documentary evidence in support of the tenure charges. The record remained open for the receipt of posthearing submissions on behalf of petitioner. Submissions were received on July 24, 2001, and the record was closed on that date.

FACTUAL DISCUSSION

Respondent is a tenured secretary with petitioner Elizabeth Board of Education. Petitioner hired her on September 27, 1993. Petitioner brought tenure charges against respondent on January 25, 2001. The Statement of Charges alleges that respondent is

[1] The proof of attempts to serve respondent has been introduced by petitioner's counsel and the facts regarding such attempts are incorporated in the **FINDINGS OF FACT** herein.

guilty of chronic and excessive absenteeism, abuse of sick leave, unbecoming conduct, incapacity to perform her duties and abandonment of her position (P-3). In support of the charges, petitioner offered documentary evidence that respondent exceeded her allotted sick time during the years 1997-1998, 1999-2000 and 2000-2001. The documents indicate that respondent had not reported to work at all since July 2000 (P-3, Exhibits A-C). While respondent had been granted a leave of absence from March 30, 1999 to May 6, 1999, she failed to return to work on May 7, 1999 (P-3, Exhibit B). She remained on unauthorized leave until March 30, 2000, at which time another leave of absence was granted from March 30, 2000 to May 5, 2000. The undersigned has gleaned from the documentary evidence that petitioner, recognizing that respondent has been encountering personal problems, has attempted to accommodate respondent by authorizing several leaves of absence. The district has a policy regarding leaves, recognizing that there are absences that are justifiable.

Again, respondent failed to report to work on May 8, 2000 and has been on unauthorized leave since May 8, 2000. The attendance records for respondent indicate that she has been absent for more than four hundred and sixty-eight days since July 1, 1997 (P-3, Exhibits A-C). An affidavit of Linda G. King, School Business Administrator for petitioner, addresses the problems that have arisen as a result of the continued absence of respondent. Other employees in the Business Office have had to perform her duties in addition to their own. This has resulted in the expenditure of funds to pay overtime to these employees (P-3, Exhibit N).

Petitioner has attempted to ascertain the intentions of respondent regarding her employment with the Board. The Board has been notified that respondent has been in treatment for substance abuse in a facility in Florida (P-3, Exhibits D, J, K, M). Despite several attempts at contacting respondent, petitioner has been unable to obtain any response (P-3, Exhibits F, G, H, I). Respondent has failed to contact her attorney at any time up to the scheduled hearing date of June 26, 2001. Although an answer was filed on behalf of respondent, that answer was authorized by and at the direction of the New Jersey Education Association. Respondent herself has not communicated with counsel at all. She has also failed to contact the school district that employs her,

despite the fact that she has not reported to work since May 2000. In support of the charges against respondent, petitioner has provided a copy of the policy regarding leaves (P-3, Exhibit O).

By certification dated May 29, 2001, Mr. Syrek advised that although he has made numerous attempts to contact respondent, he has been unsuccessful in communicating directly with her (C-1).[2] All contacts were to the facility in which respondent was admitted. Mr. Syrek has been advised that respondent has since left the facility as of on or about May 9, 2001. Respondent has not contacted him at any time since that date.

FINDINGS OF FACT

Based on the *ex parte* proofs taken pursuant to *N.J.A.C.* 1:1-14.4(c), I make the following **FINDINGS OF FACT**:

1. Respondent, Michelle Hernandez, is a tenured secretary with respondent Elizabeth Board of Education.

2. Petitioner hired respondent on September 27, 1993.

3. Respondent was absent from work during the year 1997-1998 for thirty-six days.

4. Respondent was absent from work during the year 1999-2000 for one hundred ninety-eight days. Of those absences, seventeen days were on leave granted by petitioner.

5. Respondent was absent from work during the year 2000-2001 in excess of two hundred thirty-eight days. Of those absences, thirty-four days were on leave granted by petitioner.

[2] This certification is dated May 29, 2001. Although not introduced at the hearing, it is referenced in the within decision as Exhibit C-1. The information provided therein formed the basis upon which the motion to be relieved as counsel for respondent was granted. The substance of that certification was also considered in the within matter.

6. Petitioner has notified respondent on several occasions, requesting that she return to work. Specifically, notices were sent out on March 17, 2000, March 29, 2000, June 27, 2000, January 9, 2001 and January 23, 2001.

7. Respondent has been absent from her position as secretary with the Elizabeth Board of Education since March 23, 1999.

8. The continued absence of respondent has affected the operation of the Business Office of petitioner.

9. Respondent has not contacted petitioner since that date advising of her intentions about returning to work.

10. On January 25, 2001, tenure charges were filed against respondent with Linda G. King, Board Secretary/School Business Administrator for petitioner.

11. The tenure charges included chronic and excessive absenteeism, incapacity, unbecoming conduct, abandonment of position and abuse of sick leave.

12. On February 22, 2001, petitioner certified the tenure charges to the Commissioner of Education.

13. On February 26, 2001, petitioner caused a copy of the charges, Certificate of Determination and Board Resolution to be mailed to respondent by certified mail.

14. These documents were returned "undelivered" on March 7, 2001.

15. On March 7, 2001, petitioner caused a copy of the charges, Certificate of Determination and Board Resolution to be delivered to respondent via first class mail and airborne express.

16. An answer was filed with the Department of Education on behalf of respondent on March 16, 2001.

LEGAL DISCUSSION

Secretaries of a board of education shall hold office under tenure upon serving full time for three consecutive years in the position. Such employees shall not be dismissed or suspended or reduced in compensation, except for neglect, misbehavior or other offense and only in the manner prescribed by the provisions of *N.J.S.A.* 18A:6-9, *et seq.* *See N.J.S.A.* 18A:17-2. In matters involving the termination of a tenured employee in the public school system in New Jersey, the provisions of *N.J.S.A.*18A:6-10 apply. That statute provides in pertinent part:

> No person shall be dismissed or reduced in compensation,
>
> (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state ...
>
> except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

Excessive absenteeism constitutes valid grounds for dismissing a tenured teacher, even where the absences have been excused or are caused by legitimate reasons of personal illness. *State-Operated School District of Jersey City v. Pellecchio*, 92 *N.J.A.R. 2d* (EDU) 267, 269-270; *Tenure Hearing of Lena White*, 92 *N.J.A.R. 2d* (EDU) 157, 161; *Tenure Hearing of Edna Booth*, 1985 *S.L.D.* 722, 744, 760-761; *Tenure Hearing of DeKrafft, supra*; *Tenure Hearing of Reilly, supra*, 1977 *S.L.D.* at 413-415. Even if a teacher's performance in the classroom is sufficient and even if the absences were approved leave or sick days to which the teacher was entitled, the absences may nevertheless be considered as material to the issue and can justify removal of the teacher. *Trautwein v. Board of Educ. of Bound Brook*, 1980 *S.L.D.* 1539 (Dkt. A-2773-78, N.J. App. Div., April 8, 1980), *certif. den.*, 84 *N.J.* 469 (1980); *Tenure Hearing of Sheets*, 1979 *S.L.D.* 790, 798, *adopted* State Bd. of Ed., 1980 *S.L.D.* 1536.

Relative to the foregoing, it is well settled law that a teacher's chronic and excessive absenteeism constitutes both "unbecoming conduct" and "incapacity" such as to amount to "just cause" which warrants the termination of a teacher under *N.J.S.A.* 18A:6-10. *In the Matter of the Tenure Hearing of Jerome Kacprowicz*, 93 *N.J.A.R. 2d* (EDU) 1147, 151, citing *Trenton Board of Education v. Williamson*, OAL DKT. EDU 7335-85 (Apr. 14, 1986), *aff'd* Commissioner (May 28, 1986).

Nevertheless, in order for a Board of Education to terminate a tenured employee for excessive absenteeism, the Board must demonstrate that:

> There was consideration of (1) the particular circumstances of the absences and not merely the number of absences, (2) the impact that the absences had on the continuity of instruction during the period of time the absences occurred, not merely after the fact and (3) that there be some warning given to the employee that his or her supervisors were dissatisfied with the pattern of absences.
>
> [*In the Matter of the Tenure Hearing of Lena White*, 92 *N.J.A.R. 2d* (EDU) 157, 161.]

The point at which the absenteeism is judged to be excessive falls within the reasonable judgment and discretion of the local school district. *Trautwein v. Board of Educ. of Bound Brook, supra*. In sum, excessive or chronic absenteeism of a tenured employee, even if related to legitimate medical or health problems, has been held to constitute "incapacity," "unbecoming conduct," and/or "just cause" within the meaning of *N.J.S.A.* 18A:6-10, so as to warrant dismissal from employment.

While most tenure cases involve the dismissal of tenured teachers, the evaluation of cause must certainly apply to tenured secretaries as well. In one case, a tenured clerk could not have been said to have abandoned her position, having maintained contact while her doctor informed the board that she was disabled. However, it could be said that she was unable to perform, thus supporting her dismissal from her tenured position due to incapacity. *In Matter of Tenure Hearing of Stanley*, 95 *N.J.A.R.* 2d (EDU) 495 (1995).

CONCLUSIONS

This matter has developed a unique posture for tenure hearings. Generally, when a respondent fails to answer a charge, there is little but the formality of the statute to unfold. However, when an answer is filed on behalf of a respondent who might not have answered upon her own initiative, the process becomes more than mere formality. Procedural guidelines must be followed. In that regard, I have concluded that notice was sufficient in the instant matter. In addition to notices being served on the then attorney of record, copies of all appropriate notices were served on respondent at her last known residence. As such, I further concluded that the submission of proofs *ex parte* was also appropriate under the circumstances. From the facts adduced from the evidence before me, it is abundantly clear that petitioner has sustained its burden in establishing just cause to sustain the dismissal of respondent due to excessive absenteeism and incapacity, and I so **CONCLUDE**. Not even the tenure laws can countenance the excessive and continual absences from work exhibited by respondent.

ORDER

Based on the foregoing, I hereby **ORDER** that respondent, Michelle Hernandez, be **DISMISSED** as a tenured employee of petitioner, School District of the City of Elizabeth.

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

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

8/24/01
DATE

ROBERT J. GIORDANO, ALJ

Receipt Acknowledged:

8/31/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP - 4 2001
DATE

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

md

APPENDIX

EXHIBITS

P-1 Proof of Service, March 7, 2001

P-2 Copy of envelope indicating "not deliverable as addressed - unable to forward", March 2, 2001

P-3 Letter and Statement of Charges, January 25, 2001

P-4 Resolution, February 22, 2001

P-5 Certificate of Determination

P-6 Application for Disability Retirement, January 31, 2001

C-1 Certification, May 29, 2001

OAL DKT. NO. EDU 3126-01
AGENCY DKT. NO. 50-2/01

IN THE MATTER OF THE TENURE HEARING :
OF MICHELE HERNANDEZ, SCHOOL :
DISTRICT OF THE CITY OF ELIZABETH, :
UNION COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

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

Upon his full and independent review the Commissioner concurs with the findings and conclusions of the Administrative Law Judge that, under the circumstances here, *ex parte* submissions of proofs were appropriate and such proofs satisfy the Board's burden of establishing its charges of excessive absenteeism and incapacity against respondent, necessitating her dismissal from her tenured position.

Accordingly, the Initial Decision of the OAL is affirmed for the reasons stated therein. Respondent Michele Hernandez is terminated from her tenured secretarial position with the Board of Education of the City of Elizabeth as of the date of this decision.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10|15|01
Date of Mailing: 10|15|01

* 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.

381-01

MARC NOVEMBRE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF UNION CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

October 15, 2001

OAL DKT. NO. EDU 9195-00
AGENCY DKT. NO. 320-9/00

MARC NOVEMBRE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF UNION 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: 10|15|01

Date of Mailing: 10|16|01

382-01

CHESTER EDUCATION ASSOCIATION, on behalf of teaching staff members,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF THE TOWNSHIP OF CHESTER, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

October 15, 2001

OAL DKT. NO. EDU 11348-99
AGENCY DKT. NO. 170-6/99

CHESTER EDUCATION ASSOCIATION, on behalf of teaching staff members,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF THE TOWNSHIP OF CHESTER, 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.

ACTING ASSISTANT COMMISSIONER

Date of Decision: 10|15|01

Date of Mailing: 10|15|01

383-01

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

October 15, 2001

OAL DKT. NO. EDU 9522-00
AGENCY DKT. NO. 362-9/00

DAVID SCHLESINGER,	:	
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 Ruotolo
ACTING ASSISTANT COMMISSIONER

Date of Decision: 10|15|01

Date of Mailing: 10|15|01

384-01

SAMUEL HOLMES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

October 15, 2001

OAL DKT. NO. EDU 4103-00
AGENCY DKT. NO. 97-3/00

SAMUEL HOLMES,	:	
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

Date of Decision: 10|15|01

Date of Mailing: 10|15|01

385-01

CITY OF BURLINGTON BOARD OF EDUCATION, BURLINGTON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	
	:	

October 15, 2001

OAL DKT. NO. EDU 02191-00
AGENCY DKT. NO. 40-1/00

CITY OF BURLINGTON BOARD OF EDUCATION, BURLINGTON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	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: 10|15|01

Date of Mailing: 10|15|01

386-01

JOSEPH BARTKOWICZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

October 15, 2001

OAL DKT. NO. EDU 6740-00
AGENCY DKT. NO. 223-6/00

JOSEPH BARTKOWICZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, 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.

Maria Kuncetti

ACTING ASSISTANT COMMISSIONER

Date of Decision: 10|15|01

Date of Mailing: 10|15|01

387-01

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 ON MOTION
RESPONDENT.	:	

October 15, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
9 Quakerbridge Plaza
P. O. Box 049
Trenton, New Jersey 08625-0049
(609) 588-6633
Fax (609) 588-6536

01 OCT 11 PM 2:47

M. Kathleen Duncan
Administrative Law Judge

October 10, 2001

Dakar R. Ross, Esquire
Hill Wallach
202 Carnegie Center
Princeton, New Jersey 08543-5226

LETTER ORDER

Darlene Prince
85 Baldwin Lane
Willingboro, New Jersey 08046

RE: D.P. o/b/o D.P. v. BOE of Township of Willingboro
OAL DKT. NO. EDU 6503-01

Dear Ms. Prince & Mr. Ross:

This will confirm, pursuant to our conversation on the record yesterday, that petitioner's motion for a stay of the continuing suspension pending a determination on the merits is **DENIED** as moot; D.P. will have served the entire suspension in issue by the close of school on Thursday, October 11, 2001, and no meaningful order could be entered before that time since my decision on the motion is required to be submitted to the Commissioner of Education for review pursuant to *N.J.A.C.* 1:1-12.6 and accordingly, no final decision on the motion could be rendered before the close of school on October 11, 2001. This will also confirm that respondent is **ORDERED** to file an answer to the petition of appeal on or before October 19, 2001. The answer should specify exactly what actions the respondent asserts it has taken with respect to disciplining D.P., since it was not at all clear to me from yesterday's discussions exactly what sanctions had been imposed for what conduct or when and how petitioner was notified of respondent's determinations. Specifically, the documents given to me by petitioner yesterday reflect a letter dated September 12, 2001, providing in pertinent part:

> Your son/daughter has been SUSPENDED from school as a result of the infraction detailed on the enclosed form. The dates of the suspension are **#32 Administrative Leave 9/11-9/12/01.**

. . .

and another letter dated 10-2-01, providing:

> Your son/daughter has been SUSPENDED from school as a result of the infraction detailed on the enclosed form. The dates of the suspension are **9/27-10/11/01 #2 Open Defiance, #20 Abusive Language first and second offense, #14 MAJOR Classroom Disruption. Out of School Suspension.**

There are no other particulars described on the forms attached to either letter.
When I specifically asked respondent's counsel on the record yesterday for a citation for what seemed to be the respondent's position that D.P. was now also precluded from attending extra-curricular activities, the only response I got was "past practice." I see from reading the copy of the Secondary Discipline Policy handbook, given to me by petitioner, that Section III B, provides:

. . .

> *After the accumulation of 10 discipline points, in grades 9 through 12, students will no longer have the privilege of participating in inter-scholastic athletics, or in other extra-curricular activities including grade level class trips, proms, dances, plays, clubs, games, and other social activities.*

Does respondent assert that D.P. has accumulated 10 or more discipline points? If so, respondent's answer should set forth the basis for the calculation. I have scheduled the plenary hearing in this matter for Monday, November 26, 2001. At that time we will address the issue of whether respondent's actions disciplining D.P. were arbitrary, capricious or unreasonable, and, if so, what relief should be granted. The burden of proving by a preponderance of the competent and credible evidence that the respondent acted arbitrarily is upon petitioner; however, pursuant to *N.J.A.C.* 1:1-14.7(l), I am ordering respondent to proceed first. Petitioner's witnesses will testify following respondent's. Please bring an original and two copies of any document you intend to offer into evidence.

Finally, I am enclosing for both parties copies of *N.J.A.C.* 1:1-12.6 and 6A:3-1.6, governing the filing and processing of applications for temporary emergent relief. If there are further applications for such temporary emergent relief, I expect to see affidavits from both sides setting forth the alleged facts. In general, such motions are decided on the basis of affidavits and oral argument. I may (or may not) permit limited supplemental testimony, but you should not expect to conduct a full-blown hearing on the return date for such a motion. Please remember to send a copy of all papers filed to your adversary and always show that the copy was so served on the face of the document.

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.

Oct. 10, 2001
DATE

M. Kathleen Duncan
M. KATHLEEN DUNCAN, ALJ

cc

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 ON MOTION
RESPONDENT.	:	

The Letter 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 D.P. will have served the entire suspension imposed by the Board by the close of school on Thursday, October 11, 2001, no meaningful order could be entered at this point in time.

Accordingly, the within application for emergent relief is denied. Respondent is hereby directed to file an Answer to the Petition of Appeal with the Office of Administrative Law on or before October 19, 2001 as directed by the ALJ, and this matter shall move to plenary hearing on its merits, scheduled for November 26, 2001.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10|15|01
Date of Mailing: 10|15|01

* 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.

388-01

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.

COMMISSIONER OF EDUCATION

DECISION

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 requesting and receiving specific information from the Board setting forth the amount of tuition owed, the Commissioner received a letter from an attorney acting on behalf of petitioner contesting the calculation of the amount of tuition owed by petitioner. As such, the Commissioner remanded the case to OAL for proceedings solely to determine the amount of tuition owed by petitioner to the Board.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

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.

No Appearance for or on behalf of petitioner

Joseph M. Wenzel, Esq., for respondent (McCormack & Matthews, P.C.)

Record Closed: August 22, 2001 Decided: August 28, 2001

BEFORE **STEPHEN G. WEISS**, ALJ:

This "residency" appeal was transmitted to the Office of Administrative Law by the Department of Education on June 7, 2001 following the filing of a *pro se* petition by E.M.M.A., the father of two elementary age school children, M.A. and H.A., asking that they be permitted to attend the Union Township public schools *gratis*. In his petition the father claimed his address to be 2735 Route 22 West, #308, Union, New Jersey. He explained that his family is here from the Sudan and since one of his sons has a medical condition which was being treated at Children's Specialized Hospital, temporarily he has moved to a hotel in Union Township to be close to him. In that petition E.M.M.A.

acknowledged that if the Commissioner determined his children not to be eligible for a free education in the district, or finds that he has abandoned or withdrawn his appeal, tuition costs may be assessed against him for the period of his children's ineligible attendance.

The Board filed an answer denying eligibility, and, by way of counterclaim, sought reimbursement equal to 1/180th of the total annual per pupil cost multiplied by the number of days of ineligible attendance by the two students. *See, N.J.A.C.* 18A:38-1(b)(2).

A hearing in connection with the residency appeal was scheduled for August 22, 2001 and notices to that effect were sent to the parties, including E.M.M.A. at the Route 22 address provided by him in his petition. When the hearing was convened at 9:55 a.m. on that date the only one who appeared was the attorney for the Board, Mr. Wenzel. E.M.M.A. did not appear nor was any communication received from him, either orally or in writing, at any time indicating his intended non-appearance.

As a result of petitioner's non-appearance, Board counsel moved to dismiss the petition on the basis that E.M.M.A. had abandoned and/or withdrawn it. To that end, he pointed out that efforts had been made over the last few months to contact the father, without avail. These included sending letters both by certified and regular mail to the Route 22 address, and making telephone calls there. The letters were returned unclaimed (moved left no address) and the telephone number, when called, resulted in a message that it had been disconnected with no forwarding number given.

The file also contains two appointment forms for consultations at Children's Specialized Hospital for M.A. Those forms (Exs. R-1,R-2) indicate that the address for the children was at 10 Hill Street, Apartment 2H, Newark, New Jersey 07102. Counsel for the Board further represented that he had sent the answer by both regular and certified mail to the that Newark address and no response was given although someone signed for them on petitioner's behalf. Counsel also sent interrogatories by regular mail both to the Union and Newark addresses. The Union envelope was returned unclaimed and the Newark envelope was never returned although presumably it was received.

Given all of the circumstances it is clear that petitioner has determined to abandon his appeal. Based, as well, on the evidence that I do have, it seems that the likelihood of his succeeding had he even come to the OAL hearing was rather slim. All of that evidence points to the conclusion that this family likely is or was residing in Newark and the only connection with Union is the fact that the father might have stayed for a period of time during April at a hotel on Route 22. Although I make no finding with respect thereto, it does appear to me that if formal proofs were presented that would have been the conclusion to be drawn.

In light of the fact that petitioner must be deemed to have abandoned his case, I also recommend that the Board's counter-claim for tuition reimbursement be granted. Counsel did not have specific information but believed that the two children attended public school for nearly all of the 2000-2001 school year in Union. From a practical standpoint, collection of any tuition reimbursement is quite problematic. However, both the statute and the petition of appeal, itself, contain a basis for a tuition reimbursement recovery should the Board be inclined to pursue.

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

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

August 28, 2001
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

8/31/01
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

ACTING DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP - 4 2001
DATE

OFFICE OF ADMINISTRATIVE LAW

\mvh

APPENDIX

Witness List: None

Exhibit List:

R-1 Children's Specialized Hospital appointment notice, February 14, 2001

R-2 Children's Specialized Hospital notice, March 14, 2001

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.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions to the Initial Decision were timely filed pursuant to *N.J.A.C.* 1:1-18.4. In its submission the Board indicates it is inclined to pursue its counterclaim for tuition against petitioner; thus, while it urges affirmance of the Initial Decision, the Board also requests remand of the matter to the OAL for hearing on the calculation of tuition. On September 18, 2001, the Board was instructed to submit to the Commissioner, within five (5) days, the information for the calculation of tuition required by *N.J.A.C.* 6A:3-8.1(d) for each of petitioner's children; *i.e.,* the rate(s) of tuition for the year(s) at issue, the *per diem* rate(s) for same, the date the ineligible attendance began, and the number of days of ineligible attendance at issue for each child.

On September 24, 2001, the Board submitted a certification by the Board Attorney which provided information to calculate the tuition owed for the period of ineligible attendance in the Union Township Schools by petitioner's children, one who, the Board reports, attended kindergarten and one who attended grade 4 from April 23 – May 29, 2001. At the *per*

diem rate of $32.70 for kindergarten and $39.50 for grade 4, the Board calculates tuition owed to be $1,949.40.

On October 9, 2001, a letter from Abdul Majid Hasan, Esq. was filed on petitioner's behalf in response to the Board's information regarding calculation of tuition. The letter avers, *inter alia,* that:

> 1. Petitioner initially enrolled his children in the Union Township Schools on April 30, 2001;
>
> 2. The children were in kindergarten and first grade, not kindergarten and fourth grade;
>
> 3. The children's last day of attendance was May 9, 2001. Petitioner recalls the date because, in light of the controversy surrounding their attendance at school, he declined the advice of the school's principal to leave the children in school to the end of that week;
>
> 4. Petitioner lived at the Best Inn Hotel in Union from May 5, 2001 through May 13, 2001; thereafter, living with a friend at 901 Chestnut Road in Union; and
>
> 5. On or about May 14, 2001, petitioner moved from Union, New Jersey to New York where he could get appropriate medical care for his son. (Hasan letter, dated October 5, 2001)

Upon review of the record in this matter[1], the Commissioner is compelled to agree with the Administrative Law Judge (ALJ) that petitioner abandoned or withdrew his appeal when he failed to appear at the OAL hearing. Consequently, the recommended decision of the ALJ is adopted for the reasons set forth in the Initial Decision, except as it pertains to the Board's counterclaim for tuition.

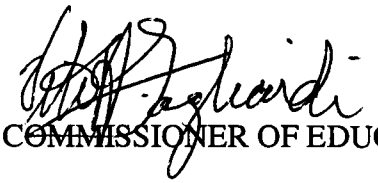
However, review of the parties' submissions in response to the Initial Decision clearly indicates that a factual dispute exists regarding the dates of the children's attendance in

[1] Upon review of the record, the Commissioner notes that the letter of ineligibility for attendance at school in Union Township sent to petitioner by respondent references the children's visa/immigration status. The Commissioner wishes to caution the Union Township Board of Education, and other boards of education as well, that the visa/immigration status of a student seeking admission to school *may not* be considered in making eligibility determinations pursuant to *N.J.S.A.* 18A: 38-1.

the Union Township Public Schools and the grade placement of one of petitioner's children. Therefore, calculation of tuition owed by petitioner cannot be effectuated based on the record currently before the Commissioner. Consequently, the matter must be remanded to the OAL for further proceedings as necessary to yield an accurate calculation of tuition owed. Such calculation should consider, among other evidence, school register data which documents the daily attendance of a pupil in a given school by grade pursuant to the requirements of *N.J.A.C.* 6:3-9.1 *et seq.*

Accordingly, the matter is hereby remanded to the Office of Administrative Law for the sole purpose of conducting further proceedings, as may be necessary, to calculate the tuition owed by petitioner to the Board for the period of ineligible attendance of his children during the 2000-2001 school year.

IT IS SO ORDERED.[2]



COMMISSIONER OF EDUCATION

Date of Decision: 10|15|01

Date of Mailing: 10|16|01

[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.

389-01

BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, MERCER COUNTY,	:	
PETITIONER-CROSS RESPONDENT,	:	COMMISSIONER OF EDUCATION
v.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAWRENCE, MERCER COUNTY,	:	
RESPONDENT-CROSS PETITIONER.	:	

October 17, 2001

AGENCY DOCKET NO. 171-6/01

BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, MERCER COUNTY,	:	
PETITIONER-CROSS RESPONDENT,	:	COMMISSIONER OF EDUCATION
v.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAWRENCE, MERCER COUNTY,	:	
RESPONDENT-CROSS PETITIONER.	:	

For Petitioner: Dennis M. DeSantis, Esq. (Destribats, Campbell, DeSantis, Magee & O'Donnell)

For Respondent: David W. Carroll, Esq. (Parker, McCay & Criscuolo, P.A.)

The Board of Education of the Township of Washington having applied, pursuant to *N.J.S.A.* 18A:38-13 and *N.J.A.C.* 6A:3-6.1, to the Commissioner of Education for a change of designation of the receiving district for its high school pupils, heretofore designated to attend the Lawrence Township High School in respondent's district, to attend a high school to be established in petitioner's proposed K-12 district; and

The Board of Education of the Township of Washington having further requested that severance be made contingent on its receipt of approval of the voters of the Township of Washington of the necessary local support for the construction of a high school; and

The Board of Education of the Lawrence Township School District having joined with petitioner in requesting a termination of the sending-receiving relationship between itself and petitioner; and

The Board of Education of Lawrence Township having further requested that severance be granted without the contingency that the voters of Washington Township approve the necessary local support for the construction of a high school, based on the Board's assertion that such funding may be approved by the Commissioner of Education pursuant to *N.J.S.A.* 18A:7G-12; and

Petitioner having conducted a feasibility study in accordance with *N.J.S.A.* 18A:38-13 and *N.J.A.C.* 6A:3-6.1; and

Petitioner and respondent having further stipulated to certain facts, including facts reflected in the feasibility study, setting forth that no substantial educational, financial or racial impact will inure to either school district upon severance of the sending receiving relationship; and

The feasibility study having established to the Commissioner's satisfaction that the withdrawal of the Washington Township students from the Lawrence Township High School would cause no substantial negative impact on the educational program of the Lawrence Township High School or on the quality of education received by the pupils in each of the districts; and

The feasibility study having further established to the Commissioner's satisfaction that there will be no substantial negative impact on the financial conditions of petitioner and respondent; and

The feasibility study having further established to the Commissioner's satisfaction that said withdrawal will have no substantial impact on the racial composition of either the proposed high school or the Lawrence Township High School; and

The Commissioner having reviewed and considered the public comments, filed pursuant to *N.J.A.C.* 6A:3-6.1, for and against severance of the sending receiving relationship between the Boards when assessing the educational, financial and racial impact on each district, and having determined that the public comments do not reveal that a substantial financial, educational or racial impact will inure to either district; now therefore

IT IS ORDERED, on this 17th day of October 2001 that, pursuant to *N.J.S.A.* 18A:38-13 and *N.J.A.C.* 6A:3-6.1, the application of the Board of Education of the Township of Washington for severance of its sending-receiving relationship with the Lawrence Township School District beginning in September 2004, and as set forth in paragraph 12 of the petition of appeal, is APPROVED, said severance not to take effect, however, unless and until such time as the Board has received all necessary approvals and constructed its own high school, and, in the opinion of the Mercer County Superintendent of Schools, is actually able to provide programs and facilities for its high school students as anticipated in the feasibility study and petition of appeal; and

IT IS FURTHER ORDERED that, upon review of the cross petition filed by the Lawrence Township Board of Education seeking unconditional termination of the sending receiving relationship between the Boards, and consideration of the parties' suggestion in their Consent Case Management Order to bifurcate this matter in order to first address the petition, while holding open the cross petition for consideration if voter

approval for funding of a high school is not obtained by petitioner by December 11, 2001, the Commissioner, having determined that the cross petition is premature at this juncture, hereby DISMISSES THE CROSS PETITION WITHOUT PREJUDICE to the Board filing a petition in the future should any condition to severance ordered above not occur.

COMMISSIONER OF EDUCATION

Date of Decision: 10|17|01

Date of Mailing: 10|17|01

390-01

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, **(EARLY CHILDHOOD AID APPLICATION),**	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

October 18, 2001

OAL DKT. NO. EDU 04113-99
AGENCY DKT. NO. 42-3/99

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, **(EARLY CHILDHOOD AID APPLICATION),**	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record and notice of withdrawal of the Board's appeal of the rejection of its Early Childhood Plan and concomitant funding request for the 1999-2000 school year, 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

Date of Decision: 10|18|01

Date of Mailing: 10|18|01

391-01

P.E.W., on behalf of minor children,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINWOOD, ATLANTIC COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

October 18, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON MOTION FOR EMERGENT RELIEF
OAL DKT. NO. EDU 6408-01
AGENCY DKT. NO. 385-9/01

P.E.W. o/b/o MINOR CHILDREN,
Petitioner,
v.
CITY OF LINWOOD
BOARD OF EDUCATION,
Respondent.

P.E.W. and C.J.W., *pro se* parents on behalf of minor children

William S. Donio, Esq., for respondent (Donio, Bertmanm & Donio, attorney)

BEFORE **EDGAR R. HOLMES**, ALJ:

The parents of twin fourth graders, a boy and a girl, filed a petition and a request for emergent relief seeking to change the classroom assignment of their children in the Linwood public school. The matter was transmitted to the Office of Administrative Law (OAL) to be heard as a contest the case pursuant to *N.J.S.A.* 52:14B-1 *et seq.* and *N.J.S.A.* 52:14F-1 *et seq.*

The petitioners allege that their children, and in particular their daughter, are placed in a classroom setting which has interrupted their education and caused emotional and physical distress to their daughter. The evidence adduced by the parents was anecdotal and insufficient to

overcome the presumption that the Board acted in good faith. *K.L.L.* 92 *NJAR 2d* 650. The Superintendent appeared by way of affidavit and described the process by which the Board groups its pupils. It did not appear to be an arbitrary or capricious scheme.

Nevertheless, the parents' allegations, especially those which indicate that their daughter suffers daily migraines and other illnesses as a result of her classroom placement, are sufficient to warrant an early return date. Accordingly I **DENY** the parents' request for emergent relief, and I **ORDER** that the matter be set down for a plenary hearing on Friday, the 19th day of October, 2001, at 9 a.m. at the Office of Administrative Law, 1201 Bacharach Boulevard, Atlantic City, New Jersey.

The parties are instructed to provide each other with all materials intended to be presented at the hearing and to comply with the rules for discovery at *N.J.A.C.* 1:1-10.1.

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.

October 11, 2001
DATE

Edgar R. Holmes/RWS
EDGAR R. HOLMES, ALJ

lam

LIST OF WITNESSES

For Petitioners:

P.E.W. and C.J.W.

For Respondent:

Affidavit of Thomas Baruffi

OAL DKT. NO. EDU 6408-01
AGENCY DKT. NO. 385-9/01

P.E.W., on behalf of minor children,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LINWOOD, ATLANTIC 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 (OAL), and the Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner affirms the Order denying emergent relief as he concurs with the ALJ's hearing determination that petitioners have 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 shall move to hearing on its merits, scheduled for October 19, 2001, as directed by the ALJ.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10|18|01

Date of Mailing: 10|18|01

* 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.

A.M. and S.M., on behalf of minor child, M.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

October 18, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER AND RECORD SEALED

ORDER ON MOTION
FOR EMERGENT RELIEF
OAL DKT. NO. EDU 7831-01
AGENCY DKT. NO. 365-9/01

A.M. AND S.M. ON BEHALF OF
MINOR CHILD, M.M.,
Petitioners,
v.
BOARD OF EDUCATION OF LIVINGSTON
TOWNSHIP, ESSEX COUNTY,
Respondent.

David B. Rubin, Esq., and **Joseph D. Pope**, Esq., for petitioners

James J. Rothschild, Jr., Esq., for respondent
(Weiner, Hoenig, Scherer, Skyland & Perrotti, attorneys)

BEFORE **RICHARD McGILL,** ALJ:

A.M. and S.M. filed a petition with the Commissioner of Education seeking relief in regard to the expulsion of their son, M.M., by the Livingston Township Board of Education (respondent). In conjunction with the petition, petitioners filed a motion for emergent relief.

The matter was transmitted to the Office of Administrative Law on September 21, 2001, for determination as a contested case. Oral argument in regard to the motion for emergent relief was conducted on September 26, 2001.

As set forth in *N.J.A.C.* 6A:3-1.6(b), the factors to consider in regard to an application for emergent relief are as follows:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The first consideration is whether petitioner will suffer irreparable harm if the requested relief is not granted. Here, respondent has offered M.M. placement in three other educational institutions including the Interim Alternative Educational Program, the Milton School and Essex High School. In addition, M.M. may apply on or after May 15, 2002, for readmission to Livingston High School for the 2002-2003 academic year. While it is understandable that M.M. and his parents would prefer their local high school, which may well be the better educational institution, it is unlikely that the alternative placement will cause M.M. irreparable harm.

The second consideration is whether the legal right underlying petitioner's claim is settled. It is undisputed that a board of education may not 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 facts in this matter are reasonably clear. M.M. brought homemade explosive devices to school on four occasions. Respondent characterizes the devices as bombs, while petitioners describes them as homemade firecrackers. The devices consisted of CO_2

cartridges, which are approximately three inches in length and a half inch in diameter, filled with powered model rocket fuel, which was to be ignited by a fuse. On the second and third occasions, M.M. attached brads, which are small nails, to the outside of the CO_2 cartridges.

On a weekend in January 2001, M.M. placed the CO_2 cartridge on the back of a vending machine which stood next to an exterior wall of the Mount Pleasant Middle School and lit the fuse. M.M. and others ran around the corner of the school building and heard the device go off. The damage to the vending machine was very limited and evidently went unnoticed at the time. No one else was present in the area.

On a Thursday evening in that same timeframe, M.M. was attending a concert at the school. M.M. went outside with a device and met some friends. M.M. placed the device in the chute for soda cans and lit the fuse. M.M. and the others again ran around the corner of the school building for their own protection and heard the device go off. Any damage to the vending machine again went unnoticed.

On a Saturday afternoon, M.M. returned to the same location and placed the device on the front of the vending machine. M.M. lit the fuse, and he and others ran around the corner of the school building. From that location, they heard the device go off. No one else was in the area, and any damage to the vending machine evidently went unnoticed once again.

On Saturday, February 17, 2001, M.M. and a friend entered the school through an open window. M.M. had another $C0_2$ cartridge taped to his leg and an M&M (the candy) tube containing a used road flair. M.M. and the friend broke into an office and took a set of keys. However, they decided to leave the school without doing any damage or utilizing or placing an explosive device. While in the school, M.M. and his friend set off a silent alarm. When they exited the school through the window, the police apprehended them.

In regard to the explosive devices, their destructive capacity is not clearly established because they were homemade. However, it is known that they did not seriously damage the vending machine. On the other hand, the description of the devices and the fact that M.M. ran

around the corner of the school building after lighting the fuse suggest that the devices were capable of causing personal injury. It is also noteworthy that M.M. took each device to the school. If he had simply wanted to satisfy his curiosity, he could have exploded the devices in an open field.

On February 18, 2001, M.M. was detained at the Essex County Youth Detention Center, where he remained for approximately forty days. Due to M.M.'s small stature and the threats posed by other youths, M.M. had to be placed in protective custody, which consisted of solitary confinement in a cell. On April 3, 2001, M.M. pled guilty to three violations of the New Jersey Criminal Code in regard to the incident on February 17, 2001, and another three counts in regard to the soda machine. As a result, M.M. was adjudicated a delinquent. Shortly thereafter, M.M. was released from the Essex County Youth Detention Center, but he was confined to his home with an ankle bracelet. There were very strict terms including restrictions on contacts with minors. On June 2, 2001, M.M. was permitted to go out in his backyard, and on June 27, 2001, he was allowed to remove the ankle bracelet. In August 2001, M.M. was allowed to attend summer camp in New England. On August 15, 2001, a Superior Court judge placed M.M. on closely-supervised probation known as the Juvenile Intensive Supervision Program.

On September 10, 2001, respondent conducted a hearing to determine whether M.M. should be expelled from school. The determination was to expel M.M. on terms set forth above.

Respondent has a policy, designated Policy #5114, concerning suspensions and expulsions. In accordance with Policy #5114, a student may be suspended or expelled for disruptive behavior including: "F. Willfully causing or attempting to cause substantial damage to school property; ... L. Use or possession of unsafe or illegal articles ...." Policy #5114 further states: "The Board will consider expulsion only if: ...B. The nature of a single act presents such a clear possibility of danger to others that immediate definitive action is indicated."

Petitioners attempt to minimize the danger by describing the devices as homemade firecrackers. In addition, petitioners point to the fact that the expulsion hearing was not held

until six months after the incidents as indication that there was no immediate danger. Further, petitioners rely on expert opinions to the effect that M.M. is not a danger to others.

Petitioners' arguments are unpersuasive. As noted above, indications are that the devices had the capacity to cause personal injury and were both unsafe and illegal. Petitioners' argument concerning the date of the expulsion hearing disregards two important facts. First, M.M. was suspended immediately after the incident on February 17, 2001, and did not return to school during the interim. Second, the expulsion hearing was adjourned several times at petitioners' request, while criminal proceedings against M.M., who was a fourteen-year-old juvenile, ran their course. In regard to the expert opinion that M.M. is not a danger to others, it appears that the Superior Court judge did not accept this view for the disposition of M.M.'s case.

The parties have cited a variety of expulsion cases, but none is very similar to this matter. Respondent's citation to cases involving bomb threats provides the best guidance. Bomb threats have been found to be grounds for expulsion. This indicates that an expulsion under the circumstances of this case is not arbitrary, capricious or unreasonable. Under the circumstances and in view of the facts as set forth above, petitioners have not established that they have a likelihood of prevailing on the merits of the underlying claim.

In regard to the equities and the interests of the parties, it is evident that M.M. has brought this situation on himself through his own serious misconduct. On the other hand, respondent has to be concerned about the safety of the students and others in the schools. Therefore, the equities of the situation clearly favor respondent.

In view of the above, I **CONCLUDE** that emergent relief is not warranted in this case. Accordingly, it is **ORDERED** that the motion for emergent relief 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.

Oct. 4, 2001
DATE

RICHARD McGILL, ALJ

OAL DKT. NO. EDU 7831-01
AGENCY DKT. NO. 365-9/01

A.M. and S.M., on behalf of minor child, M.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The decision and 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 petitioners have 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 shall move to hearing on its merits.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10|18|01

Date of Mailing: 10|18|01

* 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.

394-01

D.M., on behalf of minor child, E.M., P.D., on behalf of minor child, K.D., D.H., on behalf of minor child, L.H. and A.P., on behalf of minor child, D.P.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL SCHOOL DISTRICT, BERGEN COUNTY AND JOHN J. KEENAN,

RESPONDENTS.

S.K.P., on behalf of minor child, K.K. and P.P. on behalf of minor child, L.P.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL SCHOOL DISTRICT, BERGEN COUNTY AND JOHN J. KEENAN,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

October 22, 2001

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING PETITIONS FOR EMERGENCY RELIEF
OAL DKT. No. EDU 7677-01
AGENCY DKT. No. 358-9/01 and
OAL DKT. No. EDU 7708-01
AGENCY DKT. No. 363-9/01
(CONSOLIDATED)

D.M., o/b/o E.M., P.D., o/b/o K.D., D.H., o/b/o L.H., and A.P., o/b/o D.P.,

Petitioners,

v.

BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL SCHOOL DISTRICT AND JOHN J. KEENAN,

Respondents.

S.K.P., o/b/o K.K., and P.P. o/b/o L.P.,

Petitioners,

v.

BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL SCHOOL DISTRICT,

Respondent.

Brian T. Giblin, Esq., for D.M., o/b/o E.M., P.D., o/b/o K.D., D.H., o/b/o L.H., and A.P., o/b/o D.P., petitioners (Giblin & Giblin, attorneys)

Dennis G. Harraka, Esq., for S.K.P., o/b/o K.K., and P.P., o/b/o L.P., petitioners (Ferrara, Turitz, Harraka & Goldberg, attorneys)

James L. Plosia, Jr., Esq., for the Board of Education of the Northern Highlands Regional High School District and John J. Keenan, respondents (Appruzzese, McDermott, Mastro & Murphy, attorneys)

BEFORE **DIANA C. SUKOVICH**, ALJ

PROCEDURAL HISTORY

On September 11, 2001, petitioners D.M., P.D., D.H., and A.P. filed an application for emergent relief with the State Department of Education (DOE) pertinent to action taken by respondents affecting petitioners' respective minor children. The DOE transmitted that matter to the Office of Administrative Law (OAL) on September 12, 2001 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to 13. It was docketed as EDU 7677-01. On September 13, 2001, petitioners S.K.P. and P.P. filed a petition for emergent relief with the DOE, also seeking relief pertinent to action taken by the Northern Highlands Regional School District (District) relative to their respective minor children. The DOE transmitted that matter to the OAL on September 17, 2001 for determination as a contested case, and it was docketed as EDU 7708-01.

Petitioners initially filed briefs and certifications in support of their motions, and respondents filed a brief and certification in response to the petitions on September 18, 2001. Petitioners D.M., P.D., D.H., and A.P. filed additional certifications on September 19, 2001. Oral argument was conducted on the latter date, and the parties were given the opportunity to file additional legal references, as well as additional documents, in support of their positions. The parties subsequently filed additional documents.

NATURE OF THE CASE

The minors in question are all seniors at the District's high school (High School) and, it is reasonable to expect, would have been on the High School's girls' varsity field hockey team during the current school year. Try-outs were conducted during the summer of 2001, and the season commenced in September. By letter dated September 4, 2001, John J. Keenan (Keenan), Principal of the High School, advised petitioners that their respective children were suspended from the field hockey team and prohibited from serving as captains for any other athletic team. Petitioners seek emergent relief, reinstatement to the girls' varsity field hockey team, pending a plenary hearing. Respondents oppose granting emergent relief.

FACTS

Petitioners in OAL Dkt. No. EDU 7677-01 filed certifications of P.D., D.H., and A.P. Respondents filed a certification of Keenan. Based upon a review of the motion papers, including the certifications, as well as the information conveyed during oral argument, it is clear that many of the pertinent facts are not materially in dispute at this time.

The District's constituent municipalities are Allendale and Upper Saddle River. Petitioners are seniors at the High School. Prior to the 2001-2002 school year, the school had three girls' field hockey teams, freshman, junior varsity (JV), and varsity teams. It is reasonable to anticipate that the High School would have had freshmen, JV, and varsity teams during the current school year. Petitioners were all members of the varsity team during prior school years, and, consistent with respondent's practice that seniors who previously were on the varsity team would not be "cut," it is reasonable to anticipate that they would have been on the varsity team during the current school year. There are usually three captains for the teams. It is reasonable to expect that K.K. and P.P. would have been captains.

Petitioners attended a field hockey camp, the East Coast Field Hockey Camp (Hockey Camp), in Estella, Pennsylvania, from on or about July 30, 2001 through August 3, 2001. Students at the High School who would be sophomores during the current school year also attended. A total of 14 incoming seniors and 11 incoming sophomores attended the Camp. Approximately a total of 300 individuals were at the Hockey Camp at the time in question. The Hockey Camp was not affiliated with the High School and was not a school-sponsored activity. Petitioners apparently paid the Camp fee directly to the Camp, and permission slips for attendance were not required by the High School. Katherine Ohnegian (Ohnegian), the girls' field hockey coach, had "some involvement" with planning the trip. It was not, however, an "officially sanctioned" District trip. (Keenan's Certification, par. 5.) No coaches or staff from the High School, nor high school coaches from any other schools, attended. Ohnegian apparently collected money for transportation costs from students. Petitioners, as well as other students from the High School, traveled to the Hockey Camp via bus, a three-hour ride each way.

Keenan certified that on Wednesday, August 29, 2001, administrative personnel began to "hear rumors of improper activities" which had occurred at the camp. A field hockey player "confirmed" to Herb Cohen (Cohen), the High School's Athletic Director, on that date, the details, and personnel thereafter commenced a "preliminary" investigation. (*Id.* at para. 2.) Respondent's personnel received additional "direct information" regarding the matter during the afternoon of August 30, 2001, and Keenan met with Cohen, Vice Principals Joseph Occhino and Frank DeLuise, and Ohnegian during the evening of August 31, 2001, a Friday, regarding the matter. The allegations were that the "seniors" on the field hockey team had engaged in "harassment of a hazing nature" of the incoming sophomores on the team at the Hockey Camp. (*Id.* at par. 3.)

Keenan additionally certified that on September 1, 2001, members of the "Northern Highlands Administrative team" interviewed all but two of the fourteen seniors, in the presence of their parents, who were on the field hockey team, as well as eight of the eleven sophomores who had attended the Hockey Camp, also in the presence of their parents. (*Id.* at par. 4.) Two seniors, including K.K., were not interviewed because their parents were on vacation and unavailable to attend the interview. Those seniors were told that they should have their parents contact the "Administration" as soon as they returned from vacation, and messages were also left on the answering machines of the parents of the two seniors in question, to the effect that they were to contact the school as soon as possible so that interviews could be conducted. None of the parents ever contacted the "Administration". (*Ibid.*)

Keenan also certified that after conducting the interviews on September 1, 2001, High School personnel reached several conclusions. These were that the seniors who had engaged in "hazing" spent approximately $300 on 'hazing' equipment prior to the trip to the Hockey Camp (*Id.* at para. 5b), and that certain "hazing" activities had been engaged in by the incoming seniors, directed at the incoming sophomores, during the bus trips to and from the Hockey Camp, and also at the Camp, as set forth in paragraphs 5e through 5q of Keenan's Certification. A copy of that portion of the Certification is attached herewith as Appendix A for convenience. Respondent's personnel additionally concluded that many of the "events" were videotaped by the seniors and that the videotape was circulated and viewed by both parents and students.

Based upon the information presented by respondents' counsel during oral argument, High School personnel apparently subsequently unsuccessfully attempted to obtain, or view, any such videotape. In addition, personnel also concluded that at least one sophomore became "physically ill" during the bus ride to the Hockey Camp, as a result of the alleged treatment, requiring the bus to stop; that the seniors were "warned by the adults" operating the Hockey Camp on three separate occasions against engaging in "hazing" and that "hazing" is illegal in Pennsylvania; that the "Camp "officials" "threatened" to send the girls home because of their "hazing conduct"; and that "[M]ost of the sophomores were "clearly traumatized" by the incidents in question, and "[M]any of the sophomores and/or their parents expressed a "reluctance or even total inability" for the sophomores to continue playing on the same team as the seniors, (*Id.* at par. 5(r) & (s), and that the seniors' "hazing conduct" continued after the students returned from the Hockey Camp, for example, the seniors "compelled" several freshman field hockey players to "lick chocolate syrup off the chests of male athletes", and seniors made "threatening speeches" to freshmen and sophomore players, warning of "dire consequences" if the latter "said anything about these actions", specifically, that the seniors would make their "lives" 'a living hell' (*Id.* at pars. 5-7).

Keenan additionally certified that the sophomores informed personnel that "all the senior field hockey players were involved, to some degree", in the pertinent activities and that the seniors interviewed "for the most part confirmed the activities and the existence of the videotape, although many denied that they were direct participants." (*Id.* a par. 8.) The "Administration" does not know "precisely which seniors did what in terms of the hazing," but concluded that all of the seniors participated, to some degree, in the activities in question. Apparently, none of the seniors reported the incidents alleged and/or attempted to "prevent or halt the circulation of the videotape in the community." Respondent's personnel also apparently concluded that "many of the seniors falsely denied any participation in these activities despite the unanimity of the sophomores as to the involvement of the seniors and that some of the seniors falsely denied that any of these activities occurred, even when they were questioned about specific activities. (*Id.* at para. 9.) High School personnel determined that "[P]ending the completion of the Administration's investigation," all senior field hockey players should be suspended indefinitely from the field hockey team. (*Id.* at para. 10.)

A meeting was conducted at the High School during the evening, on September 4, 2001, to which the "District" had "invited each and every senior player and their parents". (*Id.* at par. 10.) Apparently, each of the players attended, with at least one parent. Keenan certified that he addressed, in detail, the facts, as viewed by the High School, and distributed an identical letter to all of the girls' parents, advising that all senior field hockey players were suspended permanently for the Fall 2001 season and that they were prohibited from serving as captains for any other athletic team. For convenience, a copy of that form letter is attached herewith as Appendix B.

Keenan certified that personnel determined to impose the same penalty on each senior because they concluded that each had participated in the "hazing activities"; the District received no "exculpatory evidence" from the seniors, or any other source, including, but not limited to, the sophomores; and that personnel had requested that the seniors and/or their parents provide the District with a copy of the videotape in question, and that although the District has information "that the videotape has not been destroyed," none of the seniors, nor their parents, produced the tape. In that respect, Keenan stated in his Certification: " . . . I note from a review of the Petitioners' pleadings that none of the four juvenile appellants deny any of the allegations concerning the above-described conduct." (*Id.* at Para. 11.)

As a result of the suspension of the seniors from the hockey team, the High School has two girls' field hockey teams for the current school year, freshman and varsity teams. The varsity team apparently includes sophomores, although the exact make-ups of the teams are not clear. Apparently, the regular season is scheduled to end in mid-or late October. Previously, there were no sophomores or freshmen on the varsity team.

K.P. stated, in part, in her Certification that she first became aware of any problems related to the Hockey Camp at approximately 8:15 a.m. on September 1, 2001, at which time she was contacted by Cohen, who informed her that there were 'serious allegations' and that her daughter would be interviewed at 9:15 a.m. K.P. went to the High School, arriving at approximately 9:00 a.m. and went to the library, where other parents and two senior girls were present. K.P. also certified that she was not allowed to talk to the parents or her daughter prior to her interview. However, she

attended an interview with her daughter, Keenan, and DeLuise. K.P. additionally certified that she asked Keenan for the basis for his authority to conduct the interview and that he did not provide such; that Keenan asked D.P. questions regarding incidents alleged to have taken place at the Camp and on the buses; that all the questions were "vague" and did not request "specific information" about K.P.'s participation in any of the activities; that he did not ask for the names of those who did participate; and that after the interview was concluded, she was told to leave the building and not talk to the other students or their parents. (K.P.'s Certification, pars. 3-5.) K.P. additionally certified that the following Monday, she was contacted by the varsity field hockey coach in the afternoon and told that Tuesday's practice was canceled and a meeting was scheduled on Tuesday evening; she attended that meeting, but there was no "discussion", only a recitation of 'allegations' by Keenan, who announced that all the senior girls had been suspended from the team and were banned from holding any captain position in any other sport for the remainder of the year; K.P. received a copy of Keenan's September 4, 2001 letter; and D.P. was never advised of any specific allegations of wrongdoing against individual students. (*Id.* at par. 7-9.)

The High School Student-Parent Handbook (Handbook) includes a list of offenses/violations and specified disciplinary actions. Pertinent to "Harassment," discipline for a first offense includes one to three days' suspension, referral to the "Affirmative Action Officer", peer mediation, and a parent conference; for a second offense, three to five days' suspension, referral to the Affirmative Action Officer, peer mediation, and a parent conference; and for a third offense, five days' suspension, a principal's "hearing", and referral to the Affirmative Action Officer. For "Pranks or Prankish Behavior", the disciplinary action is at the discretion of the Administration. The Handbook, pertinent to harassment, references materials on 'sexual harassment'. (Handbook, p. 12.) The Handbook also contains a listing of a "Continuum of Unwanted Sexual and Gender-directed Behavior Patterns". (*Id.* at 18.)

The Handbook also sets forth the "EXPECTATIONS FOR STUDENT ATHLETES" (Expectations), which state, in part, that except for "extraordinary or extenuating circumstances", the coaching staff has certain specified expectations of "youngsters" who are candidates for an interscholastic sport, including comporting

themselves in a manner reflecting "positively" on their family, team, school and themselves. (*Id.* at 36). The Expectations also state the following:

> Please be advised that coaches will handle athletes who do not live up to expectations on an individual basis and that part of the disciplinary process may result in one or more of the following: **The loss of captainship, the loss of a varsity letter, probation or dismissal from an athletic team. Such actions will be reviewed by the Athletic Director before implementation.** (*Ibid.*)

The Handbook generally provides that students are expected to exercise "self-discipline" and to behave in a mature, courteous, and responsible manner at all times and that improper behavior will result in disciplinary action, including, but not limited to, removal or exclusion from participation in student activities. Examples of unacceptable behavior include "disrespectful actions, including harassment, discourtesy, and the use of inappropriate language and gestures directed toward staff or students", "threats, in any form, to harm people or damage property", "disobedience, insubordination, or the use of profanity or abusive language", "pranks, in any form, at any time, and for any purpose", and "demonstrating any other behavior or possessing any item which does or could endanger the health, safety, or welfare of any members of the school community". (*Id.* at 8.)

DISCUSSION

The Commissioner of the DOE (Commissioner) generally has jurisdiction to hear and determine controversies and disputes arising under the school laws. *N.J.S.A.* 18A:6-9. Public schools are required to provide a free education to individuals between the ages of 5 and 25 years, in certain circumstances. *N.J.S.A.* 18A:38-1.

Where the subject matter of a contested case controversy is a particular course of action by a district board of education, or any other parties subject to the Commissioner's jurisdiction, a petitioner may include, by way of separate motion, an application for emergent relief or a stay of the action in question, pending the Commissioner's final decision in the case. *N.J.A.C.* 6A:3-1.6(a). A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief addressing

certain specified standards, to be met for granting such relief. Those standards are as follows:

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying the petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; **and**
>
> 4. Balancing the equities and interests of the parties, petitioner will suffer greater harm than the respondent if the requested relief is not granted.
>
> (*Id.* at § b) (emphasis added)

IRREPARABLE HARM

Counsel for petitioners argued, at oral argument, that petitioners, who apparently intend to attend college subsequent to their graduations, would be irreparably harmed if emergent relief is not granted, in part, because they will not be able to include information regarding participation on the varsity field hockey team, their status as captains, if applicable, possible participation in play-off games after the regular season is over, and, at least in some cases, in relation to applications for sports scholarships. D.M., P.D., D.H., A.P. and K.P. all certified that their children would be harmed if not permitted to play field hockey during the current school year because they would lose their rights to compete, would not "qualify" for "All League, All County, and All State honors", and their children's ability to compete for scholarships would be eliminated. (Certifications, par. 3.) Respondents argue that petitioners have not demonstrated that they have, or will, suffer legally cognizable irreparable harm if emergent relief is not granted.

As petitioners S.K.P. and P.P. note, the Commissioner has long recognized the value to students of participation in extra-curricular activities, also referenced as co-curricular activities, in general. *Smith v. The Paramus BOE*, 1968 *S.L.D.* 62, 64-65. The Commissioner has also noted the importance of interscholastic sports, specifically, to students. *BOE of the City of Camden v. N.J. State Interscholastic Athletic Association*, 92 *N.J.A.R.* 2d (EDU) 182, 189 (*Camden BOE*).

However, as respondents argue, the Commissioner has also repeatedly held that students do not suffer irreparable harm if they are prohibited from participating in extra-curricular activities, including sports activities. *BOE of the City of Trenton v. N.J.S.I.A.A.*, 91 *N.J.A.R.* 2d (EDU) 158 (*Trenton BOE*), *Camden BOE, supra, Elmwood Park BOE v. New Jersey State Interscholastic Athletic Association*, 94 *N.J.A.R.* 2d (EDU) 106 (*Elmwood Park BOE*), *W.M.B. v. Woodbury District Board of Education*, 96 *N.J.A.R.* 2d (EDU) 695 (1996) (*Woodbury BOE*). The Commissioner has "long held", for example, that a prohibition on attending a senior prom does not constitute irreparable harm. *Woodbury BOE, supra* at 696. The "extraordinary remedy" of a stay has not been granted in the context of sports activities, in light of the principle that "participation in sports is a privilege not a right." *Trenton BOE, supra* at 160 (citations omitted). *See also, Camden BOE.*

In addition, although petitioners may not be able to play on the varsity team, the Certifications of petitioners regarding the argued effects of non-participation are conclusionary in nature, and speculative. Petitioners, for example, do not address the specific goals and needs of their children, any information regarding a particular college's admission procedures, whether they have been actively recruited for college teams, whether or not they are on other sports teams, and the effect of such participation on the college admission and scholarship processes. Petitioners' representations and arguments in that respect are not supported by certifications and are similarly conclusionary in nature. Additionally, although prior girls' field hockey varsity teams may have participated in State and County championship tournaments, petitioners do not argue, nor demonstrate, that such participation during the current school year is inevitable or guaranteed.

The Commissioner has held that arguments regarding denial of an opportunity to benefit from college athletic scholarships or education are "merely speculative, at best, and misguided as to the purpose of inter-scholastic sports in the educational process at worst, and are thus dismissed, as being without merit." *City of Camden BOE, supra* at 189. In that case, the Commissioner rejected arguments that a denial of participation in basketball play-offs would deny students exposure to college scouts, potential scholarship offers, and attendance at higher levels of education. *Ibid.* The

Commissioner has also noted that there is "no protectable expectation for any school to participate in championship competition." *Elmwood Park BOE*, *supra* at 109.

Based upon the foregoing, I am persuaded that petitioners have not demonstrated irreparable harm. All four elements of the requirements for emergent relief must be satisfied, and petitioners therefore cannot be granted emergent relief. Notwithstanding, in the interest of administrative efficiency, I will consider the other requirements set forth in *N.J.A.C.* 6A:3-1.6.

STATUS OF UNDERLYING LEGAL RIGHTS AND LIKELIHOOD OF PREVAILING

Consideration of whether petitioners have demonstrated that the legal rights underlying their claims are settled and whether they have demonstrated a likelihood of prevailing on the merits of the underlying claims are interrelated. Petitioners advance several arguments in that respect.

Petitioners D.M., P.D., K.D., and A.P. argue that their children were not given a preliminary hearing, nor a full and proper hearing, prior to being suspended from the varsity team, in violation of *N.J.S.A.* 18A:37-2 and the Fourteenth Amendment to the Constitution; that respondents do not have jurisdiction to impose discipline on them because the alleged incidents occurred at an event which was neither sanctioned nor sponsored by the District; and that respondents violated their own rules and regulations, as set forth in the Handbook, because they did not know the exact degree of any participation by petitioners in the alleged misconduct and did not attempt to differentiate the consequences of such alleged misconduct. Relevant to their arguments regarding the need for a preliminary hearing prior to any suspension, petitioners rely, in part, on *R.R. v. the Board of Education of the Shore Regional High School District*, 109 *N.J. Super.* 337 (Chancery Div. 1970) (*R.R*). Petitioners S.K.P. and P.P. similarly argue that respondents' action were arbitrary and capricious and violated the District's own policies and procedures, as reflected in the Handbook. Although recognizing that a school district may have a right to control participation in extra-curricular activities based on misconduct occurring outside of the school, petitioners, also referencing *R.R.*, argue that there is no evidence that K.K. or L.P. ever comported themselves in such a way, or that they placed any student's physical or emotional safety

in jeopardy. Petitioners S.K.P. and P.P. also cite to the Administrative Guide of the New Jersey Association of School Administrators, which, in part, on its face, summarizes pertinent statutory requirements and related Commissioner decisions. However, such is not determinative of the issues presented. Petitioners also argue that respondents' actions cannot stand because they violated the Handbook, more specifically, the sanctions imposed did not consider facts specific to each petitioner.

Respondents argue that a hearing was not required, that students can be disciplined for conduct occurring outside of school, that respondents' actions were reasonable, and that petitioners have not demonstrated a likelihood of success on the merits or that the law is settled in their favor.

N.J.S.A. 18A:37-2 addresses the conduct which shall constitute good cause for a suspension or expulsion of a pupil from school. *N.J.S.A.* 18A:37-2. That provision, as well as related ones, on their face, address expulsions, suspensions, or removal from school, not participation in extra-curricular activities. *N.J.S.A.* 18A:37-2 to 5 & *N.J.S.A.* 18A:37-7 *et seq.*

A seminal case regarding due process pertinent to students is *Gross v. Lopez*, 419 *U.S.* 565, 95 *S.Ct.*, 729, 42 *L.Ed.* at 2d 725 (1975) (*Gross*). That case involved an appeal by administrators of the Columbus, Ohio, public school system challenging the determination of a federal court that the appellees, high school students, were denied due process, contrary to the Fourteenth Amendment, because they were temporarily suspended without a hearing, neither prior to the suspensions nor within a reasonable time thereafter, and enjoining the administrators to remove all references to the suspensions from their records. State law provided for a free education to all children between the ages of six and twenty-six and empowered principals to suspend a pupil for misconduct for up to ten days or to expel the student, and imposed certain procedural requirements. 42 *L.Ed.* 2d at 730 - 731.

The Court noted that when considering whether due process requirements apply, the "nature" of the interests, not the "weight", must be considered. Although the appellees were "excluded" from school temporarily, the length and consequent severity of a "deprivation", although relevant to determining the appropriate form of a hearing, 'is

not decisive to the basic right' "to a hearing of some kind." " . . . as long as a property deprivation is not *de minimis*, its gravity is irrelevant . . ." to the question of whether account must be taken of the Due Process cause. A ten-day suspension was not *de minimis*. *Id.* at 735-736 (citations omitted). Due process requirements require, at a minimum, that a student facing the possibility of a suspension must be given some type of notice and hearing. In cases involving a suspension of ten days or less, the student must be given oral or written notice of the charges, and, if the student denies them, an explanation of the evidence the authorities have and an opportunity to present his/her "side of the story." *Id.* at 737. (citation omitted). There also should be no delay between the time the notice is given and the time of the hearing. In most cases, however, a disciplinarian may "informally discuss" the misconduct alleged with the student "minutes after it had occurred." *Id.* at 739 (citation omitted.) Generally, the notice and hearing should precede removal, although there are recurring situations in which such cannot be required. *Ibid.* However, the Due Process clause does not require, at hearings regarding a "short suspension", the opportunity to obtain counsel, confront and/or cross-examine witnesses, or call witnesses. *Id.* at 740. The Court made clear that it was considering only "short" suspensions, *i.e.*, those not exceeding ten days. *Id.* at 740.

Gross did not consider limitations on or prohibitions from participation in extra-curricular activities, and courts have subsequently determined that when there is no exclusion from the educational process, there is no constitutionally protectable interest to which due process attaches. *See, e.g., Nevares v. San Marcos Consol. Independent School*, 111 *F.* 3d (5th Cir. 1997), *Casey v. Newport School Committee*, 13 *F.Supp.* 2d 342 (D.R.I. 1998) (*Casey*). *Nevares* involved a challenge by a high school student to a transfer to an alternative educational program. Referencing *Gross*, the court noted that Nevares was " . . . not being denied access to public education . . . ." The court referenced prior decisions holding that there is no protected property interest in a denial by a school to offer a student a particular curriculum, no protected interests in the separate components of an educational process, such as participation in interscholastic activities, and no constitutional right to the particular incidents of education, such as sports, advance placement classes, attending a particular school, or a transfer to a different school for disciplinary reasons. *Id.* at 27. The court in *Casey* noted that the right to a public education " . . . does not include entitlement to particular aspects of the

educational program", nor does it ' . . . necessarily encompass every facet of the educational program.' *Casey, supra* at 246 (citations omitted).

Citing *Gross*, the court in *Glidden v. County of Monroe*, 958 *F.Supp.* 73 (W.D.N.Y. 1997), held that a high school student did not have a protectible property interest in participation in a school marching band, whether such was deemed to be a curricular or extra-curricular activity, although under applicable state law, the student had a legitimate claim of entitlement to a public education. Courts have also held, relevant to sports activities, that the due process requirements of the Fourteenth Amendment do not apply to a one-year prohibition of a high school student from inter-scholastic athletic competition, pursuant to a local rule prohibiting such participation when a student transferred from one school district to another but did not reside in the transferee district with a parent or guardian, *Dallam v. Cumberland Valley School District*, 391 *F. Supp.* 358 (1975); that a student does not have a constitutional right to such "incidents of education" as participation in sports, *Seamons v. Snow*, 84 *F.* 3d. 1226 (10th Cir. 1996); and that college students at a state university who are placed on probation and denied certain school privileges did not assert grievances rising " . . . to the level of the deprivation of a right secured by the Constitution requiring judicial relief." *Sill v. Pennsylvania State University*, 462 *F.* 2d 463 (1972).

Similar results have been reached by courts in New Jersey. In *R.R.*, upon which petitioners rely, the court determined that the possible imposition of a " . . . serious sanction such as suspension or expulsion" mandates procedural due process pursuant to the Fourteenth Amendment. *R.R., supra* at 346 (citations omitted). In *State v. Conk*, 180 *N.J. Super.* 140 (App. Div. 1998), the court, citing *Gross*, noted that the "focus" of *N.J.S.A.* 18A:37-1 to 5 " . . . is to guarantee student discipline and the student's due process rights in proceedings taken by the school administration which could result in the imposition of the serious sanctions of suspension or expulsion." *Id.* at 144 (citation omitted).

As respondents argue, although extra-curricular activities, including inter-scholastic athletics, are an integral part in satisfying the breadth of programs required in public schools in New Jersey, " . . . each pupil does not have a right to participate in inter-scholastic athletics." *Burnside v. N.J.S.I.A.A.* 1984, *S.L.D.* 1677-94, *aff'd* 1984

S.L.D. 1695-1701, unpublished decision (App. Div. November 15, 1984, at 1697, *certif. den.* 101 *N.J.* 236 (1985). Students do not have a federally protected property interest in extra-curricular activities. A suspension from playing a particular sport therefore does not have to comport with due process. *Palmer v. Merluzzi*, 689 *F. Supp.* 400 (*D.N.J.* 1988), *aff'd* 868 *F.* 2d 90 (3rd Cir. 1989).

Commissioner decisions also recognize a distinction between procedural requirements mandated in cases of suspension or exclusion from the educational system and limitations on or exclusion from participation in extra-curricular activities. *See, Kopera v. West Orange Bd. of Education*, 60 *N.J. Super.* 288 (App. Div. 1960). In *Woodbury BOE,* the Commissioner, in determining that the petitioners had not demonstrated a likelihood of success on the merits, stated that: "It is well-settled that the Board's policy concerning participation in its senior events may not be upset unless it can be demonstrated to be patently arbitrary, capricious or unreasonable" and that " . . . the burden of proof that an action was so deficient rests with the person challenging the decision." *Woodbury BOE, supra* at 697 (citations omitted). The Commissioner has similarly noted that participation in inter-scholastic sports has not been deemed to be a constitutional right and that participation in extra-curricular activities does not rise to the level of a property interest protected by procedural due process. *City of Camden BOE*, *supra* at 188. (citations omitted).

Even in cases involving a possible suspension or expulsion, if public school officials have "reasonable cause" to believe that a student, because of activities occurring after school hours and off school premises, presents a danger to himself or others, they may temporarily suspend him/her for a short period of time, pending a "full hearing", but, under ordinary circumstances, must afford a "preliminary hearing." *Id.* at 347. Such preliminary hearing may, however, be "completely informal." The student should be given the opportunity to persuade the authorities that there is a case of "mistaken identify" or another "compelling reason" why he/she should not be suspended pending a full hearing. The nature of a full hearing depends on the circumstances of the case. *R.R., supra* at 348.

Even if Fourteenth Amendment due process requirements are applicable in this case, which petitioners have not demonstrated, petitioners have not demonstrated that

the law is settled or they are likely to prevail regarding any issues pertinent to whether respondents' actions prior to Keenan's September 4 letter met the requirements of a preliminary hearing.

In light of the above, I am persuaded that petitioners have not demonstrated that even if they were not afforded a "hearing" prior to their suspensions, they are likely to prevail on the merits. nor that the law is settled in their favor. Even if due process principles are applicable, hearings to address claims of procedural deficiencies in violation of *Gross* are generally not *de novo* but are intended to review the action in question and the process provided, to determine whether a school district acted in an "arbitrary or capricious manner." The "heavy burden of persuasion" rests with petitioners. *R.W. v. Hunterdon Central Regional High School District Board of Education,* 93 *N.J.A.R.* 2d (EDU) 114, 115.

Arguably, respondents' actions must not have been arbitrary, capricious, or unreasonable. *See, Burnside, supra.* However, petitioners have not demonstrated that they are likely to prevail on the merits in that respect, nor that the law is settled. District personnel spoke with most of the students in question and reached conclusions that all of the seniors had participated, to some extent. Available information regarding the allegations, in particular, that the sophomore students were each assigned to a "Master", arguably support a reasonable basis for concluding participation to some extent by petitioners. Although petitioners may not initially have been advised of all the specifics of the alleged misconduct, Keenan's certification was filed prior to oral argument, and none of the petitioners subsequently filed certifications that they were not involved in any of the alleged incidents of harassment, that such incidents did not occur, that a videotape of any such incidents was made, that students and/or parents viewed the videotape, and that High School personnel unsuccessfully asked to see or view the videotape.

The Handbook's procedures on discipline in general, as well as the requirements specific to participation in sports, on their face, are applicable. In addition, school boards are not required to establish an "exhaustive shopping list of infractions with specified disciplines" when developing a student handbook. It is sufficient to impose discipline if the conduct in question "clearly violated the letter and spirit of school rules."

R.W., supra at 115 (citation omitted). The alleged activities in question, on their face, clearly fall within the general prohibition of unacceptable behavior in the Handbook, as well as the District's policy pertinent to athletics, specifically. The Handbook is consistent with the definitions of exclusion and suspensions as reflected in the pertinent case law. (Handbook, p. 9.)

I am also not persuaded that petitioners have demonstrated that the law regarding discipline for activities or incidents related to matters not occurring on school grounds nor related to officially sanctioned school activities is settled in their favor, nor that they are likely to prevail in that respect. The Commissioner has held that management by local school boards of their schools will not be interfered with except in certain circumstances, such as a violation of the law, dishonest action, or an abuse of discretion in a 'shocking manner.' *A.F. v. BOE of the Township of Holmdel*, Decision on Motion, pp. 919-920 dated June 18, 1991. [1] The Commissioner held in that case that action of a board of education is presumed to be valid and can only be set aside if a petitioner can establish that such action was arbitrary, capricious, or unreasonable. *Id.* at 921.

R.R., upon which petitioners rely, as discussed hereinabove, considered a suspension, not participation in extra-curricular activities. R.R., a high school sophomore on the date in question, subsequent to dismissal from school, went to his home in a neighboring municipality. Finding the door locked and no one home, R.R. went across the street to the home of another individual. A physical altercation thereafter developed. Based upon information obtained from a local police department, and other information, the superintendent of the high school suspended R.R. until the next meeting of the board of education. The school board subsequently decided that R.R. should continue to remain at home pending an investigation and the outcome of the trial. *R.R., supra* at 339-341. The court held that in New Jersey, public school officials are authorized to suspend or expel students for events occurring out of school hours, and for conduct occurring away from school grounds, if such "is reasonably necessary for the student's physical or emotional safety and well-being, or for reasons

[1] This decision was cited by, and a copy was provided by, at this judge's request, petitioners S.P.K. and P.P.

relating to the safety and well-being of other students, teachers or public school property." *Id.* at 344. (citations omitted).

In light of the nature of the alleged incidents of harassment and other activities, including the fact that High School personnel concluded that there was reason to believe students were threatened after their return to school, petitioners have not demonstrated that the safety and well-being, including the emotional or psychological well-being, of other students was not threatened.

For the above reasons, I am also persuaded that petitioners did not demonstrate that the law is settled, or that they are likely to prevail on the merits, *vis-à-vis* their arguments that the actions taken were not individualized to their particular circumstances. In light of Keenan's certification regarding the information available to the High School's personnel, and the fact that petitioners did not demonstrate that due process requirements are applicable, nor that respondents' actions were arbitrary, capricious, or unreasonable, and in light of the nature of the alleged incidents, petitioners did not demonstrate that respondents' actions must be overturned because the same sanction was imposed on each petitioner.

BALANCING OF EQUITIES

Petitioners argue that they will suffer greater harm than will respondents if emergent relief is not granted. Respondents argue to the contrary.

In determining questions of relative harm, the Commissioner has noted that a local board of education " . . . has an important interest in enforcing its policies in order to effectively operate its schools and insure academic achievement." *Parsippany BOE*, *supra* at 697. In addition, as respondents allude, in this case, they are in the position of having to consider the well-being of the freshmen and sophomore field hockey players, as well as the senior players. I am persuaded that petitioners have not demonstrated that a balancing of the equities is in their favor.

CONCLUSION

For the foregoing reasons, I **CONCLUDE** that petitioners' applications for emergent relief should be denied.

ORDER

It is hereby **ORDERED** that petitioners' applications for emergent relief be and are 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.

October 7, 2011
DATE

DIANA C. SUKOVICH, ALJ

\mvh

b. The camp was not an officially sanctioned board of education trip, but field hockey coach Ms. Ohnegian had some involvement with the planning of the trip. No coaches or staff from Northern Highlands attended the trip (nor did any other high school coaches from any other schools attend the camp, which had approximately 300 student campers during the week in question).

c. The seniors who engaged in the hazing spent approximately $300.00 on "hazing equipment" prior to the trip.

d. Many of the events described below were videotaped by the seniors, and the videotape was circulated and viewed by both parents and students in Allendale and Upper Saddle River (the school district's constituent municipalities).

e. Each senior field hockey player acted as a "master" for a sophomore field hockey player for the duration of the trip.

f. The girls went to the camp by way of a three-hour bus ride. During the bus ride sophomores were forced by the seniors to put red hots and hot peppers in their mouths, which were then taped shut for most or all of the three-hour trip. Other sophomore girls were compelled to keep dog bones or bottles in their mouths.

g. At least one sophomore became physically ill during the bus trip as a result of this treatment, requiring the bus to stop on the highway.

h. On the return trip from the camp, four sophomore girls were locked in the bus bathroom for ten minutes or more.

Offices
se, McDermott,
o & Murphy
ional Corporation
idence Boulevard
) B[illegible]2
or: J 07936
8) 58[illegible] 778

i. The senior field hockey players wrote on the tape over the sophomore girls' mouths such things as the following: "I am a pussy licker"; "I blow my father"; "I lick my brother's cock". Several sophomore girls were forced to make such statements on videotape.

j. The bus stopped for a meal break during the trip to Pennsylvania. In a public restaurant during this stop the sophomores were forced to wear dog collars and leashes, smear ketchup on their faces, wear thongs over their pants, and order food by stating to the restaurant workers, "I'll blow you for a free burger" or "I'm a slut give me a cheeseburger".

k. At the camp itself, the sophomores were forced by these seniors to "bob" for pig's feet or have their faces pushed into plates of dog food.

l. Seniors placed eggs in the bras of sophomore players before practices and punched the girls in the chest, sometimes repeatedly, to break the eggs.

m. On videotape sophomores were forced to simulate "giving a blow job" to a banana. This action was done at the specific verbal direction of the senior field hockey players.

n. Sophomores were also videotaped while being interviewed by seniors concerning the sophomores' sexual activities. For example, the sophomores were asked on videotape: "Why haven't you fucked anyone yet"; "Why are you still a virgin"; and were to answer the question on tape. Also on videotaped were sophomore girls showering

Law Offices
Apruzzese, McDermott,
Mastro & Murphy
A Professional Corporation
25 Independence Boulevard
PO Box 112
Liberty Corner, N.J. 07938
(908) 580-1776

in bathing suits; several sophomore girls expressed discomfiture with this activity being videotaped.

o. At the direction of the senior field hockey players, the sophomore field hockey players performed a "fashion show", which consisted of a mock striptease. This activity was also videotaped. During this activity, the seniors told the sophomores that the more clothes they took off, the more likely they were to be spared from other hazing activities.

p. Sophomores were forced to put jelly and marshmallows in their socks, then don their cleats and practice.

q. In addition, the senior girls videotaped the following: seniors, prior to practice, pulled the sophomores' shorts and underwear back and poured syrup down their buttocks. The sophomores thereafter were forced to practice in that condition. Many of the sophomores were particularly upset about having their buttocks filmed.

r. The seniors were warned by the adults operating the camp on three separate occasions against engaging in hazing and that hazing is illegal under the laws of the State of Pennsylvania. The camp officials threatened to send the girls home from the camp due to their hazing conduct.

s. Most of the sophomore girls were clearly traumatized by the incidents described above. Many of the sophomore girls and/or their parents expressed a reluctance or even total inability for the sophomores to continue to play on the same team as the seniors.

APPENDIX B

Northern Highlands Regional High School
HILLSIDE AVENUE
ALLENDALE, NEW JERSEY 07401
PHONE (201) 327-8700 FAX (201) 327-2161
www.northernhighlands.org

JOHN J. KEENAN
Principal

FRANK J. DeLUISE
Assistant Principal

JOSEPH J. OCCHINO
Assistant Principal

HERBERT A. COHEN
Dean of Student Activities
Athletic Director

RONA S. MEYERS
Supervisor of
Pupil Personnel Services

September 4, 2001

Dear Mr. & Mrs.

As you are aware, we have been investigating allegations concerning the behavior of senior field hockey players towards sophomores at a recent field hockey camp. After several days of interviews, consultations, and deliberations, we have concluded the following:

1. The actions taken by the seniors toward the sophomores were demeaning, injurious, unwanted, and totally inappropriate.

2. Several seniors were not honest when questioned by administrators.

3. Given the emotional distress suffered by the sophomore athletes, it is impossible for them to participate as teammates to the seniors.

4. Our school has made many efforts over the past three years to eliminate harassing behaviors. Thus, our senior field hockey players should have been more aware of what is appropriate than their predecessors.

5. Not having been present, we are not aware of the exact degree of participation of the seniors, and as such will not attempt to differentiate consequences.

6. All seniors are permanently suspended from the field hockey team and prohibited from serving as captains for any other athletic team.

We are deeply distressed that our seniors will not be able to participate this season, but we are hopeful that this will bring the matter to a conclusion, and that none of them will face criminal complaints. However, rest assured that any harassment directed at any individual resulting from this incident will become a matter for police involvement.

We know that you will not be happy with our decision, but we hope you understand that it is made in an effort to do what is in the best interest of all of our students.

Sincerely,

19d

OAL DKT. NOS. EDU 7677-01 and EDU 7708-01 (CONSOLIDATED)
AGENCY DKT. NOS. 358-9/01 and 363-9/01

D.M., on behalf of minor child, E.M., P.D., on behalf of minor child, K.D., D.H., on behalf of minor child, L.H. and A.P., on behalf of minor child, D.P.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL SCHOOL DISTRICT, BERGEN COUNTY AND JOHN J. KEENAN,	:	DECISION ON MOTION
RESPONDENTS.	:	

S.K.P., on behalf of minor child, K.K. and P.P. on behalf of minor child, L.P.,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL SCHOOL DISTRICT, BERGEN COUNTY AND JOHN J. KEENAN,	:	
RESPONDENTS.	:	

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 petitioners have 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 shall proceed to hearing on its merits.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10|22|01

Date of Mailing: 10|22|01

* 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.

396-01

R.W., on behalf of minor child, K.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF STERLING HIGH SCHOOL DISTRICT, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

October 24, 2001

OAL DKT. NO. EDU 4519-00
AGENCY DKT. NO. 197-6/00

R.W., on behalf of minor child, K.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF STERLING HIGH SCHOOL DISTRICT, 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.

Maria Kuveitello
ACTING ASSISTANT COMMISSIONER

Date of Decision: 10|24|01

Date of Mailing: 10|24|01

397 -01

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

October 24, 2001

OAL DKT. NO. EDU 2553-00
AGENCY DKT. NO. 89-3/00

M.H., on behalf of minor child, K.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSBOROUGH, 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.

Maria Mucciotti

ACTING ASSISTANT COMMISSIONER

Date of Decision: 10|24|01

Date of Mailing: 10|24|01

398-01

JANET PARHAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
AND	:	
JOAN RICHARDSON,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	
_____	:	

October 24, 2001

OAL DKT. NOS. EDU 03077-00 And EDU 03078-00 (CONSOLIDATED)
AGENCY DKT. NOS. 369-12/99 And 368-12/99

JANET PARHAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
AND	:	
JOAN RICHARDSON,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	
	:	

The record and notice of withdrawal in this consolidated matter 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 consolidated matter is no longer deemed to be a controversy before the Commissioner and is accordingly dismissed.

IT IS SO ORDERED.

ACTING ASSISTANT COMMISSIONER

Date of Decision: 10|24|01

Date of Mailing: 10|24|01

399-01

C.H., on behalf of minor child, R.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

October 24, 2001

OAL DKT. NO. EDU 10380-99
AGENCY DKT NO. 345-11/99

C.H., on behalf of minor child, R.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, 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.

ACTING ASSISTANT COMMISSIONER

Date of Decision: 10|24|01

Date of Mailing: 10|24|01