State of New Jersey
Department of Education
Trenton

NEW JERSEY

SCHOOL LAWS

Enacted during the Legislative Session of 1964

SCHOOL LAW DECISIONS

January 1, 1964, to December 31, 1964

Keep with 1938 Edition of New Jersey School Laws

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DECISIONS RENDERED BY THE STATE BOARD OF EDUCATION, SUPERIOR COURT (APPELLATE DIVISION), SUPREME COURT, AND UNITED STATES DISTRICT COURT OF NEW JERSEY, ON CASES PREVIOUSLY REPORTED

I

In the Matter of the Special School Election Held in the School District of the Borough of Bernardsville, Somerset County

Decision of the Commissioner of Education

The petitioner in this matter, Joseph J. Cirillo, charges that the special referendum held December 3, 1963, in the School District of the Borough of Bernardsville, seeking authorization to issue school bonds in the amount of $1,385,000 for the purpose of constructing additional school facilities, was improperly conducted. He seeks to have its results set aside and declared void. The respondent Board of Education denies any improper or illegal conditions in the conduct of the election.

To determine the facts of this complaint an inquiry, at which all interested parties were permitted to be heard, was held by the Assistant Commissioner in charge of Controversies and Disputes on January 3, 1964, at the office of the Somerset County Superintendent of Schools.

At the inquiry petitioner advanced three contentions: (1) the information released by the Board of Education prior to the referendum was confusing and misleading to the average voter; (2) the brochure prepared by the Board and mailed to voters to inform them about the proposal contained misleading and doubtful facts; and (3) the election procedure was improper and unlawful.

The announced results of the balloting were as follows:

	Yes	*No*
Polling District #1	263	219
Polling District #2	270	202
Civilian Absentee	7	1
Total	540	422

Petitioner's first two allegations of confusing and misleading information appear to rest on newspaper reports, conversations, and comments of individuals and the fact that the cost of the project was increased from the $750,000 figure originally contemplated to the $1,385,000 amount finally put before the electorate. With respect to the brochure, it is charged that although it was entitled "School Referendum Facts," it contained many opinions and predictions.

The Commissioner finds no merit in these two complaints. The inquiry revealed that the Board enlisted the aid of a committee of citizens for the purpose of conducting a telephone canvass inviting members of the community to inspect the existing school facilities. Four such tours, open to any interested person, were arranged. Public meetings on the proposal were scheduled for November 22, 25, and 26, although only one was actually held because of the assassination of President Kennedy which caused the cancellation of the first two. The brochure is similar in form and substance to those generally issued by boards of education in advance of a bond referendum and a careful examination of it reveals nothing that would come within the prohibitions

enunciated in *Citizens, etc., Public Funds* v. *Parsippany-Troy Hills Board of Education*, 13 *N. J.* 172 (1953).

Petitioner asserts that the Board of Education "took the offensive to get support of its proposal" and that such action, if not illegal, is at least unethical. The Commissioner cannot agree. As the New Jersey Supreme Court said in *Citizens, supra*, at page 181, there are limits to "the extent to and manner in which the funds may with justice to the rights of dissenters be expended for espousal of the voters' approval of the body's judgment. Even this the body may do within fair limits." But the Court also pointed out that it is entirely proper for a board to try to obtain approval of its proposal, saying at page 181:

> "We do not mean that the public body formulating the program is otherwise restrained from advocating and espousing its adoption by the voters. Indeed, as in the instant case, when the program represents the body's judgment of what is required in the effective discharge of its responsibility, it is not only the right but perhaps the duty of the body to endeavor to secure the assent of the voters thereto."

In support of his third charge of illegal procedure at the polls, petitioner asserts that there were present at the polling places during the time that they were open for voting, two persons who were not duly appointed challengers and who, therefore, had no right to be there. He contends that their presence interfered with the proper conduct of the election and constituted electioneering in violation of the law.

Respondent's witnesses admit that there were two persons present at both polling places but they deny that they interefered in any way with the conduct of the election, or that they engaged in any activity which could be considered electioneering. It appears that these persons had lists on which they checked off the names of voters as they appeared to cast their ballot. Using these lists, other persons made telephone calls to citizens who had not yet voted. However, several persons who were involved in this charge testified that in no case was a voter approached at the polls, that the calls were made for the sole purpose of urging those who had not yet done so to vote, and that there was no attempt to suggest how any ballot should be marked.

The Commissioner must point out that the challenge made to the school referendum herein and whatever shadow of doubt has been cast upon its validity, results from respondent's failure to give precise and careful attention to the specific requirements for the conduct of school elections. In this case it appears that there would have been no grounds for complaint had the extra persons at the polls been properly designated as challengers. According to the testimony their activities did not go beyond the scope permitted to challengers and any question as to their presence could have been eliminated by appointing them as such, as provided by *R. S.* 18:7–35. Not being appointed challengers they had no authority to be present during the balloting and should not have remained there.

The Commissioner does not find, however, that the presence of these four unauthorized persons at the polls is ground for the voiding of this election. It is clear that they confined their activities to recording those who had voted and that they interfered in no way with those who came to vote or with the

orderly conduct of the election. Nor is there any showing, other than petitioner's speculative assertion, that the results were affected or would have been otherwise had they not been present. Absent such a showing, minor irregularities on the part of the officials in charge are insufficient to set an election aside as was said *In the Matter of the Recount of Ballots Cast at the Annual School Election in the Township of Ocean, Monmouth County*, 1949-50 *S. L. D.* 53:

> "It is well established that irregularities which are not shown to affect the results of an election will not vitiate the election. The following is quoted from 15 *Cyc.* 372, in a decision of the Commissioner in the case of *Mundy* vs. *Board of Education of the Borough of Metuchen*, 1938 *Edition of School Law Decisions, at p.* 194:
>
> > 'Where an election appears to have been fairly and honestly conducted, it will not be invalidated by mere irregularities, which are not shown to have affected the result, for in the absence of fraud the courts are disposed to give effect to elections when possible. And it has been held that gross irregularities when not amounting to fraud do not vitiate an election.'
>
> "The following is quoted from *Hackett* vs. *Mayhew*, 62 *N. J. L.* 481, similarly quoted *In re Canvassers' Returns*, 25 *N. J. L. J.* 115, excerpts from which are found on pages 148 and 149, respectively, of *N. J. S. A. Title* 19:
>
> > 'It was never the legislative intent, nor is it the proper statutory construction, to defeat the vote of the citizen by an act for which he was neither directly nor indirectly responsible, nor for a negligent or willful act of a municipal official, nor for the misconception of any legal duty or form required in the preparation of ballots issued by such an official for distribution to the voters.'"

See also *In re Clee*, 119 *N. J. L.* 310 (*Sup. Ct.* 1938); *In re Smock*, 5 *N. J. Super* 495 (*Law Div.* 1949).

The Commissioner finds and determines that the will of the electorate was fairly expressed and determined at the special school referendum on December 3, 1963, in the School District of the Borough of Bernardsville and that, therefore, the results, approving the proposal, will stand as announced.

COMMISSIONER OF EDUCATION.

January 15, 1964.

II

DISMISSAL OF TENURE EMPLOYEE NOT WARRANTED IF OFFENSE DOES NOT JUSTIFY SUCH A PENALTY

IN THE MATTER OF THE TENURE HEARING OF ALBERT CURTIS, BOROUGH OF EATONTOWN, MONMOUTH COUNTY

For Complainant, Clarkson S. Fisher, Esq.

For Respondent, Vincent J. McCue, Esq.

For Board of Education, Abraham J. Zager, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

This matter is brought before the Commissioner of Education on a certification of charges against Albert Curtis, a janitor in the employ of the School District of the Borough of Eatontown, Monmouth County. The charge was made by Seymour Koteen, father of Marsha Koteen, at the time a twelve-year-old pupil in the Eatontown Memorial School, and was received and considered by the Board of Education at its meeting on March 4, 1963. The Board determined that the charge and the evidence in support of it would be sufficient, if true in fact, to warrant dismissal or a reduction in salary, and directed its secretary to certify such determination to the Commissioner of Education and to serve a written copy of the charge and certification upon Albert Curtis. The said certification was received by the Commissioner of Education on March 14, 1963.

A conference of counsel called for April 30, 1963, for the purpose of determining and scheduling procedures to be followed to dispose of this matter, was postponed until May 21. Counsel for petitioner then moved to dismiss the charges on two counts: (1) that the Commissioner lacked jurisdiction to act since the 60 days' statutory time in which to hold a hearing had elapsed, and (2) that the charges failed to state sufficient grounds upon which a dismissal or suspension could be based. Arguments on the motion were submitted in briefs, and on August 7, 1963, the Commissioner denied petitioner's motion in a written decision. On November 12, 1963, a hearing of the charge was held by the Assistant Commissioner of Education in charge of Controversies and Disputes at the office of the Monmouth County Superintendent of Schools at Freehold, New Jersey.

The charge is made under oath in a letter to the Eatontown Board of Education, as follows:

> "I hereby complain and charge that on December 20, 1962 one Albert A. Curtis, school janitor, committed an improper battery upon the person of my daughter, Marsha Koteen, age 12, on school property.
>
> "I herewith urge the School Board of the Borough of Eatontown to take the proper disciplinary proceedings.
>
> (Signed) SEYMOUR KOTEEN."

The incident complained of occurred on Thursday, December 20, 1962. Marsha Koteen, 12 years old, hereinafter referred to as the pupil, was driven to school that morning by her father, arriving at about 7:30 A. M. She entered the school, looked in the school office and found it empty, waited in the lobby, and then went toward her classroom in the west corridor. During this time she saw no staff members and only two other pupils who, on entering, went to the east wing.

When she reached the west corridor the pupil saw Albert Curtis, the head janitor, hereinafter referred to as the janitor, who was checking conditions in that part of the school. The janitor, 53 years old, had been in the employ of the Eatontown Board since 1955, the last six years as head janitor. When the pupil saw him she put the books she was carrying on the floor, approached and asked him to unlock the door to the classroom so that she could put her books and a doll she had with her in the room for safekeeping while she went to the playground. It was at this point that a physical contact occurred, the improper battery referred to in the complaint, the exact nature of which is in dispute. The testimony with regard to it is conflicting and will be considered in more detail below.

The pupil then retrieved her books and went out to the playground. She reported the incident to no one at the school nor to her parents that day. Asked why, she stated that she didn't think it was the concern of her teacher or principal (Tr. 30, 40), and that her parents were "having a party and the house was full of people." (Tr. 8) She finally told her parents jointly at 6 o'clock on the day following (Tr. 44), which was Friday and the last day of school before the Christmas recess. Her father called the superintendent of schools that same evening and the following morning, on Saturday, the superintendent interviewed the pupil at her home in the presence of her parents. The father also notified the police and it was agreed to let the matter rest until Wednesday morning, December 26, when the janitor was due to return to work. On that day he was interviewed by a detective of the Eatontown Police Department, to whom he made a statement of the incident (Ex. P-1). Later that day he accompanied the detective to Freehold and submitted voluntarily to a lie detector test. No complaint was lodged by the county or municipal authorities.

The superintendent of schools suspended the janitor from his duties and reported the matter to the Board of Education at a budget planning session that same evening. At a subsequent Board of Education meeting on January 7, 1963, the suspension was ratified and extended "pending further study by the Board." (Tr. 119) The matter was considered further at a Board meeting on January 31, 1963, at which the janitor was present. A committee of the Board subsequently met with the pupil and her parents but no further action was taken until the regular Board meeting on March 4 when the charge herein was submitted, received, and certified.

The issue herein depends on what actually occurred in the encounter between the pupil and janitor and whether there was misbehavior of a kind to warrant dismissal.

According to the janitor, the pupil approached him, put both arms around his waist, looked up at him and asked him to open her classroom door. In this position he admits that he put his arm around her shoulders, that as she

continued to coax and said "I love you, Al," he gave her a light kiss on the forehead, and that his hand dropped down her back as she released her hold and turned from him. He admits that his conduct, in putting his arm around her and giving her "a peck on the forehead" (Tr. 78) was not proper but he denies any intention or attempt to touch her improperly or violate her person.

The pupil, on the other hand, testified that she approached the janitor and asked him to open her classroom door. While refusing to do so he put his arm around her shoulders and then, she insisted, he kissed her on the lips and let his hand slide down her back and felt her buttocks. At this point she moved away, retrieved her books and went outside. She admitted that during this encounter she had one arm around his waist because she thought he was being kind (Tr. 30) but she could not be sure as to both arms.

Confronted with this conflicting testimony from the only withnesses to the encounter, the Commissioner must look to such other evidence as will shed light on the matter. A comparison of the sworn statement of the janitor made to the police officials (Exhibit P-1) with his testimony at the hearing, shows agreement in all material respects. The testimony of the pupil, however, differs from other previous accounts ascribed to her in ways which must be noted. She admits relating the incident on separate occasions to her parents, to the superintendent of schools, to a police officer and to a lawyer, but denies that these accounts differed in any respect from her testimony at the hearing.

The superintendent of schools testified that he interviewed the pupil at her home in the presence of her parents and that he made some notes while there which he discarded a week or so later when he wrote a more complete account of the interview. According to the superintendent, the pupil told him that the janitor:

> "* * * came toward her, saying nothing but mumbling and kept approaching her mumbling and as he got close to her he put his arms around her—and I can only use the words that she used with me—kissed her up and down and felt her all over.
>
> "Q. She told you that he kissed her up and down and felt her all over?
>
> "A. Yes.
>
> "Q. Did she tell you anything else that he did?
>
> "A. She said she then broke away from him, that he ran after her, ran or walked after her and grabbed her again and repeated this action and that—
>
> "Q. Wait a minute now. That he ran after her?
>
> "A. He went—he proceeded after her. She broke away from him after this first encounter. He proceeded after her and repeated the act, all the while mumbling.
>
> "Q. Did she tell you what he did in repeating the act?
>
> "A. It was basically the same thing. He kissed her up and down and felt her all over. I mean they were her words.

"Q. Did you ask her how far he had to run to catch her the second time?

"A. No, I didn't ask her. I got the impression that she had broken away from him, taken a few steps and that he proceeded after her again.

"Q. What else did she tell you?

"A. Then when she broke away the second time and left the building and he did not pursue her * * *"

The pupil's father, however, called to testify as a rebuttal witness, stated, without specifying particulars, that the superintendent's testimony as to what the pupil said to him was not entirely correct.

In evidence also is R-1, a statement in the pupil's handwriting in the presence of the police officer when he interviewed her at her home on January 8, 1963, in the presence of her parents. The officer testified that the written statement incorporated everything that was substantially material in his oral interview with the pupil. (Tr. 68) The excerpt of the statement pertinent to the incident is:

> "I walked down the hall to the west wing, Mr. Curtis was working in the halls. I asked if he could open my door (20) but he said no. Then he started talking to me and put his arm around me. I thought he was being kind and I put my arm around him. Then he started feeling me. I tried to get away, I picked up my books and moved swiftly to the front of the school."

Testimony was also elicited on another facet of this matter which occurred prior to the incident in question. It appears that the janitor was accustomed to eat his lunch on the back porch of the school where he was often joined by the mailman. On a number of occasions, when the pupil would be in the same vicinity playing with other girls, she would sit on his knee. He testified that he tried to discourage this practice by getting up and going inside because he feared that it would cause trouble, but finally he had to threaten that if she did not desist he would tell the principal. (Tr. 80) The pupil admits to sitting on the janitor's lap, giving as her reason that she was just "playing a game" (Tr. 37), but she denies that he ever warned her that he would tell the principal.

The Commissioner finds that even if what occurred is limited to the actions admitted by the janitor, his conduct was improper. This is not denied by the janitor himself. Certainly parents have every right to expect that their children will be completely safe from molestation when they are in the custody of school personnel and to protest and bring to light any instance which tends to indicate otherwise.

The Commissioner, however, while finding the janitor in error and without condoning his behavior, is convinced that there was no attempt to molest nor any evil intent. His study of the evidence leads him to the belief that this was not a calculated action but an impulsive one, albeit unwise, whose motivation was paternalistic and innocent of any sexual connotation. Considering the age of the pupil, it is easy to understand how an unintentional brush of the hand, as the two separated, might have been interpreted as a violation of her person. That she is a child must also be taken into account in con-

sidering the slight but significant variances in her several accounts of the incident which are in the record. The details related by her at the hearing were far less dramatic and condemnatory than those ascribed to her by the superintendent of schools, who was positive as to the accuracy of his recollection. As was said in *Palmer* v. *Audubon*, 1939-49 *S. L. D.* 183, at 188:

> "It is the opinion of the Commissioner that testimony of children, * * *, 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.
>
> "To determine the capacity and responsibility of an infant witness is the duty of the trial court. *LoBiondo* v. *Allen*, 132 *N. J. L.* 437."

A consideration of all the factors in this case, including the age and level of understanding of the pupil, the unblemished record of the janitor, the noon time incident preceding this encounter, the actual encounter itself in which the pupil had her arm or arms about the janitor's waist while she looked up at him and coaxed him to grant her a favor, the fact that she reported the occurrence to no one until late the next day, and the absence of evidence that the experience was materially traumatic, leads to the conclusion that this unfortunate incident was impulsive and unwise but not deliberate or evil.

Having reached this conclusion, the Commissioner finds that the offense herein does not warrant so drastic a penalty as dismissal. In the Commissioner's judgment, the stress which this litigation has placed upon the janitor with attendant uncertainty as to his vocational future plus the notoriety which unfortunately attaches to a matter of this kind, have already imposed a severe enough penalty.

The Commissioner finds and determines that the actions of Albert Curtis in respect to a pupil, Marsha Koteen, in an encounter between them on the morning of December 20, 1962, in the Eatontown Memorial School were unwise and improper and constituted conduct unbecoming a janitor in a public school. The Commissioner further finds that the offense was of such a nature as to justify disciplinary action, but that it does not warrant dismissal and that sufficient penalty has already been imposed. He, therefore, directs the Board of Education of the Borough of Eatontown to reinstate Albert Curtis in the position of head janitor from which he has been suspended.

COMMISSIONER OF EDUCATION.

January 17, 1964.

III

PROOF OF INCOMPETENCE AND INEFFICIENCY SUFFICIENT TO WARRANT DISMISSAL OF TENURE TEACHER

IN THE MATTER OF THE TENURE HEARING OF LEO S. HASPEL, BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, MIDDLESEX COUNTY

For the Complainant, Ruttiger & Eichling
(William H. Eichling, Esq., of Counsel)

For the Respondent, Gittleman & Capone
(Harold A. Capone, Esq., of Counsel)

DECISION OF THE COMMISIONER OF EDUCATION

Complainant in this matter seeks the dismissal of a teacher, Leo S. Haspel, hereinafter referred to as the teacher, who has acquired tenure of position in the School District of the Borough of Metuchen. Written charges against the teacher, signed by William J. Nunan, Superintendent of Schools, and Eugene R. Biringer, principal of Metuchen High School, were received and ordered filed by the Metuchen Board of Education at its meeting on March 29, 1963. Pursuant to the Board's resolution, and as provided by *R. S.* 18:3–26 for charges alleging inefficiency, the secretary prepared a notice specifying the nature of the charges and counsel served the teacher with the notice and a copy of the charges on April 1, 1963. Subsequently, on July 2, 1963, the Board of Education adopted a resolution finding that following April 1 the teacher had made no effort to correct and remedy the deficiencies charged, determining that the charges previously filed were sufficient, if true in fact, to warrant the dismissal of the teacher, and directing that the charges be forwarded and so certified to the Commissioner of Education. By the same action, the teacher was ordered served with a copy of the charges, the certification, and the resolution, and was suspended from his employment, without pay, pending determination of the charges. The certification was received by the Commissioner on July 8, 1963.

Pursuant to *R. S.* 18:3–29 a hearing of the charges was commenced on September 5 in the State Department of Education Building, Trenton. At that time the teacher asked for a continuance until he could be represented by counsel. The request was granted and hearings were resumed on October 31, November 20 and 21, 1963, at the City Hall, New Brunswick.

The school laws provide for the tenure of teachers in *R. S.* 18:13–16 and 17, the pertinent excerpts of which read as follows:

> "The services of all teachers, principals, assistant principals, vice-principals, superintendents, assistant superintendents, and such other employees of the public schools as are in positions which require them to hold an appropriate certificate issued by the Board of Examiners, excepting those who are not the holders of proper certificates in full force and effect, shall be during good behavior and efficiency,* * *

"No teacher, principal, superintendent, assistant superintendent or any other employee under the tenure referred to in section 18:13–16 of this Title shall be dismissed or subjected to a reduction of salary in the school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause and after a written charge of the cause or causes has been preferred against him, signed by the person or persons making the same, and filed with the secretary of the board of education having control of the school in which the service is being rendered, and after the charge has been examined into and found true in fact after a hearing conducted in accordance with the Tenure Employees Hearing Act. Charges may be filed by any person, whether a member of the school board or not."

The charges are set forth in paragraphs numbered 1 to 9, each of which will be considered separately before dealing with the complaint as a whole.

Most of the testimony in support of the charges was offered by Dr. William J. Nunan, Mr. Eugene R. Biringer, and Mr. Reno Zinzarella, who occupied different positions in the Metuchen School System during the two academic years covered in the complaint, as follows:

1961-62

Dr. Nunan, principal, Metuchen High School
Mr. Biringer, employed in another school district
Mr. Zinzarella, vice-principal, Metuchen High School

1962-63

Dr. Nunan, superintendent of schools, Metuchen
Mr. Biringer, principal, Metuchen High School
Mr. Zinzarella, vice-principal, Metuchen High School

In the interest of brevity and clarity, regardless of the year in question, Dr. Nunan will be referred to hereinafter as the superintendent, Mr. Biringer as the principal, and Mr. Zinzarella as the vice-principal.

CHARGE #1

"During the school year 1961-1962 and during the school year 1962-1963 the said Leo Haspel failed to follow the directives of the school's principals in carrying out certain routine functions; such functions being (a) failure to attend required special events, these being on November 6, 1961, and March 9, 1962; (b) refusal to complete medical reports on students injured in his classes, as required by state law and school regulation, such being April 23, 1962, and May 8, 1962; (c) allowing students to leave class to go to the lavatory and without passes on an almost daily basis, during 1962-1963 school year; (d) refusing to honor a pass signed by the high school principal's office on December 6, 1962; (e) refusing at close of the 1961-62 school year to submit a detailed annual report to his department head, as required, the subject being junior business training."

For clarity, each of the sub-charges will be recited and considered individually.

"(a) failure to attend required special events, these being on November 6, 1961, and March 9, 1962;"

Testimony on this charge was offered by the vice-principal and the superintendent. On November 6, 1961, in the evening, a school program known as "Back-to-School Night" was scheduled to afford parents an opportunity to visit the classrooms and meet the teachers of their children. Although all faculty members were required to be present, the teacher herein left school at the close of the regular school day and did not return for the evening program. When asked for an explanation the next day, he pleaded illness as his excuse. He testified further that he had not telephoned to notify either of the administrators because he had not wished to disturb them at their homes and that he had told the secretary in the school office before leaving in the afternoon that he was unfit to return that night.

The second occurrence referred to in the charges concerns an "Exhibit Night" on March 9, 1962. All teachers are also required to attend this function, at which pupils' work is displayed and the staff is available to talk with parents. The vice-principal testified that at three separate times during that evening he visited the teacher's classroom and found it unattended. It is not contended that the teacher failed to be present at the school building, but that by not being available in his classroom and by an inadequate display of pupils' work products he had not performed his duties properly. This allegation is denied by the teacher who asserts that he was present and that he remained in his room during the entire evening.

It is clear that the teacher did not attend the program on November 6, 1961, and that he failed to provide adequately for his absence. The Commissioner finds the first part of Charge 1(a) with respect to November 6, 1961, to be true.

The testimony with regard to the night of March 9, 1962, is conflicting. The Commissioner notes also that the charge is "failure to attend" this event. It is admitted that the teacher did attend and the complaint seems to be that he did not participate in the program. The Commissioner finds that the part of Charge 1(a) referring to March 9, 1962, has not been proved and is hereby dismissed.

> "(b) refusal to complete medical reports on students injured in his classes, as required by state law and school regulation, such being April 23, 1962, and May 8, 1962;"

According to the vice-principal, while touring the building during a class period on April 23, 1962, he observed a "trail of blood in the hall," (Tr. 85) which led to the teacher's classroom. He noticed blood on the classroom supply closet and asked the teacher if there had been an accident. The teacher professed ignorance of any such occurrence. At the nurse's station the vice-principal found a pupil being treated for a massive nasal hemorrhage which, according to the boy, resulted from his being struck on the nose by another pupil in the teacher's class. Further interrogation disclosed that the disagreement and the blow had occurred in the classroom.

School regulations require the completion of prescribed accident report forms by those in a position to know the facts. Such forms were sent to the teacher, who returned them with the notation: "(name of pupil) had a nosebleed in class" and the date. The school nurse complained to the superintendent who ordered a second set of forms sent to the teacher and that he

be directed to complete them. The teacher made a similar entry on the second set of forms, leaving incomplete such items as "Cause of Accident" and "Witnesses of Accident." In his testimony the teacher denied any knowledge of a fight in his class and asserted that he completed the forms to the extent of his knowledge.

The second part of the charge relates to an incident involving several pupils on May 8, 1962, in the teacher's classroom. The vice-principal testified that he made an investigation as a result of a boy's complaint to him that his back had been injured in an altercation in the teacher's class that day. It appears that one boy in the classroom threw a piece of chalk at a second boy passing the door in the corridor. The second boy entered the room, attacked as his tormentor a third boy, injuring his back, and then, discovering his error, punched the thrower of the chalk and threw him to the floor. Asked to report on the usual forms, the teacher described the accident and its cause as follows:

> "Accident: (name of first boy) and an unknown student were fighting in room 103. (name of injured boy) claimed that he was in pain (his desk was turned over). I sent for Mr. Zinzarella who took the students out of the room.
>
> "Cause of Accident: I do not know." (Ex. P-20)

In answer to this charge, the teacher stated that he put down everything he knew about the incident and completed the forms as best he could within the extent of his knowledge. Again, in this instance, the actual basis of complaint is not reflected in the language of the charge. Sub-charge 1(b) alleges "refused to complete medical reports * * *." The facts are that the teacher did not refuse to complete the reports but failed to disclose information which the administrators were certain was within his knowledge. As the vice-principal stated "* * * Mr. Haspel was in the classroom at this time, would know this fracas occurred. I cannot conceive of him not knowing the cause of the injuries here." (Tr. 90)

The Commissioner finds that the teacher herein did not refuse to complete the reports required of him, but rather that he did not include therein information which a competent teacher in similar circumstances would have known or discovered. To the extent, therefore, that this sub-charge raises a question of deliberate insubordination, it will be dismissed, but the Commissioner will consider it further as part of a total question of competence.

> "(c) allowing students to leave class to go to the lavatory and without passes on an almost daily basis, during 1962-1963 school year;"

In his testimony the principal stated that, contrary to school regulations, pupils from the teacher's class were permitted to go to the lavatory frequently and did so without being issued a pass by the teacher. He asserted that this was "almost a daily procedure" and that he had actually observed its occurrence a minimum of 30 to 36 times. (Tr. 20, 21) Even after he spoke to the teacher about it, there was no improvement.

The teacher denies these allegations of the principal, saying that he permitted pupils to go to the lavatory without a pass very rarely and only then in an emergency. (Tr. 496) At another time he said: "After April 1st, when

I got the charge, no student left my class without a pass, regardless of how urgent the emergency may have been." (Tr. 434)

The Commissioner's study of the testimony leads him to the conclusion that the weight of the evidence supports the charge. The Commissioner finds, therefore, that sub-charge 1(c) is true.

"(d) refusing to honor a pass signed by the high school principal's office on December 6, 1962;"

This charge concerns an incident on December 6, 1962, when the teacher was on assigned duty at the intersection of two corridors to control the passage of pupils who had finished lunch into the classroom section of the building. One pupil, who had a special assignment in respect to the senior play, presented a pass signed by the principal's secretary authorizing his going to another part of the school. The teacher refused to let him pass, telling him he would have to wait until the end of the period. The boy protested, the teacher enlisted the support of another teacher, and the altercation grew until the boy, over the teacher's objection, sought out the vice-principal and appealed to him. He permitted the boy to go to his destination, and when the teacher protested his lack of support, the vice-principal criticized his refusal to honor a properly executed pass and his judgment in handling the matter.

The Commissioner finds that the weight of the testimony supports the complaint and sub-charge 1(d) is determined to be true.

"(e) refusing at close of the 1961-1962 school year to submit a detailed annual report to his department head, as required, the subject being junior business training."

It appears that on May 14, 1962, the teacher was directed by a department head to submit by the first week in June "a brief summary of the work covered in all your classes during the school year." (Ex. R-2) Although the department head testified in respect to another charge, she was not questioned in respect to this complaint. The vice-principal stated that the teacher failed to submit the report but admitted that his only source of knowledge was the department head's having told him so. The teacher, on the other hand, avers that he had only one class, Junior Business Training, of concern to the department head, that he did prepare a brief report of the work in that class, and that he handed it to the department head at 8 A. M. on June 4.

In evidence as R-2 is the directive from the department head quoted above, and attached to it is a copy of the report which the teacher claims to have submitted. The report was subjected to some attack as to its adequacy as the "detailed" annual report specified in the charges but, as the teacher points out, the directive asks for only a "brief summary." This being so, the Commissioner will offer no comment or evaluation on the merits of the report as such.

The evidence on this charge supports the teacher's claim that he did prepare and submit a report as requested. The Commissioner finds, therefore, that sub-charge 1(e) is not true in fact, and it is dismissed.

The burden of Charge 1 is that the teacher failed to follow the directives of the school's principals in carrying out certain routine functions. Subcharges (b), (e), and part of (a) have been dismissed with respect to the

general charge, leaving (c), (d), and part of (a) in support of it. The Commissioner finds, therefore, that there is some evidence in support the general allegation of Charge 1. He further finds that, considered alone, the proofs in support of this charge are not sufficient to warrant dismissal.

CHARGE #2

"During the school year 1961-1962 and during the school year 1962-1963 the said Leo Haspel failed to keep a satisfactory and up-to-date plan book in accordance with school directives, in that said book showed insufficient materials to be of value to a substitute or supervisor and to the said teacher, his teaching as observed not following the plans therein set forth."

Evidence in support of this charge was offered by the three school administrators. Their testimony was similar, corroborating each other. According to them, the faculty as a whole was well informed with respect to policies and requirements in respect to planning their instructional procedures and use of a plan book. These policies were made known through faculty meetings, sections of the Teachers' Manual (Exs. P-1, P-2), and individual conference. All three testified that they had discussed instructional planning and the inadequacy of his recorded plans with the teacher a number of times. Specific deficiencies were pointed out and numerous suggestions made but without material change or improvement.

In the judgment of the administrators, the teacher's plans were too briefly stated to be useful either to himself, a supervisor, or a substitute teacher. They found a preponderance of the entries to be assignments in terms of pages and problem numbers in a textbook, seat work to be done, or topic headings. Both the superintendent and the vice-principal stated that from their observation even these minimal plans were not followed.

The chairman of the mathematics department, called by the defense, said that he had examined the teacher's plan book two or three times each year (Tr. 384, 390) and found it satisfactory. The teacher testified that the principal had evaluated his plan book in 1962-63 and had attached a note stating "plans seem adequate." At another time, when the principal found fault with his plans, the department chairman had said the criticism was nonsense. (Tr. 438) The teacher further testified that he had complied with requests and suggestions of the administration, putting into his plan book whatever they wanted him to. As an example of such compliance, he stated that he "put the section of the Manual which had these objectives to which he referred in the plan book from that day on." (Tr. 502)

That there are differences of opinion among educators with regard to the use and value of teacher plan books is well known, and this division was indicated to some degree in the testimony. The Commissioner finds no need, however, to express an opinion or comment upon the efficacy of the plan books nor of the way in which they should be kept and used. It is clear that the school administration herein had policies and requirements in respect to plan books about which the faculty was adequately informed. Whether those policies were enlightened, effective, useless, or nonsense was not within the jurisdiction or the competence of the teacher or the chairman of the department

to determine. It goes without saying that the teacher could seek to have these policies modified by appropriate professional procedures, but to choose to ignore or not to comply with reasonable directives must be at his peril.

An examination of the teacher's plan books for the two years in question leaves little doubt as to the merits of this complaint. The daily plans give no suggestion of objectives and purposes, of methods to be employed, of specific problems to be attacked, of individualization of instruction, or of numerous other elements of the teaching process which are involved in effective instruction. Such entries as "students to put homework on board," "exercise 1, page 213 (board work and seat work)," "circles-oral discussion," with which these plan books are replete, and which indicate the nature of the record kept, give little indication of what is involved in the preparation and presentation of an effective period of instruction.

The Commissioner finds that the teacher failed to make and record adequate daily teaching plans in accordance with the policies, directives and standards of the school administration. Charge 2 is determined to be true in fact.

CHARGE #3

"During the school year 1961-62, the said Leo Haspel failed to attend follow-up conferences with the school principal on October 26, 1961, January 9, 1962, and February 5, 1962."

It appears that the faculty in this school is informed by the principal at the beginning of each school year that after he visits a class for the purpose of observing and evaluating, the visit is to be followed by a conference. The initiative in seeking the conference is placed upon the teacher. In this charge, the superintendent, who at the time (1961-62 school year) was high school principal, testified that on three occasions the teacher failed to follow up a visit made to his classroom with a conference. The superintendent also said that he had called this duty to the teacher's attention at the beginning of the year and he had "made many more conferences this particular school year that (sic) he had in the past," (Tr. 196) but that he had missed on the three dates cited in the charge.

In his defense the teacher pointed out that the requirement of a follow-up conference following a visit is waived if the principal speaks to the teacher about his observations at the end of the class. According to him, the principal did so speak to him at the conclusion of his visit on October 6, 1961, and the teacher believed no further follow-up to be necessary.

On the second day cited in the charge, January 9, 1962, the teacher claims he was absent and could not have been observed. With regard to the third school day, February 5, 1962, he testified that he attempted to see the principal and was told he was too busy preparing for a faculty meeting which was to be held at the close of school that day and that he did in fact confer with the principal on the next day, February 6.

The testimony on this charge is conflicting. No proofs were offered by complainants other than the superintendent's statements and no evidence was introduced to refute the teacher's defenses of an end-of-class conference, absence, and a one-day delayed conference. The Commissioner finds, therefore,

that Charge 3 is not supported by the weight of the evidence, and it is dismissed.

CHARGE #4

"During the school year 1961-1962 and during the school year 1962-1963, the said Leo Haspel persisted in using ineffective and inappropriate classroom teaching methods not conducive to stimulating his pupils in independent thought, such methods being characterized among other things by: excessive seat work, inadequate pupil participation, little verbal instruction or demonstration, lack of individualized instruction, little or no use of available visual aids and poor test construction."

All three administrators gave testimony in support of this charge. Each one recited in detail the number and kind of visits made to observe the teacher's work with his classes, what was observed, and the kinds of suggestions, aids, and directives given to the teacher to help him improve his instructional skills and techniques. Supporting the testimony are 22 "Report of Teacher Visitation" records on which are entered the observations of the administrator and his notes of specific points to be discussed with and suggestions made to the teacher. The principal and the vice-principal also stated that many parents and pupils complained to them about the teacher's ineffectiveness and requested transfer to other classes. The principal admitted that the teacher had accused him of being overcritical and prejudicial against him but denied that this was so, saying that he had "a very open mind to Mr. Haspel * * * a definite attitude of trying to help Mr. Haspel," and that his approach with him "was just what it was with every teacher." (Tr. 48, 47)

According to the administrators, the teacher's instruction was characterized by excessive seat work and an absence of pupil participation, explanation, demonstration, discussion and questioning, and use of visual aids. In the words of the principal, the teaching was "very ineffective, very inappropriate to the situation. Ninety some per cent of his classroom time was devoted to seat work, whereupon he would put the pages of the work on the blackboard for the students and, after one or two minutes of explanation, the students would begin to work at their seats for the period. This was a typical situation as far as I could see, throughout the entire year." (Tr. 37, 38)

Even after having been notified formally of his deficiencies by service upon him of the charges herein, the teacher made no appreciable progress in the elimination of them. The testimony of all three administrators, their observation reports, and other exhibits reveal that although there were one or two instances of teaching which gave promise after April 1, 1963, they were brief and isolated and that generally the teaching remained at the same unacceptably low standard. The principal's annual evaluation report to the superintendent dated June 20, 1963 (Ex. P-18) concludes: "I have seen little or not (sic) change in Mr. Haspel's teaching to indicate that he has made an effort to correct the defiiciencies noted."

Finally, when asked to compare this teacher's competence with that of other members of the staff, each of the administrators rated him poorest. In the words of the principal this teacher "by far has been the worst example of classroom teacher in all my supervisory experience * * *." (Tr. 60) The vice-principal stated that the teacher "was, in my judgment, the poorest

teacher that we had on the staff * * *." (Tr. 113) Similarly the superintendent said, "It's the poorest example of teaching that I have observed in the Metuchen School System." (Tr. 211)

The teacher countered this testimony with a general denial. He asserted that he had responded to the criticisms and suggestions made and that whatever he had been asked or told to do he had done. He denied that he used seat work techniques excessively and expressed the belief that his pupils had made good progress under his tutelage. He attacked the validity of the evaluations made in terms of actual clock hours spent in observing his teaching and raised as a defense the fact that he was assigned classes of less able pupils in a make-shift classroom. In answer to this the vice-principal testified that the new faculty member who had replaced the teacher has been teaching the same pupils in the same classroom and "doing a very fine job." (Tr. 339)

The evidence in support of this charge is conclusive. It is clear that the administration had reason to be concerned with the quality of this teacher's instruction and that they tried in many ways to help him improve.

It is likewise clear that despite the warning given by service of these charges, and the opportunity afforded to raise the standard of his performances, there was little or no improvement in the quality of his teaching for the balance of the school year.

The insinuation that the efforts of his superiors to help him were more harassment than help the Commissioner finds to be unfounded. Nor does he find merit in the suggestion that a proper evaluation could not be made on the basis of the total number of minutes spent by the administrators in classroom observation. Although the fact seems to be a mystery to many teachers, it is true that a qualified supervisor does not have to observe for hours of time nor for full class periods, in order to arrive at sound judgments of the quality of the teaching-learning situation. In this case the Commissioner finds that the administrators were aware of the teacher's lack of understanding of the teaching-learning process, that they attempted in ways which were appropriate to help him, that he failed to improve to any significant degree, and that the description of the teacher's classroom techniques are those characteristic of instruction which is sterile and unproductive.

The Commissioner finds that the evidence supports Charge 4 conclusively.

CHARGE #5

"During the school year 1961-1962 and during the school year 1962-1963, the said Leo Haspel failed to maintain adequate discipline on the following dates: October 11 and 31, 1961; November 13, 16 and 20, 1961; January 23, 29 and 30, 1962; February 6, 9, 14 and 28, 1962; March 1, 6, 9, 12, 13, 14, 16, 19, 23, 26, 27, 28, 29 and 30, 1962; April 2, 3, 9, 11, 12 and 23, 1962; May 3, 4, 8, 9, 10, 15, 17 and 22, 1962; June 1, 4, 5, 6, 7, 11, 12, 13 and 14, 1962; September 11 and 27, 1962; October 26, and 31, 1962; November 1, 1962; December 10 and 13, 1962; January 15, 16, 29 and 30, 1963; February 1, 7, 19, 21, 26 and 27, 1963; and March 8 and 28, 1963."

The evidence in support of this charge is repetitive and cumulative. Most of it was introduced through the testimony of the vice-principal who had the

major responsibility for pupil discipline. According to him the teacher had great difficulty in controlling his classes and resorted to sending pupils to the office excessively. He complained that pupils were sent without passes at times and almost always without any helpful explanation of the nature of the infraction which could be used in dealing with the offender. The most common statement accompanying the pupil was "disrupts the class." There was testimony also in regard to the teacher's inability to control the study hall to which he was assigned. On several occasions, the teacher had to send for one of the administrators in order to restore order in the study hall.

Introduced into evidence were more than 70 exhibits (P-25—97) supporting this charge of poor discipline. Most of the exhibits are pupil passes with the date, time, class, and name of the pupil, followed by some such phrase as "disrupts the class." The disciplinary problems represented by these exhibits occurred on 49 different days in the period from October 1961 to June 1962 and on 19 days from September 1962 to March 1963. They also represent a total of more than 150 pupil referrals from the teacher's classes to the office in this period of time.

An example of the kind of problem presented is found in Exhibit P-45, which consists of 9 pupil passes of the kind described above, attached to a memorandum dated March 16, 1962, signed by the vice-principal. The memorandum reads as follows:

> "During the 9th period Mr. Haspel sent 7 boys to the office for disturbing the class. I escorted the boys to Mr. Haspel's room and found the class in disorder. I told Mr. Haspel the office was completely filled and that these boys would receive demerits and he should proceed with the class. I remained in the class for approximately ten minutes and the class was disrespectful to him. They resented the lesson he was giving them on algebra equations on work sheets. The class remained in order as long as I was there, but about ten minutes after I left Mr. Haspel sent three more boys down to the office. They complained that they had not been prepared to do the assignment he gave them and when they asked questions about the assignment he sent them to the office for disturbing the class.
>
> "Plus 7 from another class."

It appears that there was an abrupt cessation of pupil referrals to the office after the charges herein were served. It might be assumed from this that the teacher's discipline problem was swiftly corrected but the evidence does not so indicate. Although not so obvious after April 1, 1963, the reports of the supervisors reveal that classes continued to be unruly.

The teacher's defense to this charge rests to some extent on explanations of the background or causes of a few of the incidents cited, which, in his opinion, justified their occurrence. For the most part, however, he contends that his difficulties in controlling pupils were directly related to the kind of pupils he was assigned to teach. He argues that his classes were comprised of pupils who were academically less able, less motivated to learn, that they were more difficult to control and that most of those he had trouble with had been suspended or punished in other drastic ways many times.

The Commissioner recognizes close ties between this charge and the preceding one. Poor discipline is most often rooted in poor teaching. Having found the charge of poor teaching to be true, indiscipline would be an expected concomitant. Youth who are unchallenged, bored with stereotyped and unimaginative routines which to them have little meaning and no purpose, quickly lose respect for and rebel against the person who provides such leadership.

The Commissioner holds also that it is specious to seek to excuse poor discipline on the grounds that the children are less able and therefore more unmanageable. Competent teachers create a climate for learning which interests and motivates the members of the particular group being taught. Lack of discipline is the inevitable result of poor teaching whether the group be of high or low scholastic aptitude, and conversely, pupil self-control is a by-product of good teaching.

In this case, the continuing number of instances in which pupils were sent from the classroom to the office for disciplinary purposes indicates a lack of competency which no excuse can justify. The Commissioner finds, therefore, that there is abundant evidence in support of Charge 5.

CHARGE #6

"That on November 16, 1962, the said Leo Haspel left school during the ninth period, without permission, and did not return that day, in contravention of school and district rules and directives."

The only witness to this charge was the principal, who alleged that on Friday, November 16, 1962, during the final period, he observed the teacher leave the school premises with his briefcase, presumably on the way home. Because teachers are required to have authorization to leave early, the principal made inquiries of the vice-principal and the secretaries, none of whom knew of any request for or granting of such permission.

The teacher denies that he left school early on the date in question or at any other time without prior authorization.

This charge is minor and out of the present context would be hardly worth mentioning. To have left school not more than 45 minutes early on one Friday seems hardly a serious dereliction. The evidence also discloses that the teacher had not made excessive requests for early leaving and that his attendance record was good and he was always punctual.

In the Commissioner's opinion the evidence educed in support of this complaint is insufficient. Charge 6 is dismissed.

CHARGE #7

"That after numerous conferences with supervisors, wherein specific suggestions and directives were made to improve his teaching procedures, that said teacher failed to comply with such suggestions."

The matter of this charge overlaps and reinforces that of Charge 4. Each of the three administrators testified that although they tried to help the teacher improve his classroom skills and made specific suggestions in regard thereto, there was no noticeable attempt to change nor did any material improvement result. A number of instances were recited by each of the administrators, all

of whom said that the quality of the teacher's performance remained poor. The superintendent, after testifying that he found no compliance with his suggestions for improvement and that the teaching performance persisted at the same low level, made the following observations: (Tr. 221, 222)

"Q. Had Mr. Haspel complied with suggestions that you had previously made to him, would there have been any change?

"A. I am sure that if he had put into operation some of these recognized variations in teaching techniques that the situation could have been considerably improved. I think whenever we vary our techniques and adjust our methods to involve all the youngsters, regardless of ability, they become interested in the work and you find a considerable change in the learning which takes place and I think you also find an improvement in the general decorum of the room. I don't think it is necessary to work for discipline at any time when the learning activity is meaningful and the students understand what they are doing and they see some reason in their activity when they can do the work, when they are interested in it. I made this observation as a result of my visits to all the teachers in the school system. Discipline is not a factor with ninety-nine per cent of the faculty. I don't mean that any faculty member might not have one student during the year or two students during the year with whom they have to have help. I'm talking about general discipline problems involving 8 or 10 or 12 youngsters and a thing which becomes almost a daily situation. And I attribute this, through my observations, to the meaningful activities which are going on in these classrooms. These are not teachers who are even thinking about discipline. There is simply so much going on that is interesting, they simply don't have time to get into trouble.

"Q. During the 1962-1963 school year did you make specific suggestions to Mr. Haspel to improve his teaching procedures?

"A. Yes, I did.

"Q. To your knowledge did he follow these suggestions, as you observed?

"A. No, he did not, * * *."

In addition, the teacher complains that the evaluations made of his work were extremely unfair and cites his self-evaluation as a true picture of his ability as a teacher saying:

"* * * This is my evaluation of myself. This was the way I rated myself. Outstanding in almost every category. That, in my opinion, is an honest evaluation of me." (Tr. 565)

The self-evaluation referred to is dated March 8, 1963, and is attached to an evaluation made by the principal and submitted by complainants as Exhibit P-110. A comparison of the ratings made by the principal and those made by the teacher of himself show the following:

	Number of Characteristics Marked	
	By the Principal	*By the Teacher*
Outstanding	0	19
Desirable	1	1
Acceptable	7½	0
Questionable	3	0
Unsatisfactory	8½	0

During the course of this hearing it became apparent that the teacher's concept of teaching and the teacher's role in the learning process is an extremely limited one. Because of his restricted understanding it is not only possible but probable that he was unable to accept the criticisms made or to grasp the meaning of the suggestions offered. This observation is made not to excuse his deficiencies but as seemingly the only way to account for his failure to remedy his shortcomings, his feelings of prejudice and persecution, and his self-concept as a master teacher.

The Commissioner finds the evidence supports Charge 7, and it is determined to be true in fact.

CHARGE #8

"That on or about October 29, 1962, the said Leo Haspel refused to participate in a program of teacher training with two student teachers from Montclair, as directed."

Compared to charges 4, 5, and 7, the subject matter of this complaint is relatively unimportant. It appears that a student teacher requested opportunity to observe a class in business mathematics. The only class in this subject was one taught by the teacher charged herein. According to the department head, when the student teacher asked if she could visit that class the teacher replied that he had a full class and no room for a visitor and he refused to admit her. Other testimony elicited the fact that the class in question was not over-crowded and there were vacant seats available.

The teacher denies the remark attributed to him that there was a lack of room in his class. He admits denying the observation requested but says that he knew nothing about student teachers being present, that she appeared to be a pupil and he thought it was some sort of prank.

The evidence falls short of the complaint as expressed in the charge. The allegation is that the teacher "refused to participate in a program of teacher training with two student teachers * * *, as directed." No proofs were offered to show that the teacher knew that the request was a part of a program of teacher training, or that there was more than one student involved, or that he was in any way directed to participate by his supervisors. The Commissioner finds, therefore, that Charge 8 is not supported by the evidence and it is dismissed.

CHARGE #9

"That on March 25, 1963, the said Leo Haspel refused to submit a report on his area of mathematics to the curricular study committee as requested by the chairman of the high school division of such committee."

The evidence reveals that the teacher did at one time refuse to submit the report in question to the appropriate committee chairman, but that he did submit it later. In January 1963, when requested to prepare a report on the course in General Mathematics by the chairman of a curriculum study committee, the teacher refused and again refused a second request in February. When his failure to cooperate was brought to the attention of the principal and he was advised to prepare the report he did so, submitting it on March 20.

Although submitted, the chairman complained that it came unreasonably late for her to include it in her final report to the superintendent on March 25.

The teacher contends that he did prepare and submit the report before the March 25 deadline. He excuses his earlier refusals by saying that the chairman had volunteered to serve on the curriculum committee and that being so he thought she should write the report rather than assign it to other teachers. When he learned that her assignment of parts of the report to other teachers had the administration's approval, he complied.

While this is a relatively minor incident, it is revelatory of the teacher's attitude toward the school and his responsibilities to it. Although he finds that the teacher did not refuse to submit the report referred to on March 25, 1963, the said report having already been delivered on March 20, and the charge, therefore, is not true, the Commissioner does not condone or approve the uncooperative spirit of the teacher as revealed in the testimony on this charge. Charge 9 is dismissed.

Having considered each of the charges separately, the Commissioner has determined that the evidence educed fails to support Charges 1 (in part), 3, 6, 8, and 9, and they will be dismissed. There remains Charges 1 (in part), 2, 4, 5, and 7, which have been found to be true. The next question to be answered is whether these charges, either separately or considered together, warrant dismissal.

The answer must be in the affirmative. In the Commissioner's judgment Charges 4 and 5 alone constitute a sufficiently serious indictment of the teacher's services to warrant dismissal. The addition of the other complaints only serves to strengthen the judgment that this teacher has forfeited the right to continued employment in this school system.

Public schools exist not to provide jobs for adults but to educate children. The tenure laws themselves support this principle as the Legislature in its enactment and the courts in their interpretation have recognized. Thus it is that teacher tenure has been held to be a matter of legislative status and not one of personal privilege, enacted primarily for the benefit of children in the schools. See *Vroom* v. *Board of Education of Bayonne*, 79 *N. J. L.* 46 (*Sup. Ct.* 1909); *Phelps* v. *State Board of Education*, 115 *N. J. L.* 310, 314 (*Sup. Ct.* 1935), affirmed 116 *N. J. L.* 412 (*E. & A.* 1936), affirmed 300 *U. S.* 319, 81 *L. Ed.* 674 (1937); *Greenway* v. *Board of Education of Camden*, 129 *N. J. L.* 46, 49 (*Sup. Ct.* 1942), affirmed *Ibid.* 461 (*E. & A.* 1943); *Offhouse* v. *State Board of Education*, 131 *N. J. L.* 391, 396 (*Sup. Ct.* 1944), appeal dismissed 323 *U. S.* 667, 65 *S. Ct.* 68, 89 *L. Ed.* 542 (1944); *Thorp* v. *Board of Trustees of Schools for Industrial Education*, 6 *N. J.* 498, 506, (1951); *Zimmerman* v. *Board of Education of Newark*, 38 *N. J.* 65, 71 (1962). Faced with a choice between the right of a teacher to be employed and the right of pupils to a good education, the decision must always be in favor of the children. Tenure laws for school personnel were not designed to be used as a cloak to hide inefficiency or shield incompetence.

> "The tenure of office statute was not intended to prevent district boards of education from dismissing incumbents of positions in school systems whose conduct is fairly found to be such as to injuriously affect its proper functioning or the maintenance of the required standards of instruction

or discipline." *Cook* v. *Board of Education of Plainfield*, 1939-49 *S. L. D.* 177, affirmed State Board of Education, 180 at 182.

Inefficiency and incompetence of the teacher are clearly demonstrated in this case. The examples of ineffective teaching methods, inability to control pupil behavior, and lack of cooperation with the school administration and staff over the last two years of time, plus his unwillingness or inability to correct his deficiencies after notice was served on him, provide incontrovertible evidence of unfitness to continue as a teacher in this school system. As the Supreme Court said in *Redcay* v. *State Board of Education*, 130 *N. J. L.* 369, 371 (*Sup. Ct.* 1943), affirmed 131 *N. J. L.* 326:

> "* * * Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it also might be shown by many incidents."

and also at page 370:

> "* * * The school system is a service rendered to those who must attend school. The system cannot function except by the services of capable and efficient principals and teachers."

Finally, the Commissioner finds no evidence of bias or prejudice toward this teacher by his superiors or of efforts to force him out of the school system by pressure and harassment. Part of the teacher's defense is that these administrators were biased against him and "ganged-up" to get rid of him. In the Commissioner's opinion the testimony supports an entirely opposite point of view: that the administration attempted in appropriate ways and over a considerable span of time to help this staff member, and only when their efforts were fruitless did they seek to dismiss him for the welfare of the school system.

The Commissioner finds and determines that the evidence offered in support of the charges against Leo S. Haspel results in a clear showing of incompetence and inefficiency as a teacher in the Metuchen High School sufficient to warrant his dismissal by the Board of Education of the School District of the Borough of Metuchen.

COMMISSIONER OF EDUCATION.

January 20, 1964.

Affirmed by State Board of Education without written opinion, October 7, 1964.

Pending before Superior Court, Appellate Division.

IV

TENURE HEARING CHARGES, EVEN IF TRUE, MAY BE DISMISSED FOR INSUFFICIENCY

In the Matter of the Tenure Hearing of Marion A. Dix, Borough of Bogota, Bergen County

On Motion to Dismiss

Decision of the Commissioner of Education

For the Complainant, William DeLorenzo, Esq.

For the Respondent, Joseph A. Fitzpatrick, Esq.

Written charges against the respondent, a teacher under tenure in the Bogota school system, were filed with the Board of Education of that district by the superintendent and read at a meeting of the Board on September 10, 1963. At that time the Board adopted a resolution, pursuant to the provisions of the Tenure Employees Hearing Act, *R. S.* 18:3–23 *et seq.*, certifying to the Commissioner its determination that the charges would be sufficient, if true in fact, to warrant dismissal or a reduction in the salary of the teacher, and ordering that a copy of the charges and the resolution be served upon the respondent. It was further ordered that respondent be suspended without pay pending determination of the charges.

A hearing on the charges was conducted by the Assistant Commissioner in charge of Controversies and Disputes at the Bergen County Court House, Hackensack, on November 4, 1963. At the conclusion of the presentation of testimony in support of the charges, counsel for respondent moved for their dismissal on the grounds that they are not sufficient, even though admitted, to warrant dismissal or a reduction of salary. It is to this motion that the Commissioner here addresses himself.

The charges are three in number. The Commissioner will consider each of them separately and in the aggregate.

CHARGE #1

"That Marion Dix did lie to her superior, Robert Pollison, in his capacity of principal of Bogota High School on March 27, 1963 by stating to him that she had called Dr. Harold A. Zintel, whom she had been requested to contact on the day previous, and that Dr. Zintel had said that 'Dixie, there is nothing wrong with you physically or mentally', when in fact she had not even contacted Dr. Zintel."

In support of this charge, testimony was heard from the superintendent, the principal of the High School, and the chairman of the business education department, in which the respondent had been employed for more than 20

years. On the basis of observations that indicated to them that respondent's effectiveness as a teacher had declined over the preceding several months, they met with her, apparently on March 26, 1963, to discuss her work. A suggestion was made to her that the cause of the change in her teaching effectiveness was a "condition of emotionality" (Tr. 61), and it was recommended that she see her family doctor. On the following day she reported to the principal that "she had called her doctor and he said, 'Dixie, there is nothing wrong with you mentally or physically.'" (Tr. 50) The superintendent doubted this statement and called the doctor. On March 28 the superintendent confronted respondent about her report to the principal and asked her directly if she had seen her doctor. She admitted that she had not, adding, "I'll do anything you want me to do. What do you want me to do?" (Tr. 64)

In her answer to this charge, respondent admits that she had given such a report to the principal, but states that she had been examined by this doctor on September 4, 1962, and submits with her Answer a letter from him (Schedule A, as stipulated) to that effect.

The Commissioner finds Charge #1 to be true in fact. However, he determines that this charge would not of itself warrant dismissal or reduction in salary. The Commissioner does not condone deception by a teacher to her supervisors and administrators. On the other hand, whether respondent had or had not followed merely a recommendation, however well intended, that she consult her family physician would not of itself provide grounds on which she could be deprived of her tenure rights. Consequently her false report, even though morally and professionally wrong, cannot be burdened with so serious a consequence.

CHARGE #2

> "That Marion Dix did fail and/or refuse to immediately contact Dr. Adolpho Zier to make an appointment with him for a psychiatric evaluation as she was directed to do by her superior, Dr. Edward F. Donahue, in his capacity as Superintendent of Schools, with the authorization of the Board of Education, by letter of April 5, 1963, which Marion Dix did consent to do on that date."

Following the incident set forth in Charge #1, the superintendent reported to the Board, and he was "authorized" at an executive session (Tr. 65) to direct respondent "to immediately receive a psychiatric evaluation" which was to be filed with him. His letter to her (Schedule B of respondent's Answer, as stipulated) closes with these paragraphs:

> "Arrangements have been made with Dr. Adolpho Zier, 174 Hillside Avenue, Teaneck, to make this evaluation at the expense of the Board of Education. Please contact him immediately for an appointment.
>
> "Unless your continuance as a teacher is recommended by me to the Board of Education prior to May 1, 1963 based upon a satisfactory report from Dr. Zier, I shall be forced to suggest that the Board of Education discontinue your services as a teacher at the close of this school year. I would regret this action very much."

Respondent does not deny that she did not immediately contact Dr. Zier for an appointment. In fact, the superintendent testified that he made an appointment on her behalf for April 9, which she did not keep, having left school before closing that day claiming that she was ill. (Tr. 66, 67) Another appointment was made for her, but on May 7, before the appointed time, her attorney wrote to the superintendent that his client "has no intention of accepting the gratuitous invitation contained in your letter that she receive a psychiatric evaluation." (Ex. P-2) Meanwhile, at the request of respondent's family doctor, another psychiatrist made an evaluation of her, but lacking respondent's authorization, made no report of his findings to the Board (Schedule D of Answer, as stipulated).

The real burden of Charge #2 is that respondent failed and/or refused "to immediately contact" Dr. Zier for an appointment, as she had consented to do, and the Commissioner finds this charge true. However, it is obvious to the Commissioner that the emphasis here is on the word "immediately." Otherwise, he is at a loss to understand—and there was no explanation offered in the testimony—why the superintendent *himself* should have made the first appointment for April 9, only four days, including a week-end, after delivery of his letter to her on April 5. Even assuming, but not deciding, that the directive had legal validity, having had its background in an unofficial meeting of the Board, the Commissioner will not find in respondent's failure or refusal to act almost *instantaneously* so serious a dereliction as to warrant loss of tenure rights.

CHARGE #3

> "That Marion Dix did fail to keep an appointment for a psychiatric examination with Dr. Adolpho Zier on May 28, 1963, which appointment had been made pursuant to a direction of the Board of Education by its resolution at a Special Meeting held on May 22, 1963."

On May 22, 1963, having received no report of a psychiatric evaluation by Dr. Zier, the Board of Education at a special meeting adopted a resolution requiring and directing respondent to submit to psychiatric evaluation by Dr. Zier, at Board expense, commencing on May 28 and continuing at such other times as the doctor might set appointments. In the same resolution the Board suspended respondent with pay, beginning with the close of school on May 23 and continuing until such time as the Board had received and reviewed the psychiatric evaluation, but in no event beyond June 30, 1963.

The authority given to a board of education to direct a teacher to submit to individual examination is contained in *R. S.* 18:5–50.5, the pertinent parts of which read as follows:

> "* * * In addition to the routine examination of all employees as provided in this act, the board of education may require the individual examination of an employee whenever in its judgment such employee shows evidence of deviation from normal physical or mental health.
>
> * * *
>
> "The cost of examinations, laboratory tests, or X-ray procedures may be borne by the board of education when made by a physician or institution designated by the board. In lieu of the examination by such au-

thority with payment by the board, an employee may be examined at his own expense by a physician or institution of his own choosing; provided, that such physician or institution shall be approved by the board of education.

"If the result of the examination indicates mental abnormality or a communicable disease, the employee shall be ineligible for further service until satisfactory proof of recovery is furnished. If an employee is under contract or tenure protection, he may be granted any sick leave compensation provided by the board of education for other employees, and shall upon satisfactory recovery be permitted to complete the term of his contract, or, if under tenure, shall be re-employed with the same tenure status as he possessed at the time his services were discontinued; provided, the absence does not exceed a period of 2 years. * * *"

While, as indicated heretofore, respondent submitted to a psychiatric evaluation by a physician to whom she was referred by her family doctor, there is nothing in the record to show that she sought approval of this physician by the Board, as required by the statute, *supra*. In any event, she did not keep the appointment with Dr. Zier on May 28. The doctor testified that she called and said that she had some personal business to attend to, but that she would keep the next appointment. (Tr. 99, 100) Thereafter she kept three appointments, on June 4, 11, and 18, and the evaluation was concluded and reported to the Board by letter dated June 29, 1963. (Ex. P-4)

Again it is not denied that respondent failed to keep the appointment on May 28, and the Commissioner finds the charge true. And again the Commissioner holds that this charge, even though true, is not sufficient to warrant dismissal or reduction in salary. The significant fact is that the evaluation ordered by the Board, which was clearly within the authority given it in *R. S.* 18:5–50.5, *supra*, was completed within the time set by the Board.

It must be emphasized that no charges bearing upon respondent's competence or efficiency were made or certified to the Commissioner. It must also be clear that the Commissioner will not, in his consideration of this Motion, make any determination upon either the report submitted by Dr. Zier or his testimony bearing upon his evaluation of respondent, or whether the Board of Education may determine that respondent is ineligible for service under the provisions of *R. S.* 18:5–50.5, *supra*. The Commissioner's determination herein is limited solely to the sufficiency of the three dismissal charges to which respondent's Motion gives a presumption of truth and which are not in fact denied. While in no wise approving either deception or contumacy, the Commissioner does not find the three specific acts charged by the superintendent and certified by the Board, taken either separately or in the aggregate, to be sufficient to warrant the dismissal or a reduction of the salary of respondent.

The Motion is granted and the charges are dismissed. It is ordered that respondent be reinstated pursuant to the provisions of *R. S.* 18:3–23.

COMMISSIONER OF EDUCATION.

February 25, 1964.

Affirmed by State Board of Education without written opinion, October 7, 1964.

V

BOARD MAY NOT ADOPT TRANSPORTATION POLICY WHICH IS DISCRIMINATORY

BRUNO DORSKI, ON BEHALF OF BIRCHWOOD PARENTS OF EAST PATERSON,
Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF EAST PATERSON, BERGEN COUNTY,
Respondent.

For the Petitioner, *Pro Se*

For the Respondent, *Pro Se*

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal was filed by the petitioner, as "spokesman" for the parents residing in the Birchwood section of East Paterson, alleging that respondent's plan for transporting pupils to the Memorial Junior-Senior High School discriminates against their children.

This matter is submitted to the Commissioner in a Stipulation of Facts agreed upon at a conference of the parties on January 21, 1964, in the office of the Assistant Commissioner in charge of Controversies and Disputes in the State Department of Education, Trenton.

On March 20, 1963, the Transportation Committee of respondent Board submitted a report in which it recommended "de-limiting present transportation by re-establishing the boundary lines." The Committee recommended that for the school year 1963-64, transportation to the High School be provided only for those pupils living outside an arc described from the school as a center, with a radius of one mile. On May 14 the Board established transportation routes for 1963-64,

> "* * * such routes in affect (sic) being in line with proposed Plan No. 1, thereby eliminating from transportation to the junior-senior high school those students who live within one air mile from the Elm Street entrance to said school * * *."

On June 6, the resolution approving the minutes of the May 14 meeting included the following explanation:

> "It should be made a matter of record that Plan A, on which the transportation routes to the high school are based is: one air mile from the Elm Street entrance of the junior-senior high school and all students living within the arc of such shall be obliged to walk to the high school; those students living south of Route 46 and the Parkway shall be provided transportation to the high school."

The explanation above, taken literally, adds nothing to the meaning of the plan, since students living south of Route 46 and the Parkway are already outside the one-mile arc. In its application, however, it has led to the dispute

herein. Route 46 and Garden State Parkway intersect at a point just south of the arc; the Parkway is tangent to the arc within the Borough of East Paterson, Route 46 is tangent at a point on the extension of the arc into the adjoining City of Paterson. Lying inside the area within East Paterson bounded on the north by the arc, on the southwest by Route 46, and on the southeast by the Garden State Parkway, are the homes of petitioner and those on whose behalf he acts. The 35 junior and senior high school children in this area live *outside* the arc which the Board has made determinative of the right to transportation. But since they do not live *south* of Route 46 and the Parkway they are required to walk to school. Petitioner contends that the designation of this particular group of children as exceptions to the general rule providing transportation to children outside the arc is discriminatory.

The right of a board of education to provide transportation for children living remote from any schoolhouse is contained in *R. S.* 18:14–8. Further, *R. S.* 18:14–8.1 provides:

> "In addition to the provision of transportation for children living remote from any schoolhouse, and for mentally retarded and physically handicapped children, the board of education of any school district may provide, by contract or otherwise, in accordance with law and the rules and regulations of the State Board of Education, for the transportation of other children to and from public school.
>
> "The cost of transporting children pursuant to this act shall not be included in calculating the amount of State aid for transportation of pupils."

For purposes of calculating State aid for transportation of pupils, "remote" has been defined as 2 miles or more for pupils in the elementary grades (kindergarten to grade 8), and 2½ miles or more for pupils in high school (grades 9 to 12). No issue of "remoteness" is presented here. The question is solely whether, in providing transportation at local expense, respondent has adopted a plan which, with respect to petitioner herein, is arbitrary, capricious, discriminatory, or in bad faith.

With respect to the question of bad faith, petitioner alleges that the transportation plan, as it affects him and those he represents, was designed as a reprisal for the negative vote by the people of the Birchwood area against the adoption of the school budget. It is stipulated that this allegation has its foundation in a remark set forth in respondent's Answer as having been made by a member of the Board of Education, in a discussion of petitioner's complaint, to the effect "that while the Board of Education was in sympathy with the petitioners, and understood their plight, such persons must remember the important (sic) of school budgets, and that how such persons vote in February school elections affects any budget for the next school year." In the light of the Transportation Committee's recommendation to "de-limit" transportation consistent with available funds, the Commissioner does not find in this remark evidence of improper intent, and he dismisses the question of bad faith.

There remains for the Commissioner's consideration the question of whether there is a rational basis for the exception of children living in the disputed area heretofore described, from the general provision that transportation shall be furnished to all children living outside the arc.

It has been previously determined that in providing transportation for pupils living at distances less than legally "remote," a board of education may establish categories of children who are entitled to such transportation. In *Iden, et al.* v. *Board of Education of West Orange*, 1959-60 *S. L. D.* 96, the Commissioner sustained a Board policy to provide transportation at local expense to pupils who must travel hazardous routes, and upheld the Board's right to discontinue such transportation for certain pupils when the hazardous conditions have been eliminated. In the case of *Schrenck, et al.* v. *Board of Education of Ridgewood*, 1960-61 *S. L. D.* 185, petitioners claimed that in denying transportation to their children while furnishing it to other children who were required to cross a heavily traveled state highway, the Board of Education discriminated against their children. In finding that there was no discrimination constituting abuse of the Board's discretion, the Commissioner said, at page 188:

> "In the Commissioner's judgment, a board of education may, in good faith, evaluate conditions in various areas of the school district with regard to conditions warranting transportation. It may then make reasonable classifications for furnishing transportation, taking into account differences in the degree of traffic and other conditions existing in the various sections of the district. Such differences need not be great in classification, but no classification may be unreasonable, arbitrary or capricious. *Guill, et al.* v. *Mayor and Council of City of Hoboken*, 21 *N. J.* 574 (1956); *Pierro* v. *Baxendale*, 20 *N. J.* 17 (1955); *DeMonaco* v. *Renton*, 18 *N. J.* 352 (1955); *Borough of Lincoln Park* v. *Cullari*, 15 *N. J. Super.*, 210 (*App. Div.* 1951).
>
> "The respondent Board has evaluated traffic conditions in the areas in question and its judgment is that the traffic conditions encountered by pupils crossing Route No. 17 to reach the secondary schools are such as to justify transportation at local expense. Its judgment is that the conditions encountered by petitioners' children in traveling to and from the Glen School are not such as to justify transportation. * * *"

On the other hand, in *Klastorin* v. *Board of Education of Scotch Plains*, 1956-57 *S. L. D.* 85, the Commissioner found that in providing transportation for pupils on the basis of hazardous conditions, the Board's policy was inconsistent and thereby discriminatory.

In the instant case, the only explanation offered by respondent for the disputed exception is contained in its Answer, that Route 46 and the Parkway form a "natural" boundary, admittedly farther from the school than the one-mile arc. Respondent makes no offer of proof that conditions of travel for the pupils in the disputed area are any different from those for any other pupils living equally distant outside the arc. If there is, in fact, any utilitarian advantage resulting from the use of principal highways as a "natural" boundary in one area of the school district instead of the uniformly delineated arc which has been made applicable to all other areas, it has not been demonstrated. It therefore cannot be used as a reasonable basis for creating a category of pupils who are denied transportation when all others equally distant from the school and similarly situated are furnished transportation. The Commissioner finds such a distinction arbitrary, and as such discriminatory against the children of petitioner and those he represents.

The Commissioner directs respondent to adopt and execute a transportation policy which is just and equitable for the pupils of the school district, consistent with the principles set forth herein.

COMMISSIONER OF EDUCATION.

February 25, 1964.

Affirmed by State Board of Education without written opinion, May 6, 1964.

VI

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE BOROUGH OF CARTERET, MIDDLESEX COUNTY

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the annual school election held in the school district of the Borough of Carteret on February 11, 1964, of the balloting on the three appropriation items submitted were as follows:

	At Polls		*Absentee*		*Total*	
	Yes	*No*	*Yes*	*No*	*Yes*	*No*
Current Expenses ($1,617,305)	1,046	1,093	2	1	1,048	1,094
Capital Outlay ($30,535)	949	1,073	3	----	952	1,073
Evening School ($1,250)	1,026	983	3	----	1,029	983

A request for a recount of the votes cast for and against the appropriation items was filed with the Commissioner of Education and was granted. On February 25, 1964, the Assistant Commissioner of Education in charge of Controversies and Disputes conducted a recount of the voting machines used in this election with respect to the three public questions. The recount disclosed a transposition of the votes cast for and against capital outlay and evening school in two of the polling places but these errors failed to alter the ultimate result of the election as announced. The tally of the votes as determined by the recount was as follows:

	At Polls		*Absentee*		*Total*	
	Yes	*No*	*Yes*	*No*	*Yes*	*No*
Current Expenses ($1,617,305)	1,046	1,093	2	1	1,048	1,094
Capital Outlay ($30,535)	945	1,079	3	----	948	1,079
Evening School ($1,250)	1,030	977	3	----	1,033	977

The Commissioner finds and determines (1) that the appropriation of $1,250.00 for evening school was approved and (2) that the appropriations for current expenses and capital outlay failed to be approved by the voters.

COMMISSIONER OF EDUCATION.

March 3, 1964.

VII

In the Matter of the Annual School Election Held in the Township of Chester, Morris County

Decision of the Commissioner of Education

The announced results of the balloting for candidates for membership on the Board of Education for three full terms of three years at the annual school election held February 11, 1964, in the School District of the Township of Chester in the County of Morris were as follows:

	At Polls	*Absentee*	*Total*
Joseph C. Phayer	171	1	172
Leonard Barker	158	2	160
William Steinberg	139	0	139
Charles C. Loper	138	1	139
H. R. Beurrier	116	0	116

Because of the tie vote for the third seat on the Board, the Commissioner of Education granted the request of the Board of Education for a check of the votes cast and assigned the Assistant Commissioner of Education in charge of Controversies and Disputes to conduct the recount which was held on February 28, 1964, at the office of the Morris County Superintendent of Schools, Morristown.

In its canvass of the votes, the election board properly voided one ballot for the reason that it contained appropriate marks before the names of four candidates instead of three, the number to be elected. The recount disclosed a second ballot similarly marked which should also have been voided. This ballot was therefore declared void with the result that at the conclusion of the recount the tally stood:

	At Polls	*Absentee*	*Total*
William Steinberg	138	0	138
Charles C. Loper	138	1	139

The Commissioner finds and determines that Joseph C. Phayer, Leonard Barker, and Charles C. Loper were elected to membership on the Chester Township Board of Education for full terms of three years each.

Commissioner of Education.

March 5, 1964.

VIII

In the Matter of the Annual School Election Held in the Township of Millburn, Essex County

Decision of the Commissioner of Education

The announced results of the balloting for membership on the Board of Education for three terms of three years each and for two appropriations items at the annual election held February 11, 1964, in the School District of the Township of Millburn in the County of Essex were as follows:

	At Polls	*Absentee*	*Total*
Richard H. Roberts	2,414	2	2,416
Nils O. Ohlson	2,081	0	2,081
Arthur Spiegelman	1,937	2	1,939
Doris F. Hammond	1,916	2	1,918

	Yes	*No*	*Yes*	*No*	*Yes*	*No*
Current Expense	1,445	1,554	2	0	1,447	1,554
Capital Outlay	1,548	1,372	2	0	1,550	1,372

A request for a recount was made to the Commissioner of Education by the Board of Education for the reason that the results from Polling District #4 showed the tally for votes for the candidates to be in excess of the total number of votes cast in that district. It was also requested that the accuracy of the tally with respect to the Current Expense question be determined. The recount was conducted at the Washington School in Millburn on February 21, 1964, by the Assistant Commissioner in charge of Controversies and Disputes.

All polling districts were checked and the voting recounted for the two appropriations items with the following results:

	At Polls		*Absentee*		*Total*	
	Yes	*No*	*Yes*	*No*	*Yes*	*No*
Current Expense	1,456	1,546	2	0	1,458	1,546
Capital Outlay	1,568	1,397	2	0	1,570	1,397

A complete recount of the balloting for candidates was also made for Polling Districts #4 and #13 and a spot check of several other districts. Although small differences were found in the tally for each district, the only significant change was in Polling District #4 where it was discovered that Mr. Spiegleman had received a total of 122 votes instead of 222 as reported by the election officials. That this was a clerical error was shown by the original tally sheet upon which there were only 122 tally marks opposite the name of Mr. Spiegelman but 222 had been recorded as the total count. This error also accounted for the excess of votes counted over ballots cast in Polling District #4.

Correcting the original tally by the reduction of 100 votes in Mr. Spiegelman's total results as follows:

	At Polls	*Absentee*	*Total*
Richard H. Roberts	2,414	2	2,416
Nils O. Ohlson	2,081	0	2,081
Doris F. Hammond	1,916	2	1,918
Arthur Spiegelman	1,837	2	1,039

The Commissioner finds and determines that the Current Expense appropriation question failed to win the approval of the voters but that the appropriation of $57,441.12 for Capital Outlay was approved. The Commissioner further finds and determines that Richard H. Roberts, Nils O. Ohlson, and Doris F. Hammond were elected to the Millburn Township Board of Education for full terms of three years each.

COMMISSIONER OF EDUCATION.

March 5, 1964.

IX

BOARD MAY NOT REIMBURSE MEMBERS FOR LEGAL EXPENSE OF PRIVATE LAWSUIT

ON MOTION FOR SUMMARY JUDGMENT

AIME FAMETTE,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF WOOD-RIDGE, BERGEN COUNTY,

Respondent,

AND

ANTHONY A. AGOSTINE,

Intervener.

For the Petitioner, Mahliot and Genton
(George D. Mahliot, Esq., of Counsel)

For the Respondent, Charles L. Bertini, Esq.

For the Intervener, Major and Major
(James A. Major, Esq., of Counsel)

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner in this matter is a taxpayer in the Borough of Wood-Ridge, who seeks an order from the Commissioner prohibiting respondent Board of Education from expending public funds to reimburse certain Board members for legal fees and expenses in connection with a civil action in the Superior Court of New Jersey; prohibiting the Board from expending public funds for the legal defense of the instant action; and alternatively, either declaring that in voting to pay their legal costs and expenses certain Board members are in violation of their statutory qualifications for membership on the Board, or ruling that the votes cast on this matter by these Board members

are a nullity. The intervener in this action is a Board member who, upon proper application, was given leave to intervene because he has an interest in the final determination herein which cannot be properly advanced by either petitioner or respondent. *Cf.* 3 *New Jersey Practice* § 833. Intervener asserts that respondent's resolution to reimburse individual board members for legal fees and expenses in the civil action is invalid, and that he is entitled, as the defendant in the civil action, to reimbursement for legal fees and expenses incurred in his defense.

Application for Summary Judgment in his favor has been made by petitioner, with a like application by intervener for Summary Judgment in favor of himself and the petitioner. The argument on the application is submitted in briefs of counsel.

The Commissioner finds no dispute as to any fact which is material to his determination in this matter. The questions before the Commissioner are:

1. Can a board of education spend public funds to reimburse some members of the board for legal fees and expenses as plaintiffs in a libel suit against another member of the board?

2. Can a board of education be required to reimburse the defendant board member for his expenses in defense of that suit?

3. Can individual board members properly vote such reimbursement when their own claims for payment are involved?

4. Can a board of education spend public funds for the defense of a taxpayer's suit, such as the instant matter, seeking determination of questions 1, 2, and 3, above?

The libel suit from which these questions have developed resulted from a statement published in a local newspaper in June 1961 by intervener, who was a member of the Board of Education. The four other members of the Board at that time considered certain of the language contained in this release libelous, and as individuals brought suit in civil court against the fifth member as an individual, seeking punitive and compensatory damages. Both plaintiffs and defendant personally retained counsel for this civil action, although defendant (intervener herein) requested the Board to provide counsel for his defense, which the Board denied on advice of its attorney. In the course of the trial before a jury in Superior Court on November 29, 1962, a settlement was effected and the suit was dismissed. *Isaac V. Young, et al.* v. *Anthony Agostine*, Superior Court, Law Division: Bergen County, Docket L-5341-61 (61-2643). No monetary consideration was paid by defendant to the plaintiffs, but by agreement defendant paid $1,000 toward printing costs incurred in bringing on the case for trial.

Following settlement of the libel action, respondent, on December 5, 1962, adopted a resolution providing that both plaintiffs and defendant be reimbursed for their legal fees, subject to an opinion of its counsel on whether it might properly do so. Counsel advised the Board by letter dated December 24, that in his opinion the Board could legally reimburse the plaintiffs, but not the defendant, for their legal expenses in the libel suit. Meanwhile petitioner herein, following the December 5 meeting, had filed a taxpayer's suit in Superior Court seeking, *inter alia*, to restrain the Board from making such

reimbursement as it had conditionally authorized, and to restrain the Board from using public funds to defend his own action against the Board. On February 7, 1963, the Court entered an order dismissing the taxpayer's suit, on the ground that plaintiff (petitioner herein) had failed to exhaust his administrative remedies before the Commissioner of Education under *R. S.* 18:3–14 and 15. On February 11 thereafter the petition of appeal herein was filed.

Can a board of education spend public funds to reimburse certain members of the board for legal expenses as plaintiffs in a libel suit against another member of the board? The Commissioner is not aware of, nor has counsel suggested, any determination of this question by the courts. Numerous decisions have dealt with the question of the board's right to *defend* itself or one of its members in actions arising out of the good faith performance of a public duty. Basic among these is *State, Bradley, pros.*, v. *Council of Hammonton*, 38 *N. J. L.* 430 (*Sup. Ct.* 1876), in which the prosecutor sought to restrain the Town Council from expending public funds to defend one of its members in a suit arising out of the good faith performance of an act authorized by the council to protect some of the public moneys of the town. The Court affirmed the Council's resolution to defend the suit. The State Board of Education took cognizance of this decision when it affirmed the Commissioner in *Houston* v. *Board of Education of North Haledon*, 1959-60 *S. L. D.* 73, affirmed 1960-61 *S. L. D.* 232. In determining that a board of education has implied power to use school funds to defray the legal expenses of one of its members for defense of a suit arising out of the member's performance of his duties, the State Board said:

> "In resolving the question here presented we should keep in mind the principles of public policy by which we should be guided. First, we should be alert to avoid improper use of public funds. Second, public money should not be expended for such retention of attorneys if indeed the acts upon which the suit is based were not related to official duties of the defendant. Third, the principles to be adopted should not serve to discourage interested citizens from assuming the burdens of such public service which they render in serving on or for, Boards of Education."

On the other hand, where it is shown that a board member is not "performing in good faith a duty of his office or position in furtherance of the work of the board for which he was purportedly acting," then his defense at the public's expense is not warranted. *Errington* v. *Mansfield Township Board of Education*, 81 *N. J. Super.* 414 (*App. Div.* 1963).

In the instant case, four members of respondent board were plaintiffs in an action in which they sought punitive and compensatory damages for a statement made in the public press by the fifth member. They sued individually as private citizens. Had the trial gone to decision, and had they prevailed, they would have benefited individually and privately from the jury's verdict. The Board as such stood neither to gain nor to lose. The Commissioner finds no public purpose served by plaintiffs' suit; on the contrary, the purpose was private and personal. The Commissioner finds and determines that respondent is without authority, either express or implied, to expend public funds to reimburse present and former Board members for their legal fees and expenses as plaintiffs in the case of *Isaac V. Young, et al.*

v. *Anthony Agostine, supra.* He further determines the resolution of December 5, 1962, providing for such reimbursement, and a subsequent resolution of February 13, 1963, (added as Exhibit F supplementing petition of appeal) setting aside the sum of $2,582.40 for such reimbursement, to be nullities, void and of no effect.

Much of the reasoning in the above determination is applicable to the second question: *Can a board of education be required to reimburse the defendant board member for his legal expenses in defense of such a libel suit?* Applying the reasoning of the Commissioner and the State Board in *Houston* v. *North Haledon, supra,* it is at the most discretionary with a board whether it will spend public funds for the defense of one of its members sued in tort for an act performed in good faith in connection with the duties of his office. But such discretion is bounded by the criteria set out by the State Board for its determination in *Houston, supra.* The Commissioner should not and will not consider the merits of the alleged libel. That question was settled forever in the proper court of law, "in the public interest," with the agreement of all parties to the suit. But the Commissioner must determine whether the act for which the defendant member was sued was committed in the good faith performance of the duties of his office. The Commissioner finds that it was not. The only proper forum for the consideration of board business is a regularly called meeting of the board. *R. S.* 18:7–63. Board meetings are required by law to be public. *R. S.* 18:5–47. There is ample opportunity thus afforded to debate before the public a matter of policy which a board member believes vital to an informed citizenry. The rationale of *State, Bradley, pros.,* v. *Hammonton, supra,* and *Houston* v. *North Haledon, supra,* does not follow here. Rather the reasoning of the Court in *Errington* v. *Mansfield Township Board of Education, supra,* is controlling:

> "* * * We are not passing judgment on whether the letter in the instant case is libelous, or whether there is any valid defense thereto. If there is liability by reason of its having been written, the liability is personal to the writer and is not that of the board of education. Defense of the action must be at the expense of the individual and not at the expense of the board.
>
> "We have not been referred to any authority nor are we aware of any, upholding the right of a public official to be defended at the public expense in a suit for libel resulting from his expression of a purely personal opinion.* * *"

The Commissioner determines that the intervener herein has no claim to reimbursement for his legal fees and expenses as defendant in the libel suit instituted against him. He further determines that respondent Board did not abuse its discretionary authority in denying interevener such reimbursement.

Can individual board members properly vote reimbursement payments when their own claims for payment are involved? Having found the resolution providing these payments to be a nullity, the Commissioner will consider this question only to the degree that petitioner asserts that in voting on the resolution, three members of the Board thereby disqualified themselves from continuing their Board membership.

School law (*R. S.* 18:7–11) requires, *inter alia*, that a member of the board

> "* * * shall not be interested directly or indirectly in any contract with or claim against the board."

It is petitioner's contention that the claims for reimbursement were claims against the board which were improper *ab initio*, but that in any event the board members having a direct interest in them should have refrained from voting on the resolution. The Commissioner does not agree that the law should be co construed. The Wood-Ridge Board of Education has five members. At the time the libel suit was instituted, all five members were involved, four as plaintiffs and one as defendant. By December 1962, one plaintiff-member was no longer on the Board. Suppose, for example, a majority of all the members of a board have valid claims for expenses, such as those permitted under *R. S.* 18:9–6, or claims for valid defense of legal action against them arising out of good faith performance of official duty. Under the application of petitioner's reasoning, it would be impossible for the Board to pay such claims. The Commissioner finds no impropriety in the participation of these members of the Board in the vote on the resolution of December 5, 1962, particularly since the payments were conditioned on the opinion of the Board's counsel as to their legality.

The final question to be considered is, *Can a board of education spend public funds for the defense of a taxpayer's suit seeking determination of the questions previously considered?* The answer is in the affirmative. The Commissioner is required to decide controversies and disputes arising under the school laws. *R. S.* 18:3–14. The petition herein is before the Commissioner because a similar petition was dismissed without prejudice by the Superior Court on the grounds that petitioner had failed to exhaust his administrative remedies under *R. S.* 18:3–14 and 15. The Board of Education, not its individual members, is named as respondent, because petitioner's dispute is with the legality and propriety of a Board resolution. *R. S.* 18:7–59 provides:

> "A board may, in its corporate capacity, sue and be sued in any court and employ counsel therefor. The amount of the expense incurred by the board in conducting or defending such action shall be certified to the assessor by the president and district clerk of the board. The amount shall be assessed and collected in the next annual tax levy."

The question of a board's authority to retain counsel has been previously considered by the Commissioner, as in *Houston* v. *North Haledon, supra*; *Arning* v. *Board of Education of Passaic*, 1939-49 *S. L. D.* 40; and *Nicosia* v. *Board of Education of East Paterson, et al.*, 1949-50 *S. L. D.* 47. See also *Sleight* v. *Board of Education of Paterson*, 112 *N. J. L.* 422 (*E. & A.* 1933). The Commissioner can find no reason in law why respondent should not be authorized to pay reasonable fees to counsel for its defense in this action, and in the preceding action in Superior Court.

The Commissioner finds and determines that respondent Board is without authority to reimburse any of its present or former members for their legal fees and expenses in connection with the case of *Isaac V. Young, et al.* v. *Anthony Agostine, supra*, and declares that any or all resolutions or actions purporting to make such reimbursement are a nullity, void and of no effect.

He further finds that the votes of the several Board members in support of said resolutions do not constitute disqualification for membership, and dismisses that portion of this petition of appeal. Finally, he finds that the intervener herein has no valid claims against the respondent Board and his petition is dismissed.

COMMISSIONER OF EDUCATION.

March 6, 1964.

X

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SOUTHERN REGIONAL HIGH SCHOOL DISTRICT, OCEAN COUNTY

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the balloting at the annual school election held February 4, 1964, for a seat on the Board of Education of the Southern Regional High School District, Ocean County, from the constituent district of Long Beach Township were as follows:

	At Polls	*Absentee*	*Total*
Alan S. Block	172	0	172
George L. Ackerman	163	1	164

Pursuant to a request made to the Commissioner of Education, the Assistant Commissioner in charge of Controversies and Disputes conducted a recount of the ballots at the Southern Regional High School on March 4, 1964.

The poll list revealed that 339 persons had voted. At the conclusion of the recount the tally stood:

	At Polls	*Absentee*	*Total*
Alan S. Block	169	0	169
George L. Ackerman	162	1	163
Referred	8	----	----
	339		

Six of the eight ballots referred were voided by agreement either because they showed no mark for either candidate or marks for both. With a margin of six votes and only two ballots remaining, there was no need to make a further determination with regard to them as the result would remain unaffected.

An inquiry into allegations of irregularities in connection with the election was also held at the same time and place. The main burden of the complaint is that partisan political support was enlisted in support of Mr. Block. It is also charged that the election officials at several polling places failed to report data such as number of names on the poll list, ballots counted, ballots cast, and ballots voided, to the secretary of the Board of Education, and that notices of the election were not posted in time in one district. Sworn testimony was heard with respect to these charges and documentary evidence was received.

It appears that the candidacy of Mr. Block was the subject of a resolution of endorsement at a meeting of the Long Beach Township Regular Republican Club held prior to the election, which was reported in the local newspaper. Complainant contends that the injection of partisan political activity into a school district election is improper and illegal and may be assumed to have affected the result in this case where the successful candidate prevailed by a narrow margin of votes. Mr. Block denies soliciting the support of any political organization and points out that there could have been no way by which he could have prevented such an endorsement if a group chose to take such action. Both sides rely on *Botkin* v. *Westwood*, 52 *N. J. Super.* 416 (1958) in which the Court said:

> "It is very clear that the legislative scheme of separation of school district from governing body has for one of its principal objects the very sound policy of keeping partisan politics out of the administration of local public education as far as possible * * *. The aim is clear that the local school system shall be run by the citizens through their elected representatives on the board of education and not by political parties and that the elections of board members shall be on the basis of educational issues and not partisan considerations. * * *"

The Commissioner most certainly agrees and reiterates his often expressed belief that partisan politics have no place in school district elections. He is unable to find, however, any basis for setting aside an election on the grounds such as those herein. There is no evidence that the successful candidate sought the aid of the political group nor is there any proof that the group's endorsement affected the balloting for either candidate. If the mere assertion that a political organization had supported a particular nominee were enough to void an election, it would be a simple matter, as the successful candidate points out, to eliminate an opponent by arranging to have a political group endorse him and thereby give him "the kiss of death."

It is well established that an election will be given effect and will not be set aside unless it can be shown that the will of the people was thwarted, was not fairly expressed, or could not be properly determined. *Love* v. *Board of Chosen Freeholders of Hudson County*, 35 *N. J. L.* 269; *Petition of Clee*, 119 *N. J. L.* 310, 196 *A.* 476; *Application of Wene*, 26 *N. J. Super.* 363, 97 *A. 2d* 748, affirmed 13 *N. J.* 185, 98 *A. 2d* 573. The Commissioner finds no such showing in this case.

The Commissioner finds no necessity to make a finding with regard to the omission of certain data by some of the election officials in their reports to the secretary of the Board, or to the allegation of delay in posting notices in one district. Even though it appears that these charges are founded in fact, the Commissioner finds them insufficient to void the election. Nor do they have any application to the petitioner herein, occurring as they did in constituent districts in which he was not a candidate. At most, they could affect only the appropriations questions, and no contention has been raised as to these or as to candidates in any of the districts concerned. The Commissioner will, therefore, take no action with respect to the omissions charged, but he will admonish those in charge of future elections to become familiar with their duties and to carry out every requirement of the law in the discharge of their responsibilities.

The Commissioner finds and determines that Alan Block was elected to membership on the Southern Regional High School District Board of Education on February 4, 1964, for a full term of three years.

COMMISSIONER OF EDUCATION.

March 18, 1964.

XI

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION IN THE BOROUGH OF PALISADES PARK, BERGEN COUNTY

DECISION OF THE COMMISSIONER OF EDUCATION

An inquiry into alleged illegal conduct in connection with the annual school election held February 11, 1964, in the School District of Palisades Park, Bergen County, was conducted by the Assistant Commissioner of Education in charge of Controversies and Disputes on March 9, 1964, in the Bergen County Court House, Hackensack. The inquiry was held in response to a "formal complaint and protest" in the form of a letter to the Commissioner of Education signed by Gaetano F. Torchia, an unsuccessful candidate for a seat on the Palisades Park Board of Education.

The complaint is directed against two challengers, Dominick DeCarlo and Alexander Darkus, who, it is charged, unlawfully solicited votes and engaged in electioneering during the course of the balloting. It is also charged that their "deliberate political interference became so blatant and unruly that it became necessary* * * to summon a policeman * * * so that law and order might be sustained."

At the hearing testimony was heard from complainant, the two challengers, the policeman, two election officials, and the secretary of the Board of Education.

The testimony failed to support the charges. Both challengers, who were properly appointed, denied any electioneering, soliciting of votes, partisan political activity, or improper conduct of any kind. Complainant produced no witnesses to testify to attempts to influence their vote, nor did he offer any proof other than his own asserted belief that unlawful soliciting occurred. The election officials who testified observed no such misconduct.

The incident which provoked the calling of police appears to have resulted from complainant's objection to a certain voter's remaining in the coridor of the school after his ballot had been cast. An altercation ensued and it seems that complainant took upon himself to summon the police to remove the individual, a duty which clearly belonged to the election officials to whom the alleged loitering should have been reported. The election official testified that while the noise of this altercation was distracting, it was momentary and no further incident marred the procedures.

Complainant does not ask that the election be set aside but requests the Commissioner to bar the two named challengers from serving as election officials as long as they hold any elective or appointed political office. Even

if the evidence supported the charge of unlawful activity, the Commissioner knows of no law or authority under which such a proscription could be made.

The Commissioner finds and determines that the evidence offered fails to support the charges of unlawful conduct in connection with the annual election held in the Palisades Park School District and dismisses the complaint herein.

COMMISSIONER OF EDUCATION.

March 18, 1964.

XII

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF MANCHESTER TOWNSHIP, OCEAN COUNTY

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the voting for two seats on the Board of Education at the annual election held in the School District of the Township of Manchester, Ocean County, on February 11, 1964, were as follows:

	At Polls	*Absentee*	*Total*
Thomas Richards	151	0	151
James J. Galloway	112	3	115
Russell Sheets	114	0	114
Anthony Arena	85	0	85
Wilbur Wallis	40	1	41
Henry Meiers	17	0	17

Pursuant to a request from Russell Sheets, the Commissioner of Education directed the Assistant Commissioner of Education in charge of Controversies and Disputes to conduct a recount of the votes cast. The recount, made at the office of the Ocean County Superintendent of Schools on March 18, 1964, confirmed the announced results above.

Petitioner's main challenge is to the validity of 3 absentee votes which, when added to those cast at the polls, resulted in the election of his opponent. It is well established, however, that absentee ballots do not come within the jurisdiction of the Commissioner of Education and he will not, therefore, canvass such ballots or rule on them. *R. S.* 19:57–24 provides in part:

> "* * * Disputes as to the qualifications of military service or civilian absentee voters to vote or as to whether or not or how any such military or civilian absentee ballot shall be counted in such election shall be referred to the County Court of the county for determination. * * *"

See also *In re Recount of Ballots Cast at the Annual School Election in the Township of Monroe, Gloucester County*, 1957-58 *S. L. D.* 79; *In re Recount of Ballots Cast at the Annual School Election in the Borough of Little Ferry, Bergen County*, 1960-61 *S. L. D.* 203.

The Commissioner finds and determines that Thomas Richards and James J. Galloway were elected to membership on the Manchester Township Board of Education for full terms of 3 years each.

COMMISSIONER OF EDUCATION.

March 24, 1964.

XIII

In the Matter of the Annual School Election Held in the Borough of Fairview, Bergen County

Decision of the Commissioner of Education

The announced results of the voting at the annual election held in the School District of the Borough of Fairview, Bergen County, on February 11, 1964, for 3 members of the Board of Education were as follows:

	At Polls	*Absentee*	*Total*
Robert DeGennaro	934	2	936
Arthur Gentilella	917	0	917
Ferdinand Pesce	772	2	774
Michael DeSimone	763	0	763
Ralph Waeckerling	739	0	739
Stanley Stasi	414	0	414

A request for a recount of the ballots cast for Michael DeSimone and Ferdinand Pesce was granted by the Commissioner of Education and conducted by the Assistant Commissioner of Education in charge of Controversies and Disputes on March 9, 1964, at the warehouse of the Bergen County Board of Elections. The recount confirmed the announced results above.

The Commissioner finds and determines that Robert DeGennaro, Arthur Gentilella and Ferdinand Pesce were elected to membership on the Board of Education of the Borough of Fairview for full terms of 3 years each.

Commissioner of Education.

March 24, 1964.

XIV

In the Matter of the Annual School Election in the Borough of Island Heights, Ocean County

Decision of the Commissioner of Education

The announced results of the voting for three seats on the Board of Education for the full term of three years each, at the annual election held February 11, 1964, in the School District of Island Heights, were as follows:

Rober Delambily	104
John Benson	39
Fred Grigg	39
Joseph Spangenberg	38
Norman Muller	37

There were also a small number of write-in votes for each of twelve or more other persons.

Pursuant to a request from one of the candidates and at the direction of the Commissioner of Education, the Assistant Commissioner in charge of

Controversies and Disputes conducted a recount of the ballots on March 18, 1964, at the office of the Ocean County Superintendent of Schools in Toms River.

Although there were three seats on the Board of Education for full terms of three years each and one seat for an unexpired term of two years to be filled at this election, only one nominating petition was filed. As a result, three blank spaces in addition to the space containing the printed name of Robert Delambily were provided for voters to write in the names of persons for the three-year terms. Below these spaces there appeared in order (1) a heavy ruled line, (2) the words "For Membership to the Board of Education —2 Years—Unexpired Term (Vote for One)," (3) a light ruled line, and (4) a space to write in the name of the person voted for the two-year term. The Commissioner finds this arrangement of the ballot to be correct and in full compliance with statutory provisions. (*R. S.* 18:7–30 and 31)

The Report of the Proceedings indicates that some write-in votes were not counted because of variations in the spelling of the name or failure to write the full name. Thus votes for John Benson were counted but those of Jack Benson or J. Benson were tallied separately and not added to those for John Benson. Similarly, votes for Norman Muller and N. Muller were counted separately as was also the case for Fred Grigg, Frederick Grigg and F. Grigg, and for Joseph Spangenberg and Joe Spangenberg. In the recount, where the intent of the voter could be fairly determined, such ballots were aggregated in a single tally as provided in *R. S.* 19:16–4, the pertinent excerpt of which states:

> "No ballot cast for any candidate shall be invalid * * * because the voter in writing the name of such candidate may misspell the same or omit part of his Christian name or surname or initials."

See also *Joseph Flach, In re Madison Borough Annual School Election*, 1938 *S. L. D.* 176.

The recount disclosed 18 ballots could not be counted for any candidate. Fifteen of these were marked for 4 candidates instead of 3, and 3 ballots contained no mark in the square before the name of any candidate. An additional 9 ballots were reserved for later determination. At the conclusion of the recount, the tally stood:

Robert Delambily	104
John Benson	48
Fred Grigg	40
Joseph Spangenberg	40
Norman Muller	42

No agreement could be reached with respect to the 9 ballots in dispute and they were, therefore, referred to the Commissioner for determination. On 8 of these ballots there are 3 names written in the 3 blank spaces under the printed name of Robert Delambily. In each case one of the names has been crossed out by use of one or more pencil or ink lines drawn horizontally through the name and the same name is written again below the space for the two-year term. It seems obvious that the voter, in each instance, erred in writing in his choices in the proper places and, upon realizing his mistake

sought to correct it. Inquiry disclosed that the pencils supplied in the voting booths contained no eraser. Lacking means to erase his error, the voter obviously made his correction in the only available way, by lines drawn through the name incorrectly placed. Marks and erasures do not invalidate a ballot unless they are intended to identify or distinguish it. Title 19, the General Election Law, to which the Commissioner looks for guidance in determining election disputes, provides in *R. S.* 19:16–4:

> "* * * No ballot which shall have, either on its face or back, any mark, sign, erasure, designation or device whatsoever, other than is permitted by this Title, by which such ballot can be distinguished from another ballot, shall be declared null and void, unless the district board canvassing such ballots, or the county board, judge of the Superior Court or other judge or officer conducting the recount thereof, shall be satisfied that the placing of the mark, sign, erasure, designation or device upon the ballot was intended to identify or distinguish the ballot. * * *"

See also *In the Matter of the Recount of Ballots Cast in the Annual School Election in the Township of Union, Union County*, 1939-49 *S. L. D.* 92; *In re Recount of Ballots Cast in the Annual School Election in the Borough of Bloomingdale, Passaic County*, 1955-56 *S. L. D.* 103.

The Commissioner finds no reason to believe that the marks made to cross out a name written on these ballots by the voters were intended to identify or distinguish the ballots. These ballots will, therefore, be counted and added to the tally, as follows:

				Total
Robert Delambily	104	plus	0	104
John Benson	48	plus	2	50
Fred Grigg	40	plus	6	46
Joseph Spangenberg	40	plus	3	43
Norman Muller	42	plus	1	43

The Commissioner makes no determination with regard to the final ballot referred because, no matter how decided, it will not alter the results above.

The Commissioner finds and determines that Robert Delambily, John Benson and Fred Grigg were elected to membership on the Board of Education of the School District of Island Heights for full terms of three years each.

COMMISSIONER OF EDUCATION.

April 2, 1964.

XV

BOARD PLAN FOR RACIAL INTEGRATION IS ENTITLED TO FAIR OPPORTUNITY TO BECOME EFFECTIVE

CLARENCE ALSTON AND DONNA ALSTON,
BY THEIR PARENTS, CLARENCE ALSTON AND ONEIDA ALSTON, ET AL.,
Petitioners,

v.

THE BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,
Respondent.

For the Petitioners, Gross & Stavis
(William Rossmore, Esq., and Morton Stavis, Esq., of Counsel)

For the Respondent, Harrison B. Johnson, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Protest is made by a group of petitioners against the adoption by respondent of a plan aimed at reducing the high proportion of Negro pupils in one of its elementary schools. Petitioners contend that the plan is inadequate and illegal.

Testimony was heard and exhibits received by the Assistant Commissioner of Education in charge of Controversies and Disputes at a hearing on October 2, 1963, at the office of the Union County Superintendent of Schools in Elizabeth.

There are seven elementary schools in the Union Township School District. In a pupil census made in or about February and March 1963, the enrollments and racial composition thereof are shown to be as follows:

School	*White Pupils*	*Negro Pupils*	*Total*	*% Negro*
Battle Hill	735	---	735	---
Connecticut Farms	685	1	686	0.1%
Franklin	764	---	764	---
Hamilton	385	---	385	---
Jefferson	25	444	469	95%
Livingston	713	15	728	2%
Washington	829	---	829	---
	4,136	460	4,596	10%

During the 1962-63 school year, a community group known as the Vauxhall Committee held a series of meetings with respondent Board and advanced various suggestions and plans for achieving more integration of the two races in the schools of the district. These sessions culminated in a meeting on June 3, 1963, at which the Board presented a plan which it had formulated and which it subsequently adopted at its regular meeting on June 18, 1963, as follows:

"That the Union Township Board of Education adopt a voluntary optional pupil transfer policy for the regular pupils of the Jefferson School District only, commencing September, 1963. It is the Board's intention to implement this policy on a limited basis effective September, 1963, and to provide for complete implementation to coincide with the opening of the Newark State College Demonstration School in September, 1964."

Under respondent's plan provision is made in the 1963-64 school year for the transfer to the other six elementary schools on a free choice basis of approximately 150 pupils now assigned to the Jefferson School. In the succeeding 1964-65 school year opportunity will be afforded for transfer to the same six schools and the Newark State College Demonstration School now under construction, of all pupils in the Jefferson School area. Other features of the plan provide (1) that transfers are to be approved in the order in which applications are received; (2) after the first year pupils are assured of completing their elementary education in the school to which they transfer; and (3) transportation is to be provided at public expense to pupils who transfer to schools more than two miles from their homes.

Both parties rely for support on the decision of the Commissioner in three prior appeals in which the issue of racial segregation was raised: *Fisher, et al.* v. *Board of Education of Orange*, decided May 15, 1963; *Booker, et al.* v. *Board of Education of Plainfield*, decided by the Commissioner June 26, 1963, affirmed State Board of Education February 5, 1964; and *Spruill, et al.* v. *Board of Education of Englewood*, decided by the Commissioner July 1, 1963, affirmed State Board of Education September 24, 1963. In these cases the Commissioner found that housing patterns in each district had led to the maintenance of a school whose enrollment was all or virtually all Negro. He further found, as most recently stated in *Spruill, supra*, that compulsory attendance at an all or nearly all Negro school

"* * * engenders feelings and attitudes in pupils which tend to interfere with learning;

"that, where means exist to prevent it, such a concentration of Negro pupils as exists in the Lincoln School constitutes a deprivation of educational opportunity under New Jersey law for the pupils compelled to attend the school; * * *"

In each of these cases the Commissioner determined that reasonable and practicable means, consistent with sound educational and administrative practice, were available to reduce the extreme concentration of Negro pupils in the particular school in the district, and placed upon the local board of education the responsibility of adopting a plan, subject to his approval, to achieve that purpose.

To the extent that the Union Township school system contains a school whose enrollment is made up almost entirely of Negro pupils who are compelled to attend that school by virtue of their residence in its established attendance area, the instant matter shares elements common to the *Orange, Plainfield* and *Englewood* cases, *supra*. The Commissioner finds no reason herein to depart from his previous conviction enunciated in those cases that such a situation engenders feelings and attitudes which tend to interfere with

learning, and that where means exist to prevent it, continuance of such a situation constitutes a denial of equal educational opportunity under New Jersey law.

The instant situation, however, is clearly distinguishable from the *Orange*, *Plainfield*, and *Englewood* matters, *supra*. In those cases the issue, decided affirmatively, was whether a school district has a duty to reduce the extreme concentration of Negro pupils in a school when appropriate means exist to do so. In the instant case respondent Board has accepted the duty enunciated in the Commissioner's decisions and has on its own initiative adopted a specific plan aimed at reducing the extreme proportion of Negro pupils in its Jefferson School.

The question in this case then is not whether the Commissioner should direct the Board of Education to formulate a plan but whether he will interfere with the exercise of the Board's discretion to adopt the proposal which is here challenged.

Petitioners contend that the plan should be set aside on the grounds that it places the "burden of achieving racial balance within the school system upon the children attending the Jefferson School who would attend other schools, and provides for no transfers of white children from other schools into Jefferson School." They predict that the "Board's plan is destined to failure, and whether designedly so or not, will cause a continuance and indeed an intensification of the racial imbalance of the Union Township Schools." In support of this latter contention, they offer evidence that for the 1963-64 school year, 15 pupils, of whom 11 are white, transferred from Jefferson School under the terms of respondent's plan, thereby increasing the ratio of Negro to white pupils in that school. They contend that this is, *ipso facto*, proof of the ineffectiveness of respondent's plan.

Petitioners' attack on the plan rests largely on the testimony of an expert witness, a sociologist, who testified that in his judgment the policy adopted by the respondent does not and will not accomplish the purpose for which it is designed. He characterizes it as an "open enrollment plan" and bases his conclusions of inadequacy and failure on his knowledge of the experience of other school districts, specifically New York City, New Rochelle, Newark and Plainfield, in each of which, he alleges, similar plans were unsuccessful. As an alternative, petitioners offer a plan devised by this witness which they predict would result in much greater racial balance and would be far superior to respondent's allegedly inadequate solution.

Respondent, on the other hand, contends that its plan will not only eliminate the high proportion of Negro pupils in Jefferson School but will also, with the implementation of both phases of the plan, produce a better balance of races in all other elementary schools of the district than could be achieved "by any other workable plan suggested or considered." In presenting its plan to the Vauxhall Committee, the Board said:

> "One of the strongest points of this policy will be the *guaranteed* availability of a seat for every regular pupil from the Jefferson School District in one of the remaining elementary schools or the Newark State College Demonstration School effective September, 1964. In fact, it is possible that the remaining student body in Jefferson School could be-

come so small as to warrant the closing of Jefferson School for the regular Jefferson School pupils."

Moreover, respondent contends, it has developed a plan consonant with the directive of the Commissioner in *Fisher, et al., supra.*

In their prayer for relief, petitioners ask that "the Commissioner of Education formulate a plan to be applied to the elementary schools of Union Township to eliminate de facto segregation * * *."

The Commissioner has already made it clear in previous decisions that he does not consider it his function to formulate a plan such as petitioner prays for and impose it upon a local board of education where the board is competent to act. Nor will he usurp the powers of the board of education to choose from among several plans the one most appropriate to the particular school district and its problems. In his judgment the local board of education is not only best suited but also has the responsibility under law to determine attendance areas and assignment of pupils to schools. *R. S.* 18:11–1. Thus, in *Booker* v. *Plainfield, supra*, where three plans were stipulated, the Commissioner said:

> "The Commissioner believes that it is the responsibility and the prerogative of the Board of Education to determine which of the proposals is best suited to the needs of the school system which it is called upon to operate. * * *"

The plan *sub judice*, whether it be called "open enrollment" or "voluntary optional pupil transfer," is the plan adopted by respondent after

> "* * * some twenty-two meetings to discuss the Vauxhall Committee's request, with many hours of outside reading, review and study of the many facets involved in a solution. The administrative staff has spent countless hours in studying, reviewing and preparing reports of the many questions raised during our discussions. We have given careful and detailed deliberation to formulate a plan which will be of a long-range nature and not just temporary, which will enure to the best interests of the entire educational system and which will still correct 'de facto' segregation in Jefferson School. * * *" *Union Township Board of Education's Decision Concerning Racial Imbalance in Jefferson School. June 3, 1963.*

It is possible that a number of plans could be evolved to deal with this problem and each would have its proponents. It is also probable that any plan will have certain advantages and disadvantages. Even the plan urged by petitioners, as devised by its sociologist, contains elements which are debatable when educational values are considered. It is apparent, therefore, that evaluation and choice of the various solutions proposed should be made in the first instance by the local board of education whose members have been chosen by the people of the community to make the decisions affecting their schools.

There can be no question that a board of education has the authority to correct a school assignment policy which works a disadvantage to some pupils. It is equally clear that in reviewing the action taken by a board to remedy the situation such as that herein, the Commissioner is constrained to keep within proper limits of judicial inquiry. As the Commissioner said in *Boult*

and Harris v. *Passaic Board of Education*, 1939-49 *S. L. D.* 7, 13, affirmed State Board of Education, 1939-49 *S. L. D.* 15, affirmed 135 *N. J. L.* 329 (*Sup. Ct.* 1947), 136 *N. J. L.* 521 (*E. & A.* 1948):

> "* * * it is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards.* * *"

Petitioners point to the fact that only 15 pupils elected to transfer during the 1963-64 school year as conclusive proof that respondent's plan is ineffective. But it is as reasonable to assume that there has been insufficient time thus far to test its operation adequately. The new policy was announced on June 3, 1963; applications became available on June 7; and all applications were required to be submitted by July 1. It is not unreasonable to conclude that such a short period of time was insufficient to overcome a natural reluctance to change patterns of long standing. Moreover, the plan is in its first year and not yet fully operative. The second year not only offers opportunity for all pupils in the Jefferson School to transfer elsewhere but assures completion of their elementary school education in the school to which they transfer. The possibility is also recognized that the Jefferson School may ultimately be closed. Under these circumstances the Commissioner is of the opinion that respondent's plan has not yet been given a fair trial and he cannot indulge in a presumption that it will fail to achieve its purpose.

The Commissioner will also point out that any plan may fail, not so much because of any inherent imperfections but because of disinterest in making it work or even efforts exerted to see that it does not. If those who oppose the proposal take an active part in encouraging parents not to transfer their children it is very likely that little change will result. The Commissioner believes, however, that all persons of good will in the community should work together to solve this problem by means of the Board's plan in order that it may be properly tested.

The Commissioner also rejects petitioners' argument that this is an "open enrollment" plan and that such plans when tried in other communities have been unsuccessful. It is well to be chary of labels. Such categorizing and the assumptions which follow can be misleading. What is tagged "open enrollment," "optional transfer," or any other label may vary so widely in its specific application to any school district as to make it unique. The Commissioner is aware that pupil transfer plans of one kind or another have been tried and in many cases abandoned. He cannot fail to recognize, however, that the basic feature of respondent's plan herein is the same as that which the Court found to be acceptable in the case of *Taylor* v. *Rochelle Board of Education*, 195 *F. Supp.* 231 (*S. D. N. Y.*), aff'd, 294 *F.* 2*d* 36 (2*d Cir.*), cert. denied, 368 *U. S.* 940, 82 *S. Ct.* 382 (1961). In that case, the New Rochelle Board of Education provided for voluntary transfer of pupils from an all Negro school to any of the other schools in the district but did not offer or arrange for such transfers to children in schools other than the one sought to be desegregated. This policy the Court accepted as providing a

proper solution to the problem. While it may be true that New Rochelle has modified this policy as a result of experience since its inception, the Commissioner cannot overlook the fact that in its original form it satisfied the requirements of law as interpreted by the U. S. District Court and the Circuit Court of Appeals. Respondent's plan herein is similar in its main features, and in other respects is even broader in scope.

The Commissioner, therefore, will not condemn a plan adopted by a board of education for the sole reason that it bears the label of or is similar to a plan which proved unsuccessful elsewhere. There are about 600 school districts in New Jersey, ranging in size from densely populated large cities to small rural areas with few inhabitants. The problems and interests of one district may have little meaning for another which has its own kinds of concerns. In this diversity, many different remedies may be employed to meet similar problems. Methods which function well in some districts fail in others so that it is impossible to prescribe a solution of choice for all. It is clear that the Union Township Board of Education gave much study to this problem and evolved the present policy only after due consideration. It must be presumed that in choosing this method they acted in good faith and with the best interests of the school district as a whole as their primary consideration. There is no evidence of arbitrary, capricious, or unreasonable action and, absent such a showing, the Commissioner will not interpose his judgment but will afford the Board a proper opportunity to test the merits of its plan.

In his study of this case the Commissioner has taken note of the case of *Goss, et al.* v. *Knoxville Board of Education*, 373 *U. S.* 683, 83 *S. Ct.* 1405, 10 *L. Ed.* 2*d* 632 (1963). In that matter, the plan adopted by the Knoxville Board of Education would have permitted transfer of a pupil from any school in which he was in the minority as to race to a school in which his race was in the majority. In rejecting the Board's plan, the Court said:

> "* * * Here the right of transfer, which operates solely on the basis of a racial classification, is a one-way ticket leading to but one destination, *i.e.*, the majority race of the transferee and continued segregation. * * *"

This condition is distinctly different from that under review here, where pupils in one school may transfer to other schools without regard to race. The end actually sought in *Goss* was continued racial segregation rather than the opposite result hoped to be achieved here. Later on in the *Goss* decision, after noting that the transfer plans proposed for Knoxville were purely racial in character and for the purpose of discrimination and therefore invalid, the Court went on to say:

> "This is not to say that appropriate transfer provisions, upon the parents' request, consistent with sound school administration and not based upon any state-imposed racial conditions, would fall. Likewise, we would have a different case here if the transfer provisions were unrestricted, allowing transfers to or from any school regardless of the race of the majority therein. * * *"

The Commissioner holds that the Union Township Board of Education is entitled to select and implement its plan to eliminate unequal educational

opportunity resulting from extreme concentration of Negro pupils in one of its schools. He finds that the Board of Education has considered and adopted such a plan and has put it into operation. At this posture of the case the Commissioner will take no position with respect to the merits of the plan nor intervene to set aside the policy before it has had fair opportunity, with the full cooperation and good will of all parties, to become fully effective.

The petition is dismissed without prejudice to its reinstitution at a subsequent time should the facts and circumstances so warrant.

COMMISSIONER OF EDUCATION.

April 6, 1964.

DECISION OF THE STATE BOARD OF EDUCATION

In general, the opinion of the Commissioner of Education in this matter satisfactorily sets forth the factual and policy considerations involved in the case.

At the hearing before the State Board, the parties stated that by June 25, 1964 they would know approximately how many students would request transfer from Jefferson School for the school year 1964-65. This information was submitted to the State Board of Education by stipulation of the parties. The stipulation indicates that there are 83 applications for transfer for the 1964-65 school year. During the school year 1963-64 there were 19 transfers under the plan.

The petitioners have alleged that the respondent's plan will not work. They argue that voluntary plans for the transfer of students are generally not satisfactory and that the only plans which solve segregation problems are compulsory in nature. This argument calls for analysis.

The core of petitioners' argument seems to be that respondent's plan cannot result in the desegregation of the Jefferson School. Except for the possibility that so many students may transfer from Jefferson School as to bring about the closing of the school, we must agree with the contention that Jefferson School will not be desegregated by reason of respondent's plan. However, there is another way in which the plan may "work". The parents of those students who feel that their children's continued attendance at Jefferson School would be to their detriment may apply for transfers. The figures before us indicate that a substantial number of parents have taken this course. It would appear that during the school year 1964-65, approximately 20% of the students at Jefferson School will have transferred to other schools. Thus, the plan will have "worked" for a very substantial percentage of the students of Jefferson School.

Although the State Board of Education does not consider the neighborhood school system to be inviolable, we prefer to retain the concept of neighborhood schools wherever possible. Jefferson School is a modern school. The segregation in the school has been brought about by housing patterns rather than any affirmative acts of discrimination. The petitioners stated at oral argument that they feel that as residents of the Vaux Hall section of Union, they are entitled to a neighborhood school and that this school must not be segregated. Thus, they reject the suggestion that the Jefferson School

be closed and its students dispersed among the other schools in the township. Apparently, the only genre of solution which would be acceptable to petitioners would be a requirement that certain of the students from Jefferson School be obliged to transfer to other schools while certain students in the remaining schools in the township would be required to attend the Jefferson School.

While we abhor the existence of segregated schools, for whatever reason, we are obliged, in dealing with the problem to consider the welfare of all of the residents of the community involved. In this instance, the respondent has produced a scheme whereby those persons feeling particularly aggrieved by the situation in Jefferson School are enabled to take affirmative steps to bring about change. Because of the numbers who have chosen to make a change, it would appear that the community is quite familiar with the alternatives available to it. The question which remains is whether we shall impose upon the Township of Union a plan which would require it to import students into the Jefferson School district.

Upon the balancing of the equities in this matter, we conclude that this should not be done. Parents of students of primary school age generally desire to have their children attend schools as close to home as possible. Our whole system of public school education in New Jersey is based on the concept that each "neighborhood" will have a school available to it. Where possible, we feel this method of school assignment should be continued.

The respondent was faced with a situation to which there was no completely happy solution. Under the plan suggested by petitioners and the plan finally adopted, one of the following had to occur: (1) Jefferson School would remain a segregated school with fewer students than before; (2) so many students from Jefferson School would transfer as to require the closing of the school; (3) pupils from outside of the Jefferson School district would be imported to the Jefferson School.

From the stipulation submitted, it is apparent that the second possibility will not take place, at least during the coming school year. In effect, respondent was faced with a choice between alternatives (1) and (3) above. The choice was difficult, since, in either event, some citizens of Union Township would be seriously inconvenienced. Under the circumstances, the respondent decided in favor of the continuation of the neighborhood school plan, except as to those parents of Jefferson School students who chose to send their children elsewhere. The action of the Board of Education of the Township of Union was reasonable and lawful. *Morean* vs. *Board of Education of Montclair*, 42 *N. J.* 237 (1964).

We hope that the recent passage of the Civil Rights Bill by Congress, the recent actions by the New Jersey Legislature and the general nationwide stirrings in the civil rights field will ultimately bring about changes in housing patterns which will make unnecessary the difficult choices presented in this case.

The decision of the Commissioner is affirmed for the reasons set forth in his opinion as supplemented herein.

July 8, 1964.

XVI

In the Matter of the Termination of the Sending-Receiving Relationship Between the Boards of Education of Middletown Township and Borough of Keansburg, Monmouth County

For the Petitioner, Roberts, Pillsbury & Carton
(Lawrence A. Carton, Jr., Esq. of Counsel)

For the Respondent, Benjamin Gruber, Esq.

Decision of the Commissioner of Education

The Board of Education of Middletown Township, petitioner herein, seeks to terminate the sending-receiving relationship under which it provides high school education on a tuition basis to pupils from the School District of Keansburg.

A hearing in the matter was conducted by the Assistant Commissioner of Education in charge of Controversies and Disputes on October 15, 1963, and January 22, 1964, in the administrative offices of the Middletown Township Board of Education.

This matter comes before the Commissioner pursuant to *R. S.* 18:14–7 which reads in part as follows:

> "No designation of a high school or schools heretofore or hereafter made by any district either under this section or under any prior 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 unless good and sufficient reason exists for such a change and unless an application therefor is made to and approved by the commissioner.* * *"

The basis of petitioner's application is that the rate of growth of the township's population is so rapid that the school enrollment outruns the available schoolhouse facilities, and that the elimination of the high school pupils coming from Keansburg would reduce the burden of providing facilities needed to eliminate double sessions at the high school level. Petitioner contends that it has been seeking to end the sending-receiving relationship since December 1954.

Respondent admits that petitioner has sought to terminate the relationship, and asserts in its defense that since 1953, it has annually attempted in good faith to join with other neighboring districts in the formation of a regional high school district, which would enable it to withdraw its high school pupils from petitioner's school. These efforts in some instances failed to progress beyond the study phase, or in instances where a referendum on regionalization was held, one or more of the prospective constituent districts rejected the proposal. At present, respondent is engaged in a regionalization study involving the Union Beach School District, with action in the study suspended during the instant litigation. Respondent contends that the termi-

nation of the existing sending-receiving relationship would create a problem for the School District of Keansburg which cannot now be resolved.

A chart of present and estimated future enrollments (P-1) reveals a pattern of steady growth of the high school. The chart shows the following enrollment figures for the high school, including Keansburg pupils, and the actual and anticipated numbers of pupils from Keansburg through the 1968-69 school year:

	Total Enrollment	*Pupils from Keansburg*
1963-64	2,940	453
1964-65	3,150	465
1965-66	3,180	475
1966-67	3,381	485
1967-68	3,541	495
1968-69	3,731	500

Existing Middletown high school facilities, according to the testimony of petitioner's superintendent of schools, can accommodate a maximum of 1,800 pupils on a full-time single-session basis. All high school pupils are presently on double-session schedules. A building expansion program, approved by the electorate in December 1963, is designed to provide sufficient high school facilities for all pupils, including those from Keansburg, to be on single sessions up to the school year 1968-69 (Tr. 56, 61, 62).

The law, as set forth in *R. S.* 18:14–7, *supra*, clearly contemplates that sending-receiving relationships shall have such a degree of stability as will enable the board of education of both the sending and the receiving district to make sound educational and financial plans. On the other hand, the statute provides that when it is demonstrated to the Commissioner that good and sufficient reason exists therefor, such a relationship may be terminated. In evaluating such reasons, the Commissioner will weigh the advantages and the disadvantages, both educational and financial recognizing that in making a decision that will effect the greatest advantages, he does not thereby necessarily eliminate the accompanying disadvantages.

The sending-receiving relationship under examination here has been a long and amicable one. The rate of population growth in Keansburg has, in recent years, been much slower than that in Middletown Township; yet in providing for its building needs petitioner has continued to make provision for high school pupils from Keansburg. The Commissioner can find no reason to conclude, however, that a receiving district must forever so provide, or in the alternative face a resumption of double sessions, which would be disadvantageous alike to the pupils of both the sending and receiving district. *Cf. Board of Education of Bradley Beach* v. *Board of Education of Asbury Park*, 1959-60 *S. L. D.* 159, 162. In the instant situation, these alternatives will confront the petitioning Board in 1968. The intervening time is a reasonable period in which respondent can make suitable plans for the education of its high school pupils. *In the Matter of the Termination of the Sending-Receiving Relationship Between the Board of Education of the Borough of Pitman and the Board of Education of the Township of Mantua*, 1958-59 *S. L. D.* 101.

The Commissioner, after reviewing all facts and exhibits presented at the hearing, finds and determines that the present and planned facilities at Middletown Township High School will be inadequate, beginning in September 1968, to provide a thorough and efficient system of secondary education for the predicted enrollment from the districts now attending the high school. For this reason, the application for the termination of the sending-receiving relationship between the school districts of Keansburg and Middletown Township is approved, effective September 1968; provided, however, that pupils of the eleventh and twelfth grades residing in Keansburg shall, if it is so requested by the Board of Education of Keansburg or other board of education then having jurisdiction over such pupils, continue to be received by the Middletown Township Board of Education until their classes graduate from high school.

COMMISSIONER OF EDUCATION.

April 14, 1964.

Pending before State Board of Education.

XVII

BOARD NOT REQUIRED TO FURNISH TRANSPORTATION FOR PRIVATE SCHOOL PUPILS BEYOND ESTABLISHED PUBLIC SCHOOL ROUTES

ST. JOSEPH'S CHURCH AND OUR LADY QUEEN OF PEACE CHURCH, RELIGIOUS CORPORATIONS, CORNELIUS F. KELLY, JAMES MULHERN, WILLIAM SHENISE AND JOSEPH TOOMEY,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST MILFORD AND MARIO GRIPPI, SUPERINTENDENT OF SCHOOLS OF THE TOWNSHIP OF WEST MILFORD, PASSAIC COUNTY,

Respondents.

For the Petitioners, David and Albert L. Cohn, Esq.
(Albert L. Cohn, Esq., of Counsel)

For the Respondents, Wallisch and Wallisch, Esq.
(Louis Wallisch, Jr., Esq., of Counsel)

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioners in this case seek to have the respondent Board of Education provide transportation for the pupils of the parochial schools operated by St. Joseph's Church and Our Lady Queen of Peace Church in West Milford Township. They assert that such transportation was promised by the superintendent of schools, and that the Board of Education is obliged to design the transportation routes for the public schools so as to provide likewise for the transportation of pupils to the parochial schools. Respondents deny both commitment or legal necessity to provide transportation other than to such pupils as are entitled to it along the routes properly established for the transportation of public school pupils.

A motion by respondents to dismiss the petition of appeal was argued on January 17, 1963, and dismissed by the Commissioner on March 29, 1963. A hearing on the factual issues was conducted by the Assistant Commissioner in charge of Controversies and Disputes in the office of the Passaic County Superintendent of Schools at Paterson on June 6 and July 31, 1963. Maps, photographs, Board minutes, transportation specifications, and other documents and records were received in evidence, and briefs and memoranda were submitted by counsel.

West Milford is a large township, essentially rural, hilly, with many wooded areas. Its extensive population growth in recent years has resulted in several more-or-less discrete clusters of homes although there is no heavy concentration of inhabitants at any point. Public transportation is available to New York and other distant points but none serves local needs.

The school system comprises four elementary schools and a new high school which opened in September 1962. Prior to that date, pupils of secondary grades were sent to Butler High School in Morris County. The withdrawal of these pupils from a school in another municipality to attend high school within their own township occasioned a redesigning of school transportation routes and precepitated the controversy herein.

St. Joseph's School, operated by St. Joseph's Church, one of the petitioners herein, was opened in 1956. Its location, in the southeastern section of the Township, is such that many of the buses which formerly transported pupils to Butler High School went past or near its site and a large number of its pupils found the routes advantageous to them and were transported on the public school buses. With the opening of the Township's own high school to the north of St. Joseph's School, the direction of flow of public school transportation was reversed, thereby eliminating many of the routes useful to the parochial school pupils.

Situated in another section of the Township, Our Lady Queen of Peace School, which commenced operations in 1960, was also affected by the rerouting of buses for the 1962-63 school year. Certain routes which formerly passed its doors now proceeded by other roads some distance away, necessitating the shuttling of parochial school pupils to their school by buses provided by them. Also the continued growth of the parochial school, whose plans call for adding a grade each year until a complete elementary school program is offered, has increased annually the number of pupils requiring transportation.

From rosters prepared with the assistance of the parochial school authorities, the public school administration has determined what parochial school pupils live on or near established public school transportation routes, and has provided to the parochial school administrators sufficient identification tickets for these pupils. It is clear from the testimony that no parochial school pupil properly entitled to transportation along an established public school route has been denied transportation. In some instances these routes pass directly by one or the other of the parochial schools and pupils leave or board buses at the schools; in other cases pupils are transported by shuttle buses between the parochial schools and some point along the route or at the public school which is the terminus of the route. In one instance the route passes a point only 0.3 miles from the parochial school, but because the traffic con-

ditions there are considered especially hazardous, the parochial school pupils travel on to the public school terminus, there to be shuttled back to the parochial school. Petitioners complain that the time required for shuttling at the beginning and end of the day has to be subtracted from the length of the school day, to the detriment of the educational program.

It is petitioners' contention that the establishment of both parochial schools was predicated on the continued provision for transportation for their pupils by public school buses on routes as they had existed prior to September 1962, and that vested rights to such transportation have thereby accrued to them. They further contend that transportation had been promised by the superintendent of schools, and that the changing of the routes constituted action which is arbitrary, discriminatory, capricious and/or in bad faith. They argue that it would be within the spirit and intent of the law, as interpreted by the courts, to redesign the routes to pass the parochial schools, to extend them beyond the public school terminus, or to carry parochial school pupils to their schools and then backtrack for short distances to resume their trips to public schools.

Respondents deny on legal grounds any vested rights to transportation as a result of previous routes. They further deny any commitment by either the Board or the Superintendent, implying that their admitted sympathy for the problems of the parochial schools may have been misinterpreted. Respondents take the position that the routes were designed to provide the most direct and economical transportation for public school pupils; that they were so approved by the county superintendent of schools as required by law; and that under the terms of the statute as interpreted by the courts, transportation for private school pupils can be only incidental to transportation furnished for public school purposes. They contend that to redesign the routes would result in less direct and more expensive transportation, pointing out, for example, that a change in one route as suggested by petitioners would result in an increase of about six miles in its length. (Tr. 134, July 31, 1963)

Finally, respondents argue that no legal authority would permit extending a public school route beyond the point at which the bus discharges its public school passengers at its terminus, in order to transport parochial school pupils to their school.

The statute which provides for the transportation of pupils to and from school is *R. S.* 18:14–8, which reads in part as follows:

> "Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.
>
> "When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part. * * *"

In this appeal the Commissioner is called upon to answer these questions:

1. Did the Board of Education violate the provisions of *R. S.* 18:14–8, *supra*, or the rules and regulations of the State Board of Education pursuant thereto, in establishing transportation routes for the 1962-63 school year which adversely affected petitioners' schools?

2. In establishing its new routes, did the Board act in bad faith or in an arbitrary, unreasonable or discriminatory manner?

3. Do petitioners enjoy any established rights to transportation of their pupils at public expense which were violated by the discontinuance or alteration of routes which had served their schools in prior years?

In arguing the first question both petitioners and respondents cite the landmark decision of the United States Supreme Court in *Everson* v. *Board of Education of Ewing Township*, 133 *N. J. L.* 350 (*E. & A.* 1945), 44 *A. 2d* 333, affirmed 67 *S. Ct.* 504 (1947), 330 *U. S.* 1, 91 *L. Ed.* 711, rehearing denied, 67 *S. Ct.* 962, 330 *U. S.* 855, 91 *L. Ed.* 1297. In that case the Ewing Township Board of Education was providing free transportation by public carrier to its pupils who were assigned to Trenton High School but was challenged on its reimbursement of bus fares to parents whose children attended parochial school in Trenton. The Court upheld the reimbursement and found the statute, *supra*, to be within the State's constitutional power, saying that while New Jersey cannot contribute to the support of a religious institution, neither can it

> "* * * exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens without regard to their religious belief."

and elsewhere:

> "* * * The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children regardless of their religion, safely and expeditiously to and from accredited schools."

Petitioners argue that the decisions of the courts in *Everson* require a broad and liberal reading of the transportation statutes, and they support this argument by reference to *Board of Education of the Central Regional High School District* v. *State Board of Education*, 27 *N. J.* 76 (1958). In that case the Court found that the regional high school district did not exceed its statutory authority under *R. S.* 18:14–8 in providing transportation to children attending parochial school along its established bus routes, even though some of these children were not in high school grades. Petitioners contend that the term "established school route" can and should be liberally construed to include such rerouting, backtracking, and extending as would be needed to provide transportation for their pupils.

Respondent, on the other hand, looks to the decision of the Court of Errors and Appeals in the *Everson* case, which was affirmed by the Supreme Court, wherein the Court said:

> "The intent of *Pamph. L.* 1941, *Ch.* 191, is that pupils may be transported to parochial schools only as an incident to the transportation of pupils to the public schools since the statute provides that children attending schools could be furnished transportation by any school district from any point *on an already established school route* to any other point *on such established school route.* * * *" 133 *N. J. L.* 350, 354.

The statute in question, *R. S.* 18:14–8, *supra*, has a history which helps to clarify its meaning and the intent of the Legislature in enacting it. Prior to its amendment by Chapter 191 of the Laws of 1941, the first paragraph read:

> "Whenever in any district there are children living remote from the schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school."

The amendment, as originally proposed to the 1941 Legislature in Senate Bill No. 152, would have added a second sentence as follows:

> "Children attending schools other than a public school, except such schools as are operated for profit in whole or in part, shall be entitled to the same rights and privileges as to transportation to and from schools as are provided for children of public schools."

This proposal failed to be enacted into law. The Commissioner agrees with respondents that, had it been adopted, a board of education would have a clear legal duty to provide routes for the transportation of all pupils, public and private. But such is not the case, and it is clear to the Commissioner that the Legislature did not intend it to be. Instead, it enacted the law as it now reads. Respondents, therefore, assert that their legal obligation is to design routes for the transportation of public school pupils living remote from their schools, and that the transportation of pupils to petitioners' schools can be no more than as an incident to that purpose.

Pursuant to the authority granted by *R. S.* 18:14–12, the State Board of Education has adopted rules and regulations applicable to pupil transportation. Rule 1416, "Routes," reads as follows:

"A. A district board of education shall establish a school transportation route or routes when it determines to provide transportation to and from school for public school children under its jurisdiction who live remote from any schoolhouse.

"B. An established route shall be any school transportation route authorized by action of a board of education as a route for children attending a public school when such route is described in detail in the minutes of the board of education and approved in writing by the county superintendent; the route description shall include but not be limited to:

1. A place and time of starting.
2. A listing of the streets, roads or roadbeds to be traveled in proper sequence, and
3. A place and approximate time of termination.

"C. Any established route for public school pupils shall be regarded as an established route for the transportation of children attending a school other than a public school, except such school as is operated for profit in whole or in part.

"D. Any child who attends a school other than a public school, except such school as is operated for profit in whole or in part, and who lives remote from such school, shall be entitled to transportation along that part of any established route advantageous to him, provided he presents himself at a stop on the route according to schedule.

"E. Where public carriers are used and transportation charges for public school pupils are paid by the board of education, the board shall consider the fare zones used for public school pupils as the limits to be observed in the application of N. J. S. 18:14–8 for pupils attending a non-public school."

It is clear to the Commissioner, and he so finds, that in establishing its routes for 1962-63 respondent Board acted within the authority granted by statute and within the bounds of the rule of the State Board. The system of routes was reorganized for a valid reason and was designed to serve the needs of the public school pupils eligible for transportation. Non-public school pupils who could take advantage of the routes as arranged were accommodated and none were denied entitlement to ride on the established routes. This fulfills the obligation of the Board of Education under school laws. The Commissioner can find nothing in the statutes which makes it mandatory for a Board of Education to provide transportation for non-public school pupils except along routes established for the transportation of public school children under its jurisdiction. Therefore, having provided properly for the transportation of pupils to the public schools, and having made such transportation available to the non-public school pupils who could take advantage of it, the respondent Board of Education has discharged its responsibilities under the law. In reaching this conclusion, the Commissioner disposes of the first question and sees no reason to decide other matters raised and argued with respect to it.

With respect to the second question, the Commissioner finds no evidence that the Board of Education acted improperly. It is clear from the testimony that whatever the routes may have been prior to September 1962, the opening of the district's own high school necessitated a radical rerouting of school buses. In the light of the Commissioner's finding herein that respondent Board has no obligation to provide transportation to petitioner's pupils other than as incident to public school transportation, it cannot be charged with unreasonable behavior or with bad faith for having designed routes to meet the needs of its public high school pupils. As to petitioners' assertion that assurance had been given by the superintendent and individual board members that transportation would be provided, the Commissioner finds no clear proof of such assurance. Even assuming that some assurance had been given, there is no evidence that the superintendent was authorized to offer it as an agent of the Board. Nor could any member of the Board make such a commitment as it is well established that board members, individually do not bind the board to a course of action.

> "* * * But the members, even all of them, taken separately, are not agents of the corporation. An act assented to by every one of them is not a corporate act, unless, at the time of assent, they are convened in organized form." *Sooy* v. *State*, 41 *N. J. L.* 394, 399 (*E. & A.* 1879).

The Commissioner finds the record devoid of evidence of action by respondents that is arbitrary, capricious, or discriminatory. It is equally lacking in any indication of bad faith on respondents' part.

There remains then the question whether petitioners had acquired any rights to transportation which were violated by respondents' abandonment or alteration of routes upon which petitioners relied. Petitioners contend, and so testified, that their schools were built in full reliance on the transportation furnished prior to the 1962-63 school year. They urge that the doctrine of estoppel applies because respondents permitted petitioners "to undergo a considerable change in position" by virtue of their dependence on provision of bus transportation. In support of this contention, they rely upon *Johnson* v. *Hospital Service Plan of New Jersey*, 25 *N. J.* 134 (1957) in which the court said, at page 143:

> "Additionally, the doctrine of estoppel applies against municipal corporations. *Vogt* v. *Borough of Belmar*, 14 *N. J.* 195 (1954); 10 *McQuillan, supra*, at §§ 29.02, 29.103; 19 *Am. Jur., Estoppel*, § 168. A great injustice would be perpetrated if at this late date Newark were permitted to deny its obligations to the Hospital Service Plan. The Plan has undergone a considerable change in position as a result of its reliance upon the authority of the medical director to enter into a valid cooperating hospital agreement, and the city's continued compliance with full knowledge of the agreement is directly responsible for the Plan's payment of benefits over the course of 11 years."

The Commissioner does not consider this case dispositive of the issue herein. In the first place, there is missing the element of ratification, either implicit or explicit, by the official body, of an unauthorized contract made by its agent. Whatever routes have existed in previous years were made by the Boards of Education then in office, which alone were authorized to establish the routes for those years. It is well established that except where specifically authorized by statute to do so (as, for example, the employment of a superintendent of schools for a term of up to five years, *R. S.* 18:7–70), a board of education may not bind a succeeding board. In *Skladzien* v. *Board of Education of Bayonne*, 1938 *S. L. D.* 120, affirmed State Board of Education 123 (1933), 12 *N. J. Misc.* 602 (*Sup. Ct.* 1934), 115 *N. J. L.* 203 (*E. & A.* 1935), the old Supreme Court enunciated this principle when it said, concerning the right of a board of education to appoint a medical inspector for a term longer than its own life:

> "It was not the legislative intent, as we see it, to pre-empt a succeeding Board of Education from exercising its prerogative of appointing a medical inspector of its own selection."

In the same way, the Commissioner holds that except where a transportation contract has been made for a term longer than one year as provided in *R. S.* 18:14–10, any board of education having the power to provide for transportation may establish routes consistent with the rules of the State Board of Education, and is not bound by routes established by any preceding board.

The Commissioner finds and determines that in establishing its transportation routes for the school year 1962-63, respondent Board of Education has acted within the authority granted it by law and within the scope of the rules and regulations of the State Board of Education pursuant thereto; that pupils attending petitioners' parochial schools have been granted transportation along such established routes, as provided by statute; and that respondents are not obligated by law to provide additional transportation under the facts of the instant case.

The petition of appeal is dismissed.

COMMISSIONER OF EDUCATION.

April 21, 1964.

XVIII

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the balloting for three seats on the Washington Township Board of Education, Gloucester County, at the annual school election on February 11, 1964, were as follows:

Jay J. Ayres	568
Harvey R. Barton, Jr.	498
West J. Kandle, Jr.	426
William W. Erb	393

A recount of the votes for West J. Kandle, Jr., and William W. Erb was conducted by the Assistant Commissioner of Education in charge of Controversies and Disputes on April 7, 1964, pursuant to a request from Mr. Erb stating that some 60 votes were voided by the election officials and that an examination of the ballots might alter the results as announced.

During the recount 60 ballots were referred for later consideration. The tally of the uncontested votes was as follows:

West J. Kandle, Jr.	414
William W. Erb	366

Subsequent examination of the 60 referred ballots resulted in agreement that 4 could not be counted and were void and that 20 were valid and should be added to the tally. At this posture, the count stood:

	Uncontested	*Counted By Agreement*	*Total*
West J. Kandle, Jr.	414	7	421
William W. Erb	366	13	379

There being a margin of 42 votes separating the two candidates with only 36 ballots yet to be determined, no further decision was necessary as, even if all 36 of the undetermined ballots were counted for Mr. Erb, the result would not be altered.

The Commissioner finds and determines that Jay J. Ayres, Harvey R. Barton, Jr., and West J. Kandle, Jr., were elected to membership on the Washington Township Board of Education for full terms of three years each.

COMMISSIONER OF EDUCATION.

April 21, 1964.

XIX

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE CITY OF ESTELL MANOR, ATLANTIC COUNTY

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the annual election held in the School District of Estell Manor, Atlantic County, on February 11, 1964, for the election of three members of the Board of Education for full terms of 3 years each were as follows:

Corinne Olson	76
Florence M. Tummon	72
Rachel C. Neill	70
Stanley McKay	20

The names of the first 3 candidates above appeared on the ballot on the face of the voting machine. Mr. McKay's 20 votes were tallied from the paper roll provided for writing in the voter's choice.

Pursuant to a request made to the Commissioner of Education by 30 residents for an investigation of certain irregularities alleged to have occurred during the balloting, the Assistant Commissioner of Education in charge of Controversies and Disputes held an inquiry at the headquarters of the Atlantic County Board of Elections on March 19, 1964. Sworn testimony was heard and the voting machine used at this election was inspected.

Petitioners allege that voters were unable to make a personal choice write-in vote because the voting machine was not working properly as to this function. They complain that although this was called to the attention of the election officials in charge by the tenth voter, it was not until voter #22 experienced the same difficulty that a repair man was called. They also complain that the pencil provided for personal choice balloting was installed at the machine on an over-long string which permitted it to hang down below the curtain. They allege that this revealed the intention of those voters who chose to write in their vote to persons outside the voting machine with the result that the secrecy of the voting procedure was invaded which may have dissuaded some persons from availing themselves of the privilege of voting for others than those nominated.

The testimony disclosed that a question as to the proper operation of the machine was first raised by voter #10 who discovered that there were several names visible when she raised the slide to write in her vote. She summoned two of the election officials who entered the booth and assisted her to write in her choice under slide #5. This resulted, she claimed, in her casting a vote against one of the nominated candidates whom she favored. In order to test the operation of the machine, one of the election officials

offered to cast her ballot next and testified that she experienced no difficulty in making a write-in vote. The balloting, therefore, continued until voter #22 discovered names already written in the space under the slide when he attempted to vote. He made no further effort to cast his ballot but complained to the election officials. A repair man was then summoned and approximately an hour later the machine was restored to complete operating condition. The balloting then proceeded without difficulty.

The testimony also reveals that the machine was tested and in proper working order before being delivered to the polling place. It is also clear that sometime thereafter the mechanism which advances the paper roll after a vote is cast failed to function properly. An examination of the roll shows that votes were written in every column from 1 to 7, inclusive. The names of the nominated candidates appeared on the ballot under keys 1, 3, and 5.

Although the circumstances brought to light in this referendum were unfortunate, the Commissioner finds no ground for voiding the election. Indeed, it appears that petitioner's primary purpose is to call attention to the problems experienced in the election in order that they might be avoided in the future, rather than to contest the outcome of the voting. The Commissioner believes that this has been effectively accomplished. There is no evidence of improper conduct by the election officials. It appears clear that they attempted to deal fairly and properly with an unexpected problem. That they did not send immediately for a repair man when the operation of the machine was first questioned by voter #10 was a matter of discretion and judgment which they were entitled to decide. When it became clearly evident that the machine was not working properly, they did take the proper steps to correct the difficulty.

Neither does the testimony disclose any deliberate intent to destroy the secrecy of the balloting through placement of the pencil supplied for write-in votes. The Commissioner views this also as fortuitous rather than planned and finds no substantial ground therein for believing that the results would have been otherwise had the pencil been out of sight.

The Commissioner finds no fault with the conduct of the election board but views this case as one of those unfortunate incidents which occur occasionally to mar an otherwise orderly procedure. In any event, there is no showing that the results of the election would have been different had the machine worked properly during the casting of the first 22 votes and, absent such evidence, the results as announced will stand.

> "It is well established that irregularities which are not shown to affect the results of an election will not vitiate the election. The following is quoted from 15 *Cyc.* 372, in a decision of the Commissioner in the case of *Mundy* v. *Board of Education of the Borough of Metuchen*, 1938 *Edition of School Law Decisions*, at p. 194:
>
> > 'Where an election appears to have been fairly and honestly conducted, it will not be invalidated by mere irregularities which are not shown to have affected the result, for in the absence of fraud the courts are disposed to give effect to elections when possible. And it has been held that gross irregularities when not amounting to fraud do not vitiate an election.'

"In the decision of the Supreme Court *In re Clee,* 119 *N. J. L.* 310, at page 330, it was said:

> 'It is the duty of the court to uphold an election unless it clearly appears that it was illegal. *Love* v. *Freeholders,* 35 *N. J. L.* 269, 277; public policy so ordains. *Cleary* v. *Kendall, supra.*' " *In the Matter of the Recount of Ballots Cast at the Annual School Election in the Township of Ocean, Monmouth County, 1949-50 S. L. D. 53.*

The Commissioner finds and determines that Corinne F. Olson, Florence M. Tummon, and Rachel C. Neill were elected to membership on the Estell Manor Board of Education for full terms of three years.

COMMISSIONER OF EDUCATION.

April 27, 1964.

XX

AUTHORITY OF LOCAL BOARD TO CONTROL HIGH SCHOOL FRATERNITIES EXTENDS INTO SUMMER VACATION

RALPH F. ANGELILLO, SR., INDIVIDUALLY AND ON BEHALF OF RALPH ANGELILLO, JR.,

Petitioner,

v.

BOARD OF EDUCATION OF MANCHESTER REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,

Respondent.

For the Petitioner, Peter Calcia, Esq.

For the Respondent, Samuel A. Wiener, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner here appeals from respondent's resolution suspending his son from school and otherwise punishing him as a result of its finding that he was in violation of Board of Education rules forbidding fraternities or secret societies enacted pursuant to *R. S.* 18:14–111, following a hearing conducted by respondent in accordance with said rules.

On application of petitioner, the Commissioner directed that the execution of the punishment be stayed temporarily, pending the filing of a petition of appeal. Respondent moved to vacate the stay and oral argument was heard on the Motion by the Assistant Commissioner in charge of Controversies and Disputes in Trenton on September 27, 1963. On October 2, the Commissioner extended and continued the stay pending his determination of the issues set forth in the petition herein.

Counsel for both parties have filed briefs, and oral argument on the appeal was heard by the Assistant Commissioner in charge of Controversies and Disputes at Trenton on December 6, 1963. Additionally, the record before the Commissioner contains respondent's "Resolution establishing policy,

rules, regulations, and discipline with respect to membership in fraternities, sororities, and other secret organizations," and the transcript of the proceedings of the Board of Education on September 5, 1963, captioned *In the Matter of Ralph Angelillo, Jr., 12th Grade Student.*

Respondent's resolution concerning school fraternities has a prior history before the Commissioner. Before the beginning of the 1962-63 school year, the Board of Education adopted the resolution, referred to above, which was designed to outlaw and eliminate fraternities and related activities in the high school. The parents of two unrelated pupils, who were subsequently disciplined for refusing to comply with the regulations, filed an appeal before the Commissioner, protesting that the resolution violated their rights and was an unwarranted assumption of authority by the Board. This matter, *Milligan, et al.* v. *Manchester Regional High School Board of Education,* 1961-62 *S. L. D.* 197, was decided on December 27, 1962, and upheld the resolution adopted by the Board as a proper exercise of its authority under the statute. (*R. S.* 18:14–111) The instant matter arises from a disciplinary action directed against Ralph Angelillo, Jr. (hereinafter called Ralph), petitioner's son, as a result of an incident purportedly violating certain provisions of respondent's resolution.

Testimony before the Board reveals that on the evening of June 21, 1963, the day on which the Manchester Regional High School officially closed for the summer, Ralph was host to a group of high school boys at a "coke party" at his home. The party was held with his parents' knowledge and consent, and he provided light refreshments for the boys. Beyond that, Ralph and his father disclaim responsibility for and participation in any of the arrangements, or knowledge of the letter of invitation sent to incoming ninth grade pupils, which reads as follows: (*Proceedings,* page 6):

> " 'Friday night, June 21, Omega is having a party for a few of the incoming Freshman boys. We cordially invite you to attend this party which will be held at the home of Brother Ralph Angelillo's on Suncrest Avenue, North Haledon, at 7:00 P.M. This is a fine chance for the brothers of our Fraternity to meet you and for you to meet them and make new acquaintances.
>
> " 'We sincerely hope you can attend. You will be phoned sometime this week for further information.
>
> " 'Sincerely, The Brothers of
> Alpha Sigma Psi Chapter.' "

Ralph admitted that he had belonged to Omega prior to September 6, 1962, when both he and his father signed declarations, as provided in the Board's resolution, that Ralph was not a member of, did not participate in, or was not in any way affiliated with a fraternity of the kind proscribed. Subsequent to that date, he testified, he had attended no fraternity meetings, paid no dues, nor taken any active or other part in the fraternity. (*Idem,* 8) He explained that he had allowed the use of his house on June 21 as a favor, in return for previous invitations to other boys' homes. He testified further that he had discussed the proposed "coke party" with his parents, and the decision was reached that "since school was done there wouldn't be any harm in having an informal party at my house." (*Idem,* 11) Ralph's father corroborated his

son's testimony in all respects. The only other witness called was the high school principal, who read into the record his report of the incident to the Board of Education. Petitioner offered at several points to produce other witnesses to corroborate his son's assertion of non-membership in the fraternity.

At the conclusion of the hearing, the Board considered the testimony in closed session, after which it moved and adopted a resolution (1) finding that Ralph Angelillo, Jr., did violate the rules and regulations of the Board of Education by belonging to or participating in and continuing affiliation with a fraternity within the school district; (2) directing that Ralph be suspended from school for 5 days, during which he could not attend or participate in any school activities; and (3) revoking any and all honors and awards which he had received during the school year 1962-63. (*Idem*, 41, 42)

Petitioner bases his appeal on the following grounds:

1. The Board's action constitutes an illegal invasion of parental authortiy and deprives petitioner of his constitutional rights.

2. The Board's action was against the weight of the evidence.

3. The Board's action in retroactively revoking the petitioner's awards for the 1962-63 school year and suspending him from school was arbitrary, unreasonable, and an abuse of its discretion.

4. The Board's disciplinary action, particularly the forfeiture of awards, was oppressive, unreasonable, and in violation of law.

With respect to his first argument, petitioner submits that to extend the authority of the Board so that it controls the activities of pupils during the summer vacation has no foundation in law and acts to deprive the parent of his natural and legal control of his child. In defense of this position, he relies upon *Wilson, et al.* v. *Abilene Independent School District*, 190 *S. W.* 2*d* 406 (*Ct. of Civ. Appeals*, Texas, 1945). In that case the court sustained a lower court's refusal to grant a temporary injunction against the enforcement of school board regulations controlling membership in fraternities, pending final determination of the suit. In finding that the board has implied authority to make such regulations, the Court said:

> "As intimated above, we hold that the attempt on the part of the board to extend such regulations to cover the period during which the school was in summer vacation would be an undue invasion of parental authority. In none of the Texas or other cases which we have examined have the courts sought to extend the rule of *loco parentis* to such length and we are unwilling to so extend it here. To do so would be shocking to every concept of parental authority. Furthermore, during said vacation period the teachers and pupils are scattered and it would be unenforceable. We sustain appellant's contention on this point."

No other case directed to the Commissioner's attention, nor any other of which he is aware, urges the limitation of the board's authority as in the *Wilson* case, *supra*. Rather, the principle has long been recognized by the courts that the power of the school to control pupil behavior extends beyond the bounds of the schoolhouse and the school day when such behavior

reaches back within the school to the harm of the proper order and educational purposes of the school.

> "* * * If the effects of acts done out of schoolhouses reach within the school-room during school hours and are detrimental to good order and the best interests of the pupils, it is evident that such acts may be forbidden. * * *" *Burdick* v. *Babcock,* 31 *Iowa* 562 (1871), as quoted in Messick: *The Discretionary Powers of School Boards.* Durham: The Duke University Press, 1949, page 105.

The conduct to be controlled through the exercise of such power must necessarily be relevant to the legitimate interests and purposes of the school.

> "* * * The rules and regulations made must be reasonable and proper, or, in the language of the statute, 'needful,' for the government, good order, and efficiency of the schools,—such as will best advance the pupils in their studies, tend to their education and mental improvement, and promote their interest and welfare. But the rules and regulations must relate to these objects. The boards are not at liberty to adopt rules relating to other subjects according to their humor or fancy, and make a disobedience of such a rule by a pupil cause for his suspension or expulsion. * * *" *State ex rel. Bowe* v. *Board of Education of the City of Fond du Lac,* 63 *Wis.* 234 (*Sup. Ct.* 1885), 23 *N. W.* 102.

A case decided by the Court of Appeals of Ohio in 1963 has many of the elements found in the instant matter. In *Holroyd et al.* v. *Eibling, et al.,* 188 *N. E. 2d* 797, plaintiffs sought to enjoin the school officials of Columbus from enforcing a regulation which barred pupils from membership in fraternities, sororities, societies or organizations defined in essentially the same terms employed in *N. J. S. A.* 18:14–110. In the language of the Court:

> "* * * Plaintiffs claim * * * that if Regulation 10.22 is enforced, the defendants will take complete control of a pupil's activities as far as associations are concerned at all times during the year, both summer and winter, thereby denying the parents their responsibility in selecting associates for their children outside school hours and away from school property * * *."

After finding that the Board of Education had discretionary authority to adopt such a regulation, the Court continues at page 802:

> "We have considered the contentions that the enforcement of this regulation would constitute an invasion of parental authority * * *; and we find no merit in these contentions."

It is the public policy of this State, as expressed in *R. S.* 18:14–111, that a fraternity, sorority, or secret society of public school pupils as defined in *R. S.* 18:14–110, is "inimical to the good of the school system and to the democratic principles and ideals of public education and the public good." Boards of education are required to adopt rules and regulations providing for the necessary disciplinary measures to prevent the formation and maintenance of such societies in their high schools. It would be naive to expect that if such societies were permitted to run at full gallop throughout the summer, their pernicious effects upon pupils and school affairs would stop at the

instant school reopened in the fall. The Commissioner therefore reaffirms his findings in *Milligan* v. *Manchester, supra,* that the statutory authority to make relevant rules and regulations given by *R. S.* 18:14–111 cannot be so narrowly construed as to limit the board to controlling fraternities only within the school property and within school hours. He finds, further, that such authority extends to the summer vacation period.

Having so found, the Commissioner will consider the petitioner's contentions that respondent's findings were against the weight of evidence and the punishment improper. The Commissioner deems the record before him to be adequate. The "proceedings" or "hearing" before respondent Board was conducted in accordance with the procedures established in its resolution, and the pupil and his parents were duly noticed, with opportunity to be represented by counsel. Not only were petitioner and his son questioned by the Board, but they in turn were given full latitude in speaking in explanation and defense of the charge. Ralph's testimony that he did not consider himself a member of a fraternity after he had signed a declaration to that effect, and that he had not paid membership dues or attended fraternity meetings after the declaration, stands unrefuted. In fact, the only evidence to the contrary which could be taken to support the Board's finding on this point is the party invitation, which was not signed by Ralph and of which he disclaimed any knowledge. This evidence is at best circumstantial and, without corroboration, is not sufficient to support the charge that he did "belong to" a fraternity in violation of Board policy and rules. On the other hand, the testimony is convincing that both petitioner and his son were aware that the "coke party" was limited to "members and potential members of this fraternity" (*Proceedings,* page 8), and that in family conference "we discussed it and we thought that since school was done there wouldn't be any harm in having an informal party at my house." (*Idem,* 11; see also page 24). Thus, under the rules of respondent Board, petitioner's son did on June 21, 1963, "participate in and continue affiliation with a fraternity within the school district," and the Commissioner so finds.

Having found that Ralph Angelillo, Jr., did not "belong" to a fraternity between September 6, 1962 and June 21, 1963, the Commissioner finds no basis for revoking any honors and awards which he had received during the period of non-membership. However, in the light of his finding that, even if through an error in judgment, Ralph participated on June 21 with a fraternity in full knowledge of respondent's rules and determination to eliminate fraternities and their influences from the high school in which he held a position of leadership, the Commissioner will not disturb respondent's resolution suspending this pupil for a period of five days. Such a period of suspension is not unreasonable, harsh, or oppressive, and is within the statutory power of a board of education (*R. S.* 18:8–14, 18:7–57).

The Commissioner finds and determines that respondent Board of Education acted within its statutory authority in enforcing its rules and regulations governing fraternities during the summer vacation period. He finds respondent in error in finding that petitioner's son continued to "belong" to a fraternity following his signed declaration to contrary, and orders that the revocation of honors and awards to petitioner's son be set aside. He further finds that, in violation of rules, petitioner's son did "participate in"

a fraternity, and affirms respondent's right to impose a five-day suspension from school for such violation.

COMMISSIONER OF EDUCATION.

May 7, 1964.

XXI

ALLEGATION OF VIOLATION OF RULES OF PUPIL CONDUCT MUST BE SUPPORTED BY WEIGHT OF CREDIBLE EVIDENCE

FREDERICK WOOD, ON BEHALF OF CRAIG WOOD, A MINOR,

Petitioner,

v.

BOARD OF EDUCATION OF MANCHESTER REGIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,

Respondent.

For the Petitioner, Robert P. Alliegro, Esq.

For the Respondent, Samuel A. Wiener, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner here appeals from respondent's resolution suspending his son from school and otherwise punishing him as a result of its finding that he was in violation of Board of Education rules enacted pursuant to *R. S.* 18:14–111, following a hearing conducted by respondent in accordance with said rules.

On application of petitioner, the Commissioner, on October 2, 1963, directed that the execution of the punishment be stayed pending the filing of the petition and the determination of the issues presented therein.

Counsel for both parties have filed briefs, and oral argument on the appeal was heard by the Assistant Commissioner of Education in charge of Controversies and Disputes at Trenton on February 27, 1964. Additionally, the record before the Commissioner contains respondent's "Resolution establishing policy, rules, regulations, and discipline with respect to membership in fraternities, sororities, and other secret organizations," and the transcript of the proceedings of the Board of Education on September 24, 1963, captioned *In the Matter of Craig Wood, 11th Grade Student.*

Respondent's resolution, as contained in the record, has for its purpose the prohibition of secret fraternities and sororities in Manchester Regional High School, pursuant to *R. S.* 18:14–111. It provides, *inter alia*, for a declaration signed by each pupil or his parent that he does not belong to, participate in, or affiliate in any way with such an organization. Failure to make such a declaration, or continuance of membership, participation in, or affiliation with such an organization, after having made it, subjects a pupil, upon a hearing and finding by the Board of Education to punishment which may include suspension or expulsion and denial of honors and awards. The right of respondent Board to make such rules and regulations was sustained

by the Commissioner in *Milligan, et al.* v. *Manchester Regional High School Board of Education*, 1961-62 *S. L. D.* 197.

In the instant case, Craig Wood was accused by the parent of another pupil of having worn a so-called "fraternity sweater" while on the streets of North Haledon on an evening in August 1963. Respondent Board ordered a hearing to be held on September 24, 1963, at which testimony was heard from the complaining parent, the superintendent of schools, petitioner herein, and his son Craig. It was readily admitted by both Craig and his father that on the evening of August 15, Craig had worn a gold and black sweater of a kind that had been identified with a local fraternity, but it was denied that the sweater represented any membership, affiliation, or participation by Craig in any such organization. He had worn the sweater, it was asserted, under protest and on the insistence of his father, who testified that since the family's clothing was packed for a vacation trip the next day, this sweater—an "occasional" garment originally belonging to an older brother but now used also by other members of the family—was the only one available. The superintendent of schools testified that he had met Craig on the street that evening and cautioned him that others might get the impression that by wearing the sweater he was a fraternity member, and that the boy thereupon took the sweater off and put it across his arm. No witness testified to seeing any identifying fraternity insignia, other than that the gold and black colors characterized a sweater worn by members of Omega Gamma Delta, which Craig's older brother had belonged to some years previously. In reply to a question whether he had made statements to other boys about "pulling the wool" over the superintendent's eyes, Craig made an absolute denial.

Petitioner challenges the constitutionality of *R. S.* 18:14–111, but does not press this argument before the Commissioner, since it is well established that the Commissioner will not decide questions of constitutionality. *Thorp* v. *Board of Trustees of Schools for Industrial Education—Newark College of Engineering*, 1949-50 *S. L. D.* 61, 62, affirmed State Board of Education, 1950-51 *S. L. D.* 70, affirmed 6 *N. J.* 498 (1951).

Petitioner also argues that the authority of the Board under *R. S.* 18:14–111 should not be construed so broadly as to control the behavior of pupils during the summer vacation period. The Commissioner has thoroughly considered this question in the case of *Angelillo* v. *Board of Education of Manchester Regional High School District*, decided on this day. The Angelillo matter involves issues present in the instant case, and the Commissioner in that decision

> "* * * reaffirms his finding in *Milligan* v. *Manchester*, *supra*, that the statutory authority to make relevant rules and regulations given by *R. S.* 18:14–111 cannot be so narrowly construed as to limit the board to controlling fraternities only within the school property and within school hours. He finds, further, that such authority extends to the summer vacation period."

Petitioner next contends that the findings of the Board were against the clear weight of evidence, based upon hearsay testimony, and not supported by the credible evidence. With this contention the Commissioner agrees. Respondent Board finds "that the said Craig Wood did in violation of Board policy and the rules and regulations governing students at Manchester Re-

gional High School belong to or participate in and continue affiliation with a fraternity within the school district." (*Proceedings*, page 27) Giving "due regard to the opportunity of the hearer below to observe the witnesses and evaluate their credibility," (*In re Masiello*, 25 *N. J.* 590, 606 (1958), the Commissioner can find nothing whatsoever in the testimony to support such a finding. The pupil wore a gold and black sweater which had once belonged to his brother, and which no longer bore the fraternity insignia which might once have adorned it. This act, without further explanatory evidence, is at best ambiguous. Beyond the fact of the sweater, only the unsupported statement of the complaining witness, which even counsel for respondent discredited (*Proceedings*, page 20), makes any attempt to link Craig Wood as a member, affiliate, or participant in a fraternity.

Having so found, it is unnecessary for the Commissioner to consider other arguments of petitioner. The Commissioner directs that the findings and resolution of respondent Board of Education on September 24, 1963, be reversed. He orders that the stay of punishment provided by said resolution be made permanent, and that Craig Wood be restored to his former standing in the school community.

COMMISSIONER OF EDUCATION.

May 7, 1964.

XXII

BOARD OF EDUCATION IS REQUIRED TO GIVE TERMINATION NOTICE PROVIDED IN CONTRACT

LEON GAGER,

Petitioner,

v.

BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, CAMDEN COUNTY,

Respondent.

For the Petitioner, Cassel R. Ruhlman, Jr., Esq.

For the Respondent, Norman Heine, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner in this case contends that his teaching contract was illegally terminated, and that he is entitled to salary to the date when his contract was purportedly terminated and for a period of 60 days thereafter. Respondent denies that it unlawfully terminated the contract, and asserts that petitioner breached the contract by failing, neglecting, and refusing to perform the duties of his employment.

A hearing was conducted by the Assistant Commissioner in charge of Controversies and Disputes at the office of the Camden County Superintendent of Schools, Pennsauken, on November 19, 1963.

Petitioner was employed to teach in respondent's schools under the terms of a contract effective September 1, 1962, and was assigned to instruct classes in mechanical drawing and wood shop. On December 20, 1962, he was suspended from his duties by the superintendent. On December 27 following, respondent Board of Education terminated petitioner's contract as of December 20.

Petitioner's contract of employment contains the following clause:

> "It is hereby agreed by the parties hereto that this contract may at any time be terminated by either party giving to the other 60 days' notice in writing of intention to terminate the same * * *."

It is petitioner's contention that pursuant to the terms of this contract he is entitled to salary from December 20, when he was suspended, to December 27, when the Board acted, and for the 60-day notice period following the Board's determination to terminate the contract.

Respondent admits that it dismissed petitioner in the manner indicated, but contends that by his failure, neglect, and refusal to perform the duties of his employment, he has breached his contract which contains the following clause:

> "The said party of the second part * * *agrees to faithfully do and perform duties under the employment aforesaid, and to observe and enforce the rules prescribed for the government of the school by the Board of Education."

Such a breach, respondent argues, deprives petitioner of the protection of notice of intention to terminate the contract.

The issue thus placed before the Commissioner is whether respondent, without giving the notice provided in the contract, has dismissed petitioner properly.

Testimony was given by the superintendent, the high school principal, the vice-principal, and the head of the industrial arts department, bearing upon petitioner's failure to establish and maintain suitable disciplinary control in his classes, to take attendance in the manner suggested by his supervisors, to file proper lesson plans, to follow the course of study, and to deal adequately with pupils arriving late to class. The witnesses testified that they had observed petitioner's teaching procedures, and beginning on September 26 had held conferences with him concerning the quality of his work. On November 14 the principal addressed a letter to petitioner (Ex. R-2), setting forth three conditions which he must fulfill: (1) that he must submit to the department head weekly lesson plans; (2) that he must establish and maintain control in all of his classes; and (3) that he must follow the prescribed course of study for both mechanical drawing and wood shop. The letter contained this further warning:

> "If the above three conditions are not met by December 1, 1962, I will then make a recommendation to the Superintendent to release you from your contract."

The principal testified that on December 5 he recommended that petitioner be released. In the letter which he wrote to the superintendent (Ex.

R-3), the principal expressed the opinion that conditions #1 and #3 "have been partially satisfied," but that "#2 has definitely not been met." Subsequently, at a conference of the administrative staff, the department head, and the president of the Board of Education, it was decided to suspend petitioner pending later Board action "because of the continued failure to comply with instructions and recommendations and the continuing poor conditions." (Tr. 91, 92) Then followed the notice of suspension on December 20 and the action of the Board terminating the contract on December 27, as heretofore noted.

Petitioner does not deny respondent's right to dismiss him under the terms of the contract. (Tr. 116) His testimony indicates that he was aware of administrative dissatisfaction with his work, as it was revealed to him in conferences and observation reports. Following a conference on November 12 and the written memorandum of November 14, *supra*, he consulted with the principal and department head about his teaching (Tr. 102):

"Q. Did you have occasion to ask them how your work was progressing?

"A. After that I asked Mr. Maiese several times in the hall how my work was progressing. He said it was improving.

"Q. He said it was improving.

"A. Didn't have any immediate complaints."

It is petitioner's contention that if respondent was dissatisfied with his work and wished to dismiss him, it was obligated to do so under the terms of the contract of employment and in accordance with the law as set forth in *R. S.* 18:13-11.1, which reads as follows:

> "If the employment of any teacher is terminated on notice pursuant to a contract entered into between the teacher and the board of education, it shall be optional with the board of education whether or not the teacher shall teach during the period between the time of the giving of the notice and the date of termination of employment fixed therein."

The Commissioner finds nothing in the evidence before him to support a conclusion that petitioner knowingly and willfully refused to perform the duties of his employment and enforce the rules and regulations of the Board of Education. It is unrefuted that he had reason to believe that he was making improvement in two of the three conditions he was called upon to fulfill. (Ex. R-3) It is clear also from the testimony that in his own estimate he maintained suitable control in his classes (Tr. 95), or found reason for his failure to do so in the size of his classes (Tr. 97, 107), the physical layout of the classroom (Tr. 98, 99), the age of the furniture (Tr. 100, 101), or established procedural systems which he considered unsuitable (Tr. 96). While the Commissioner affirms the Board's right to determine that petitioner's work was unsatisfactory to the degree that it did not wish to continue his employment, and while the Commissioner neither affirms nor denies the validity of petitioner's self-justification, he is convinced by petitioner's testimony that his conduct and practice do not contain the elements of willful failure, neglect, or refusal to perform his duties such as to warrant summary dismissal. It is not to be expected that all teachers will be satisfactory in all employment situations, and for this reason, many boards of education pro-

vide, as does respondent herein, a means whereby on written notice a contract may be terminated. Such a provision would be rendered worthless if a board of education were able to determine that unsatisfactory performance constituted such a breach of the contract as to make the notice unnecessary.

The remaining matter to be considered is petitioner's claim to compensation for the period from December 20 to December 27, and for 60 days thereafter. Having found that petitioner is entitled to the 60-day notice provided in the contract of employment, the Commissioner determines that petitioner must be compensated for such a period, even though the Board of Education, pursuant to *R. S.* 18:13–11.1, *supra*, did not require his services during that time. However, petitioner is not entitled to compensation for the period of suspension. The statute permitting suspension under the circumstances of the instant case is *R. S.* 18:6–42 (assigned by reference to superintendents of regional school districts in *R. S.* 18:8–14 and 18:7–70.2), as follows:

> "The superintendent of schools may, with the approval of the president of the board, suspend any assistant superintendent, principal, or teacher, and shall report such suspension to the board forthwith. The board, by a majority vote of all of its members, shall take such action for the restoration or removal of such assistant superintendent, principal, or teacher as it shall deem proper, subject to the provisions of sections 18:13–16 to 18:13–18 of this Title."

The testimony makes it clear that the procedures set forth in this statute were observed. The suspension was made effective on Thursday, December 20. The week's interval before the Board met to take action contained both a week-end and Christmas. While the term "forthwith" in the statute, *supra*, is grammatically applied to the superintendent's action, the Commissioner believes that the sense of the word must be applied to the subsequent determination by the Board. The seven-day interval obtaining in the present circumstances is a reasonable time for the convening of respondent Board to take action on the suspension. *Cf.* Decision of the Commissioner on Motion to Dismiss, *Marmo* v. *Board of Education of Newark*, October 24, 1963.

The Commissioner finds and determines that the termination of petitioner's services by the Lower Camden County Regional Board of Education was not in accordance with the terms of their mutually agreed upon contract of employment. He directs that respondent pay to petitioner his salary for a period of 60 days.

COMMISSIONER OF EDUCATION.

May 11, 1964.

XXIII

In the Matter of the Special Election Held in the School District of Beverly City, Burlington County

For Petitioner Mario Farias, George S. Dezseran, Esq.

For Respondent City Board of Education, Martin J. Queenan, Esq.

Decision of the Commissioner of Education

Petitioner seeks the invalidation of a special referendum in the School District of Beverly City, Burlington County, authorizing the issuance of bonds in the amount of $350,000, on the grounds of failure to give proper notice. Respondent admits that the legal advertisement set forth in the statute was not made but contends that there was otherwise no lack of notice to the voters and the results of the election should be sustained.

Testimony was heard and exhibits received by the Assistant Commissioner in charge of Controversies and Disputes on March 11, 1964, at the office of the Burlington County Superintendent of Schools, Mount Holly.

The School District of Beverly City operates under the provisions of Chapter 6 of Title 18. The contested referendum herein sought authorization for the issuance of bonds of the district for the purpose of constructing additional school facilities, the results of which were: Yes—278; No—270.

The required ordinance was given first reading on September 10, 1963, and second reading and adoption on November 12, 1963, at public meetings of the Beverly City Council. At the latter meeting the Council fixed the time for the referendum to be January 14, 1964, from 12:00 noon to 8:00 P. M. In due course the seven notices of the election required by statute were posted at appropriate places at least seven days prior to the election. These notices correctly stated the hours the polls would be open from 12:00 noon to 8:00 P. M. Although not required by law, sample ballots were also mailed to the voters of the district. On these sample ballots the polling hours were incorrectly stated as from 2:00 to 8:00 P. M. There was no publication of the notice of the election by the clerk of the municipality in a newspaper in the district as required by statute, and it is this omission that petitioner points to as a fatal defect to the validity of the election.

The relevant statute is *R. S.* 18:6–63, the pertinent excerpt of which reads:

> "* * * It shall be the duty of the clerk of the municipality to give notice of any such election, setting forth, in addition to the proposition to be submitted, the day and time thereof and place or places thereof and the polling districts therefor by reference to the general election districts established and used in the municipality and the hours during which the polls at such election will be open. At least seven days before the date of such election, said clerk shall post not less than seven copies of such notice, one on each schoolhouse within the municipality and the others at such other public places in the municipality as he may select, and shall publish said notice in a newspaper published in the municipality if there be one or, if there be no such newspaper, in a newspaper published in

the county and circulating in the municipality. No other or different notice of said election shall be required to be posted, published, delivered or otherwise given. * * *"

Petitioner's position is that the statute places a duty on the clerk of the municipality which is not directory but mandatory and that failure to give such notice by newspaper as the law requires, renders the election illegal, void and of no effect. This being so, it is contended, no argument of substantial compliance can be raised nor can other kinds of notice be substituted for the legal publication specifically stated in the law. He points also to the discrepancy between the posted notices and the sample ballots in respect to the hours the polling places were to be open and states that this produced further confusion of the voters. As a result of these defects, the issue, according to petitioner, is not whether the will of the people prevailed, but whether the will of the people was expressed.

Respondent admits failure to give the appropriate legal notice by newspaper. In extenuation it notes that during this time the work of the municipal clerk, who was fatally ill and who, in fact, expired on the day of the hearing, was being performed by a deputy. It contends, however, that despite the omission, the voters were adequately informed of the referendum. It points to articles which appeared in the newspaper during the period of preparation for the election; to a brochure containing relevant information, 800 copies of which were prepared and given to the P.T.A. for distribution to the municipality; to a public meeting which was held for the purpose of informing the citizens; to the posting of the seven notices, and to the fact that sample ballots were mailed to every voter. As a result of these efforts, respondent avers, the voters were fully informed of all matters with respect to the referendum, including the date and hours for voting. It contends that the omission of the newspaper notice was more than overcome by the other notices and publicity given to the voters. The Board also cites the fact that no voter, including petitioner who offered no testimony, has come forward to state that the single procedural defect complained of herein prevented his voting or affected the results in any way. Finally, respondent argues, petitioner having presented no evidence that the admitted irregularity repressed a full and free expression of the popular will, the assertion of a mere technical fault should not serve to set the election aside.

The Commissioner of Education, in contested election decisions over many years, has expressed his belief that school district elections are no less important than other elections and his concern that they be conducted in strict compliance with every requirement of law. Nevertheless, and despite the best efforts of school officials, irregularities, as a consequence of human fallibility, do from time to time occur. In his consideration of the effect of irregularities such as occurred herein, the Commissioner has looked to pronouncements of the courts, such as the following, for guidance:

"* * * the courts consider the nature of the irregularity, its materiality, the significance of its influence and consequential derivations in order to determine whether the digression or deviation from the prescribed statutory requisitions had in reasonable probability so imposing and so vital an influence on the election proceedings as to have repressed or

contravened a full and free expression of the popular will, and thus deduce the legislative intent reasonably to be implied.

"* * * 'The right of suffrage is too sacred to be defeated by an act for which the voter is in no way responsible, unless by the direct mandate of a valid statute no other construction can be given.' *Bliss* v. *Woolley*, 68 *N. J. L.* 51, on *p.* 54 (*Sup. Ct.* 1902); *Lane* v. *Otis*, 68 *N. J. L.* 656, on *p.* 660 (*E. & A.* 1903); *Attorney-General* v. *Belleville*, 81 *N. J. L.* 200, on *p.* 206 (*Sup. Ct.* 1911)." *Sharrock* v. *Keansburg*, 15 *N. J. Super.* 11, 17 and 18 (*App. Div.* 1951).

"It is the duty of the court to uphold an election unless it clearly appears that it was illegal. *Love* v. *Freeholders, &c.*, 35 *N. J. L.* 269, 277; public policy so ordains." *In re Clee*, 119 *N. J. L.* 310, 330 (*Sup. Ct.* 1938).

"* * * Laws directing the way and manner in which elections shall be conducted are generally construed by the courts as directory, unless a non-compliance with their terms is expressly declared to be fatal. 20 *C. J.* § 223, *page* 181; 29 *C. J. S.*, *Elections*, § 214. Elections should never be held void unless they are clearly illegal.

"* * * Certainly irregularities on the part of election officers or others which do not appear to affect, alter or void the voting, the counting, or the returns, will not form a ground of contest. *Lehlbach* v. *Haynes*, 54 *N. J. L.* 77, 23 *A.* 422 (*Sup. Ct.* 1891)." *In Re Wene*, 26 *N. J. Super.* 363, 376, 377 (*Law Div.* 1953).

"Acts and omissions to act may render the local election officers liable to indictment, and yet, absent malconduct, fraud, or corruption, the election result is unimpeachable. *In re Clee*, 119 *N. J. L.* 310, 321 (*Sup. Ct.* 1938). Where, as here, there is an unwitting omission of a formal requirement otherwise supplied in substance, the ballots are invulnerable; the overturning of the result in such circumstances would frustrate the will of the voters for errors and omissions of form not related to the merits; and this would do violence to the legislative will. In this regard, acts and omissions by the district board mandatory before election may for reasons of policy be deemed directory after the election, if it indubitably appears that the election result was not thereby prejudiced. The question is essentially one of fairness in the election. An election is not vitiated by the defaults of election officers not involving malconduct or fraud, unless it be shown that thereby the free expression of the popular will in all human likelihood has been thwarted." *Wene* v. *Meyner*, 13 *N. J.* 185, 196 (1953).

It is not necessary to debate whether the required newspaper notice is mandatory or directory before and after the election or whether other kinds of notice can supply the omission. Failure to give statutory notice constitutes a defect which cannot be ignored. The crucial question, however, is whether the irregularity prevented the election from being conducted fairly and without prejudice so that the will of the people was properly determined and was not suppressed. Unless the latter can be shown, the irregularity in itself will not vitiate the election.

The evidence in this case falls short of any clear showing that the people's will was not expressed in this election. Petitioner asserts that the omitted

newspaper notice voids the results but no proof is offered that any voter was affected thereby. There is no evidence that any voter failed to exercise his franchise because he did not know of the election; that persons who did not vote would have done so had the newspaper notice appeared; or that the results of the balloting were affected in any way by the omission of the notice. Absent such a showing, the Commissioner will not set aside and render of no effect the votes of the 548 citizens who did cast a ballot indicating their choice. The Commissioner finds the omission of the newspaper notice to be a serious oversight, much to be regretted, but in the light of all the facts in this case one that did not prevent an impartial election in which the will of the voters was fairly determined.

Nor does the discrepancy between the hours of balloting as shown by the published notices and the sample ballots provide a substantial basis for challenge. The statutory notices carried the correct hours and the polls were, in fact, open from noon until 8 o'clock. Beyond the mere assertion that the different statements confused the voters, no evidence was educed that any voter or the result of the referendum was affected in any way thereby. Here again, the existence of irregularities over which the voters had no control will not serve to vitiate the election absent proof of fraud, misconduct, or prejudice to the results. *Cf. In re Livingston*, 83 *N. J. Super.* 98 (*App. Div.* 1964).

The Commissioner finds and determines that the omission of newspaper notice, as required by statute, and such other irregularities as may have occurred, did not prevent the will of the voters from being fairly determined at the referendum held in the School District of Beverly City, Burlington County, on January 14, 1964. The Commissioner finds that the issuance of bonds in the amount of $350,000 was authorized by the citizens at that referendum.

COMMISSIONER OF EDUCATION.

May 18, 1964.

Appeal before State Board of Education ruled out of time, June 29, 1964.

Appeal before Superior Court, Appellate Division, dismissed by agreement, August 28, 1964.

XXIV

WHERE LOCAL SALARY GUIDE EXCEEDS STATE MINIMUM SCHEDULE, BOARD RULES FOR WITHHOLDING INCREMENTS ARE CONTROLLING

ZELDA GOLDBERG,

Petitioner,

v.

BOARD OF EDUCATION OF THE WEST MORRIS REGIONAL HIGH SCHOOL DISTRICT, MORRIS COUNTY,

Respondent.

For the Petitioner, Milton I. Goldberg, Esq.

For the Respondent, Schenck, Smith & King
(Alten W. Read, Esq., of Counsel)

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner in this case is a teacher under tenure in respondent's school. She complains that for the 1963-64 school year she did not receive the salary increment which she contends is due her under the terms of respondent's salary guide, and that in withholding such increment respondent did not comply with the provisions of law.

A joint pre-trial memorandum submitted by counsel states the respective contentions of petitioner and respondent, and the issues to be decided by the Commissioner. A hearing was held by the Assistant Commissioner in charge of Controversies and Disputes at the office of the Morris County Superintendent of Schools on November 18, 1963, following which briefs were submitted by counsel.

Petitioner has been employed as a teacher in respondent's school since 1958. During the school year 1962-63 her salary was $6800, which represented the ninth step on the local salary guide effective for that year. A new guide was developed during the 1962-63 school year, and on February 19, 1963, each teacher received at a teachers' meeting a "proposed salary" under the new guide for 1963-64 (P-4). For petitioner the "proposed salary" was $7100, representing the tenth step on the new scale. The guide was adopted by the Board on February 26, 1963 (P-5). On the afternoon of March 5 the superintendent of schools told petitioner that he was recommending to the Board that her increment be withheld for the 1963-64 school year, for reasons which had been given to her at a conference on the previous January 28. At a Board meeting held on the evening of March 5, teachers' salaries were fixed for the following year. Petitioner's salary was established at $6850, and she was notified to this effect by letter from the superintendent on the following day.

It is clear from the testimony of the superintendent and high school principal that the recommendation for withholding petitioner's increment was based upon reasons deemed by the superintendent to be sufficient. Further, the testimony establishes that the question of petitioner's increment had been discussed by both the Board's personnel committee and the Board itself

in executive session, and that the Board's formal action on March 5 was taken pursuant to the superintendent's recommendation.

It is petitioner's contention that the granting and withholding of salary increments are subject to the provisions of Section 7 of Chapter 249, Laws of 1954 (*R. S.* 18:13–13.7), which reads as follows:

> "The schedule set forth in this act is intended to prescribe a minimum salary at each step, and any increment prescribed shall also be considered a minimum. Boards of education shall have the power to increase for any teacher or classification of teachers included in any schedule, the initial salary or the amount of any increment or the number of increments. Any board of education may withhold, for inefficiency or other good cause, the employment increment or the adjustment increment or both by any teacher in any year by a majority vote of all the members of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the teacher concerned. The teacher may appeal from such action to the Commissioner of Education under rules prescribed by him. The Commissioner of Education shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. The Commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment."

Petitioner argues that she did not receive written notice from the Board of its action to withhold her increment within 10 days thereof, together with the reasons therefor. Failure of respondent to comply with these provisions of the statute, she contends, is a denial of her rights under the law, and entitles her to an increment and salary for 1963-64 in accordance with the local salary guide for such year.

Respondent contends, on the other hand, that when the salary paid to a teacher is in excess of that required to be paid to her as a minimum under the provisions of the Minimum Salary Law (*R. S.* 18:13–13.1, *et seq.*), the Board is not bound by the provisions of *R. S.* 18:13–13.7, *supra*. It argues, further, that when the local salary guide provides for salaries higher than the minimums established in *R. S.* 18:13–13.2, the granting of increments rests within the discretion of the board, and that in this instance there has been no abuse of such discretion. The salary guide contains a provision that "any increments may be withheld in whole or in part by the Board of Education for unsatisfactory service or any other reason upon recommendation of the Superintendent" (P-5). In acting in accordance with this rule, respondent contends that it made its determination within its discretion.

Although counsel have stated in their pre-trial memorandum the issues posed by the conflicting contentions of petitioner and respondent, the Commissioner deems the over-riding question to be, If the salary voted to be paid to a teacher is in excess of the minimum salary to which the teacher is entitled under the provisions of *R. S.* 18:13–13.2, do the provisions of *R. S.* 18:13–13.7 apply? Upon the answer to this question rest the anwers to the other questions concerning petitioner's right to notice, to reasons, and indeed, to a salary increment.

Prior to the enactment of Chapter 249 of the Laws of 1954 (*R. S.* 18:13–13.1 *et seq.*), the statutes established a minimum salary but not a scale of minimum salaries and increments for teachers. *R. S.* 18:13–13, as adopted in the general revision of 1937, required that every teacher be paid a minimum salary of $100 per month of employment during the school year. Subsequent amendments in 1941, 1944, 1947, 1949, and 1951 raised the minimum salary to $2500. The 1954 Minimum Salary Law not only established minimum salaries for various levels of professional training, but also required that within each level of training the teacher shall be advanced by annual salary increments of $200 to a "minimum maximum" based on the number of years of professional experience in the public schools. Provision was also made for mandatory adjustment increments to bring a teacher to his proper place on the schedule.

The language of *R. S.* 18:13–13.7, *supra*, clearly sets forth the intent of the schedule: "to prescribe a minimum salary at each step, and any increment prescribed shall also be considered a minimum." But having met these minimum requirements, a board of education is given full latitude "to increase for any teacher or classification of teachers included in any schedule, the initial salary or the amount of any increment or the number of increments" (*R. S.* 18:13–13.7, *supra*). Section 8 of the act (*R. S.* 18:13–13.8) further provides:

> "Nothing contained in this act shall be construed * * * to prevent the adoption of any salary schedule which shall meet its minimum requirements * * *."

Thus respondent Board adopted for 1963-64 a salary guide which provided for petitioner, at step 9, a salary several hundred dollars higher than the minimum established by law for teachers on that step.

It will be observed from the historical review of minimum salary legislation *supra*, that legislative policy has moved from a statutory *minimum salary* (*R. S.* 18:13–13) to a statutory *minimum salary schedule* providing for a series of minimum increments (*R. S.* 18:13–13.1, *et seq.*). To such minima every properly certificated teacher has such rights as are provided by law, of which the teacher cannot be deprived except in strict accordance with the procedures set forth in the statutes. *Forsyth* v. *Board of Education of Freehold*, 1955-56 *S. L. D.* 77; *Colangelo* v. *Board of Education of Camden*, 1956-57 *S. L. D.* 62, affirmed State Board of Education 66. Beyond that, in accordance with the powers granted to the board by *R. S.* 18:13–13.8, *supra*, and by *R. S.* 18:13–5, to "make rules and regulations governing the engagement and employment of teachers and principals, the terms and tenure of the employment, * * * the rights and duties of the teacher with respect to his employment, shall be dependent upon and governed by the regulations in force with reference thereto."

It has been established that neither a state nor local salary guide has a contractual effect. *Greenway* v. *Board of Education of Camden*, 1939-49 *S. L. D.* 151, affirmed State Board of Education 155, affirmed 129 *N. J. L.* 46 (*Sup. Ct.* 1942), 129 *N. J. L.* 461, 462-463 (*E. & A.* 1943). See also *Offhouse et al.* v. *Board of Education of Paterson*, 1939-49 *S. L. D.* 81, affirmed State Board of Education 85, *cert.* denied, 131 *N. J. L.* 391, 396 (*Sup. Ct.* 1944). A local salary schedule has been said to be "a rule or regulation

governing the salaries of teachers which it makes for its own convenience and guidance," *Greenway, supra*, 1939-49 *S. L. D.* at 158; and the Supreme Court in *Offhouse, supra*, at page 396, describes a regulation providing for increments as "a mere declaration of legislative policy that is at all times subject to abrogation by a local board in the public interest." The Commissioner maintained a similar determination in *Kopera* v. *Board of Education of West Orange*, 1958-59 *S. L. D.* 96, 97, when he said:

> "A salary guide, if adopted by a district board of education, and if higher than the minimum salary requirements of *N. J. L.* 18:13–13, *et seq.*, is only an announced goal or objective of the board."

While the Court, on appeal from the affirmance of the State Board, remanded *Kopera* for further finding of fact and conclusions by the Commissioner, it did not take exception to the Commissioner's definition, *supra*, 60 *N. J. Super.* 288, 294 (*App. Div.* 1960). In *Wachter* v. *Board of Education of Millburn*, 1961-62 *S. L. D.* 147, in which petitioner appealed the withholding of a salary increment under the terms of a local salary guide, no claim was made that any rights accruing under the Minimum Salary Law had been violated. However, had the Commissioner found that such rights existed under the law, "the proper discharge of his duty requires corrective action." *In re Masiello*, 25 *N. J.* 590, 607 (1958). But the Commissioner found that the increment was withheld within the discretion of the Board, in the exercise of which he would not intervene.

Thus the history and past construction of the Minimum Salary Law, and prior decisions of the courts and of the Commissioner himself, lead him to the determination that petitioner herein has no rights under the terms of *R. S.* 18:13–13.7 which have been violated by respondent's decision to withhold a salary increment provided by its own salary guide for the school year 1963-64.

There remains the question of petitioner's rights under the terms of respondent's salary guide for 1963-64. The old Supreme Court dealt directly with this question in *Fraser, et al.* v. *State Board of Education*, 133 *N. J. L.* 15 (1945). The Court's decision, in full, reads as follows:

> "A writ was allowed in this case for the determination of two questions. 132 *N. J. L.* 28.
>
> "1. Do teachers in a school system, who have acquired tenure, have a right to the increases provided by an existing salary schedule when the time for such increases occur? We think not. If the reasoning in *Greenway* v. *Board of Education of Camden*, 129 *N. J. L.* 461, is somewhat extended, as we think it should be, board action is necessary to implement every increase.
>
> "2. May the recommendation by the persons named in the schedule be arbitrarily withheld? We can find nothing in the proofs beyond inaction. There is nothing to indicate that it was arbitrary. To decide otherwise it is admitted would necessitate overruling the reasoning in the Greenway case, *supra*. This we cannot do.
>
> "The judgment of the State Board of Education will be affirmed."

This question has come before the Commissioner on previous occasions. In *Kopera, supra*, it was found that increments under West Orange's salary guide were granted automatically unless the services rendered were evaluated as unsatisfactory under the rules and regulations of the Board of Education. It remained for the Commissioner, on remand of the case from Superior Court, Appellate Division, to determine whether there was proper basis for the Board's determination that Miss Kopera's services were unsatisfactory. 1960-61 *S. L. D.* 57, affirmed Superior Court, Appellate Division, January 10, 1963. In *Wachter* v. *Board of Education of Millburn, supra*, at page 148, the local salary guide provided that increments could be withheld "for reasons judged sufficient by the Superintendent and approved by the Board of Education." The Commissioner determined that the superintendent had found "sufficient" reasons, which were approved by the Board. In *Belli* v. *Board of Education of Clifton*, decided by the Commissioner March 20, 1963, the local salary guide provided that "in the event * * * no action to the contrary is taken by this Board, the annual increments, as the same become due * * * will become part of the salary * * *." No provision was anywhere expressed for the withholding of increments, and the Commissioner found that petitioner's increment had been improperly withheld.

In the instant case, the local guide provides that increments may be withheld "for unsatisfactory service or any other reason upon recommendation of the Superintendent." The evidence before the Commissioner is clear that the superintendent had reasons which were known to the Board, upon which he based his recommendation. The nature and validity of such reasons are not in issue before the Commissioner. It is also clear that the recommendation of the Superintendent had been discussed by the Board in executive session at least once before final action was taken at a regularly convened meeting on March 5. The Commissioner cannot find in respondent's action either a violation of the provisions of its own salary guide or those elements of arbitrary, capricious or unreasonable behavior which would constitute reason to set its action aside.

The Commissioner finds and determines that the withholding of petitioner's salary increment for the school year 1963-64 was not violative of any provisions of *R. S.* 18:13–13.1, *et seq.*, and was in conformance with the terms of respondent's local salary guide for such year.

The petition is accordingly dismissed.

COMMISSIONER OF EDUCATION.

May 20, 1964.

Pending before State Board of Education.

XXV

In the Matter of the Annual School Election Held in the Township of Winslow, Camden County

For Elwood C. Heggan, A. Donald Bigley, Esq.

For Board of Education, Samuel A. Donio, Esq.

Decision of the Commissioner of Education

The announced results of the annual school election held February 11, 1964, in the School District of the Township of Winslow for the election of three members to the Board of Education for full terms of three years each were as follows:

	At Polls	*Absentee*	*Total*
Raymond Liberto	375	4	379
Ernest D. Heggan	350	2	352
Elwood C. Heggan	253	---	253
James M. Wilson	249	4	253
William Alkazin	129	2	131

Because of the tie vote for the third seat on the Board, a request for a recount was granted by the Commissioner of Education and conducted by the Assistant Commissioner in charge of Controversies and Disputes at the office of the Camden County Superintendent of Schools on March 6, 1964.

During the recount, one ballot was not accounted for in polling district #4. The poll list contained the names of 56 voters and there were 56 ballot coupons, confirming the report of the election officials for this polling place that 56 votes were cast and counted. Only 55 ballots were found in the package delivered to the county superintendent, however. The announced results for this polling place for the two candidates in question were Elwood C. Heggan —40 and James M. Wilson—24. The recount confirmed this tally. The report of the election officials also shows that of the 56 votes cast, one was voided. No voidable ballot was found among the 55 ballots recounted. It must be assumed that the ballot voided by the election officials was not included with those counted and eventually delivered to the county superintendent of schools and that it is this ballot that is missing.

Of 10 ballots set aside during the recount, 5 were voided by agreement and 5 were referred to the Commissioner for determination. At this posture the tally stood:

	At Polls	*Absentee*	*Total*
Elwood C. Heggan	251	---	251
James M. Wilson	245	4	249
Referred	5	---	5

Determination of the 5 referred ballots was held in abeyance pending a further inquiry into the election on charges of irregularities filed by Mr. Elwood C. Heggan and the location of the missing ballot. This hearing was held in the office of the Camden County Superintendent of Schools on April 29, 1964.

Complainant alleges the following improper procedures:

1. Only one voting booth was provided at each polling place.

2. Voters were permitted to mark their ballot outside the voting booth.

3. The marked ballots, poll lists, ballot coupons, and the election materials were not sealed in envelopes before delivery to the Secretary of the Board.

4. The election materials were removed by the Secretary of the Board from the envelopes in which they were delivered to him.

Complainant's testimony was unrefuted on all four charges. It appears that only one voting booth was provided in each polling place despite the requirements of *R. S.* 18:7–20, which provides

> "* * * that not less than two booths shall be installed at each polling place. * * *"

It further appears that voters were handed a ballot and permitted to mark it outside the voting booth, although the statute (*R. S.* 18:7–36) provides:

> "* * * No ballot shall be handed to a voter until there is a booth ready for occupancy and until the voter shall have signed the poll list. The election officers shall not allow a voter to mark his ballot outside of an election booth unless the voter is unable to enter the booth by reason of his physical disability. * * *"

The testimony also reveals that the requirements of *R. S.* 18:7–45 were not carefully observed. This statute provides:

> "At an annual or special election of the legal voters of the district held at two or more polling places, the tally sheet, poll list, and ballots shall be placed by the secretary of each election in a sealed package indorsed with the address of the polling place and the date on which the election was held, and the chairman shall deliver the same immediately to the secretary of the board, together with a statement of the result of the election, signed by the chairman and secretary. * * *"

According to the Secretary of the Board, the tally sheets, poll list, marked and unused ballots, ballot coupons, report of the proceedings, etc., were placed in one envelope and delivered to him. The following morning he opened the envelope, removed its contents, rearranged the materials, placing the marked ballots, tally sheets, ballot coupons, and poll lists in a sealed envelope which he subsequently delivered to the office of the County Superintendent, retaining the unused ballots and reports of the proceedings.

No charge is made that the Secretary or any other official tampered with the ballots or election materials, and any inference of fraud or deliberate misconduct is denied by all who testified. Nor is there any evidence that the omissions or improper acts prevented any voter from casting his ballot or that they had any effect on the results of the election. It appears clear that the irregularities here brought to light were the result of failure to give careful attention to all of the requirements of the school election laws by those charged with the duty, rather than a deliberate attempt to interfere with the expression of the will of the voters. This being so, the Commissioner finds

no ground for the voiding of the election, it being well established that, absent fraud or misconduct or reason to believe that the will of the people was suppressed, mere irregularities on the part of the election officials will not vitiate an election.

> "* * * the courts consider the nature of the irregularity, its materiality, the significance of its influence and consequential derivations in order to determine whether the digression or deviations from the prescribed statutory requisitions had in reasonable probability so imposing and so vital an influence on the election proceedings as to have repressed or contravened a full and free expression of the popular will, and thus deduce the legislative intent reasonably to be implied.
>
> "* * * 'The right of suffrage is too sacred to be defeated by an act for which the voter is in no way responsible, unless by the direct mandate of a valid statute no other construction can be given.' *Bliss* v. *Woolley*, 68 *N. J. L.* 51, on *p.* 54 (*Sup. Ct.* 1902); *Lane* v. *Otis*, 68 *N. J. L.* 656, on *p.* 660 (*E. & A.* 1903); *Attorney-General* v. *Belleville*, 81 *N. J. L.* 200, on *p.* 206 (*Sup. Ct.* 1911)." *Sharrock* v. *Keansburg*, 15 *N. J. Super.* 11, 17 and 18 (*App. Div.* 1951)
>
> "Acts and omissions to act may render the local election officers liable to indictment, and yet, absent malconduct, fraud, or corruption, the election result is unimpeachable. *In re Clee*, 119 *N. J. L.* 310, 321 (*Sup. Ct.* 1938). Where, as here, there is an unwitting omission of a formal requirement otherwise supplied in substance, the ballots are invulnerable; the overturning of the result in such circumstances would frustrate the will of the voters for errors and omissions of form not related to the merits; and this would do violence to the legislative will. In this regard, acts and omissions by the district board mandatory before election may for reasons of policy be deemed directory after the election, if it indubitably appears that the election result was not thereby prejudiced. The question is essentially one of fairness in the election. An election is not vitiated by the defaults of election officers not involving malconduct or fraud, unless it be shown that thereby the free expression of the popular will in all human likelihood has been thwarted." *Wene* v. *Meyner*, 13 *N. J.* 185, 196 (1953)

It remains to determine the five contested ballots referred and the results of the balloting for the third seat on the Board of Education. These ballots fall into two categories and are determined as follows:

EXHIBIT A—Four ballots on which there are extra markings. One of these has a very light curved pencil line extending vertically through three of the squares before candidates' names. Another has very roughly and heavily made cross marks before three names to the extent that one square is almost completely filled but the cross mark is still distinguishable. The third has coarsely made cross marks before three names and a slight pencil mark of no identifiable character before a fourth candidate. The last ballot is marked in blue ink for three candidates with a slight diagonal line in the square before another name.

In the Commissioner's judgment these ballots are valid and must be counted. There is no reason to believe that the extra markings are intended to

distinguish or identify the ballot or are other than marks which appear commonly. Individual idiosyncrasies in marking a cross, plus or check mark are not unusual. The marks on these ballots, although coarse and roughly made, clearly reveal the intent of the voter and approximate the prescribed form closely enough to be counted. Nor does the use of blue ink invalidate the vote. See *R. S.* 19:16–4. *In re Recount of Ballots Cast at the Annual School Election in the Borough of Stratford, Camden County*, 1956-57 *S. L. D.* 119; *In the Matter of the Recount of Ballots Cast at the Borough of Watchung, Somerset County*, 1960-61 *S. L. D.* 170; *In re Recount of Ballots Cast at the Annual School Election in the Township of Monroe, Gloucester County*, 1957-58 *S. L. D.* 79.

EXHIBIT B—One ballot on which there is a cross in blue ink to the right and following the name of each of three candidates but no mark of any kind appears in the square before the name of any candidate.

This ballot cannot be counted for any candidate. While these wrongly placed marks would not necessarily invalidate the ballot, it is well established that a vote is not made and cannot be tallied unless the voter marks a proper mark in the appropriate square. The election law, Title 19, to which the Commissioner looks for guidance, provides at *R. S.* 19:16–3c as follows:

> "c. If no marks are made in the squares to the left of the names of any candidates in any column, but are made to the right of said names, a vote shall not be counted for the candidates so marked, but shall be counted for such other candidates as are properly marked; but if the district board canvassing the ballot or the county board, judge of the Superior Court or other judge or officer conducting a recount thereof, shall be satisfied that the placing of the marks to the right of the names was intended to identify or distinguish the ballot, the ballot shall be declared null and void."

See also *In the Matter of the Recount of Ballots Cast at the Annual School Election in Commercial Township, Cumberland County*, 1952-53 *S. L. D.* 74.

The Commissioner finds that the four contested ballots in Exhibit A will be added to the tally. Exhibit B is not voted and will not, therefore, affect the tally.

The final tabulation of votes is as follows:

	At Polls	*Absentee*	*Exhibit A*	*Total*
Elwood C. Heggan	251	---	---	251
James M. Wilson	245	4	4	253

Testimony was also heard from the chairman of the election board in District #4 with respect to the missing ballot. Her recollection was clear that one ballot was voided for the reason that it was voted for four persons instead of three. No such ballot was found among those for District #4 in the recount and no accounting for this omission could be offered by any witness.

While the absence of this ballot is to be deplored, it could not affect the final tally as determined above, as even were it properly voted for Mr. Elwood C. Heggan, Mr. Wilson would still prevail.

The Commissioner finds and determines that Raymond Liberto, Ernest D. Heggan, and James M. Wilson were elected to membership on the Winslow Township Board of Education for full terms of three years each.

The Commissioner further directs the Winslow Township Board of Education and its Secretary (1) to provide at least two voting booths at each polling place, (2) to instruct the election officials it may appoint in the proper performance of their duties, (3) to provide appropriate and adequate materials for the election boards in order that they may discharge their responsibilities properly, and (4) to take such other remedies as may be necessary to insure that every requirement of law is observed and carried out in all future school elections.

COMMISSIONER OF EDUCATION.

May 26, 1964.

Pending before State Board of Education.

XXVI

TEACHER UNDER CONTRACT NOT ENTITLED TO HEARING ON FAILURE TO BE RE-EMPLOYED

HOWARD A. OZMON, JR. v.
PATERSON STATE COLLEGE AND
MARION E. SHEA, PRESIDENT

Dear Mr. Pressler:

Receipt of your verified petition on behalf of Assistant Professor Ozmon is hereby acknowledged.

The school law of New Jersey authorizes the Commissioner of Education to appoint and remove principals, teachers and other employees of the state colleges subject to the approval of the State Board of Education. The decision not to offer the petitioner, Howard A. Ozmon, a contract for the forthcoming academic year was my own, based upon the recommendation of the Department Chairman, The Dean of the College and the President of the College. In this matter I find no reason to undertake to review judicially the exercise of my own legislatively delegated discretion.

Further, I am advised by the Attorney General that the decision not to offer a contract to an employee without tenure does not constitute a legally cognizable cause of action within the purview of the school laws of this State. In cases such as this, there is no statutory provision which would entitle an untenured employee to a hearing.

You may consider this letter as a dismissal of your petition.

Sincerely yours,
F. M. RAUBINGER,
Commissioner of Education.

Mr. David A. Pressler
Okin & Pressler
595 Broad Avenue
Ridgefield, New Jersey
May 21, 1964.

Pending before State Board of Education.

XXVII

TEACHER UNDER CONTRACT NOT ENTITLED TO HEARING ON FAILURE TO BE RE-EMPLOYED

FRANK S. TAYLOR v.
PATERSON STATE COLLEGE
MARION E. SHEA, PRESIDENT

Dear Mr. Pressler:

Receipt of your verified petition on behalf of Assistant Professor Taylor is hereby acknowledged.

The school law of New Jersey authorizes the Commissioner of Education to appoint and remove principals, teachers and other employees of the state colleges subject to the approval of the State Board of Education. The decision not to offer the petitioner, Frank S. Taylor, a contract for the forthcoming academic year was my own, based upon the recommendation of the Department Chairman, The Dean of the College and the President of the College. In this matter I find no reason to undertake to review judicially the exercise of my own legislatively delegated discretion.

Further, I am advised by the Attorney General that the decision not to offer a contract to an employee without tenure does not constitute a legally cognizable cause of action within the purview of the school laws of this State. In cases such as this, there is no statutory provision which would entitle an untenured employee to a hearing.

You may consider this letter as a dismissal of your petition.

Sincerely yours,

F. M. RAUBINGER,
Commissioner of Education.

Mr. David A. Pressler
Okin & Pressler
595 Broad Avenue
Ridgefield, New Jersey
May 21, 1964.

Pending before State Board of Education.

XXVIII

TEACHER'S SALARY INCREMENTS SUBJECT TO LOCAL SALARY GUIDE RULES WHERE SALARY IS ABOVE STATE MINIMUM SALARY GUIDE

FRANCIS M. STAREGO,

Petitioner,

v.

STEPHEN J. MALIK, SECRETARY OF THE BOARD OF EDUCATION OF THE BOROUGH OF SAYREVILLE, AND THE BOARD OF EDUCATION OF THE BOROUGH OF SAYREVILLE, MIDDLESEX COUNTY,

Respondent.

For the Petitioner, Paul C. Kemeny, Esq.

For the Respondents, Edward A. Kolodziej, Esq., and Eugene F. Hayden, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner, a teacher under tenure in the Sayreville Schools, seeks the payment of certain salary increments and adjustments which he claims were improperly withheld from him in the school years 1955-56, 1956-57, 1957-58, and 1959-60. Respondents deny that they have withheld any moneys due to petitioner as an employee of the Board of Education.

The case is submitted to the Commissioner in a Stipulation of Facts and briefs of counsel. The original petition of appeal was brought against Stephen J. Malik, Secretary of the Sayreville Board of Education. By agreement of counsel, the Board of Education was joined as a party respondent.

Petitioner was first employed in respondents' schools in September 1950 at a salary of $2,650, which included an allowance for three and one-half years of military service. At meetings of the Board of Education his salary was fixed for the years in question as follows:

Meeting	*School Year*	*Salary*
June 13, 1955	1955-56	$4,250
April 9, 1956	1956-57	5,425
April 15, 1957	1957-58	5,925
April 13, 1959	1959-60	6,425

There were stipulated the several salary guides or "salary computers" employed by respondent Board for these years. These "computers" are tables, or grids, showing salaries for teachers at each year of employment with respondent Board, modified by allowed prior service credit. Petitioner claims that the salaries paid to him were below those provided for his years of experience in each of the several years listed above. The alleged deficiencies claimed in the petition of appeal are not the same as those described in petitioner's brief, and both sets of figures are different from those which the Commissioner notes when he compares the salaries actually paid with those

shown in the computers. However, the Commissioner finds no need at this point to establish the precise dollar amount of the difference. The prior issue to be determined, since differences do exist, is whether petitioner has been improperly denied any salary increments.

Petitioner rests his argument upon the application of the Minimum Salary Law, *R. S.* 18:13–13.1, *et seq.* (Chapter 249 of the Laws of 1954 as amended by Chapter 153, Laws of 1957). This law establishes a schedule of minimum salaries, increments, and adjustment increments to be paid to teachers at various levels of training and experience. It provides (*R. S.* 18:13–13.3) that a teacher shall be entitled annually to an employment increment until he reaches the State maximum; and it further grants to local boards of education the power to increase for any teacher or classification of teachers the number or amount of any increments (*R. S.* 18:13–13.7). Petitioner herein does not claim that he was being paid at the minimum salary level during the years in question, nor does it appear that he was denied any increment subject to any provision of *R. S.* 18:13–13.1, *et seq.* In *Goldberg* v. *Board of Education of West Morris Regional High School District,* decided May 20, 1964, the Commissioner determined that when the salaries provided under a local salary guide are higher than those set forth in the Minimum Salary Law, the Board is not bound by the terms of *R. S.* 18:13–13.7.

The question that remains, then, is whether any provision of respondent Board's own salary guide, which was higher than the State schedule, was violated with respect to petitioner. In *Goldberg, supra,* the Commissioner further held that when the salaries provided by a local salary guide are higher than those of the State schedule, the rules of the local board of education for administering such a guide are controlling. In the instant case the schedules furnished in the Stipulation give no indication of the policy of the Board for granting or withholding increments or for adjusting salaries which are below the current schedule, and petitioner has offered nothing to show that he was denied increments in violation of the local rule, or that the Board was in any way arbitrary, capricious, or unreasonable. Moreover, respondents assert that in 1955 the Board adopted the following rule as a part of the salary guide:

> "The teacher has the right to appeal his case to the Teacher's Committee of the Board of Education if he feels that just recognition has not been granted after conferring with his principal and the Superintendent."

Petitioner has not challenged the existence or the continued effectiveness of this rule, nor is there any evidence that at any time he availed himself of the right of appeal which the rule afforded him. In fact, except for the year 1959-60, the Stipulation shows that each year upon notification of the salary voted to him for the ensuing school year, he signed an acknowledgment to the effect that he wished to be re-employed for the year at the salary indicated. While the Commissioner imputes no legal or contractual significance to such acknowledgments, (*Mateer* v. *Board of Education of Fair Lawn,* 1950-51 *S. L. D.* 63), he views petitioner's acceptance of the salaries, in the face of the asserted rule providing a means of appeal, *supra,* as further indication that the petitioner was not denied any salary which was due him.

The Commissioner finds and determines that respondents have paid to petitioner all salaries due to him, and that he has not been denied any rights to salary increments available to him under respondent Board's rules and regulations.

The petition of appeal is dismissed.

COMMISSIONER OF EDUCATION.

June 2, 1964.

XXIX

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT, SOMERSET COUNTY

DECISION OF THE COMMISSIONER OF EDUCATION

The Commissioner is asked in this case to rule on the validity of the annual school election held February 4, 1964, in the Watchung Hills Regional High School District and specifically in the constituent district of Passaic Township, Morris County. The petitioner, James Morelock, charges that certain named persons who were not registered 40 days prior to the date of the election, were permitted to cast a ballot in this district. He asserts his belief that the number of illegal ballots so permitted is sufficient to alter the results of the election as announced.

The Assistant Commissioner of Education in charge of Controversies and Disputes held an inquiry into the complaint on April 24, 1964, at the office of the Morris County Superintendent of Schools, Morristown. Testimony was taken of the petitioner, the secretary of the board of education, and of two of the election officials. Examination was also made of the poll lists and of the signature copy registers used in this election.

A check of the names supplied by petitioner of persons alleged to have voted improperly, disclosed that a number of them had in fact registered less than 40 days prior to February 4, but that only two had cast a ballot in the election on that date. As the announced results showed a difference of 13 votes between the two candidates for the full-term seat on the board of education, the result cannot be affected by those two votes and will stand as announced.

The Commissioner finds and determines that Charles F. Hempstead was elected at the annual school election on February 4, 1964, to membership on the Watchung Hills Regional High School District Board of Education for a full term of three years.

COMMISSIONER OF EDUCATION.

July 16, 1964.

XXX

In the Matter of the Annual School Election Held in the Township of Jackson, Ocean County

Decision of the Commissioner of Education

Following the annual school election on February 11, 1964, in the Jackson Township School District, Ocean County, the Commissioner of Education received complaints from some 20 residents of that district in regard to certain activities connected with the referendum. The Assistant Commissioner of Education in charge of Controversies and Disputes conducted a hearing at the office of the Ocean County Superintendent of Schools on April 1 to determine the facts of the controversy.

The complaint is directed toward the distribution of a school newsletter entitled "The Interpreter" which was given to pupils to take home to their parents the day of the school election. It is alleged that the content of the newsletter attempted to influence voters with respect to approval of the budget and as to choice of candidates. Petitioners contend that the use of this medium for such a purpose was improper.

It appears that the superintendent of schools has distributed a school newsletter known as "The Interpreter" at four intervals during the school year for the past four years for the purpose of informing parents about a variety of school topics. This particular issue is duplicated typewriting on both sides of two sheets of 8½" x 11" paper or four pages in all. The heading on the first page is as follows:

Jackson School District
Jackson, New Jersey
"The Interpreter"

Office of the	Box 56
Superintendent	R. D. 4, Jackson, N. J.
B. A. Froelich, Editor	
Volume 7, Number 1	February 10, 1964

SPECIAL ELECTION ISSUE

"Let's Check Our Facts Let's Consider Our Values"

An Editorial

* * * * * * * * *

It is not disputed that copies of the newsletter were distributed to pupils to take home on the day of the election. Petitioners contend that the material and its arrival in homes just prior to the opening of the polls constituted a deliberate attempt to "brainwash" the voters to influence them to approve the budget, and to elect those candidates who favored expenditures for school purposes. While several specific excerpts are cited as offensive, it is

the material as a whole and its total effect to which petitioners object as an improper attempt by school officials to influence the outcome of the election. Asked what relief he sought, petitioners' principal witness stated:

> "It isn't a question of seeking relief, sir. I feel that if we only serve to impress upon the Board, whether it's this Board or any other board, that matters of this type should be handled in another manner. I feel articles of this type and the way it was delivered, the manner it was presented is, to my way of thinking, a deliberate attempt to try to influence voters. I feel that the Superintendent of Schools, whoever he may be, and the employees of the School Board if they wish to present facts to the citizens of the community regarding a proposed budget or expenditures, they have a perfect right to do so, but when they try to color their articles to the extent that certain candidates should or should not be supported, I think this is overstepping the bounds of their responsibility and they should be prohibited from doing this.
>
> "Q. Let me be perfectly clear. You do not seek to have the Commissioner set this election aside. You seek to bring these matters which you feel to be improper to light and to public attention through this tribunal.
>
> "A. That would be the extent of my feeling on this at the present time."

The Superintendent of Schools in his testimony took sole responsibility for the issuance of the newsletter and stated that his only purpose, as in all prior issues of "The Interpreter," was "to enlighten the people of the district." (Tr. 42) He stated that there had never been any complaint or question about prior issues and denied any impropriety or intent to influence the election.

The Commissioner finds no need to analyze and evaluate the newsletter in question. A study of it discloses no particular statement which can be cited as outright propaganda urging approval of the election proposals and yet the tenor of the whole unquestionably favors approval of the budget presented and of those candidates who support expenditures for public education. What influence, if any, such a newsletter actually had upon the outcome of the election (which approved the budget by a 40 vote plurality) it is, of course, impossible to determine. One can only conjecture that it influenced the vote of few, if any, persons. But it is certain that the material offended a number of citizens whose resentment is expressed in this complaint. The fact of severe criticism by so many persons is alone sufficient to create serious question of the propriety of the material. Under these circumstances its issuance, no matter how innocent the intent, must be held to have been poor judgment.

The Commissioner also directs the attention of the school authorities to the proscription contained in *R. S.* 18:14–78.1 against the use of school children for distribution of election literature or materials. The law is explicit:

> "No printed, written, multigraphed or any other kind of matter, which, in any way, in any part thereof, promotes, favors, or opposes the candidacy of any candidate for election at any annual election conducted

pursuant to the provisions of article three of chapter seven of Title 18 of the Revised Statutes, or at any general or municipal or school election, whenever any question shall be hereafter submitted pursuant to sections 18:6–3 and 18:7–3 of the Revised Statutes, or which, in any way, in any part thereof, promotes, favors, or opposes the adoption of any bond issue proposal or other public question submitted at any general or municipal or school election shall be given to any public school pupil in any public school building, or on the grounds thereof, for the purpose of having such pupil take such matter to his home or to distribute it to any person or persons outside the school building or the grounds thereof. Nor shall officials or employees of public schools request or direct such pupils to engage in activities which promote, favor, or oppose any bond issue proposal or other public question submitted at any general or municipal or school election."

A second section of this statute (*R. S.* 18:14–78.2) provides for its implementation by the adoption of rules and regulations by each board of education as follows:

"The board of education of each school district shall prescribe the necessary rules and regulations to carry out the purposes of this act."

Since the petitioners have not sought to challenge the validity of the annual school election on the basis of the alleged improprieties discussed above, the Commissioner does not address himself to that question. The petitioners' purpose to call public attention to the matters of which they complain has been accomplished. Their legitimate interest in seeking a broader remedy is hereby recognized, and the Jackson Township Board of Education is directed to adopt rules and regulations pursuant to *R. S.* 18:14–78.2 in accordance with the requirements of law including, of course, *R. S.* 18:14–78.1, and with the views expressed herein.

COMMISSIONER OF EDUCATION.

July 23, 1964.

XXXI

THE COMMISSIONER WILL NOT DECIDE MOOT ISSUES

ANTHONY AMOROSA,

Petitioner,

v.

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

Respondent.

For the Petitioner, John W. Yengo, Esq.

For the Respondent, John Witkowski, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

As a citizen of Jersey City, petitioner charges that the employment of Mrs. William McDonald by respondent Board of Education constitutes a fraud on the taxpayers of the municipality because allegedly she "did not have

the qualifications for appointment and certain documents submitted were fraudulent and false in fact." Respondent enters a general denial to the allegations of the petition and asks for its dismissal on the grounds that the matter is now moot.

Following a conference in the office of the Assistant Commissioner in charge of Controversies and Disputes attended by petitioner and counsel for respondent on January 8, 1964, respondent filed a Motion to Dismiss. Petitioner, now represented by counsel, filed a memorandum opposing the Motion, to which respondent submitted a reply.

The Petition of Appeal in this case was received by the Commissioner of Education on November 4, 1963. Prior to that date, on October 9, 1963, Mrs. McDonald submitted and the Jersey City Board of Education accepted her resignation. Respondent argues, therefore, that the matter is now moot. Petitioner concedes in his brief that the above resignation renders the issue herein moot but requests that the Commissioner hear the matter to establish the "remedy or penalty for the violations and misrepresentation on the part of Florence O'Connor McDonald."

It is well established that the Commissioner, consistent with the policy of the courts, will not hear and decide issues which are moot. *Worthy et al.* v. *Berkeley Township Board of Education,* 1938 *S. L. D.* 686, 691; *Mills* v. *Green,* 159 *U. S.* 653; *Rodgers* v. *Orange City Board of Education,* 1956-57 *S. L. D.* 50. In *Jones* v. *Montague,* 194 *U. S.* 147 (1904) the Court said:

> "Courts do not adjudicate moot cases and will not hear a case when the object sought is not attainable."

And in *Moss Estate et al.* v. *Metal Thermit Corp.,* 73 *N. J. Super.* 56 (*Ch. Div.* 1962) it was said at *p.* 67:

> "It is the policy of the courts to refrain from advisory opinions, from deciding moot cases, or generally functioning in the abstract, and 'to decide only concrete contested issues conclusively affecting adversary parties in interest.' *Borchard, Declaratory Judgments* (2*d ed.* 1941), *pp.* 34-35; *New Jersey Turnpike Authority* v. *Parsons, supra.*"

In view of the employee's resignation prior to the filing of this complaint, there is no need to consider the merits of the case since any relief which the Commissioner is empowered to grant would be futile. In accordance with the authority heretofore cited, the Commissioner will not issue advisory opinions in matters such as this. The complaint contains no charge that respondent board of education violated any law or exceeded its discretion in any manner. Rather, the pleadings indicate that petitioner's charge of wrongdoing is directed primarily at the employee who is not a party to this complaint. Under these circumstances, the Commissioner can find no reasonable basis to continue this matter.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

July 23, 1964.

XXXII

BOARD OF EDUCATION MAY MAKE AGE A FACTOR IN RULES FOR ADMISSION OF CHILDREN TO KINDERGARTEN AND FIRST GRADE

DOROTHY BOULOGNE,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF JAMESBURG, MIDDLESEX COUNTY,

Respondent.

For Petitioner, *Pro Se*

For Respondent, Thomas P. Cook, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner is the mother of a daughter, Kathleen, who was born on January 26, 1958. Petitioner complains that respondent refused to admit her daughter to its first grade class by virtue of a rule requiring that pupils must be 6 years old by December 31, 1963, in order to be admitted to first grade in September 1963. She further complains that such a rule is arbitrary and discriminatory, and that respondent further discriminated against her child by admitting to first grade another child, 6 years of age, who had attended the same private kindergarten as her daughter. Respondent denies that its action is either arbitrary or discriminatory, being a proper exercise of its discretionary authority.

The case is submitted to the Commissioner in a Stipulation of Fact, a brief on behalf of respondent, and oral argument heard by the Assistant Commissioner in charge of Controversies and Disputes at Trenton on April 14, 1964.

It is stipulated that prior to 1963, pupils were admitted to respondent's kindergarten in September if they were 5 years of age or if they would attain that age on or before December 31 during the school year. On May 7, 1962, respondent advanced to October 31, the date by which pupils entering kindergarten in September 1963 must have attained 5 years of age.

Petitioner's daughter attended a private kindergarten during the 1962-63 school year. In June 1963, petitioner sought to enter the child in the first grade of respondent's school for the following term, and requested the Board to have her tested in order to determine whether she was qualified to enter first grade. When petitioner did not receive an acceptable answer, she attended a meeting of the Board of Education on August 12, 1963, in order to press her application. At that meeting respondent adopted a further policy that the enrollment age for first grade would be 6 years on or before October 31 of the year in which the child was to enter that grade. Petitioner's application was denied on the ground that her daughter would not be 6 years old until January 1964.

On September 5, 1963, respondent supplemented the foregoing policies by adopting a resolution that children who finished kindergarten in the Jamesburg school system in June 1963, would be permitted to enter first grade for the school year 1963-64. On September 16, 1963, respondent reaffirmed the aforementioned policies and further supplemented them by a provision that children who have completed "a satisfactory kindergarten program in June 1963, and who will be six years of age by December 31, 1963," may be admitted to first grade for the school year 1963-64.

It is further stipulated that a classmate of petitioner's daughter in the private kindergarten, who became 6 years of age in June 1963, was admitted to first grade in respondent's schools for the year 1963-64.

Petitioner contends that in adopting its policies for admission to first grade, respondent has been arbitrary and unreasonable, and has acted in abuse of its discretionary authority. While she admits that her daughter cannot qualify for admission on the basis of her age, she argues that, having completed a satisfactory kindergarten program, her daughter is entitled to testing to demonstrate her fitness to be admitted to first grade. She further alleges that the aforementioned policies setting a minimum age for admission to first grade were specifically aimed to bar her daughter's entrance.

It has long been held that it is the right and responsibility of the local board of education to establish rules for the promotion of pupils from grade to grade. In 1914, the State Board of Education in reversing the decision of the Commissioner in *Staats* v. *Board of Education of Montgomery Township*, 1938 *S. L. D.* 669, 671, said:

> "The State Board of Education holds that a local board of education has authority to prescribe its own rules for promotion. It is given that express right by statute. * * *"

More recently, in the case of *Wilcox* v. *Board of Education of Oceanport*, 1954-55 *S. L. D.* 75, the Commissioner directed the admission of a child on transfer from a private kindergarten, concluding, at page 77, with the statement:

> "The Board of Education of the Borough of Oceanport, Monmouth County, will determine in its discretion the grade in which the child shall be placed. (See *R. S.* 18:11–1.)"

That a board of education may give consideration to age as a factor in determining promotion policies is set forth in the statutes. *R. S.* 18:11–1 requires boards of education to provide suitable school facilities and accommodations for the education of the children who reside in the district. Such facilities

> "* * * shall include * * * courses of study suited to the ages and attainments of all pupils between the ages of five and twenty years. * * *"

In fulfillment of its duty to provide suitable school facilities, the board has no obligation under the law to employ formal testing procedures to determine a child's fitness to enter a particular grade. The statutes specifically reserve to the local school district the right to prescribe its own rules for promotion. *R. S.* 18:3–16 empowers the Commissioner to "ascertain the

thoroughness and efficiency of any or all public schools and any or all grades therein, by such means, tests and examinations as seem proper to the Commissioner," but after giving such power, the statute concludes:

> "Nothing contained in this section shall impair the right of each district to prescribe its own rules for promotion."

While the board may use tests for grade placement purposes, it is not required to do so. In the case of *Gutch and Fugger* v. *Board of Education of Demarest*, decided by the Commissioner March 13, 1963, affirmed State Board of Education May 1, 1963, one of the questions was whether a board of education could make psychological testing a prerequisite to early admission to kindergarten. On this question the Commissioner said:

> "* * * respondent is under no obligation to obtain the results of psychological testing as evidence of readiness for schooling of a child under the age of five years. * * * If, on the other hand, respondent desires such guidance in the exercise of its discretion given it by *R. S.* 18:15–1, *supra*, the Commissioner is convinced that there is implied power for respondent to employ such professional assistance or advice as it may reasonably require."

In the instant matter, respondent could have directed that petitioner's child be tested to determine qualifications for admission to first grade. That it did not so direct does not constitute a denial of any right. Petitioner admits that her daughter did not qualify for admission to first grade on the basis of age under respondent's policy.

The Commissioner finds no evidence of arbitrary or discriminatory action in the board's modification of its policy to make children born on or before December 31, 1957, eligible for admission to first grade if they had satisfactorily completed the kindergarten program in its own or a suitable private kindergarten. Such a modification was obviously necessary to avoid inconsistency with its own rules. Petitioner lost no rights thereby which she had previously enjoyed.

Nor does the Commissioner find discrimination in the Board's admission to first grade of a child who had attended the same kindergarten as petitioner's child, but who was 6 years of age before the beginning of the school term. Such an admission was fully consonant with the Board's policy, as supplemented in its resolution on September 16, 1963, to admit to first grade in September 1963, children who had completed "a satisfactory kindergarten program in June, 1963, and who will be six years of age by December 31, 1963."

The Commissioner finds and determines that respondent's rules for admission to kindergarten and first grade for the school year 1963-64 were made within the exercise of its discretionary authority, and were neither arbitrary nor discriminatory. Petitioner's daughter is entitled to be admitted to respondent's schools in whatever grade respondent deems appropriate according to its rules.

The petition of appeal is dismissed.

COMMISSIONER OF EDUCATION.

July 29, 1964.

XXXIII

CONTINUATION OF TEMPORARY CHANGE OF HIGH SCHOOL DESIGNATIONS IS WARRANTED WHERE CONDITIONS HAVE NOT CHANGED

BOARD OF EDUCATION OF THE BOROUGH OF ALLENHURST, MONMOUTH COUNTY,
Petitioner,

v.

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

For the Petitioner, Arnone & Zager
(Abraham J. Zager, Esq., of Counsel)

For the Respondent, Joseph N. Dempsey, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

In December 1962, petitioner applied for a change of designation of its secondary school pupils from Asbury Park High School to Shore Regional High School. The Commissioner denied the application on the grounds that good and sufficient reason did not exist for the termination of the sending-receiving relationship and to that extent the petition was dismissed. He retained jurisdiction, however, and subsequently, by order dated September 5, 1963, granted the requested change of designation for nine 9th grade, six 10th grade, and nine 11th grade pupils, a total of 24, who were residents of Allenhurst, to Shore Regional High School from Asbury Park High School because of the existence of double sessions in the latter school.

It was further ordered

> "that further hearing be set down in this matter, at which time testimony will be taken and argument heard by the Commissioner on the question of the continuance of this temporary change of designation in the event that respondent eliminates double sessions before the pupils so changed shall have completed their high school education, and, upon the question of granting like changes of designation in succeeding years until said double sessions are eliminated, * * *."

Of the 24 pupils granted permission to attend Shore Regional High School during 1963-64, there remain 13 who desire to extend this temporary change of designation for the school year 1964-65. In addition, permission to transfer is requested for five 9th grade pupils who will begin their secondary school experience in September 1964. Petitioner grounds its request on the fact that double sessions will continue to be the practice in Asbury Park High School during 1964-65.

Following the filing of this application on March 16, 1964, respondent gave indication that it would not contest the extension of the temporary change of designation for those pupils already transferred or the addition of five 9th grade pupils to the list. Respondent subsequently withdrew from this proposed agreement when it learned that two others of its sending dis-

tricts, Deal and Interlaken, were preparing to make similar applications. Such applications were in fact made to the Commissioner, the one from Deal on May 15, 1964, and from Interlaken on June 8, 1964. Respondent thereupon contested all three applications on the grounds that such withdrawals would affect adversely the educational program of its secondary school. The three applications were heard concurrently by the Assistant Commissioner in charge of Controversies and Disputes at the office of the Monmouth County Superintendent of Schools on August 11, 1964.

It is conceded that Asbury Park High School will remain on double sessions during the 1964-65 school year. Having granted permission to 24 Allenhurst pupils to attend Shore Regional High School for the 1963-64 school year and no change having occurred in the basis for that approval, the Commissioner will continue the change of designation for the 13 remaining pupils during the 1964-65 school year.

The Commissioner will also approve the application for five additional 9th grade pupils to attend Shore Regional High School beginning September 1964. Respondent concedes that the withdrawal of these few pupils will have little or no effect upon its program. For the reasons already cited in this decision and order in the prior case, the Commissioner will grant the application.

The application of the Allenhurst Board of Education for an extension of the change of designation from Asbury Park High School to Shore Regional High School already granted to 13 of its pupils enrolled in high school during 1963-64 and for five more pupils who will enter 9th grade in September 1964 is hereby granted and approved.

COMMISSIONER OF EDUCATION.

August 31, 1964.

XXXIV

WHERE DISADVANTAGES OUTWEIGH ADVANTAGES, COMMISSIONER WILL DENY APPLICATION FOR CHANGE OF HIGH SCHOOL DESIGNATION

BOARD OF EDUCATION OF THE BOROUGH OF DEAL, MONMOUTH COUNTY,
Petitioner,

v.

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

For the Petitioner, Lautman & Rapson
(Solomon Lautman, Esq., of Counsel)

For the Respondent, Joseph N. Dempsey, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Application is made for a change of designation for 52 pupils resident in the Deal School District from Asbury Park High School to Shore Regional High School for the 1964-65 school year. Petitioners ground their request on the fact that Asbury Park High School will continue to operate on a two-ses-

sion basis during the forthcoming school year and the desire of the parents of these pupils to have their children enrolled in the Shore Regional High School which has a single session. Respondent Board of Education does not consent to the reassignment of these pupils from its secondary school.

This matter was heard concurrently with other applications from the school districts of Allenhurst and of Interlaken by the Assistant Commissioner in charge of Controversies and Disputes at the office of the Monmouth County Superintendent of Schools, Freehold, on August 11, 1964.

Petitioner asks the Commissioner to change the high school designation for such of its pupils now attending Asbury Park High School and such of its pupils entering high school as may desire to go to Shore Regional High School and that this designation continue in effect as long as Asbury Park High School remains on a two-sessions daily basis. The number of pupils involved approximates 52. Respondent Board contends that the withdrawal of these pupils and others who have similarly applied would have an adverse effect upon its educational program.

The applicable statute is *R. S.* 18:14–7, the relevant section of which is:

> "No designation of a high school or schools heretofore or hereafter made by any district either under this section or under any prior 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 unless good and sufficient reason exists for such change and unless an application therefor is made to and approved by the commissioner. * * *"

Asbury Park High School is the high school designated to receive secondary pupils from the Borough of Deal. Since September 1959, in order to cope with increasing enrollments, the high school has been operating on a two-session-a-day basis, with half of the pupils attending in the morning and the other half in the afternoon. The continuation of this expedient over a number of years, without any apparent prospect of a return to a single-session day, has been a source of much concern to pupils, parents, and school personnel alike. The Commissioner of Education has recognized the inadequacies inherent in such a double-session program and has granted applications for change of designations to single-session schools in several instances. *Bradley Beach Board of Education* v. *Asbury Park Board of Education*, 1959-60 *S. L. D.* 159, and *Allenhurst Board of Education* v. *Asbury Park Board of Education*, decided August 22, 1963.

In considering applications of this kind the Commissioner is guided by principles laid down in earlier decisions. Thus, in *Sparta Board of Education* v. *Newton Board of Education*, 1939-49 *S. L. D.* 30 at 31, affirmed by the State Board of Education, he said:

> "* * * The high school designation law was enacted to protect districts which had provided facilities for pupils or other districts from the withdrawal of these pupils without good cause. This statute benefits the sending district as well as the receiving district. If this law had not been enacted, sending districts, either individually or by uniting with other districts, would have been compelled to burden themselves with the erection and maintenance of high schools.

"In order to provide for cases where good and sufficient reason exists for the transfer of pupils to another high school, the Legislature charged the Commissioner with the responsibility of determining when such good and sufficient reason for a change of designation does exist. The Commissioner feels constrained to exercise his discretion under this statute with great caution. Otherwise the law will not accomplish the salutary purpose intended by the Legislature. Only in cases where educational benefits will accrue to the pupils sufficient to offset the financial loss to the receiving district is it clearly the duty of the Commissioner to grant an application for a change of designation."

See also *Board of Education of Haworth* v. *Board of Education of Dumont*, 1950-51 *S. L. D.* 42.

More recently the Commissioner has applied these principles to applications based on dissatisfaction with double sessions. In the *Bradley Beach* application, *supra*, he stated:

"* * * The Commissioner is aware that, in recent years, many factors (often unforseeable and beyond local control) have operated to force high school districts to organize their program on a double session basis and that most of them are making diligent efforts to develop facilities which will permit a return to the more complete and adequate educational opportunities possible in a one-session day. That this is so establishes even more reason for the Commissioner to exercise his discretion carefully to avoid any impending or harmful effects that might be incurred by a change of designation, no matter how temporary. At the same time, the Commissioner is convinced that double sessions cannot be considered an adequate substitute under any circumstances for the complete educational program possible in a normal school day and can only be defended under emergency conditions. Because of the deprivation of full educational opportunities for pupils, of inadequate expedients which must be employed, of the unnatural stresses and strains through inconvenience which are placed on pupils, homes and staff, the Commissioner deplores the necessity to resort to a double session organization. For this reason, in his judgment, requests for changes of designation which will permit the pupils involved to attend school on a one-session basis should be approved unless it can be shown that the benefits to the pupils will be overbalanced by the harm done to the receiving district by their withdrawal. * * *"

The Commissioner has found no reason to change his position with respect to the educational inadequacies and deprivations of a double-session school day, and admittedly such a program will be in operation during the 1964-65 school year in Asbury Park High School. There is every reason to believe that this expedient will no longer be necessary beginning September 1965. At that time Asbury Park will be relieved of the obligation to provide secondary school facilities for more than 800 pupils from Ocean Township who will thenceforth attend their own new high school. Even so, there is no possibility of eliminating the two-session day in Asbury Park High School for the forthcoming school year.

Respondent Board does not contest the fact of this undesirable condition but asserts that it should be weighed against the adverse effects if the with-

drawal is granted. It argues that the application comes late and points to the fact that commitments have already been made in terms of tuition revenues anticipated and budgeted, of teachers and staff members employed, and of class rosters and pupil assignments scheduled. It claims that the withdrawal of the pupils covered by this and other applications on top of the expected removal of Ocean Township children a year hence will cause irreparable harm to its college preparatory program. It argues further that a single year's transfer to another high school, even considering the relative merits of a single-session and a double-session day, would not represent an educational gain but would in the long run prove disadvantageous to pupils and schools alike.

The Commissioner does not share Asbury Park's fears that it will have difficulty in offering a complete college preparatory program should its enrollment be reduced to the extent of this and other applications pending plus the removal of Ocean Township pupils. However that may be, the Commissioner finds no necessity to consider this contention further, having reached his conclusion on other grounds.

The question to be decided is whether the advantages of a single-session day by transfer to Shore Regional High School outweigh the disadvantages of such transfer. The Commissioner concludes in this case that the advantages are not sufficient.

The Commissioner agrees with respondent that the application comes too late. It is well known that the budget and appropriations for school districts such as Asbury Park are fixed and determined before the end of February. It is also general practice to determine staff needs and employ personnel soon thereafter, usually in March and April. The school administration must also devote itself to the complex task of scheduling classes, assigning teachers, preparing an individual schedule for each pupil and purchasing textbooks and supplies. These matters cannot wait until midsummer to be determined. The application herein was submitted in mid-May after much of Asbury Park's planning had been accomplished. No reason is advanced why this desire to transfer on the part of pupils and parents was not made known and the request made during the early part of the last school year when there would have been little argument against it. In the Commissioner's judgment, the application herein comes too late and there is no justification for asking Asbury Park to forego the tuition revenues it had every reason to expect from the attendance of these pupils at the time it prepared its budget, nor to attempt to reduce or reassign its staff, nor to reschedule classes and pupils at this untimely date.

The Commissioner reaches this conclusion with reluctance because of the strong position he has always taken with respect to the educational handicaps imposed by double sessions. He points to the fact, however, that this disadvantage will exist for only the ensuing school year, after which he can conceive of no reason why Asbury Park High School will not resume a single-session operation. Under such circumstance he can find no advantage to one year's transfer to another district with subsequent return resulting in disruption of courses, schedules and associations and other disadvantages which are an unavoidable concomitant of transfer from one school district to another.

The Commissioner finds and determines that the advantages to be gained at this time by changing the designation of approximately 52 pupils who reside in the Borough of Deal to attend Shore Regional High School for as long as Asubry Park High School continues to operate on a two-session basis are outweighed by the disadvantages. The application is therefore denied.

COMMISSIONER OF EDUCATION.

August 31, 1964.

XXXV

WHERE DISADVANTAGES OUTWEIGH ADVANTAGES, COMMISSIONER WILL DENY APPLICATION FOR CHANGE OF HIGH SCHOOL DESIGNATION

BOARD OF EDUCATION OF THE BOROUGH OF INTERLAKEN, MONMOUTH COUNTY,
Petitioner,

v.

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

For the Petitioner, Robert V. Carton, Esq.

For the Respondent, Joseph N. Dempsey, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Application is made for a change of designation for approximately 31 pupils resident in the Interlaken School District from Asbury Park High School to Shore Regional High School for the 1964-65 school year. Petitioners ground their request on the fact that Asbury Park High School will continue to operate on a two-session basis during the forthcoming school year and the desire of the parents of these pupils to have their children enrolled in the Shore Regional High School which has a single session. Respondent Board of Education does not consent to the reassignment of these pupils from its secondary school.

This matter was heard concurrently with other applications from the school districts of Allenhurst and of Deal by the Assistant Commissioner in charge of Controversies and Disputes at the office of the Monmouth County Superintendent of Schools, Freehold, on August 11, 1964.

Petitioner asks the Commissioner to approve the withdrawal from Asbury Park High School of approximately 26 of its pupils and such others as may express a desire to go to Shore Regional High School. It is estimated that the total number would approximate 31 pupils. Respondent Board contends that the withdrawal of these pupils and others who have similarly applied, would have an adverse effect upon its educational program.

The applicable statute is *R. S.* 18:14–7, the relevant section of which is:

> "No designation of a high school or schools heretofore or hereafter made by any district either under this section or under any prior law shall be changed or withdrawn, nor shall a district having such a desig-

nated high school refuse to continue to receive high school pupils from such sending district unless good and sufficient reason exists for such change and unless an application therefor is made to and approved by the commissioner. * * *"

Asbury Park High School is the high school designated to receive secondary pupils from the Borough of Interlaken which also sends its elementary grade pupils to Asbury Park Schools. Since September 1959, in order to cope with increasing enrollments, the high school has been operating on a two-session-a-day basis, with half of the pupils attending in the morning and the other half in the afternoon. The continuation of this expedient over a number of years, without any apparent prospect of a return to a single-session day, has been a source of much concern to pupils, parents, and school personnel alike. The Commissioner of Education has recognized the inadequacies inherent in such a double-session program and has granted applications for change of designations to single-session schools in several instances. *Bradley Beach Board of Education* v. *Asbury Park Board of Education*, 1959-60 *S. L. D.* 159 and *Allenhurst Board of Education* v. *Asbury Park Board of Education*, decided August 22, 1963.

In considering applications of this kind the Commissioner is guided by principles laid down in earlier decisions. Thus, in *Sparta Board of Education* v. *Newton Board of Education*, 1939-49 *S. L. D.* 30 at 31, affirmed by the State Board of Education, he said:

"* * * The high school designation law was enacted to protect districts which had provided facilities for pupils of other districts from the withdrawal of these pupils without good cause. This statute benefits the sending district as well as the receiving district. If this law had not been enacted, sending districts, either individually or by uniting with other districts, would have been compelled to burden themselves with the erection and maintenance of high schools.

"In order to provide for cases where good and sufficient reason exists for the transfer of pupils to another high school, the Legislature charged the Commissioner with the responsibility of determining when such good and sufficient reason for a change of designation does exist. The Commissioner feels constrained to exercise his discretion under this statute with great caution. Otherwise the law will not accomplish the salutary purpose intended by the Legislature. Only in cases where educational benefits will accrue to the pupils sufficient to offset the financial loss to the receiving district is it clearly the duty of the Commissioner to grant an application for a change of designation."

See also *Board of Education of Haworth* v. *Board of Education of Dumont*, 1950-51 *S. L. D.* 42.

More recently the Commissioner has applied these principles to applications based on dissatisfaction with double sessions. In the *Bradley Beach* application, *supra*, he stated:

"* * * The Commissioner is aware that, in recent years, many factors (often unforseeable and beyond local control) have operated to force high school districts to organize their program on a double session basis and that most of them are making diligent efforts to develop facilities

which will permit a return to the more complete and adequate educational opportunities possible in a one-session day. That this is so establishes even more reason for the Commissioner to exercise his discretion carefully to avoid any impending or harmful effects that might be incurred by a change of designation, no matter how temporary. At the same time, the Commissioner is convinced that double sessions cannot be considered an adequate substitute under any circumstances for the complete educational program possible in a normal school day and can only be defended under emergency conditions. Because of the deprivation of full educational opportunities for pupils, of inadequate expedients which must be employed, for the unnatural stresses and strains through inconveniences which are placed on pupils, homes, and staff, the Commissioner deplores the necessity to resort to a double session organization. For this reason, in his judgment, requests for changes of designation which will permit the pupils involved to attend school on a one-session basis should be approved unless it can be shown that the benefits to the pupils will be overbalanced by the harm done to the receiving district by their withdrawal. * * *"

The Commissioner has found no reason to change his position with respect to the educational inadequacies and deprivations of a double-session school day, and admittedly such a program will be in operation during the 1964-65 school year in Asbury Park High School. There is every reason to believe that this expedient will no longer be necessary beginning September 1965. At that time Asbury Park will be relieved of the obligation to provide secondary school facilities for more than 800 pupils from Ocean Township who will thenceforth attend their own new high school. Even so, there is no possibility of eliminating the two-session day in Asbury Park High School for the forthcoming school year.

Respondent Board does not contest the fact of this undesirable condition but asserts that it should be weighed against the adverse effects if the withdrawal is granted. It argues that the application comes late and points to the fact that commitments have already been made in terms of tuition revenues anticipated and budgeted, of teachers and staff members employed, and of class rosters and pupil assignments scheduled. It claims that the withdrawal of the pupils covered by this and other applications on top of the expected removal of Ocean Township children a year hence will cause irreparable harm to its college preparatory program. It argues further that a single year's transfer to another high school, even considering the relative merits of a single-session and a double-session day, would not represent an educational gain but would in the long run prove disadvantageous to pupils and schools alike.

The Commissioner does not share Asbury Park's fears that it will have difficulty in offering a complete college preparatory program should its enrollment be reduced to the extent of this and other applications pending plus the removal of Ocean Township pupils. However that may be, the Commissioner finds no necessity to consider this contention further, having reached his conclusion on other grounds.

The question to be decided is whether the advantages of a single-session day by transfer to Shore Regional High School outweigh the disadvantages

of such transfer. The Commissioner concludes in this case that the advantages are not sufficient.

The Commissioner agrees with respondent that the application comes too late. It is well known that the budget and appropriations for school districts such as Asbury Park are fixed and determined before the end of February. It is also general practice to determine staff needs and employ personnel soon thereafter, usually in March and April. The school administration must also devote itself to the complex task of scheduling classes, assigning teachers, preparing an individual schedule for each pupil, and purchasing textbooks and supplies. These matters cannot wait until midsummer to be determined. The application herein was submitted in June after much of Asbury Park's planning had been accomplished. No reason is advanced why this desire to transfer on the part of pupils and parents was not made known and the request made during the early part of the last school year when there would have been little argument against it. In the Commissioner's judgment, the application herein comes too late and there is no justification for asking Asbury Park to forego the tuition revenues it had every reason to expect from the attendance of these pupils, nor to attempt to reduce or reassign its staff, nor to reschedule classes and pupils at this untimely date.

The Commissioner reaches this conclusion with reluctance because of the strong position he has always taken with respect to the educational handicaps imposed by double sessions. He points to the fact, however, that this disadvantage will exist for only the ensuing school year, after which he can conceive of no reason why Asbury Park High School will not resume a single-session operation. Under such circumstances he can find no advantage to one year's transfer to another district with subsequent return resulting in disruption of courses, schedules and associations and other disadvantages which are an unavoidable concomitant of transfer from one school district to another.

The Commissioner finds and determines that the advantages to be gained at this time by changing the designation of approximately 31 pupils who reside in the Borough of Interlaken to attend Shore Regional High School for as long as Asbury Park High School continues to operate on a two-session basis are outweighed by the disadvantages. The application is therefore denied.

COMMISSIONER OF EDUCATION.

August 31, 1964.

XXXVI

EVIDENCE OF VIOLATION OF SALARY GUIDE RULES REQUIRED TO CONTEST DENIAL OF INCREMENTS

On Motion to Dismiss

Walter Earl,

Petitioner,

v.

Board of Education of Mendham Township, Morris County,

Respondent.

For the Petitioner, Bernard F. Conway, Esq.
For the Respondent, Mills, Doyle & Muir
(John M. Mills, Esq., of Counsel)

Decision of the Commissioner of Education

Petitioner is a teacher under tenure in the school system under respondent's jurisdiction. He contends that he was improperly denied a salary increment for the 1963-64 school year and seeks a hearing before the Commissioner on his entitlement to a salary increase. Respondent moves to dismiss the complaint on the grounds that petitioner has no cause for action which is cognizable before the Commissioner.

Petitioner has been employed as a teacher by respondent Board of Education since May, 1958 and has acquired tenure of position under *R. S.* 18:13–16. During the school year 1962-63 he was paid a salary of $7700, the equivalent of step #13 on the local salary guide then in effect. On April 9, 1963, respondent adopted a new Teachers' Salary Guide, increasing each step by $300 and adding a 14th step at $8250. On April 30, 1963, petitioner was notified that his salary for the next school year would be $7700, reflecting no change from the salary of the previous year. On June 13, 1963, petitioner through his attorney directed a letter to respondent requesting the reasons why his salary for 1963-64 did not include the increase of $300 provided for step #13 in the new guide, as well as the $250 increment provided for step #14. Respondent, through its attorney, denied petitioner's request, on the grounds that since the salary voted to him was higher than that to which he would be entitled under the Minimum Salary Law, *R. S.* 18:13–13.1, *et seq.*, he was not entitled to notification of the Board's reasons for withholding his increment.

Petitioner thereupon instituted a suit in Superior Court, Law Division, Morris County, seeking an order to compel respondent to give him written notice setting forth the reasons why an increment had been withheld. After a hearing on an order to show cause, the Court entered a judgment of mandamus compelling respondent Board to furnish such written notification, and on August 6, 1963, the Board served upon petitioner a formal notice setting forth five reasons why an annual salary increment was withheld for the school year 1963-64. Petitioner's appeal before the Commissioner seeks a full hearing on the merits of these reasons.

Respondent grounds its Motion to Dismiss the petition of appeal on its contention that the provisions of the Minimum Salary Law, and in particular the procedural requirements set forth in *R. S.* 18:13–13.7, are not applicable when the salary paid to a teacher is higher than that required by law. *R. S.* 18:13–13.7 reads as follows:

> "The schedule set forth in this act is intended to prescribe a minimum salary at each step, and any increment prescribed shall also be considered a minimum. Boards of education shall have power to increase for any teacher or classification of teachers included in any schedule, the initial salary or the amount of any increment or the number of increments. Any board of education may withhold, for inefficiency or other good cause, the employment increment or the adjustment increment or both of any teacher in any year by a majority vote of all the members of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the teacher concerned. The teacher may appeal from such action to the Commissioner of Education under rules prescribed by him. The Commissioner of Education shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment."

The Commissioner considered the contention advanced by respondent in deciding the case of *Goldberg* v. *Board of Education of West Morris Regional High School District* on May 20, 1964. In that case petitioner argued that the Board was required under *R. S.* 18:13–13.7 to give her written notice of its action to withhold her increment within 10 days thereof, and its reasons therefor, and in not doing so had illegally denied her an increment. The respondent Board of Education argued that since petitioner's salary was higher than the statutory minimum to which she would be entitled, the granting or withholding of an increment was subject not to the provisions of the Minimum Salary Law, but rather to the terms of the district's own salary policy. With respect to these contentions, the Commissioner made this determination:

> "Thus the history and past construction of the Minimum Salary Law, and prior decisions of the courts and of the Commissioner himself, lead him to the determination that petitioner herein has no rights under the terms of *R. S.* 18:13–13.7 which have been violated by respondent's decision to withhold a salary increment provided by its own salary guide for the school year 1963-64."

The Commissioner has not been made aware that in entering its judgment compelling respondent herein to give petitioner a statement of its reasons for withholding an increment, the Court in any way ruled upon the applicability of *R. S.* 18:13–13.7 to local guides higher than the State minima. In any event, the suit in Superior Court, Law Division, sought only to compel the giving of reasons, which has now been satisfied. Consequently, the Commissioner here reaffirms his determination, as expressed in *Goldberg, supra,*

that petitioner has not suffered any violation of his rights under *R. S.* 18:13–13.7 by the refusal of respondent to grant him an increment provided in its own salary guide. To the extent that there is no question to be decided with reference to this statute, the Motion to Dismiss is granted.

However, in *Goldberg, supra*, as well as in *Kopera* v. *West Orange*, 1958-59 *S. L. D.* 96, affirmed State Board of Education 98, remanded to Commissioner 60 *N. J. Super.* 288 (*App. Div.* 1960), 1960-61 *S. L. D.* 57, affirmed Superior Court, Appellate Division, January 10, 1963; *Wachter* v. *Board of Education of Millburn*, 1961-62 *S. L. D.* 147; and *Belli* v. *Board of Education of Clifton*, decided by the Commissioner March 20, 1963, the decision turned on whether the teacher's increment was withheld in accordance with the terms of the board of education's own salary guide. In the first *Kopera* decision, 1958-59 *S. L. D.* 96, 97, the Commissioner said:

> "A salary guide, if adopted by a district board of education, and if higher than the minimum salary requirements of *N. J. L.* 18:13–13, *et seq.*, is only an announced goal or objective of the board. If a board adopts rules with respect to the application of a salary guide, then it must apply them without bias or prejudice."

There is nothing in the pleadings or accompanying exhibits whereby the Commissioner can determine what rules, if any, respondent Board has adopted with respect to the application of its salary guide. Lacking such information, the Commissioner is unable to determine whether, in the light of the principles enunciated in the *Goldberg, Kopera, Wachter,* and *Belli,* cases, *supra,* petitioner is entitled to any adjudication of the reasons given by respondent for the withholding of his increment. That is, it is not apparent at this point whether respondent's rules governing the granting or withholding of increments afford the Commissioner any basis for inquiry into the merits of the reasons advanced for the withholding of petitioner's increment for 1963-64.

The Commissioner finds that there is no issue involving the application of *R. S.* 18:13–13.1 *et seq.* in petitioner's case. However, so long as it appears that there may be a justiciable issue involving the application of respondent's own salary guide, he will not dismiss the matter altogether. Petitioner is directed within 20 days of this date to make an offer of proof that he has been denied an increment in violation of respondent's rules with respect to the application of its salary guide, and serve a copy of such offer upon respondent, which will have 10 days thereafter to file and serve its answer. The Commissioner will thereafter determine what proceedings, if any, are required for the proper disposition of this matter.

COMMISSIONER OF EDUCATION.

June 1, 1964.

ORDER OF DISMISSAL

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner in this matter having been required by order of the Commissioner on June 1, 1964, to file within 20 days thereafter an offer of proof determined to be necessary to the prosecution of petitioner's cause; and said offer of proof not having been filed within said 20 days or at any time subsequent thereto; and counsel having been duly noticed of the Commissioner's intention to dismiss on his own motion the petition herein for want of prosecution; and the petitioner having failed to submit the necessary proofs at any time; IT IS for good cause appearing ORDERED, on this 15th day of September, 1964, that said petition of appeal be dismissed, with prejudice.

COMMISSIONER OF EDUCATION.

XXXVII

IMPERFECTIONS IN NOMINATING PETITION DO NOT NECESSARILY RENDER IT INVALID

CLARK TAYLOR and CHARLES REMSCHEL,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF RINGWOOD, PASSAIC COUNTY, and JOHN E. MCDERMOTT,

Respondents.

For the Petitioners, Saul R. Alexander, Esq.

For the Respondents, August W. Fisher, Esq.

For Joseph J. Iannillo, Jr., Jacob L. Winograd, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

The petition in this case challenges the election of John E. McDermott to membership on the Ringwood Borough Board of Education for an unexpired one-year term at the annual school election held February 11, 1964. Petitioners contend that the nominating petition filed in behalf of Mr. McDermott to place his name on the ballot was defective and his election should therefore be declared invalid. They pray that he be enjoined from continuing as a member of the Board of Education and a vacancy declared for the seat now occupied by him.

A hearing before the Assistant Commissioner of Education in charge of Controversies and Disputes was held June 3, 1964, at the County Service Building, Paterson, to establish the facts in this matter.

On December 26, 1963, the secretary of the Board of Education received a nominating petition signed by John E. McDermott for the annual school election on February 11, 1964. It is the validity of this instrument (P-1)

which is at issue. The standard form of nominating petition, pursuant to *R. S.* 18:7–22 is as follows:

NOMINATING PETITION FOR ANNUAL SCHOOL ELECTION

To _____, Secretary of the _____ Board of Education:

We, the undersigned, are qualified voters of the School District of the _____ of _____ in _____ County, N. J. We hereby endorse _____, whose post office address is _____ (Street No. _____) as candidate for member of the Board of Education for the (full, unexpired) term of _____ years, and we hereby request that the name of said _____ be printed on the official ballot to be used at the ensuing election for the board of education members to be held February _____ 19 _____.

We, the undersigned petitioners hereby certify that the said _____ is legally qualified under the laws of this State to be elected a member of the _____ Board of Education.

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

_____ being duly sworn or affirmed according to the law on his oath deposes and says: That the above petition is signed by each of the signers thereof in his own proper handwriting; that the said signers are, to deponent's best knowledge and belief, legally qualified to vote at the ensuing election, and that the said petition is prepared and filed in absolute good faith for the sole purpose of endorsing the candidate therein named in order to secure his election as a member of the board of education.

SWORN OR AFFIRMED AND SUBSCRIBED BEFORE ME THIS _____ DAY OF _____, 19___ _____ Signature of a Petitioner

_____, the candidate for membership on the board of education, named in the foregoing petition, does hereby certify that he is qualified to be elected as a member of the _____ Board of Education; that he consents to accept and qualify as a member of the said body.

(Signature of a Candidate) _____

Examination of the nominating petition herein (P-1) discloses the following insertions and markings. In the space following the words "We hereby endorse" appears "John E. McDermott (McDermott)." Apparently there has been an erasure in this space and it also seems that most of a word which appears to have been "Edward" has been crossed out leaving the letter "E." as the middle initial. Two lines further on the words "full" and "unexpired"

are both crossed out, one with blue and the other with black ink, and the word "unexpired" is handwritten in blue ink. In the space following "term of" the numeral "3" in black ink has been crossed out with blue ink and is followed by "1 (one)" in blue ink. Further on there are two blank spaces in which the name of the candidate is to be inserted which are left blank. The signatures of fourteen persons appear in the spaces for petitioners:

William O. Kircher	Joseph Iannillo, Jr.	Peter Fellema
Paul Maykowski	Eleanor Lockhard	Irene Iannillo
John M. Running	Martin Piccochi	Lena Piccochi
Joseph De Sordi	Mary De Sordi	Virginia Ryan
Ellen Pisani	John Corten	

The name of the petitioner making the affidavit is John M. Running and the affidavit actually shows two signatures which appear to be John M. Running and Joseph Iannillo, Jr. The petition is notarized and its certification is over the signature of John E. McDermott as candidate.

From the testimony the following sequence of events appears to have occurred. Mr. Joseph Iannillo, Jr., a former member of the Board, obtained a nominating petition and started to solicit the required ten endorsers for a James Zavaglia. The testimony is conflicting as to whether Mr. Zavaglia's name actually appeared on the petition when it was presented to the first five endorsers, but it is clear that each of them understood that he was the candidate for whom they were signing. After obtaining five signatures, including his own, Mr. Iannillo discovered that Mr. Zavaglia would not accept the nomination. In his own words he then "took the name of Zavaglia off and I put the name of Edward McDermott." (Tr. 40) Later he learned from the candidate that he was known as John E. McDermott and the petition was corrected accordingly.

It appears further that Mr. McDermott was reluctant to run for a three-year term and the petition was changed to a one-year term. There was also some question about who would sign the affidavit. Mr. Iannillo had already done so but then Mr. McDermott expressed a wish that Mr. Running be the petitioner. In his words:

> "Mr. Iannillo's name was down there as 'Signature of Petitioner' and I said to Mr. Iannillo, 'I would prefer to have Mr. Running to be my petitioner.' At that point Mr. Running wrote—at that point Mr. Running said to Mr. Iannillo, 'Did these people sign for Mr. McDermott?'—Ed, actually, he said. And Joe said, 'Yes.' And John signed over Mr. Iannillo's signature." (Tr. 72)

The petition was then taken to the notary public who executed the jurat, after which it was filed with the secretary of the Board of Education on December 26, 1963. The secretary testified that she accepted the petition, although it "was messy," without question because "The name was clear enough. It had been notarized and it had been signed by the candidate and there were enough names on the petition." (Tr. 64) At no time did she advise the candidate that his petition was defective.

In connection with a "Candidates' night" about a week before the election, some questions were raised as to the validity of the McDermott petition. It

appears that at least one of the first five endorsers let it be known that his signature had been intended for Mr. Zavaglia and not Mr. McDermott. As a result a second petition (P-2) was circulated and executed and was filed with the secretary of the Board on February 10, the day before the election.

Petitioners contend that the nominating petition for Mr. McDermott was invalid on two counts: (1) the affidavit was not properly executed, and (2) although 14 persons signed the petition, five of the signatures were for Mr. Zavaglia leaving only nine for McDermott when ten are required. In support of the first argument they cite *R. S.* 19:29–1, part of the General Election Law which sets forth grounds upon which an election may be contested, paragraph i of which reads as follows:

> "When a petition for nomination is not filed in good faith or the affidavit annexed thereto is false or defective."

They contend that the affidavit is false and defective because it was not signed in the presence of a notary public nor did the signer appear before the notary public to swear to his signature.

The Commissioner finds no merit in this argument. Even if it is granted that the affidavit was not executed in strict compliance with accepted practice, it does not follow necessarily that the statement is false or defective. There is no showing that the affidavit was signed by other than the person whose name appears on it or that he wished to retract part or all of it, or that any of the statements made in it are incorrect, nor is there evidence of fraudulent conduct of any kind attached to it. The Commissioner finds no basis to declare the nominating petition invalid because of the affidavit.

Petitioners further contend that an insufficient number of persons endorsed Mr. McDermott's candidacy because of the fourteen names on the petition, only nine were for him, the first five having intended to nominate Mr. Zavaglia. The Commissioner cannot agree. One of the first five endorsers was Joseph Iannillo. It was he who circulated the petition, changed the name of the candidate to be nominated, and asked Mr. McDermott to stand for election. To claim that there were only nine acceptable petitioners because Mr. Iannillo had originally signed for Mr. Zavaglia and his signature therefore could not be counted for Mr. McDermott is idle. It is clear that nine persons signed the petition for Mr. McDermott and to that number must be added Mr. Iannillo, who testified that he left his name there with the intent to nominate respondent herein. The Commissioner finds that the minimum number of ten petitioners endorsed the nominating petition for Mr. McDermott.

The Commissioner attaches little significance to the fact that a new petition was eventually submitted on the eve of the election except as it goes to show that there were more than enough voters who wished to see respondent's name on the ballot. It is the responsibility of the secretary of the Board to examine carefully each nominating petition as it is submitted. If there is any question with respect to the petition, it is the secretary's duty to notify the candidate in order that the defect may be remedied pursuant to *R. S.* 18:7–26 as follows:

> "When a nominating petition is found to be defective, the district clerk shall notify the candidate forthwith, setting forth the nature of the defect

and the date when the ballots will be printed. The candidate endorsed in the petition may amend the same either in form or substance so as to remedy the defect, at any time prior to the date set for the printing of the ballots."

No such notice was given by the secretary. The Commissioner also notes that no signer of the nominating petition has come forward to protest its validity, to claim deception, fraud or that his signature was obtained under false pretenses.

The Commissioner deplores laxity of any kind in a school election whether it occurs because of carelessness, slipshod procedures, ignorance of the law or for whatever cause. He has consistently maintained that school elections are no less important than other elections and are to be conducted with careful regard to every requirement of law. *Annual School Election, Borough of Lincoln Park, Morris County*, 1960-61 *S. L. D.* 204. In reaching his conclusion in this case, the Commissioner does not condone or endorse the casual and informal manner in which this nomination was made. As those concerned have by now no doubt realized, it would have been better to have destroyed the original instrument and prepared a new one. However, under the circumstances of this case and for the reasons stated above, the Commissioner does not find the nomination herein false or defective.

The Commissioner finds that John E. McDermott was duly nominated and elected to membership on the Board of Education of the Borough of Ringwood for a term which will expire upon the organization of the Board of Education following the next annual school election.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

September 15, 1964.

XXXVIII

EMPLOYMENT CONTRACT MAY NOT BE SUMMARILY TERMINATED EXCEPT FOR GOOD CAUSE

ANTHONY AMOROSA,

Petitioner,

v.

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

Respondent.

For the Petitioner, T. James Tumulty, Esq.

For the Respondent, John J. Witkowski, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner was employed as a teacher under contract with respondent. On November 20, 1962, he was suspended from his teaching duties by the superintendent of schools. On May 8, 1963, respondent by resolution terminated

his services effective as of the date of his suspension. He alleges that he was dismissed in violation of the terms of his contract, and seeks the compensation which he claims is due to him under its terms.

A hearing in this matter was held by the Assistant Commissioner in charge of Controversies and Disputes at the office of the County Superintendent of Schools in Jersey City on January 28, 1964.

Petitioner's employment contract was for the period from September 1, 1962, to August 31, 1963, at a salary of $4,400 to be paid in 12 equal monthly installments with a further provision that either party could terminate the employment by giving 60 days' notice in writing (P-1).

Petitioner began teaching in September 1962. On October 25, 1962, he was charged in a complaint with two counts of assault and battery. At a hearing on the complaint in Municipal Court on November 20, 1962, petitioner pleaded guilty, was given a suspended sentence and placed on probation (later removed). That same day on receiving information of petitioner's conviction of the disorderly person complaint, the superintendent of schools consulted the president of the Board and with his approval notified petitioner that he was suspended from his teaching duties (P-2). The superintendent later informed each Board member by letter dated December 10, 1962, of the suspension action (P-3). There is no evidence that any action was taken by respondent on this information until May 8, 1963, when it adopted a resolution terminating petitioner's services effective November 20, 1962 (P-4). In the more than 5 months' period between the suspension and notice of termination, petitioner was employed from time to time as a substitute teacher on a per diem basis in two nearby school districts.

It is petitioner's contention that nowhere is there any record of any hearing or any other proceeding at which any finding of fact was made to provide a basis for breaking the employment contract. Therefore, petitioner argues, the applicable law is *R. S.* 18:13–11, which reads as follows:

> "When the dismissal of any teacher before the expiration of a contract entered into between the teacher and a board of education shall, upon appeal, be decided to have been without good cause, the teacher shall be entitled to compensation for the full term for which the contract was made; but it shall be optional with the board of education whether or not the teacher shall teach for the unexpired term."

Petitioner urges that since he was dismissed without "good cause," he is entitled to compensation for the full term of his contract.

Respondent counters with the argument that the dismissal of petitioner followed the procedures set down in *R. S.* 18:6–42, which reads as follows:

> "The superintendent of schools may, with the approval of the president of the board, suspend any assistant superintendent, principal, or teacher, and shall report such suspension to the board forthwith. The board, by a majority vote of all its members, shall take such action for the restoration or removal of such assistant superintendent, principal, or teacher as it shall deem proper, subject to the provisions of sections 18:13–16 to 18:13–18 of this Title."

Respondent points out that the superintendent suspended petitioner after having secured the approval of the Board president, and that the Board took such action as it deemed proper. Petitioner not having tenure status, respondent argues, there was no requirement that he be afforded a hearing or that the Board express a reason for its action. The determining factor, says respondent, is "whether or not the Board acted properly in good faith in view of the existing facts that it had before them in terminating the individual petitioner." (Tr. 80) Finally, respondent argues, it is for the Commissioner to decide, upon appeal to him pursuant to *R. S.* 18:13–11, *supra,* whether the Board acted in good faith and with good cause in dismissing the petitioner.

The Commissioner agrees with respondent that in the case of the suspension of a teacher by the superintendent, the Board may act to remove the teacher from his employment. He further agrees that except for teachers under tenure, whose rights are delineated in *R. S.* 18:13–17 and the Tenure Employees Hearing Act, *R. S.* 18:3–23, *et seq.,* there is no provision in the statutes for a hearing on dismissal charges before a board of education. He holds, however, that a board of education can terminate an employment contract only under the terms thereof, unless good cause within the contemplation of *R. S.* 18:13–11, *supra,* appears. In *Gager* v. *Board of Education of Lower Camden County Regional High School District,* decided May 11, 1964, for example, the Commissioner held that when a board determines that a teacher's work is unsatisfactory to the degree that it does not wish to continue his employment, it may terminate such employment only under the conditions of the contract. Such a course was open to respondent in the instant matter; it could have, for any reason or no reason, given petitioner 60 days' notice in writing of its intention to terminate his contract, and, pursuant to *R. S.* 18:13–11.1, elected not to have him teach during the period of notice. The Commissioner recognizes the possibility of circumstances constituting good cause within the contemplation of *R. S.* 18:13–11, *supra,* under which the summary dismissal of a teacher could be upheld.

In the instant matter, however, respondent neither gave notice under the terms of the contract nor made any determination that good cause existed for summarily terminating the contract. After having been notified by the superintendent on December 10, 1962, of the suspension of petitioner on November 20, 1962, the Board took no action in the matter until May 8, 1963, nearly six months later, when, without making any finding it summarily dismissed petitioner as of the date of his suspension. The Commissioner finds that such dismissal was in violation of the contract of employment, within the meaning of *R. S.* 18:13–11, *supra.*

The question remaining is the compensation to which petitioner is entitled. Petitioner urges that his rights to compensation are controlled by *R. S.* 18:13–11, *supra.* He therefore contends that if it is determined that he was dismissed without good cause, he is entitled to his full contract salary from November 20, 1962, to August 31, 1963.

The Commissioner does not believe that the statute can be so construed. Under this interpretation, a teacher improperly dismissed would be entitled to compensation to which a teacher whose contract was terminated according to the terms thereof would have no claim. Such an interpretation implies "punitive" damages, in contrast to "compensatory" damages, in a situation

where the statute refers to "compensation." In interpreting an analogous statute, *R. S.* 18:5–49.1, but with reasoning applicable to the instant matter, the Superior Court, Appellate Division, said in *Mullen* v. *Board of Education of Jefferson Township*, 81 *N. J. Super.* 151, 159 (1963):

> "* * * To 'compensate' does not carry with it authority to award more damages than actually sustained. We would equate that word with the commonly understood words 'compensatory damages.'"

and at page 160:

> "* * * Such an interpretation of *N. J. S. A.* 18:5–49.1 is unreasonable and would be inconsistent with the principle that the Legislature must always be presumed to favor the public interest as against any private one."

The Commissioner therefore concludes that *R. S.* 18:13–11 must be interpreted so as to entitle a teacher who was dismissed without good cause to that compensation which he would have received if his contract had been terminated in accordance with the terms thereof. Had respondent herein exercised such a right promptly after the suspension of petitioner, it would have been obliged to pay him only for the 60-day period of notice, dating from the suspension. See *Gager*, *supra*. But the Board did not take such action. From November 20, 1962, until May 8, 1963, petitioner was held in suspension, not knowing when or whether he would be restored to his position. Then, on May 8, the Board did act, and its action on that day may be construed as respondent's notification to petitioner of an intention to dismiss him. Since respondent is bound by the terms of its contract with petitioner, the 60-day notice provision must be considered to run from May 8. Petitioner therefore has no valid claim for compensation beyond that 60-day period.

The Commissioner finds and determines that petitioner is entitled to compensation at the rate provided in his contract from November 20, 1962, to May 8, 1963, and for a period of 60 days thereafter, the date when his contract must be considered to have been legally terminated by respondent. The Commissioner directs that petitioner be so compensated by respondent.

Counsel have argued the question of mitigation of compensation by the amount earned by petitioner at other employment during the period of his suspension. Petitioner testified that he had earned $996.00 through substitute teaching in other districts (Tr. 36, 37). The Commissioner has reviewed the opinion of the Court in *Mullen*, *supra*, with respect to mitigation of compensation and he concludes that the following reasoning of the Court, at page 159, in respect to *R. S.* 18:5–49.1 must be applied also to *R. S.* 18:13–11, *supra*.

> "One must presume that when the Legislature enacted *N. J. S. A.* 18:5–49.1 in 1948 it was aware of the provisions of *N. J. S. A.* 40:46–34, which specified that a municipal officer or employee was entitled to recover his *salary* for the period of his illegal dismissal, and that it knew of the construction which courts had given that statute, namely, that by using the word 'salary' the Legislature intended that there should be no mitigation for sums earned or that could have been earned by the person dismissed. By adopting the word 'compensation,' rather than the word

'salary' used in the older statute, the Legislature must be taken as having meant that all claims made by illegally dismissed persons under *N. J. S. A.* 18:5–49.1 be subject to the common law rule of mitigation of damages, in light of the plain meaning carried by the word 'compensation.' "

The compensation heretofore directed to be paid to petitioner will therefore be mitigated by $996.00, the amount which petitioner testified that he earned at other employment during the period of his suspension.

COMMISSIONER OF EDUCATION.

September 15, 1964.

XXXIX

COMMISSIONER WILL NOT DECIDE MOOT ISSUES

ROY J. MUNDY,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,

Respondent.

For the Petitioner, Pro Se.

For the Respondent, Foley and Manzione (Francis C. Foley, Jr., Esq. of Counsel).

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner challenges the appointment of Clifford J. Handerhan, who was at the time of said appointment a member of respondent Board of Education, as assistant secretary of the Board pursuant to *R. S.* 18:5–51.2.

At a conference of the petitioner and counsel for respondent, held by the Assistant Commissioner in charge of Controversies and Disputes at Trenton on July 9, 1964, a stipulation of facts was prepared. It was agreed by the contending parties that facts as stipulated constitute the body of relevant fact. It was further agreed that the Commissioner be requested to determine on the basis of the facts as stipulated whether there is a justiciable issue raised by the petition of appeal.

The facts are these:

1. By resolution dated May 13, 1964, respondent board appointed Clifford J. Handerhan to the position of assistant secretary of the Board of Education effective June 1, 1964, and fixed his salary. (Exhibit P-1)

2. At the time of the aforesaid resolution the Board of Education consisted of 8 members, 5 of whom, including Board member Handerhan, voted in favor of the resolution; two, including petitioner, voted against; and one member was absent.

3. By resolution dated June 10, 1964, respondent Board reappointed Clifford J. Handerhan assistant secretary for the school year 1964-65, effective July 1, 1964, and fixed his salary as before. (Exhibit P-2)

4. At the time of the resolution of June 10, the Board consisted of 9 members, 6 of whom voted in favor of the resolution; two, including petitioner, voted against; and member Handerhan abstained.

5. On June 1, 1964, Clifford J. Handerhan entered upon his employment and worked full time in the office of the secretary of the Board of Education and has done so to the present.

6. On June 19, 1964, Clifford J. Handerhan submitted his resignation as a Board member. On June 29 the Board acted upon the resignation and accepted it.

The statutory authority by which a board of education may appoint an assistant secretary is contained in *R. S.* 18:5–51.2, which reads as follows:

"Every board may, by a majority vote of all its members, appoint an assistant district clerk in those districts having district clerks and an assistant secretary in those districts not having district clerks, who may be chosen from among its members, and may fix his term of employment and his compensation. Such assistant district clerk or assistant secretary shall perform all the duties and be subject to all the obligations of the district clerk and secretary, respectively, during the absence or inability of the district clerk or secretary to act, except that such assistant district clerk or assistant secretary shall not acquire tenure of office in such capacity; *provided, however,* such assistant district clerk or assistant secretary shall have no power to act until the board of education which made such appointment shall, by a vote by the majority of its members, declare that the district clerk or secretary is absent or unable to act.

"Such assistant district clerk or assistant secretary shall be required to execute and deliver a bond similar to that required of the person for whom he is acting as assistant, and the payment of the premium thereon shall be made by the board in those cases where the board pays the premium on the bond for the district clerk or secretary."

The petition of appeal herein was received by the Commissioner of Education on May 19, 1964, and relates specifically to the original appointment of the assistant secretary by the resolution of May 13. However, as is apparent in the stipulation, respondent has subsequently reappointed Mr. Handerhan for the 1964-65 school year by a resolution on which he abstained from voting, and prior to the effective date of his reappointment his resignation from the Board became effective. There is no allegation or indication that the duties now being performed by Mr. Handerhan in his employment are in conflict with the limitations imposed by *R. S.* 18:5–51.2, *supra.*

Thus any issues raised by the original appointment, to whatever degree such issues may have then existed, are now moot. It is well established that the Commissioner, consistent with the policy of the courts, will not hear and decide issues which are moot. *Amorosa* v. *Board of Education of Jersey City,* decided by the Commissioner July 23, 1964; *Worthy et al.* v. *Berkeley Township Board of Education,* 1938 *S. L. D.* 686, 691; *Mills* v. *Green,* 159 *U. S.* 653; *Rodgers* v. *Orange City Board of Education,* 1956-57 *S. L. D.* 50. In *Moss Estate* v. *Metal Thermit Corp.,* 73 *N. J. Super.* 56, 67 (*Ch. Div.* 1962), the Court said:

"It is the policy of the courts to refrain from advisory opinions, from deciding moot cases, or generally functioning in the abstract, and 'to decide only concrete contested issues conclusively affecting adversary parties in interest.' *Borchard, Declaratory Judgments* (2d *ed.* 1941), *pp.* 34-35; *New Jersey Turnpike Authority* v. *Parsons, supra.*"

In the light of the facts herein stipulated, the Commissioner finds that there is no justiciable issue which the Commissioner can decide. The petition is accordingly dismissed.

COMMISSIONER OF EDUCATION.

September 21, 1964.

XL

UNREASONABLE DELAY IN ASSERTING EMPLOYMENT RIGHTS MAY CONSTITUTE LACHES

MARK E. GOULD,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,

Respondent.

For the Petitioner, *Pro Se.*

For the Respondent, Murphy & Skelley (Joseph T. Skelley, Esq., of Counsel).

ON MOTION TO DISMISS

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner in this matter has appealed to the Commissioner for an order reinstating him as a principal in respondent's elementary schools. He alleges that he was required to resign the elementary school principalship which he held and accept a teaching position in respondent's high school. While it is not stated in his petition, it appears and is conceded that the resignation took place in May 1962. The petition herein was received by the Commissioner on April 1, 1964. Respondent has moved before the Commissioner that the petition be dismissed on the grounds (1) that by his delay of nearly two years in filing his petition, petitioner has been guilty of such laches as should bar him from maintaining this action, and (2) that the petition of appeal is so vague, incomplete, indefinite, and ambiguous that respondent cannot reasonably be required to frame a proper answer or otherwise properly defend this action.

Oral argument on respondent's Motion was heard by the Assistant Commissioner in charge of Controversies and Disputes at the State Department of Education Building in Trenton on June 12, 1964.

It is well established in the law that

> "* * * a public employee's right to reinstatement, even assuming, but not deciding, that his removal or other interference with his rights may be unjust and unwarranted, may be lost by his unreasonable delay in asserting his rights. This recognized principle of law is founded upon considerations of public policy * * *." *Atlantic City* v. *Civil Service Commission*, 3 *N. J. Super.* 57 (*App. Div.* 1949).

In *Marjon* v. *Altman*, 120 *N. J. L.* 16 (*Sup. Ct.* 1938) relator was dismissed from his employment on August 31, 1935. With respect to his delay in filing his petition for reinstatement, the Court said, at page 18:

> "Relator is, it seems to us, indisputably guilty of laches. He instituted no proceeding for the enforcement of his asserted right until the filing of the petition herein on July 22d, 1937. While laches, in its legal signification, ordinarily connotes delay that works detriment to another, the public interest requires that the protection accorded by statutes of this class be invoked with reasonable promptitude. Inexcusable delay operates as an estoppel against the assertion of the right. It justifies the conclusion of acquiescence in the challenged action. This court has consistently frowned upon delays less glaring. *Taylor* v. *Bayonne*, 57 *N. J. L.* 376; *Glori* v. *Board of Police Commissioners*, 72 *Id.* 131; *Drill* v. *Bowden*, 4 *N. J. Mis.* R. 326; *Oliver* v. *New Jersey State Highway Commission*, 9 *Id.* 186; *Mc Michael* v. *South Amboy*, 14 *Id.* 183."

Petitioner herein has offered no logical defense to his failure to challenge the alleged improper procedures of respondent in connection with his resignation as principal. His explanation that in the intervening years he has been engaged in qualifying for such certification as would enable him to meet respondent's requirements for an elementary school teaching principalship cannot be regarded as affirmative action in the defense of his asserted rights. On the other hand, his continued acquiescence in the status established by his resignation in May 1962, and the employment of another principal for the school from which he resigned, together provide ample justification and establish a sufficient detriment as a result of the delay upon which to base a determination that petitioner is guilty of laches. *Albert* v. *Caldwell*, 127 *N. J. L.* 202, 203 (*E. & A.* 1941). The Commissioner so determines.

Having reached the conclusion that petitioner is guilty of laches, it is unnecessary to consider respondent's other grounds for moving the dismissal of this case.

Respondent's Motion is granted, and the petition of appeal is dismissed.

COMMISSIONER OF EDUCATION.

September 29, 1964.

XLI

BOARD MAY NOT DEPRIVE TENURE TEACHER OF EMPLOYMENT WITHOUT MAKING SUITABLE DETERMINATION

EDNA G. O'BRIEN,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF LITTLE FERRY, BERGEN COUNTY,

Respondent.

For the Petitioner, Thomas S. O'Brien, Esq.

For the Respondent, Robert S. Krause, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner in this case claims that she was improperly denied employment and compensation from December 11, 1962, to the time of her retirement at the end of the 1962-63 school year. She seeks an order directing respondent to compensate her at her contract salary for that period of time. Respondent claims that petitioner was physically unable to perform the duties of her employment, that its actions were reasonable and necessary, and that petitioner voluntarily applied for leave of absence for the period of time in contention. Respondent further asserts that petitioner is guilty of laches in filing her appeal, which was received by the Commissioner on July 2, 1963.

A hearing was held by the Assistant Commissioner of Education in charge of Controversies and Disputes at the County Administration Building, Hackensack, on December 10, 1963, and April 16, 1964. A memorandum was submitted by counsel for petitioner.

Petitioner was a teacher under tenure in respondent's schools, where she had been employed since 1950. At the beginning of the 1962-63 school year she was approaching her seventieth birthday, and as a member of the Teachers' Pension and Annuity Fund had applied for retirement at the end of that school year. For some time she had suffered an increasing disability in her hips, which led her to undergo the first of two surgical procedures during the summer of 1962. She returned to her teaching duties in September, using crutches as a protective device for her muscles. The second operation took place in October, and petitioner was absent from her teaching duties from October 8 through December 10, 1962.

Petitioner asserts that all arrangements for her absence, and for her return to school, using crutches, after each operation had been approved in advance by the superintendent of schools. Unfortunately, on December 1, while she was convalescing from her second operation, the superintendent died. On December 6, following her discharge from a convalescent home, she notified her principal, who was subsequently named acting superintendent, that she would return to work on Monday, December 10. Because a sleet storm on Sunday made travel hazardous, petitioner later notified the principal

that she would not report until December 11. When she arrived at the school on that day, she was directed to remain in the faculty room "until some of the members of the Board would come to talk to me." (Tr. 31) At two o'clock that afternoon, after no members of the Board had appeared, the principal directed her "to go home and not to come back any more until I discarded the crutches." (Tr. 31) It was not until some time later, upon inquiring of the Board secretary, that her son learned of a resolution adopted by the Board at a meeting on the evening of December 10, as follows (P-1):

> "BE IT RESOLVED, by the Board of Education of the Borough of Little Ferry, New Jersey, in view of the fact that a staff member is expected to return physically incapacitated, it is the recommendation of the Instruction and Personnel Committee this staff member should report to Mr. Peter J. Scandariato, Principal, and not be permitted to return to classroom.
>
> "Mr. Scandariato will interview the staff member and then bring the problem to the office of the County Superintendent of Schools."

Petitioner testified that she never received official notice of the Board's resolution, nor is there any indication that she was given any understanding on December 11, that the Board had considered her return to her duties on the previous evening. However, on January 7 she attended a conference meeting with the Board, at which her physical condition was discussed, and she was informed that she should not return to her teaching until she had discarded her crutches. At this meeting there was also a discussion of the exact nature of her employment status, since she was neither officially on leave of absence nor suspended, but held herself to be ready, willing, and able to work. The president of the Board admitted that he gave an opinion that because of the uncertainty of her status her pension was in jeopardy, and he "said she should request official leave of absence in order to protect her status with the Pension and Annuity Fund." (Tr. 125) It was further suggested that she should ask that the leave be made retroactive to December 12.

Petitioner thereupon requested a leave of absence based on respondent's suggestion and refusal to permit her to teach. At its meeting on January 14, respondent Board received petitioner's request, together with a supplementary letter in which she asked the Board to consider, in fixing the period of her leave, that contributions to her pension fund account could not be made for leave exceeding two months, and that the loss of such contributions would adversely affect the amount of her pension. She further stated that she was requesting her physician and her surgeon to write to the Board concerning her physical condition. Finally, she requested that the Board inform a private insurance company that the Board considered her incapable of resuming her duties, in order that she could receive the disability allowance provided by her policy with that company.

By resolution, respondent granted petitioner a leave of absence without pay, from December 12, 1962, to January 25, 1963, with the further provision that an extension of leave be granted if Mrs. O'Brien was "still physically incapacitated on January 25, 1963." (P-9) A copy of this resolution was sent to petitioner and to the Teachers' Pension and Annuity Fund. (R-1) There is no indication that any action was taken with respect to the

letters sent to the Board by her physician and surgeon, both of whom attested to her ability to do her work. (P-4, P-5)

At the time her first leave of absence expired, petitioner asked for and was granted an extension of the leave to March 30. (P-6, P-7) Again she asked that the Board reconsider its position, but there was no response to her request. On March 30 she addressed a further letter to respondent, having "been advised by Mr. Bezdek by telephone that you desire me to submit a request for a further extension of my leave of absence." (P-8) This extension carried to May 15. Again petitioner received no reply.

On May 16, petitioner drove to the school and presented herself ready for work. She did not go to her classroom, but spent the entire day at the school, awaiting Board members who, according to the acting superintendent, would come to talk with her. On the following day she reappeared at the school and remained there all day. The acting superintendent suggested that she ask that her leave of absence be extended, but she rejected this suggestion. She did, however, pursue a suggestion that she call a Board member, to whom she said: "Either suspend me or do something, give me some kind of status." (Tr. 45) The Board member's reply was, "We'll let you know." That was her final communication from the Board or any of its members.

In mid-June, however, she received the following letter, dated June 13, 1963, from the Washington National Insurance Company:

> "We are returning your check #539, dated June 1, 1963, in the amount of $3.56. We have been notified by the School Board that your leave expired May 15, 1963, because you are physically incapacitated.
>
> "Therefore, we are accepting no more premium from you, since you are no longer teaching. As you know, this is an income protection plan of insurance, and since your income has stopped, there is no reason to pay premium as you are no longer eligible for this particular type of insurance program.
>
> "If there are any further questions, please be sure and let us hear from you."

Over respondent's objection, the letter (P-10) was received in evidence that the insurance company discontinued insurance payments, but not as probative of any action by respondent. (Tr. 49)

The burden of petitioner's complaint is twofold: (1) that she was deprived of compensation for a period of nearly seven months, during which she asserts that she was ready, willing and able to perform either her regular classroom duties or other teaching duties which might be assigned to her; and (2) that as a member of the Teachers' Pension and Annuity Fund, the loss of compensation incurred during the final 5 years of employment reduces the retirement allowance to which she is entitled.

It is petitioner's contention that the actions of respondent Board were illegal and constitute a breach of her employment contract. By requiring her to seek a series of leaves of absence, instead of affording her a hearing and making a determination from which she could appeal to the Commissioner, the Board, she argues, has denied her due process.

Respondent argues, in answer, that petitioner was physically unable to perform her duties and that its actions were necessary and reasonable in view of its obligation to safeguard the health, welfare, and safety of the children attending its school system. Respondent further contends that petitioner voluntarily sought the leaves of absence. Finally, respondent urges that petitioner is guilty of laches in filing her petition before the Commissioner.

The question of laches will be considered first. Respondent has offered no factual basis or argument on which it grounds such a defense. It has been well established in previous decisions that in actions involving employment rights, "the protection afforded by tenure statutes must be invoked promptly." *Gilling* v. *Board of Education of Hillside*, 1950-51 *S. L. D.* 61, 62. See also *Marjon* v. *Altman*, 120 *N. J. L.* 16, 18 (*Sup. Ct.* 1938); *Atlantic City* v. *Civil Service Commission*, 3 *N. J. Super.* 57, 61 (*App. Div.* 1949); *Glori* v. *Board of Police Commissioners*, 72 *N. J. L.* 131 (*Sup. Ct.* 1905); *Jordan* v. *Newark*, 128 *N. J. L.* 469 (*Sup. Ct.* 1942). In *Marjon, supra*, the court said, at page 18:

> "While laches, in its legal signification, ordinarily connotes delay that works detriment to another, the public interest requires that the protection accorded by statutes of this class be invoked with reasonable promptitude. Inexcusable delay operates as an estoppel against assertion of the right. It justifies the conclusion of acquiescence in the challenged action."

However, in the instant matter, as petitioner stresses, there was no action available for either acquiescence or challenge. In spite of petitioner's repeated requests that there be definitive action in her case, respondent relied rather upon petitioner to follow its advice and seek leaves of absence, which she did not want but was led to believe she must secure in order to protect her pension rights. It was not until she received a letter from her insurance company rejecting her proffered premium on the grounds that she was no longer employed, that she felt that there was a basis for her petition to the Commissioner. (Tr. 47)

The Commissioner finds and determines that petitioner filed her appeal from respondent's inaction with such "reasonable promptitude" that the defense of laches will not stand.

With respect to the merits, the statutes give discretionary authority to boards of education to make rules and regulations governing the "rights and duties of the teacher with respect to his employment" (*R. S.* 18:13–5), as well as rules, regulations and by-laws for "the government and management of the public schools * * * and for the employment and discharge of principals and teachers." (*R. S.* 18:7–56) The statutes also authorize the superintendent, with the approval of the president of the board, to suspend a teacher, but require him to report the suspension forthwith to the Board, which must take action with respect to the restoration or removal of the teacher consistent with the provisions of the tenure laws (*R. S.* 18:6–42). The tenure statutes provide (*R. S.* 18:13–16 to 18:13–20) that a teacher under tenure may not be dismissed or his salary reduced except for good cause, after written charges have been preferred and a hearing held by the Commissioner pursuant to the Tenure Employees Hearing Act, *R. S.* 18:3–23 *et seq.* There is also statutory authority for a board to retire a teacher when she attains the age of 62 if she is a member of the Teachers' Pension and Annuity Fund (*R. S.* 18:13–112.45 (c)).

There is no record that respondent made any rule governing leaves of absence for teachers who are physically incapacitated. In the case of *Mateer* v. *Fair Lawn Board of Education*, 1950-51 *S. L. D.* 63, 66, which concerned the right of a teacher to take a leave of absence for maternity reasons, the Commissioner held that while a board could make reasonable rules governing leaves,

> "* * * if it seems to the board of education more advantageous not to grant leaves under rules and regulations, it does not follow that a teacher who is denied a formal leave of absence is deprived of her right to be absent without losing her position. She is, under such circumstances, *in the same position as a teacher who is absent for reasons of illness and she may return when she feels able to do so.*" (Emphasis supplied.)

In reliance upon the absence of any rule to the contrary, and her assurance from the deceased superintendent of schools that she would be permitted to work while using crutches to protect the surgery on her hips, petitioner underwent the two operations, and in fact, performed her duties as a teacher during the month of September 1962, while on crutches, following the first and preceding the second operation. Board members who testified offered nothing to indicate that her services during that month were in any way unsatisfactory, or even that they had any reason to be aware that she used crutches. There is additional testimony from Board members indicating that such conversation as they had held with the superintendent prior to petitioner's return in December had dealt only with the possibility that she might have to use a wheel chair or a "walker," not crutches. (Tr. 97, 247) There was nothing in any action of respondent known to petitioner that would have led her to doubt her right to return to work when she felt able to do so.

The action taken by respondent in its resolution of December 10, 1962, prohibiting petitioner's return to her employment, has the earmarks, if not the language, of suspension. Without granting petitioner any opportunity to establish her fitness or unfitness and relying presumably on hearsay and assumption with respect to her capacity to perform her duties, respondent prohibited her from working. It was not until January 7, nearly a month after its resolution that the Board saw her walk on crutches when she came, uninvited, to an executive session of the Board. Then it was, in the testimony of the former Board president,

> "* * * we more or less were re-assured from personal observation of the teacher being incapacitated during the presence at the meeting or the conference we had with her. It was more or less re-assuring that we did the right thing in passing the resolution concerning incapacitation." (Tr. 103)

With such "reassurance" the Board on January 14 ratified a report of the acting superintendent in which he stated (P-9):

> "In view of this evident immobility and her refusal to report to her job (December 10) when walking conditions were hazardous, it was my judgment that considering the morale and educational and psychological well being of 31 first grade children—as well as the staff member's own physical well being, I could not conscientiously permit her to resume control of any classroom situation."

By such ratification of the superintendent's action, it is the Commissioner's judgment that it then became incumbent upon respondent either to restore petitioner to her job or take such other action as would establish her employment status. The leave of absence granted by the Board at that meeting was requested, admittedly, by petitioner, but not at her own instance. Rather it came at the suggestion of one or more members of the Board to protect what its president incorrectly opined were her pension rights. Thus the onus of establishing her employment status was placed upon petitioner, rather than upon her employer, where it belonged.

It is to be deplored that a relatively simple problem was permitted to develop into the full-blown and unfortunate controversy represented herein. Certainly it could have been avoided had both parties sought competent advice and followed it with definitive action. For example, there was no need for petitioner to take a leave of absence in order to protect her pension status. As long as she was not paid any salary, her status in the Pension Fund would have been no different whether she was absent because of sick leave, or because the Board made a finding with respect to her physical condition as it related to adequate performance of her duties, or because she was granted a leave of absence. Under none of these conditions would pension deductions or service credit for pension purposes be allowable. If the Board had wanted to have petitioner remain away from her duties without affecting her pension rights, it could have continued her sick leave and paid her the difference between her salary and the compensation paid to the substitute who replaced her. Under such circumstances the regular pension deduction would have been made and the period of service for which the salary was paid would have been credited to her. It should be understood that the Board was under no obligation to pay such part salary but only that it would have been within its discretion to do so. (*R. S.* 18:13–23.12)

It must be recognized that petitioner is an elderly woman, and that at the time of these events she had borne the expense of several weeks of hospitalization and convalescence. Her sick leave pay had expired. She faced retirement at the end of the 1962-63 school year, and had in fact already applied for such retirement and received a statement of her annual retirement allowance (P-11), predicated on employment to the end of the school year. While the Commissioner does not find in the Board's efforts to have her request a leave of absence such wrongful pressure or threat as to constitute duress (*Cf. Gobac* v. *Davis*, 62 *N. J. Super.* 148, 160 (*Law Div.* 1960)), he does find the same type of emotionally charged situation which led the Supreme Court in *Evaul* v. *Camden*, 35 *N. J.* 244 (1961), to require the reinstatement of Miss Evaul "on equitable principles." In that case the Court found that "an extraordinary concatenation of circumstances" had led Miss Evaul to submit her resignation, which she later sought unsuccessfully to rescind. The Court held, at page 250:

> "In view of the above facts, we think that, in the unusual circumstances of this case, it is unduly harsh for appellant to lose rights acquired during the many years she served as a teacher in the Camden school system."

In the same way, petitioner was impelled by the imminence of her retirement to take such steps as the Board suggested to protect her pension

rights, and in so doing she lost all normal compensation from December 11 to the end of the school year, as well as the benefits that would have accrued to her pension allowance from the contributions made to her pension account during this period. The Commissioner holds such losses to be manifestly wrong and unjust.

In reaching this conclusion the Commissioner does not hold that respondent was powerless to make a finding with respect to petitioner's capacity to perform her duties while on crutches. Such a finding would have established a status under which petitioner could have taken whatever action seemed best to her. The error herein was in not making a determination. Instead, the Board advised petitioner incorrectly, required her to take a series of leaves which prolonged and aggravated the dilemma, ignored her requests and the recommendations of her physicians, and finally, before the end of the school year, gave such information to her insurance company as to lead it to conclude that she was no longer employed. While the Commissioner believes that the Board's intentions were proper and that it had no wish to deal harshly or unjustly with petitioner, he cannot escape the conclusion that its action or failure to act was ill-advised and resulted in an injustice to petitioner which should be rectified.

The Commissioner finds and determines that petitioner was unlawfully denied the right to employment and compensation from December 11, 1962, to June 30, 1963. He directs respondent to pay her salary at the rate of $6,825 per year for that period of time, subject to deductions for contributions to the Teachers' Pension and Annuity Fund and such other deductions as are lawful and required.

COMMISSIONER OF EDUCATION.

September 29, 1964.

XLII

TENURE HEARING CHARGES RENDERED MOOT BY RETIREMENT OF TEACHER

IN THE MATTER OF THE TENURE HEARING OF JOHN H. SALAKEY, TOWNSHIP OF HILLSIDE, UNION COUNTY

ORDER OF THE COMMISSIONER OF EDUCATION

On May 15, 1964, the Commissioner of Education received a Statement of Charges against John H. Salakey, a teacher in the employ of the Board of Education of Hillside Township, Union County. The charges were certified by resolution of the Board of Education adopted at its regular meeting on May 13, 1964.

In his answer to the charges, Mr. Salakey stated that he had given notice of his retirement from teaching effective June 30, 1964, by letter to the Hillside Township Superintendent of Schools dated April 22, 1964. The Board of Education subsequently accepted the resignation of Mr. Salakey effective June 30, 1964.

IT NOW appearing that the issues in this matter are rendered moot by the retirement of John H. Salakey effective June 30, 1964, which terminated his employment, and

IT FURTHER appearing that the Hillside Township Board of Education will not object to a dismissal of the charges herein,

IT IS HEREBY ORDERED on this 10th day of August, 1964, that the charges made by the Hillside Township Superintendent of Schools against John H. Salakey dated May 11, 1964, and certified by the Hillside Township Board of Education to the Commissioner of Education on May 13, 1964, be and the same are hereby dismissed.

ACTING COMMISSIONER OF EDUCATION.

XLIII

CHALLENGE OF TRANSPORTATION CONTRACT AWARD RENDERED MOOT WHEN ROUTE IS DISCONTINUED

ORDER OF DISMISSAL

MARVIN W. DURLAND,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF PLAINSBORO, MIDDLESEX COUNTY, and BENJAMIN R. STEWART,

Respondents.

For the Petitioner, Malsbury and Selecky
(John A. Selecky, Esq., of Counsel)

For the Respondent Board of Education, Smith, Stratton and Wise
(Lowell J. Curran, Esq., of Counsel)

For the Respondent Stewart, Richard J. Casey, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

WHEREAS petitioner in this matter has complained that respondent Board of Education improperly awarded a transportation contract for its Route #7 to respondent Benjamin R. Stewart; and

WHEREAS petitioner alleges that he was the lowest responsible bidder on said Route #7 and that said transportation contract should have been awarded to him; and

WHEREAS it now appears to the Commissioner that said Route #7 has been discontinued by reason of removal from the Plainsboro Township School District of the pupil for whom said Route was instituted; and

WHEREAS by reason of such discontinuance there is no relief sought by petitioner which the Commissioner can give, thereby rendering the issue moot; and

WHEREAS all parties having been duly noticed, no reason appears whereby the issues herein should not be determined to be moot, and the Commissioner having so determined;

NOW THEREFORE, for good cause appearing, IT IS ORDERED on this 13th day of October, 1964, that the petition herein be and hereby is dismissed.

COMMISSIONER OF EDUCATION.

XLIV

APPEAL FROM PUPIL'S SUSPENSION RENDERED MOOT BY READMISSION TO SCHOOL

ORDER OF DISMISSAL

EDWARD A. APPLEGATE and CHARLOTTE APPLEGATE,
Petitioners,

v.

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, ESSEX COUNTY,
Respondent.

For the Petitioners, *Pro Se*

For the Respondent, Stryker, Tams and Dill
(Francis W. Thomas, Esq., of Counsel)

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioners herein having complained to the Commissioner that their son, Steven Applegate, was suspended from the schools of respondent Board of Education and that the continuance of such suspension improperly deprived said Steven Applegate of his education; and said Steven Applegate having been readmitted to the public schools of the School District of South Orange and Maplewood for the school year 1964-65; and it now appearing that there remains no further relief sought by petitioners which the Commissioner can grant, and the Commissioner having so determined; and the parties herein having been duly noticed thereof and petitioners' objection having been considered; now therefore, for good cause appearing,

IT IS, on this 21st day of October, 1964, ORDERED that the petition herein be and hereby is dismissed.

COMMISSIONER OF EDUCATION.

XLV

BOARD'S DISMISSAL OF TEACHER IS JUSTIFIED AFTER TENURE HEARING ESTABLISHES SUFFICIENCY OF CHARGES

IN THE MATTER OF THE TENURE HEARING OF DAVID FULCOMER, HOLLAND TOWNSHIP, HUNTERDON COUNTY

For the Petitioner, Joseph V. De Masi, Esq.

For the Respondent, Cowles W. Herr, Esq.

ON REMAND TO THE COMMISSIONER OF EDUCATION

This is a remand to the Commissioner of Education by the State Board of Education for further hearing *In the Matter of the Tenure Hearing of David Fulcomer, Holland Township, Hunterdon County.* In that case, charges against Mr. Fulcomer (hereinafter referred to as the teacher) were filed by

the parents of Donald Yowell (hereinafter referred to as the pupil) and certified to the Commissioner by the Holland Township Board of Education. Testimony on the charges was heard by the Assistant Commissioner of Education in charge of Controversies and Disputes at the Hunterdon County Court House, Flemington, on April 11, 1962. On June 11, 1962, the Commissioner promulgated his decision. The Commissioner determined that the teacher improperly and unnecessarily did physical violence to the person of the pupil in two incidents on December 20, 1961; that those acts constituted conduct unbecoming a teacher; and that the charges were sufficient to warrant dismissal.

An appeal to the State Board of Education was taken by the teacher from the findings of the Commissioner. After considering briefs of counsel and oral argument, the State Board rendered its decision on December 4, 1963, in which it affirmed the Commissioner's findings of conduct unbecoming a teacher. It concluded, however, that there was

> "* * * not sufficient evidence in the record before this Board in order to reach a determination as to whether outright dismissal from the system was warranted, or whether a lesser penalty would have sufficed."

The matter was therefore remanded to the Commissioner of Education with the direction that he

> "* * * conduct a hearing at which there shall be developed all evidence relevant to the question of the propriety of the penalty to be imposed upon David Fulcomer for his conduct as above set forth. At said hearing evidence shall be produced by all parties concerned showing David Fulcomer's record as a teacher prior to the incidents of December 20, 1961, evidence bearing upon the question as to whether Mr. Fulcomer's conduct amounted to deliberate premeditated action, motivation or provocation for such acts, and any other evidence which the Commissioner may deem relevant to the question of the penalty to be imposed. Evidence shall likewise be introduced at said hearing bearing upon the employment of Mr. Fulcomer subsequent to the above incidents and down to the present date. It is further recommended that upon completion of said hearing the Commissioner shall report to this Board his findings and decision as to the proper penalty."

Following this directive a conference of counsel was held at which request was made for exchange of interrogatories and other discovery procedures before rehearing. It appeared also that some basis of agreement for settlement might be reached if time were afforded. When this hope was not realized, counsel requested a hearing, which was held before the Assistant Commissioner in charge of Controversies and Disputes at the Hunterdon County Court House on July 30, 1964. At the hearing testimony was heard from two witnesses who appeared for the Board of Education and twenty-three in addition to himself called by the teacher. Both parties also introduced in evidence the transcript of a public meeting (Exhibit P-R-1) held by the Board of Education on June 25, 1962, at which time the Board considered the Commissioner's decision of June 11, 1962, and decided to dismiss the teacher. The teacher appeared, was questioned, and spoke at that meeting, and testified also at the hearing before the Commissioner. On both occasions the teacher was given full opportunity to offer any testimony relevant to his defense. The Com-

missioner considers now satisfied beyond dispute the teacher's contention that he was not afforded an opportunity to present his case fully at the first hearing, because of counsel's agreement to limit testimony to the particular incidents which formed the basis of the charges—an agreement to which the teacher asserts he was not a party, although his former counsel concurred in it.

Examination of the testimony and a study of the transcript of the meeting before the Board of Education disclose the situation which existed with respect to this teacher in this school. It is clear that the teacher and the school's administration were far apart with respect to educational philosophy and practice. This schism led the teacher to question and contest publicly such administrative decisions as the reemployment of certain staff members. He was also outspoken in his criticism of the administration and its policies and asserted that the principal was incompetent. He appears to have espoused what could be characterized as a conservative philosphy of education centering upon knowledge of subject matter, arbitrary standards, honor rolls, autocratic discipline, etc., as opposed to a more liberal concept held by the administration and apparently most of the faculty. This clash evidently led to his becoming a focus of disharmony in the school and to what the Board termed his "defiant" and "belligerent" attitude.

The testimony fails to disclose any significant basis of provocation of the incidents upon which the Commissioner's first decision was reached. While the pupil had been a matter of concern to his teachers for some time because of poor achievement, there is no evidence of chronic serious misbehavior. For several days prior to the incidents herein he had been inattentive and had been warned by the teacher. But there is no evidence that he was unruly or defiant or acted in any way that would provoke use of force in order to control him.

The Commissioner accords much weight to the meeting of the Board of Education following the earlier decision in this matter, at which the teacher was given full opportunity to present his views and argue his case. From his study of that meeting he is convinced that the Board gave full consideration to all aspects of this matter and reached its determination to dismiss the teacher fairly and properly. He notes that the Board was aware that dismissal in this case might be unduly harsh or unwarranted. He is convinced that its members approached the matter with an open mind and finds reasons to believe that a lesser penalty might have resulted had the teacher shown any disposition to cooperate. Faced with what was characterized as a "belligerent" and "defiant" attitude, the majority of the members decided that the teacher's usefulness to this school system was ended and that he could not be reinstated without harm to the school.

The Commissioner notes that the teacher received full salary during the period of his suspension by the Holland Township Board, and that in his employment since the dismissal his salary has been equal to or greater than that for which he would have been eligible as a teacher in Holland Township.

Finally, the Commissioner is well aware that the proper exercise of his quasi-judicial review of the actions of local school boards restricts him from substituting his judgment for that of the members of the board of education in matters which lie within the exercise of their discretionary authority unless

their determination is clearly unreasonable, arbitrary, or otherwise unlawful. *Ogden* v. *Board of Education of Penns Grove-Upper Penns Neck*, 1952-53 *S. L. D.* 67, affirmed State Board of Education 72; *Boult and Harris* v. *Board of Education of Passaic*, 1939-49 *S. L. D.* 7, 11, affirmed State Board of Education 15, affirmed 135 *N. J. L.* 329 (*Sup. Ct.* 1947), 136 *N. J. L.* 521 (*E. & A.* 1948); *Liva* v. *Board of Education of Lyndhurst*, 1939-49 *S. L. D.* 69, affirmed State Board of Education 71, affirmed 126 *N. J. L.* 221 (*Sup. Ct.* 1941); *Fitch* v. *Board of Education of South Amboy*, 1938 *S. L. D.* 292, affirmed State Board of Education 293.

In this case he finds (1) that the Holland Township Board of Education gave full and fair consideration to a determination of the penalty to be imposed upon David Fulcomer as a result of conduct unbecoming a teacher; (2) that its judgment that his tenure of position was forfeit and he be dismissed from its employ was not unreasonable, arbitrary, or capricious in the circumstances of this case. The Commissioner finds no reason to reverse the decision of the Holland Township Board of Education.

COMMISSIONER OF EDUCATION.

November 13, 1964.

Pending before State Board of Education.

XLVI

BOARD OF EDUCATION MAY COMBINE DUTIES OF SCHOOL NURSE AND ATTENDANCE OFFICER

GEORGIA L. JOHNSON,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST WINDSOR, MERCER COUNTY,

Respondent.

For the Petitioner, Richard J. Casey, Esq.

For the Respondent, Baggitt, Dietrich, Mancino & Stonaker
(William C. Baggitt, III, Esq., of Counsel)

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner in this case complains that respondent has by rule joined the positions of school nurse and attendance officer, and that since the two positions are separately created by statute, they cannot be legally so joined.

A hearing in this matter was held by the Assistant Commissioner in charge of Controversies and Disputes at the Department of Education Building, Trenton, on June 24, 1964. Pre-trial memoranda were submitted by counsel for both parties.

Petitioner has been continuously employed in respondent's schools since September 1955, and holds tenure in the district. She was originally employed as a school nurse. (P-1) In the spring of 1956 she was asked to take on the duties of attendance officer, and she has performed those duties

as well as the duties of school nurse since September 1956. Her teaching contract for the school year 1956-57 (P-2) employed her to "work as a nurse," but provided for payment of "$150 auto expense (attendance)" in addition to salary. Her subsequent contracts are for employment as nurse/attendance officer, with an automobile expense allowance in addition to her salary. (P-3-9) On August 21, 1961, respondent Board approved a job description (P-10) relating to petitioner's work entitled "School Nurse—Job Description," and containing the item, B 20: "The Nurse shall also serve in the capacity of Attendance Officer." On October 21, 1963, at petitioner's instance, respondent also adopted a job description for the attendance officer (P-11) containing the item, A: "All nurses employed by this district shall also serve as attendance officers."

The testimony of both petitioner and the superintendent of schools was that the duties of the nurse and the attendance officer as set forth in the job descriptions were the duties which petitioner had, in fact, performed since 1956. Additionally, the testimony establishes that petitioner from time to time objected to the superintendent about the inclusion of her position as attendance officer on her employment contract. In 1961, after she had received respondent's job description of her duties as a school nurse, she caused an inquiry to be made as to the effect the joining of the attendance officer's duties might have upon her pension and annuity rights. However, she continued to contract and to perform her duties in the dual capacity of nurse-attendance officer, albeit in her mind she regarded the attendance duties as a "service rendered" above and beyond her professional functions as a nurse.

It was after an unfortunate incident in which she was threatened with physical harm while performing an attendance officer's duty that petitioner filed the appeal herein, challenging the legality of joining two positions established by separate statutes.

The statute establishing the position of school nurse is *R. S.* 18:14–56, which reads as follows:

> "Every board of education shall employ a physician, licensed to practice medicine and surgery within the State, to be known as the medical inspector, and may also employ an optometrist licensed to practice optometry within the State, to be known as the school vision examiner, and a nurse, and fix their salaries and terms of office. The board of education may appoint more than one medical inspector, more than one optometrist, and more than one nurse.
>
> "Every board of education shall adopt rules for the government of the medical inspector, school vision examiner, and nurse, which rules shall be submitted to the State Board for approval."

The statute establishing the position of attendance officer is *R. S.* 18:14–42, which reads in part as follows:

> "For the purpose of enforcing the provisions of this article, the board of education of each school district and the board of education of the county vocational school shall appoint a suitable number of qualified persons to be designated as attendance officers, and shall fix their com-

pensation * * *. Each board shall make rules and regulations not inconsistent with the provisions of this article for the government of the attendance officers, which rules and regulations must be approved by the Commissioner."

Petitioner makes no claim that she is unable to perform the duties of both positions; she has in fact been performing them. Her attack is rather upon the rule which requires the school nurse to be the attendance officer. She contends that the statutes which create the two positions are separate, and that the board exceeds its legal authority in making it mandatory that they be joined.

The Commissioner can find no support for such a contention. No case cited by either counsel or known to the Commissioner is clearly in point. The case of *Quinlan* v. *Board of Education of North Bergen*, 1959-60 *S. L. D.* 113, reversed State Board of Education 1960-61 *S. L. D.* 243, affirmed 73 *N. J. Super.* 40 (*App. Div.* 1962) raised the question of the tenure status of a clerk who later became a "clerk-attendance officer." In sustaining the State Board's finding that the tenure which petitioner acquired as a clerk was not terminated by her subsequent appointment as clerk-attendance officer the Court found no fault in the joining of the two positions, both of which are recognized in the statutes, but rather referred, at page 45, to the "hybrid position" to which she was appointed. There are other such "hybrids" in the public schools of the State. For example, *R. S.* 18:5–66.1 refers to janitor-engineers." It is not uncommon to find janitor-bus drivers. The Commissioner and the Courts recognized the joining of teaching and clerical duties in the position of teacher-clerk in *Phelps* v. *Board of Education of Jersey City*, 1938 *S. L. D.* 427, affirmed State Board of Education 430, 115 *N. J. L.* 310 (*Sup. Ct.* 1935), 116 *N. J. L.* 412 (*E. & A.* 1936), 300 *U. S.* 319 (1936). In a different context, the joining of the positions of principal and teacher was considered in *Kelly* v. *Board of Education of Lawnside*, 1938 *S. L. D.* 320, affirmed State Board of Education 323 (1933), in which it was determined that the teaching position held by a teaching principal could be abolished, but not the principalship.

In the instant matter the Commissioner finds no barrier, statutory or otherwise, to the joining of the positions of nurse and attendance officer. Nothing has been shown to warrant a conclusion that the positions are incompatible; on the contrary, there is much to indicate, even in petitioner's testimony, that the positions complement one another. Had respondent elected to create a part-time position of attendance officer and a part-time school nurse position, and filled the two positions with the same person, it could clearly have done so. Instead, by administrative rule it determined that the school nurse shall also be attendance officer. Such a rule lies within the authority granted by *R. S.* 18:7–56, which permits boards of education to "make, amend and repeal rules, regulations and bylaws* * * for * * * the government and management of the public schools * * * and for the employment and discharge of principals and teachers." If at some future time the Board shall deem it wise to separate the two positions, it can repeal its present rule, without impairment of petitioner's rights.

In so holding, the Commissioner does not in any sense depreciate the importance of either the school nurse or the attendance officer in the local school district. The valuable services which each performs should not be im-

properly diluted by other duties which make unreasonable demands upon the employee's time or energy. However, it is the responsibility of each board of education to determine the needs of the district and to provide for the services required in the manner dictated by its own particular circumstances.

The Commissioner finds and determines that respondent's regulation requiring its school nurse to serve as attendance officer lies within its rule-making authority provided under the statutes. The petition of appeal is accordingly dismissed.

COMMISSIONER OF EDUCATION.

November 23, 1964.

Pending before State Board of Education.

XLVII

LAND ACQUIRED BY BOARD IN AN EXCHANGE MUST BE EQUAL IN MARKET VALUE TO LAND GIVEN UP

NEWTON E. MILLER,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,

Respondent,

WAYNE TAXPAYERS ASSOCIATION, INC.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,

Respondent.

For Petitioner Miller, *Pro Se*

For the Wayne Taxpayers Association, *Pro Se*
(Mr. Paul Mortenson, President)

For the Respondent, Salvatore J. Ruggiero, Esq.

For the Township of Wayne, Peter J. Van Norde, Esq.

For William Poole, Architect, Frederick C. Waldron, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioners in this matter are a taxpayer and a taxpayers association in the Township of Wayne. They protest a resolution of respondent Board of Education to exchange a certain parcel of land for another parcel of land to be used as a part of the site for a proposed high school building, for which a bond issue referendum had been approved by the voters of the school district. Separate but essentially like complaints were filed with the Commissioner, which he directed to be consolidated for the purposes of hearing and determination.

A hearing was conducted by the Assistant Commissioner in charge of Controversies and Disputes at the Municipal Building in Wayne on October 20, 1964. Subsequent to the hearing, briefs were filed by petitioner Miller and by counsel for respondent.

The evidence in this matter consists of the testimony of an appraiser who had been employed by respondent to appraise the parcels of land at issue; the testimony of a member of the firm of architects employed by respondent to prepare the plans and specifications for the high school building; the testimony of the secretary of respondent board; and numerous exhibits consisting of Board minutes, deeds, maps and topographical surveys, and the reports of appraisers. All witnesses appeared as petitioners' witnesses, subject to respondent's objection that the appraiser and the architect are experts employed by respondent, and that in calling them as witnesses, petitioners become bound by their testimony.

On October 16, 1963, the voters of the school district approved a referendum authorizing the construction of a high school building on a site owned by the Board of Education off Berdan Avenue approximately 2,000 feet from Hamburg Turnpike in Wayne Township, and approved the sale of bonds in the amount of $3,144,000 for constructing and equipping the building. After the referendum respondent Board determined (P-R-23) that it would be in the best interest of the school district to exchange a portion of the tract consisting of 16.2 acres for a parcel of 21.7 acres held by a private owner. On the basis of appraisals made by two appraisers (P-R-9, P-R-11), and with the advice of counsel, respondent on June 2, 1964, adopted a resolution in which it determined that the two parcels of land were of equal market value and authorized the taking of the 21.7 acres in exchange for the 16.2 acres, subject to an easement on the land given by the Board in the exchange to permit the installation of a sewer line.

The authority for a board of education to give and take land in exchange is contained in *R. S.* 18:5–29, which reads as follows:

> "The board of education of any school district by majority vote of the full board may exchange or dispose of any lands owned by it and not needed for school purposes. Lands conveyed to the board by way of exchange must be located in the school district and equal in value the lands conveyed by the board in such exchange."

It is petitioners' contention (1) that the land taken by respondent in the exchange is not equal in value to that which it gave, and (2) that in any event, the cost of improving the tract acquired to make it equal in usefulness to the tract given in exchange must be considered in determining the equality of the transaction.

Petitioners called but one witness to establish the value of the parcels of land exchanged. In direct testimony the witness reaffirmed the market values at which he had appraised the land for respondent Board and he explained the basis for his determination. Having offered no evidence to establish any other values, petitioners may not, in their brief, be permitted to attack the validity of their witness' testimony with either data or conjecture designed to establish some other basis for determining equal value. The Commissioner is convinced, and so finds, that respondent had sufficient information supplied

through its appraisers, whose competence was unchallenged at the hearing, to warrant its determination that the two parcels of land were of equal market value.

Moreover, the Commissioner finds nothing in the statute, *supra*, which would indicate that the Legislature contemplated other than market value as the basis for determining that lands to be exchanged were of "equal value." To attempt to equate whatever further benefits might accrue to the owners of land exchanged under the statute would be fruitless. Both the private owner and the board of education must obviously foresee some benefit which each will derive, else no exchange could be consummated; yet for the private owner the standard by which he determines the benefit to be derived from the exchange must necessarily be different from that of the board of education, whose only standard must be that of serving the public interest in the development of suitable school facilities for the education of the children of the district. *R. S.* 18:11–1 Fair market value, determined under accepted and recognized practices and procedures, constitutes the common standard for real property transactions. Had the Legislature intended another standard, it would have said so. "Unless the contrary appears, words of a statute are presumed to be used in their ordinary and usual sense and with the meaning commonly attributable to them." *U. S.* v. *Chesbrough*, 176 *F.* 778. See also *Walinski* v. *Mayor and Council, Gloucester City*, 25 *N. J. Super.* 122, 133 (*Chancery Div.* 1953); *State* v. *Russo*, 6 *N. J. Super.* 250, 254 (*App. Div.* 1950); *Ford Motor Co.* v. *N. J. Dept. of Labor and Industry*, 5 *N. J.* 494, 503 (1950); *Hackensack Trust Co.* v. *Hackensack*, 116 *N. J. L.* 343, 346 (*Sup. Ct.* 1936); *Newark* v. *Craster*, 28 *N. J. Super.* 49, 53 (*App. Div.* 1953).

Similar reasoning must be applied to petitioners' additional contention that the costs of utilizing the land acquired in the exchange must be considered in equating its value with the parcel given up. It is conceded, and respondent's architect, as petitioners' witness so testified, that an estimated $26,000 will be required to improve the 21.7 acres acquired by exchange to make them useful for the Board's purposes. Petitioners assert that this estimate is far too low but they offer no competent testimony to support their assertion. In any event the Commissioner finds nothing in the statute that requires consideration of costs of utilizing the land in determining equal value. In the instant matter respondent determined that the exchange was desirable and in the best interest of the school district. (P-R-23) It appears that the total expenditure for the construction project as approved by the voters would not be exceeded as a result of the exchange. Respondent was advised by its own counsel and by its bonding attorneys that the exchange of land would not invalidate the referendum proposal approved by the voters of the district. (Tr. 164, P-R-27) In noting the testimony and exhibits in support of this finding, the Commissioner expresses no opinion as to the validity of the bond issue referendum. The Board of Education acted in the exercise of its discretionary authority, having obtained the previous authority of the voters, to acquire and improve land. *R. S.* 18:7–73 It is well established that unless a board of education has acted illegally or in abuse of its discretionary authority, the Commissioner will not substitute his judgment for that of the board. *Boult and Harris* v. *Board of Education of Passaic*, 1939-49 *S. L. D.* 7, 11, affirmed State Board of Education 15, affirmed 135 *N. J. L.* 329 (*Sup. Ct.* 1947), 136 *N. J. L.* 521 (*E. & A.* 1948); *Liva* v. *Board of Education of Lyndhurst*, 1939-49 *S. L. D.* 69, affirmed State Board of

Education 71, affirmed 126 *N. J. L.* 221 (*Sup. Ct.* 1941); *Fitch* v. *Board of Education of South Amboy*, 1938 *S. L. D.* 292, affirmed State Board of Education 293; *Noto* v. *Board of Education of Lopatcong*, 1956-57 *S. L. D.* 71, affirmed State Board of Education 77.

It appears to the Commissioner that much of the instant controversy rests in the broad areas of judgment and discretion which lend themselves not only to disagreement among board members but among citizens and taxpayers generally. Beyond the narrower question of the legislative meaning of the expression "equal value," as used in *R. S.* 18:5–29, which has not been, to the Commissioner's knowledge, previously litigated before the Commissioner or any court of the State, there are other questions of policy on which the petitioners find themselves at odds with the majority of the members of the Board of Education. In affirming respondent's authority to make such determinations of policy, absent any showing of abuse of discretion, the Commissioner recognizes that respondent had been fully informed of petitioner's beliefs and contentions when it made its decision.

The Commissioner finds and determines that respondent has acted within the meaning and intent of the relevant statutes in authorizing an exchange of land in its resolution of June 2, 1964. The petitions are accordingly dismissed.

COMMISSIONER OF EDUCATION.

December 1, 1964.

XLVIII

IMPRUDENT CONDUCT MAY WARRANT DISMISSAL

IN THE MATTER OF THE TENURE HEARING OF ANTHONY A. PERROTTI, AUDUBON PARK, CAMDEN COUNTY

For the Petitioner, J. Claude Simon, Esq.

For the Respondent, Meyer L. Sakin, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

The Board of Education of the Borough of Audubon Park herein seeks the dismissal of its principal, Anthony A. Perrotti, on charges of "incapacity, conduct unbecoming a Teacher and conduct detrimental to the welfare of the School System generally, and the Pupils specifically." The nine specific charges are signed by seven members of the Board of Education and were certified according to the requirements of the statute (*R. S.* 18:3–25) to the Commissioner of Education by the Board of Education on June 25, 1964. Mr. Perrotti, hereinafter referred to as "the principal," denies the allegations of each and all of the charges.

The charges were heard by the Assistant Commissioner in charge of Controversies and Disputes on August 18 and October 9, 1964, at the Camden County Court House, Camden. The matter is submitted to the Commissioner on the testimony of the witnesses heard and the exhibits submitted. The Commissioner has considered each charge separately as well as part of a whole as follows:

CHARGE #1

"That Mr. Perrotti frequently, and on a number of occasions, has made statements to individual Board Members which are untrue in fact and directly opposite to previous statements made by him to the same or other Members of the Board or to the Board as a body."

The evidence supporting this charge concerns two incidents related by several members of the board. It appears that a load of lumber delivered to the school by order of the board proved to be inferior as to quality desired. When asked about it the principal is reported to have denied any knowledge of its arrival when in fact he had signed for its receipt. The second incident concerns the acquisition of several pairs of ankle weights for use by boys who were participating in track and basketball. Asked by a board member whose son came home with the weights how they had been acquired, the principal is alleged to have professed ignorance of their existence. It was further testified that each of these denials was later renewed by the principal when confronted with the facts.

The evidence in support of this charge is confusing and inconclusive. It appears that the lumber was delivered, returned, and redelivered, and that consequently there were at least three deliveries within a short period of time. One witness stated that she had been present when the principal acknowledged to a board member that he had accepted the lumber and offered the signed receipt slip to him. The testimony with respect to this incident is neither clear nor convincing.

It also appears that the principal may not have known about the ankle weights. The boys' physical education teacher testified that he purchased the weights with funds made available to him and to be used at his discretion for equipment. He felt no need to consult the principal nor did he do so prior to the purchase.

Although the charge, the testimony, and the argument have an implication that the principal was prone to equivocation, deception, and even deliberate falsehood, the only proofs advanced are incorporated in these two incidents. The testimony fails to support the allegations even in these two instances which, were they true, would still seem to be too trivial and insubstantial to support the weight of this charge.

The Commissioner finds that Charge #1 is not supported by the evidence and is therefore dismissed.

CHARGE #2

"That Mr. Perrotti has created dissension among the Teachers of the School System and between the Teachers and the Board of Education by telling individual Teachers who on the Board were opposed to them and who on the Board were in favor of them and how the Board voted when their contracts came up for consideration. Said statements were untrue and, even if true, not in the interest of the welfare of the Audubon Park Schools that the transactions of the Board or its Committees should be discussed with the individual Teachers."

No proofs were offered in support of this charge and it was dismissed during the course of the hearings by agreement.

CHARGE #3

"That Mr. Perrotti has consistently and frequently humiliated and embarrassed Pupils in the presence of Teachers and of the entire class by cross examining the Pupil as to whether their Parents punished them and how; that in one instance a Pupil, whose Parents were separated and who lived with his Mother, was humiliated and embarrassed by Mr. Perrotti's insistance, in the presence of the entire class, that the boy had to have a consent to go on a trip, being arranged by the School, signed by his Father, although the Mother had already signed it; on another occasion with a young girl Pupil in the Fifth grade, he compelled the girl to repeat a very vulgar and bad word which she was alleged to have heard one of the boys make, much to the embarrassment and humiliation of the girl. That Mr. Perrotti told the Father of one of the Pupils to 'beat his kid's ass.' "

The only portion of this charge which remains is that section which alleges humiliation of a pupil in connection with parental consent to go on a trip. No proofs were offered with respect to the other allegations and all other parts of the charge were dismissed by agreement before the conclusion of the proceedings.

In order for a pupil to participate in a field trip, the Audubon Park School follows the common practice of requiring parental permission in advance. This consent is obtained through use of a form, which provided space for the signature of both parents. In the particular instance herein, the testimony is in agreement that one boy turned in his permission slip with only his mother's name on it. Some time later the principal came to the boy's classroom and told him that the slip would also have to be signed by his father whereupon the boy informed him that his parents were separated. At this point, the principal stated that the matter should not be discussed in the classroom. Later he discussed the matter with the boy's mother and the boy was permitted to make the trip.

There is nothing in the testimony to show a deliberate attempt to humiliate or embarrass a pupil in this instance. The boy himself admitted that the principal may not have known the marital status of his parents. That the principal did not intend to embarrass the boy and that he was without prior full knowledge seems evident by his abrupt termination of the discussion and his statement that further conversation should be private and not in the presence of the boy's classmates. If there was any error here, it appears not to have been deliberate and to have been corrected as soon as the circumstances were fully known. In any event a single isolated instance such as this cannot support a charge of frequent and consistent humiliation and embarrassment of pupils.

The Commissioner finds that the evidence does not support the allegations of Charge #3 and it is therefore dismissed.

CHARGE #4

"That Mr. Perrotti during the past three school years has, in connection with Female Teachers and Female Pupils, had the Teachers and the Female Pupils, mostly girls in the seventh and eighth grades, come to his

office and put on their gym suits and then interviewed them alone in each case fingering the suit under the guise of seeing if it fit properly."

In this school about 20 girls in the 7th and 8th grades participate in an extra-curricular athletic program of hockey and basketball. These pupils are provided with a uniform furnished by the school system which consists of a one-piece sleeveless tunic and brief panties. A blouse or shirt over which the tunic is worn and socks, shoes, etc., are supplied by the pupil. The athletic program is under the direction of one of the female classroom teachers who is assigned to this extra duty.

According to the testimony of a number of the girls, it was customary, after they were issued a uniform, to put it on in one of the girls' lavatories and to go to the principal's office for his inspection. Each of the girls who testified stated that there was no one else present during the time when she was inspected and most of them claimed that the office door was closed. From other witnesses it appears that the inspection was sometimes made by the principal alone but that some times there were others present, such as his secretary or a teacher. The principal denies directing any pupil to close the door, maintaining that it is inclined to shut automatically. It appears also that this inspection did not occur at any single period of the school year, but from time to time as one girl would be dropped from a team and her uniform transferred to another pupil, a new inspection would be made.

With respect to the nature of the inspection the pupil witnesses stated that they were asked to perform some exercises while the principal observed them. In some cases he would also test the firmness of the elastic of the underpanties at either the waist or the thighs or both with his fingers. After this examination, the pupil returned to her classroom after donning regular school clothes in the lavatory.

The principal admits making these inspections but denies any evil intent or improper motive or action. He asserts that he began this practice after observing the girls' teams in practice or in contests and noticing how ill-fitting some of the costumes were. As an example, he referred to one pupil whose underpants fitted so loosely that she was forced to hitch them up frequently during the course of her play. He made the further observation that in some instances the undergarment could also be too tight. Another example cited was that of a girl whose over-tunic was too long, hanging below the knees and presenting a sloppy appearance. He expressed a dislike for this particular kind of costume which he claimed had been chosen by the Board over his objection and stated a preference for a one-piece romper type which, in his opinion, is more suited to elementary school age pupils. When asked if the inspection of the fit of the girls' uniforms was not the function of the woman teacher assigned to the athletic program, he said that such was supposedly so, but that after doing it once or twice the teacher did not continue. His own observation of the girls at a game convinced him that he would have to take the responsibility upon himself if embarrassing situations were to be prevented and a pleasing appearance achieved. He said that the inspection consumed only about a minute, he denied any closed-door policy, and he alleged that his only purpose was to prevent immodesty or embarrassment and to insure that the teams would present an appearance that would reflect credit upon both the pupils and the school.

The evidence clearly supports the charge as it pertains to female pupils. While defending his right to make these inspections and his reasons for doing so, the principal admits the acts specified with respect to at least some of the pupils. This portion of the charge having been found true, the question then is: Does such conduct warrant dismissal?

The answer must be affirmative. The principal's misconduct has engendered strong feelings of resentment and antagonism, and where there should be confidence, there is now suspicion and mistrust. The Commissioner is convinced that because of his own acts, this man has destroyed his usefulness as a school principal in this district and can no longer serve it effectively.

The Commissioner can find no ground to condone the actions of the principal with respect to this charge. If the principal's explanation of his motives and purposes is accepted at face value, there still remains no valid reason why he felt called upon to make the inspections himself. There were a number of women teachers who could have performed this function. To insure that the children's sports clothing fitted properly, in order to spare them embarrassment, and to have the representatives of the school present a trim appearance, are worthy aims. Such worthy objectives do not justify, however, the use of improper means of accomplishment. In this case the principal took it upon himself to use means which were unnecessary, unwarranted, and offensive to commonly accepted standards of propriety.

In a matter such as this, it is not necessary to find that the principal was guilty of an immoral act or of an offense against society. It is enough to show that the behavior was of a kind to destroy public confidence in the employee and in his fitness to hold his position. As the Court said in the case of *In re Emmons*, 63 *N. J. Super.* 136, 140 (*App. Div.* 1960):

> "Nor need a finding of misconduct 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. *Asbury Park* v. *Department of Civil Service*, 17 *N. J.* 419, 429 (1955)."

In this case the Commissioner is satisfied that the principal was not motivated by evil purpose or by intent to violate the person of the girls or to do them harm. Nevertheless, he did deliberately engage and persist in a practice which, when brought to light, could only give rise to mistrust and suspicion in the minds of parents and others. Adult men, particularly those in positions of trust and responsibility with respect to children, do not properly do the kind of thing the principal herein admits doing to the girls in his school. Men who work in the public schools should avoid even the appearance of such conduct, knowing how readily it can create mistrust and destroy their effectiveness. Whether such suspicion is fair or warranted is beside the point. The fact is that it is inevitable, and persons who work with children must assiduously avoid even the appearance of evil if they and their reputations are to remain beyond reproach. The problem herein is not only that the principal behaved in this way toward female pupils, but also, and much more significant in the Commissioner's judgment is the fact that he believed his behavior to be entirely proper and beyond challenge.

It may be argued that the matter of the inspections has been exaggerated out of all proportion, that no harm resulted, and that a principal should not lose his position because of one such mistake. But in view of the foregoing, it is clear that such a contention is without merit in that it does not face the real issue involved herein.

> "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. It is well settled, therefore, that a teacher may be dismissed for * * * misconduct. The Court of Appeals of Kentucky has said that both parents 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. *Grover* v. *Stovall et al.*, 237 *Ky.* 172, 35 *S. W.* 2*d* 24 (1931). * * * Not merely good character but good reputation is essential to the greatest usefulness of the teacher in the schools. * * * It requires no extended argument to convince one that a teacher upon whom rests a well grounded suspicion of immorality cannot be an effective teacher of public school pupils. The board is not bound to form a judgment as to the truth or falsity of the charges." Hamilton & Mort: *The Law and Public Education,* The Foundation Press (1959), page 397.

No proofs were offered with respect to female teachers as alleged in this charge.

The Commissioner finds and determines that the evidence supports the allegations of Charge #4 as it pertains to female pupils, and it is in this respect proven true. He determines also that the charge warrants dismissal of the principal.

CHARGE #5

> "The Board has a requirement that in all cases where a child is sent to the Principal's Office for disciplinary action the fact must be reported to the Board or its President, and on a number of weeks in the Spring of 1964 Mr. Perrotti reported in writing to the President that no child had been sent to his Office for disciplinary action although during that period a number of children had been sent to the Principal's Office for disciplinary action."

No evidence was offered in support of this charge and it was abandoned by agreement during the proceedings. This charge is therefore dismissed.

CHARGE #6

> "That in the giving of the Iowa Tests Mr. Perrotti frequently assisted the Pupils, told them where they had given the wrong answer and permitted them to change and put down the right answer which he had given them."

Witnesses in support of this charge included a teacher and several pupils testifying respectively regarding different instances of alleged improper practices.

The teacher testified that the principal administered the examination in her classroom because she was new and had had no experience with this kind of standardized test. After the tests were scored, the principal suggested retesting one boy whose score was lower than expected. This retest was given by the principal outside the regular classroom and the test and score of the second examination were filed in the pupil's record in place of the first one.

The Commissioner finds nothing to question in this procedure which is generally accepted practice in the use of standardized tests.

The pupils who testified respecting this charge were from another class and each who testified said that while he or she was working on a standardized test, the principal would either indicate an incorrect answer which had been given or the right answer that should be made. This he would do by pointing to the right answer or by a shake of his head as the child indicated the answer believed to be correct. This alleged help was given on not more than one answer in each case.

Two teachers were present during the taking of this test. Both of them testified that the principal gave assistance in administering the test, that his activities in regard to it were entirely proper and that any help he gave to individual pupils was permissible and appropriate within the procedures for administering the examination.

The Commissioner finds no improper conduct by the principal with respect to this charge. It is common practice in the design of standardized tests to include practice questions and sample exercises at various stages to insure that pupils understand what is required and it is entirely in order to assist pupils at such times. While he respects the testimony of the children relating to this charge and believes that they testified truthfully within the limits of their knowledge, the Commissioner accords more weight in this instance to the testimony of the teachers, who are much more competent to evaluate the test situation and the actions of the principal related to it.

The Commissioner finds that Charge #6 and the proofs offered in support of it cannot sustain a charge of misconduct. It is, therefore, dismissed.

CHARGE #7

"That Mr. Perrotti had assigned the Secretary of the School Office, who is not a Teacher and does not hold any kind of Teacher's Certificate, to teach certain classes and to conduct examinations in said classes."

No evidence was offered in support of Charge #7 and it is, therefore, dismissed.

CHARGE #8

"That in an interview with Field Representatives of the Camden County Human Relations Board the following dialogue between Mr. Perrotti took place. The questions being asked by the Field Representatives and the answers being Mr. Perrotti's.

Question: How many Teachers in the School?

Answer: Ten, nine full time and one part time Music Teacher.

Question: How many Students?

Answer: 228.

Question: Are there any negro Teachers?

Answer: Not that I know of but I don't have a trace of their parentage."

The principal confirms the occurrence of the above dialogue but denies any intent on his part to be fractious or facetious. He stated that he meant only to indicate that there were no Negro teachers on the faculty judging by physical appearance but that he had no knowledge of their racial ancestry.

This appears to have been an instance of an idle and gratuitous remark which has been misinterpreted and exaggerated out of all proportion. In the Commissioner's judgment it is much too trivial a matter to support a charge of misconduct warranting dismissal.

The Commissioner determines that Charge #8 is true but finds nothing in it that would justify dismissal of the principal.

CHARGE #9

"That in a number of cases that have come to our attention where a Parent has called up Mr. Perrotti and asked for an interview, he immediately sends for the Pupil and endeavors to ascertain what the Parent wants or why the Parent wants the interview."

No proofs were presented in support of Charge #9. It was abandoned by agreement and is accordingly dismissed.

Recapitulation indicates that all of the charges, with the exception of Charge #4, have been dismissed either by agreement or because they lack substance. With respect to Charge #4, the Commissioner finds that the evidence supports the allegations and that the charge, thus proven true, justifies dismissal of the principal. The Commissioner, therefore, finds that Anthony Perrotti's right to tenure of position as principal in the School District of the Borough of Audubon Park is forfeit by reason of conduct unbecoming a principal. *N. J. S. A.* 18:13–17. The Board of Education of the Borough of Audubon Park is hereby authorized to dismiss Anthony Perrotti from its employ as of the date of his suspension at the genesis of these proceedings.

COMMISSIONER OF EDUCATION.

December 9, 1964.

Pending before State Board of Education.

XLIX

REFERENDUM TO TRANSFER CURRENT EXPENSE SURPLUS TO CAPITAL ACCOUNT IS VALID

TOWNSHIP OF BERKELEY, OCEAN COUNTY,

Petitioner,

v.

CENTRAL OCEAN REGIONAL BOARD OF EDUCATION, OCEAN COUNTY,

Respondent.

For Petitioner, Huber & Mee (William H. Mee, Esq., of Counsel).

For Respondent, Wilbert J. Martin, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

This action, brought by the Township of Berkeley, seeks to set aside a school referendum in the Central Regional High School District of Ocean County authorizing the transfer and use of surplus funds in the current expense account for the purpose of improving its school athletics facilities. Respondent Board of Education denies all charges of illegality with regard to the referendum and maintains that its actions were in every respect proper and within the scope of its discretionary authority.

Testimony was heard and exhibits received by the Assistant Commissioner in charge of Controversies and Disputes at a hearing in Toms River on August 27, 1964. Briefs of counsel were also submitted.

The Central Regional High School District is comprised of Berkeley Township, Island Heights Borough, Lacey Township, Ocean Gate Borough, Seaside Heights Borough, and Seaside Park Borough. Appropriations for annual operating expenses are raised in the six municipalities on the basis of the number of pupils in average daily enrollment from each district. Funds for the payment of bonded indebtedness and interest are apportioned on the basis of the equalized valuations in each district.

After the regional district was formed in 1954, a tract of land on which to construct the school building was offered by Berkeley Township and accepted by the regional district Board of Education. Another tract of land in Berkeley Township, dedicated to the use of the public as an athletic field, is used by the high school for its sports program. The school district has expended some funds on the improvement of the public athletic field and has provided some facilities for the use of its teams, but the Board's wish to have a more adequate athletic field located on the same site as the school resulted in a decision to seek authorization of the voters to expend funds for this purpose.

The referendum was held on June 16, 1964, at which time the following proposal was submitted to the voters of the six municipalities:

> "RESOLVED, that the resolution conditionally appropriating $29,150 adopted at the annual school election of February 5, 1963 be rescinded and,

"BE IT FURTHER RESOLVED, that the Board of Education of the Central Regional High Schol District of Ocean County be authorized to construct an athletic field on the school site and enlarge the locker room facilities in the existing high school building expending therefore not more than $125,000 and that the sum of $125,000 for the foregoing purpose be transferred from available funds in the current expense account to the capital outlay account."

The result of the voting was as follows:

	For	*Against*
Berkeley Township	73	172
Island Heights	76	5
Lacey Township	131	18
Ocean Gate	156	4
Seaside Heights	142	3
Seaside Park	77	3
Totals	655	205

The testimony received at the hearing reveals that some time prior to the referendum at least two meetings were held by the Board of Education with representatives of the various municipalities including elected officials, for the purpose of explaining the project. It appears that no protest was made at either of these meetings regarding the necessity for the proposed facilities or the method of financing their construction. Also introduced into evidence at the hearing was a copy of a duplicated leaflet setting forth facts relevant to the proposal to be voted upon. This leaflet had had some distribution within the school district.

The protest herein is not directed against the need for or desirability of the proposed new facilities but is aimed solely at the method by which they are to be financed. Instead of seeking authorization to borrow $125,000 through bonds or other methods, the Board chose to seek voter approval for the transfer of that sum from a surplus in its current operating funds to a capital outlay account. Berkeley Township contends that this results in its having to pay $17,000 more than would be the case if these moneys were raised through a bond issue. It argues that the use of current operating revenues for capital outlay purposes does violence to the basis upon which the district was originally formed and is discriminatory and unfair as to Berkeley Township in that it causes that municipality to contribute more than its fair share to the physical plant of the school. Petitioner further alleges that there exist three grounds, any of which will support a finding that the referendum was defective: (1) that the question on the ballot was not presented in simple language which could be understood by the voters; (2) that the brochure which was prepared and distributed by the Board of Education failed to disclose who was responsible for it; and (3) that the Board of Education failed to acquaint the voters with the implications of the chosen method of financing.

In his testimony the auditor for the district stated that in the year 1964, Berkeley Township is required to pay 45.68% of the regional district's current expenses and 31.64% of its debt authorization and interest. Thus the

argument of Berkeley Township that if the proposed improvement were to be financed by creating a bonded indebtedness, Berkeley Township would, for all practical purposes pay $17,000 less than it would according to the method proposed and adopted, which requires it, in effect, to shoulder a greater share in moneys appropriated from the operating surplus of the Board.

Over several years the regional district has accumulated a surplus in its current expense account claimed by petitioner to be $211,000 and by respondent to be $146,310.56. Examination of the district's audits in the files of the Commissioner show that on June 30, 1963, there was a balance of $211,310.56, of which $30,000 was appropriated in the 1963-64 school budget. There was a further appropriation in the 1964-65 budget of $35,000 of such unused balances, leaving an uncommitted surplus of $146,310.56, from which the referendum authorized the transfer of $125,000 for the proposed improvement.

The Commissioner recognizes the force of petitioner's argument and understands its position as stated by one of its witnesses: "I think it's wrong. It may not be legally wrong, but it's morally wrong. It's a breach of the original setup of the original district." (Tr. 24) He cannot, however, find any legal defect in respondent's action. The statute which controls the appropriations for regional school districts is *R. S.* 18:8–17, the pertinent excerpt of which reads:

> "The amounts to be raised for annual or special appropriations for a regional school district and the amounts to be raised for interest and the redemption of bonds of a regional school district shall be certified by the regional board of education to the county board of taxation and the county board of taxation shall apportion such amounts among the constituent school districts as follows:
>
> "(1) The amounts to be raised for interest and the redemption of bonds of a regional school district shall be apportioned upon the basis of the apportionment valuations, as defined in section 54:4–49 of the Revised Statutes, of the constituent school districts; * * *
>
> "(3) The amounts, *except the amounts referred to in paragraph (1) above,* to be raised for annual or special appropriations for a regional school district created on or subsequent to July 1, 1953, shall be apportioned upon the basis of * * * (2) the average daily enrollment of the constituent school districts during the preceding school year if * * * (c) a basis of average daily attendance shall have been adopted at the time of the creation of the regional school district." *(Emphasis added.)*

The Central Regional High School District was formed subject to the foregoing portions of the statute. Apportionments of funds upon the basis of the ratables in the constituent districts is limited therefore to the payment of interest charges and the amortization of debt. All annual or special appropriations are apportioned on a per pupil basis. Had the Board included the amount needed for this construction in the capital outlay account in an annual budget approved by the voters, such funds would have been raised on the basis of pupils in average daily enrollment. Apportioning the costs on the basis of ratables could occur only by the issuance of bonds. In this case the existence of a large surplus in its operating account gave the Board a choice

not often afforded in financing plant expansion. It could seek voter approval either to use part of the surplus or to create an indebtedness of the district. It chose to offer the use of surplus to the electorate, which endorsed the proposition. The Commissioner can find no legal invalidity in this procedure. The Board did not abuse its discretion in submitting the proposal and the voters had the final word.

Whether a school district should amass such a surplus as that accumulated by the respondent Board is not at issue in this case. The surplus existed as a result of a voter approval of annual school appropriations. There is no charge or evidence that the surplus was established fraudulently. If the electorate does not favor carrying such a surplus it can reject the proposed budget submitted at any annual school election.

Petitioner expresses fear that the practice complained of herein, if permitted in this instance, may be extended and used for other purposes. It says that the Board might continue to use this method of making major capital outlays and that this would place an unfair burden on Berkeley Township in contravention of the financial basis upon which the formation of the regional district was approved by the voters of the constituent municipalities. In the Commissioner's judgment, such a possibility appears remote. It appears also that this matter resulted from the fortuitous occurrence of an unusual surplus and an unusual need—a coincidence unlikely to recur. In any event, there being no illegality in the present circumstance, the Commissioner holds that petitioner must look to the Legislature or the ballot box for whatever relief is considered necessary.

Petitioner argues further that the requirements of *R. S.* 18:8–19 were not met in that the referendum proposal was not first submitted to the Commissioner for his endorsement. This statute, which is concerned with the adding to the purposes for which the regional school district was created, is clearly inapplicable to the present situation. The referendum question does not seek to enlarge the original educational purposes of the regional district, but instead attempts to provide more adequate means of carrying out the purposes already agreed upon when the district was formed. The Commissioner finds that this statute provides no basis for setting aside the subject election.

Nor do petitioner's three allegations of defective procedure furnish ground for voiding this referendum. The proposal set forth in full above speaks for itself. There is no evidence which would support a finding that respondent couched the proposal in terms deliberately calculated to mislead the voter. Its form and language are similar to many other proposals of its kind which are regularly submitted to the electorate. In the Commissioner's opinion a proposal so worded states the matter clearly. It is difficult to see how it could have been worded more simply and still have been legally sufficient.

Petitioner's next allegation is that the brochure prepared, printed, and circulated by the respondent Board, fails to meet the requirement of *R. S.* 18:5–82.32 a, b, and c, in that no statement of its authorship or origination appeared thereon. While this simple factual allegation is true, the Commissioner concludes after an ordinary reading of the pamphlet, that it is clearly a statement from the Board of Education. The omission, the defect and the technical failure to comply with the foregoing statutory requirement

are matters of fact but the Commissioner is unable to find therein a sufficient basis for setting the election aside. It is clearly established that the will of the people in an election is to be given effect absent a clear showing that it has been improperly suppressed or is or was made impossible to determine. *In re Clee,* 119 *N. J. L.* 310 (*Sup. Ct.* 1938); *Love* v. *Freeholders,* 35 *N. J. L.* 269 (*Sup. Ct.* 1871); *Sharrock* v. *Keansburg,* 15 *N. J. Super.* 11 (*App. Div.* 1951). No such showing has been made herein. The anonymous leaflet alone, without any further evidence of improper conduct casting doubt upon the election as a free, informed expression of the electorate's preferences, is insufficient basis for declaring the referendum a nullity. It is clear that the aforementioned section of Title 18 (L. 1958, c. 128 as amended) does not fall within the Commissioner's jurisdiction. It defines a misdemeanor and as such, is properly within the province of the county prosecutors' offices. The petitioner alleges, in effect, that a crime has been committed. While the Commissioner does not rule upon this contention one way or the other because such a matter is beyond his authority, he does find that such a criminal act, even if committed, cannot nullify a referendum absent a clear showing that such an act frustrated the purposes of the election or had a very substantial capacity to do so. The only possible recourse, in such an event, would be to have prosecuted those individuals who were responsible for the alleged criminal act.

The last allegation is that the Board of Education failed to place the financial implications of the proposal before the voters. Petitioner's argument on this point seems to rest on the contention that the Board failed to offer alternative methods of financing the proposed improvement or even advise the voters that alternative methods were available and did not advise the voters that any surplus could be used for tax reduction in future budgets. The Commissioner is able to find no basis in this allegation for setting the election aside. Alternative proposals in a referendum are inadvisable because they do not yield dispositive results. It is perfectly proper as a matter of procedure to submit one proposition to the voters which they can approve or reject. Additionally, a board of education which submits a legitimate proposal in a lawful manner, is not legally obliged to advise its constituency that alternative methods exist whereby such a proposal may be effectuated. It is well known that surplus funds can be appropriated and applied to future budget needs, in effect reducing the tax burden. In this case the voters had previously authorized the retention of a surplus when they approved the Board's budget. In the subject referendum, they chose to use a portion of the surplus toward expansion of the athletic plant rather than to have the surplus applied in such a manner as to result in a tax reduction in a subsequent year. To say that the electorate was not aware of the choices available to it is highly conjectural.

The Commissioner finds no reason to set aside the referendum held June 16, 1964, in the Central Regional High School District of Ocean County. The petition is dismissed.

COMMISSIONER OF EDUCATION.

December 30, 1964.

ALBERT D. ANGELL, JR. AND
MERRILL T. HOLLINSHEAD,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF NEWARK,
COUNTY OF ESSEX,

Respondent.

For the Petitioners, Messrs. Ruhlman & Ruhlman.

For the Respondent, Mr. Jacob Fox.

A. WALTER ACKERMAN, *et al.*

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF NEWARK,
COUNTY OF ESSEX,

Respondent.

For the Petitioners, Messrs. Clapp & Eisenberg.

For the Respondent, Mr. Jacob Fox.

Decided by the Commissioner of Education, May 11, 1960.

DECISION OF THE STATE BOARD OF EDUCATION

These are appeals by the Board of Education of the City of Newark from a Decision of the Commissioner of Education dated May 11, 1960, which held void a resolution of the said Board adopted August 25, 1959, which required all persons holding administrative or supervisory positions under the Board's jurisdiction to maintain a bona fide residence and be domiciled in the City of Newark at all times while holding such positions.

Subsequent to the Commissioner's decision, *L.* 1960, *Ch.* 167 (*N. J. S.* 18:5–49.3) became law, effective January 4, 1961. Said Act provides as follows:

> "No board of education of any school district shall require any member of its professional staff, the qualifications for whose office, position or employment are such as to require him to hold an appropriate certificate issued by the State Board of Examiners, to reside within the school district within which he is employed."

The appeals herein are therefore moot and are dismissed for that reason. Needless to say, the State Board of Education expresses no opinion as to the validity or effect of any "residence rule" as may apply to employees other than those covered by *L.* 1960, *Ch.* 167.

October 7, 1964.

CECELIA BARNES (and 20 others),
Plaintiffs-Respondents,

v.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY, NEW JERSEY,
Defendant-Appellant.

Decided by the Commissioner of Education February 28, 1962.

Decided by State Board of Education December 4, 1963.

DECISION OF SUPERIOR COURT, APPELLATE DIVISION

Argued September 21, 1964—Decided October 1, 1964.

Before Judges Goldman, Sullivan and Labrecque.

Mr. John J. Witkowski argued the cause for appellant.

Mr. Francis X. Hayes argued the cause for respondents.

The opinion of the court was delivered by Sullivan, J. A. D.

In 1958 the Board of Education of Jersey City (Local Board) "for reasons of economy and efficiency" dismissed or transferred a number of its non-educational employees, or abolished the positions held by them. This appeal by the Local Board is from a ruling by the State Board of Education (State Board) in favor of 12 of such employees.

As to the plaintiff Mosely the State Board remanded the matter to the Commissioner of Education for further fact findings on plaintiff Mosley's claim that he did not receive the first available appointment as fireman. While the Local Board has appealed this part of the State Board's decision, it "does not strenuously oppose" the remand. Our consideration of the record leads us to the conclusion that the remand was proper and should be affirmed.

The State Board ruled that plaintiffs Casey, Flanagan, Herberman, Colleran, Davis and Vigone held "clerical positions" and therefore had tenure under *R. S.* 18:6–27. It directed the reinstatement of Casey, Flanagan, Herberman and Vignone, who had been dismissed. The positions held by Colleran and Davis having been abolished, their cases were remanded to the Commissioner for a determination as to what rights, if any, should accrue to them by reason of their tenure. The Local Board has appealed this ruling.

The State Board also ruled that the plaintiffs Panucci, Meigh, O'Tolle, Cavalli and Hayden had tenure under *R. S.* 18:5–66.1 and *R. S.* 18:5–67. These statutes, in effect, give tenure protection to janitors, janitor-engineers, custodians or janitorial employees. It directed that Panucci, Meigh and O'Tolle be reinstated. Since the positions held by Cavalli and Hayden had been abolished, their cases were remanded to the Commissioner for a determination as to whether any of their rights were infringed by the abolition of their positions. The Local Board has appealed this ruling.

The appeal involves the interpretation of the tenure statutes relied on by the State Board.

In substance, *R. S.* 18:6–27 confers tenure of office on all persons "holding any secretarial or clerical position under any board of education." Appellant contends that the words "secretarial" and "clerical" are synonymous and must be read together to denote office workers with varying skills and responsibilities, and that "a clerk is one who under direction, performs routine, repetitive, non-complex clerical work of a varied nature as a beginner at the entrance level of employment."

We cannot agree that the phrase "clerical position" has the restricted meaning attributed to it by appellant. The legislative history of the amendment indicates that, as originally proposed, it would have conferred tenure on "clerks engaged in a secretarial capacity." This provision was objected to by the New Jersey Educational Association as being too narrow. As a result a committee substitute was drafted incorporating the language of the present statute. The Association approved the committee substitute which was enacted into law. *L.* 1938, *c.* 78, *p.* 194, § 2. Thus, it clearly appears that the phrase "clerical position" was intended to extend the statutory protection coverage beyond secretarial employment. Moreover, since tenure statutes are intended to secure efficient public service by protecting public employees in their employment, "the widest range should be given to the applicability of the law." *Sullivan* v. *McOsker*, 84 *N. J. L.* 380, 385 (*E. & A.* 1913).

As to plaintiffs Vignone, Casey, Herberman, Flanagan, Colleran and Davis, the State Board analyzed the testimony relating to the duties performed by these employees and concluded that the positions held by them were basically clerical in nature. Our review of the record satisfies us that there was substantial credible evidence to support the State Board's determination that these employees held "clerical positions" within the meaning of *R. S.* 18:6–27. The decision by the State Board as to these employees is in all respects affirmed.

R. S. 18:5–66.1 and *R. S.* 18:5–67, as noted, in substance extend tenure protection to any janitor, janitor-engineer, custodian or janitorial employee.

It is appellant's contention that the statutory coverage does not extend to the entire janitorial and custodial staff but is limited to the positions specified. Thus, appellant argues that an assistant janitorial supervisor is not covered, nor utilitymen, nor a groundskeeper.

Our consideration of the statutes in the light of the principle of liberal construction satisfies us that the Legislature used the terms janitor, custodian, etc., in a generic sense with the intent to include all janitorial and custodial employees.

The evidence presented as to the duties performed by plaintiffs Panucci, Meigh, O'Tolle, Cavalli and Hayden adequately supports the State Board's determination that these employees came under the provisions of *R. S.* 18:5–66.1 and *R. S.* 18:5–67. The decision of the State Board as to such employees is likewise affirmed.

85 *N. J. Super.* 42.

Certification Denied, 43 *N. J.* 450 (1964).

CHARLES B. BOOKER, et al.,

Appellants,

v.

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

Respondent.

Decided by the Commissioner of Education June 26, 1963.

DECISION OF THE STATE BOARD OF EDUCATION

Robert L. Carter, Esq., argued the Cause for Appellants.

George G. Mutnick, Esq., argued the Cause for Amicus Curiae, Plainfield Council for Educational Progress.

Victor King, Esq., argued the Cause for Respondent.

This is an appeal from a decision of the Commissioner of Education rendered on June 26, 1963. It is brought on behalf of the appellants in the name of 54 elementary school children in the schools of the City of Plainfield, and involves the question of alleged racial "imbalance" in said schools. This Board granted leave to the Plainfield Council for Educational Progress to intervene as Amicus Curiae, to file a brief and participate in oral argument. Briefs were filed and oral argument was had before this Board on November 15, 1963.

In his decision, the Commissioner made the following findings:

1. That the enrollment in the Washington School in the City of Plainfield is comprised almost exclusively of pupils of the Negro race;

2. That such an extreme concentration of Negro pupils in a school, enforced by compulsory assignment, engenders feelings and attitudes which tend to interfere with successful learning;

3. That reasonable and practicable means consistent with sound educational and administrative practice do exist to eliminate the extreme concentration of Negro pupils in the Washington School;

4. That, where means exist to prevent it, the extreme racial concentration in the Washington School constitutes a deprivation of educational opportunity under New Jersey law for the pupils compelled to attend it; and

5. That either Plan 1 or Plan 2 of the Wolff report urged by petitioners, or the Sixth Grade plan advanced by respondent, will effectively reduce the racial homogeneity of the Washington School enrollment; that all three plans appear to be educationally sound, reasonable and practicable; and that the Commissioner will approve whichever one of the three plans the Board of Education decides to put into operation.

The Commissioner directed the respondent Board:

1. To decide which of the three plans submitted is best suited to the needs of the Plainfield School system;

2. To take such steps as are necessary to insure the implementation of the chosen plan for the 1963-64 school year; and

3. To notify the Commissioner of Education as soon as is reasonably possible of its choice of plans and the action to be taken to put it into effect.

It will be seen that the decision below ordered the respondent Board to decide which of the 3 plans submitted was best suited to the needs of the School System. Subsequent to the decision, and on June 27, 1963, the respondent Board adopted the so-called "Sixth Grade Plan" to become effective in September, 1963. In essence, this Plan provided for the transfer of students from the Washington School (which had had a percentage of 96.2 of Negro students) to other elementary schools in Plainfield, except for Emerson, Bryant, Clinton and Stillman Schools, and all "sixth grade students" in all of the elementary schools were to be transferred to Washington School. The following table shows the percentage of Negro pupils in each school (a) as of April, 1963 before the adoption of the "Sixth Grade Plan" and (b) after the adoption of said Plan:

School	*Percentage of Negro, April 1963*	*Percentage of Negro, October 1963 (After Adoption of "Sixth Grade Plan")*
Washington	96.2%	36.6%
Emerson	72.1%	76.4%
Stillman	67.6%	65.2%
Bryant	65.9%	67.1%
Clinton	58.9%	66.1%
Jefferson	44.9%	52.1%
Barlow	30.8%	40.8%
Woodland	18.8%	39.8%
Evergreen	8.8%	26.5%
Cedarbrook	3.8%	17.7%
Cook	0.8%	23.4%
Lincoln	63.0%	63.3%

It will thus be seen that the extreme concentration of Negro pupils in the Washington School was greatly reduced and the 5 highest percentages of Negroes were found in the following schools: Emerson, 76.4%, Bryant, 67.1%, Clinton, 66.1%, Stillman, 65.2% and Jefferson, 52.1%.

Since the change in percentages occurred after the decision of the Commissioner, but before the decision of this Board, the parties have stipulated that this Board will decide the case on the facts as they existed after the adoption of the "Sixth Grade Plan."

Appellants complain that the resulting percentages after the adoption of the "Sixth Grade Plan" did not eliminate what is variously called "racial imbalance" and "segregation," and the complaint is that the Commissioner failed to order the reduction of "racially imbalanced schools other than the Washington School." It is further the contention of the appellants that either the so-called "sister-school plan" or, in the alternative, the "re-zoning plan" suggested by respondent's consultant, Dr. Wolff, should have been adopted rather than the "sixth grade plan." The claim as made by Amicus Curiae is that the local board of education had a legal duty to eliminate "segregation" and achieve "racial balance" in the schools.

The Commissioner in his decision made the observation that there is no claim here that there existed any intentional or deliberate segregation of elementary school pupils. Indeed the parties so stipulated. He noted the awareness of the local board as to the problem existing in the school system, the various and conscientious studies made by the board in an effort to resolve the problem. He held, in essence, that, while the school district is not, by reason of the fact that the concentration of Negro pupils is unintentional, relieved of its responsibility "to take whatever reasonable and practicable steps are available to it to eliminate, or at least mitigate, conditions which have an adverse effect upon its pupils," it does have the responsibility and prerogative to determine which proposals are best suited to the needs of the school system provided the proposals are "reasonable, practicable and consistent with sound educational practice." After giving careful consideration to each of the 3 plans under consideration by the local board, the Commissioner held that each of them was "reasonable, practical and consistent with sound educational practice" while recognizing that each of them has certain advantages, but that the favorable aspects of each does not so far outweigh the unfavorable in any one so as to make one alone the plan of choice. Having thus passed upon the reasonableness of the 3 proposals, the Commissioner left it to the local board to decide which was best suited to the needs of the Plainfield Public School System.

The Board having adopted the "Sixth Grade Plan" with the results above set forth, this Board is now called upon to weigh the attack upon the "Sixth Grade Plan" as argued by the appellants and by the Amicus Curiae. It is argued that the Commissioner departed from the principles established by him in his previous decision in the case of *Fisher, et al.* v. *The Board of Education of the City of Orange*, decided May 15, 1963. It is said by appellants that while the Commissioner recognized the existence of "completely or almost exclusively" Negro schools, he failed "to order the reduction of racially imbalanced schools other than the Washington School and has sanctioned the adoption of the Sixth Grade Plan which does not effectuate a solution to the problem." The Commissioner did not hold in *Fisher, et al.* v. *The Board of Education of the City of Orange* that any and all imbalance (if by "imbalance" is meant any percentage of Negro pupils in excess of 50%) constitutes the deprivation of equal educational opportunity which he condemned in *Fisher* and other decisions. In *Fisher* he held invidious an enrollment which was "completely or almost exclusively" Negro and in that case the effect was that the percentage of Negro children in the schools reached 99%. The same criticism was properly leveled against the concentration of Negro pupils in the Washington School prior to the Commissioner's decision, namely, 96.2%. This the Commissioner struck down by his decision here appealed from. To extend the same criticism to the result obtained by the adoption of the "Sixth Grade Plan" here, i.e., that the concentration of Negro pupils in the Emerson School (76.4%), Bryant (67.1%), Clinton (66.1%), Stillman (65.2%) or Jefferson (52.1%) simply is not tenable. Such percentages did not result in a school "completely or almost exclusively Negro." The Commissioner, with his experience in the field of education, has held that such percentages do not in fact result in deprivation of equal educational opportunities. This is the crucial question—not mere mathematical "imbalance." We respect that judgment and concur in it. We further hold that

there is no fine line which can be drawn in terms of numbers, and that each case must be judged upon its own facts.

Further, while the brief and argument of Amicus Curiae frequently interchanges the phrases "racial imbalance" and "segregation," we hold that racial imbalance (i.e., more than 50% of one race over the other) is not to be equated to invidious segregation as condemned by the Commissioner below and by this Board in *Volpe* v. *The Board of Education of the City of Englewood* (opinion filed September 25, 1963). The argument of the Amicus Curiae is that the "Sixth Grade Plan" results in "segregation." This begs the question—What *is* segregation, in the invidious sense? If a concentration of Negro children of 99% is such, is 90%, 85% or 76% also to be condemned? We repeat that we do not wish to, nor do we feel that we can, draw such a line. As recognized in the case of *Brown* v. *Topeka Board*, 347 *U. S.* 483, 74 *Sup. Ct.* 686 (1954), 349 *U. S.* 294, 75 *Sup. Ct.* 753 (1955):

> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."
>
> * * * *
>
> "To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems."

In this instance, the local board conducted conscientious studies to solve the very difficult problem confronting it, and has attempted to implement the constitutional principles which are a guiding light, even though this is not an instance of intentional segregation as existing in *Brown*, and even though it has not been authoritatively decided that *de facto* segregation is "unconstitutional." See *Volpe* v. *The Board of Education of the City of Englewood*, *supra*. We respect the local board's awareness of its own local school problems. To the local board's judgment there is added the expertise of the Commissioner of Education, who does not find that the percentages of Negro pupils which results from the "Sixth Grade Plan" amounts to a deprivation of "equal educational opportunities." We find that there is no showing here that the "imbalance" resulting from the adoption of the "Sixth Grade Plan" does deprive the Negro pupils of equal educational opportunities, the standard by which we are guided. We therefore affirm the Commissioner's decision and also the adoption of the "Sixth Grade Plan" by the local board of education. At the same time we note that the local board represents that it will constantly study the effects of the "Sixth Grade Plan" and, if experience determines that it is detrimental to the educational opportunities of the pupils it will adopt such remedial measures as may be required.

February 5, 1964.

Pending before Superior Court, Appellate Division.

IN THE MATTER OF THE TENURE HEARING OF MARION A. DIX,
BOROUGH OF BOGOTA, BERGEN COUNTY

Decided by Commissioner of Education, February 25, 1964.

DECISION OF THE STATE BOARD OF EDUCATION

Decision of the Commissioner of Education affirmed without written opinion.

October 7, 1964.

BRUNO DORSKI on behalf of BIRCHWOOD PARENTS OF EAST PATERSON

v.

BOARD OF EDUCATION OF THE BOROUGH OF EAST PATERSON, BERGEN COUNTY

Decided by Commissioner of Education, February 25, 1964.

DECISION OF THE STATE BOARD OF EDUCATION

Decision of the Commissioner of Education affirmed without written opinion.

May 6, 1964.

MARY GERSTENACKER

v.

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH RIVER, MIDDLESEX COUNTY

Decided by Commissioner of Education, July 23, 1963.

DECISION OF THE STATE BOARD OF EDUCATION

Appeal dismissed by State Board of Education as moot.

October 7, 1964.

LEO HASPEL

v.

BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, MIDDLESEX COUNTY

Decided by Commissioner of Education, February 20, 1963.

DECISION OF THE STATE BOARD OF EDUCATION

Decision of the Commissioner of Education affirmed without written opinion.

October 7, 1964.

JAMES HOLDEN, *et al.*,

Respondents,

v.

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

Appellant.

Decided by the Commissioner of Education, December 17, 1963.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal by the Board of Education of the City of Elizabeth, Union County, from a decision of the Commissioner of Education filed December 17, 1963. The Commissioner held that the children of respondents, followers of the "Black Muslim" religion, complied with the provisions of *R. S.* 18:14-80 in claiming exemption from pledging allegiance to the flag on the ground of conscientious scruples against such a pledge, being willing to stand respectfully at attention during the ceremony, and that the local Board of Education improperly excluded said children from the schools. He ordered reinstatement of the children of respondents.

Oral argument was listed before the Legal Committee of the State Board of Education on October 23, 1964. No one appeared on behalf of respondents, but Joseph G. Barbieri, Esq., attorney for the local Board, appeared and argued on behalf of appellant Board of Education.

The Legal Committee of this Board recommends that the decision of the Commissioner be affirmed for the reasons stated by the Commissioner in his decision below.

Dated: November 4, 1964.

Pending before Superior Court, Appellate Division.

ETHEL M. MASSEY,

Appellant,

v.

BOARD OF EDUCATION OF THE BOROUGH OF LITTLE SILVER, MONMOUTH COUNTY,

Respondent.

Decided by the Commissioner of Education, December 18, 1963.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal by appellant from a decision of the Commissioner of Education rendered December 18, 1963, holding:

(1) that the action of the Little Silver Board of Education in refusing to provide home instruction for appellant's son in the 1960-61 school year, lacking necessary information and a complete application, was within its discretionary authority and, therefore, it has incurred no obligation to reimburse appellant for tutoring courses contracted for without its knowledge or sanction;

(2) there was no denial of educational opportunity to appellant's son other than the unavoidable problems which result from enforced absences brought about by his unfortunate chronic illness; and

(3) that appellant's son is still entitled to attend the schools of the local district or, if he is physically unable to do so, to submit an application for home instruction supported by such data as may be necessary to make a valid evaluation and determination to the Board of Education of the district in which he is a resident.

Appellant served her Notice of Appeal from the Commissioner's decision on February 3, 1964, more than 30 days after the filing of the said decision. *N. J. S.* 18:3–15 provides, with respect to appeals to the State Board of Education:

> "* * * all such appeals shall be taken within 30 days after the decision is filed, * * *."

Thus, the State Board has no jurisdiction to entertain this appeal.

Accordingly, the motion of respondent Board of Education to dismiss the appeal is granted.

November 4, 1964.

DUDLEY R. MOREAN, III, *et al.*,
Petitioners-Appellants,

v.

THE BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, IN THE COUNTY OF ESSEX AND THE STATE BOARD OF EDUCATION,
Respondents.

Decided by the Commissioner of Education, July 3, 1963.

Decided by the State Board of Education, October 2, 1963.

DECISION OF THE SUPREME COURT

Argued March 16, 1964. Decided May 4, 1964.

Mr. Morris M. Schnitzer argued the cause for the appellants (*Messrs. Kasen, Schnitzer & Kasen*, attorneys; *Mr. Waldron Kraemer*, on the brief).

Mr. Charles R. L. Hemmersley argued the cause for the respondent The Board of Education of the Town of Montclair.

Mr. Joseph A. Hoffman, Deputy Attorney General, argued the cause for the respondent The State Board of Education (*Mr. Arthur J. Sills*, Attorney General of New Jersey, attorney).

PER CURIAM:

For many years Montclair had four junior high schools known as Hillside, George Inness, Mt. Hebron and Glenfield. As early as 1948 a professional survey group advised that a better and more economical educational program could be provided by fewer and larger junior high schools but no action to that end was taken at that time. Nevertheless the subject remained

as a live one and in 1961 a group known as the Taylor Committee was appointed to study Montclair's junior high and elementary school facilities. The charge or instruction to the committee referred to the generally prevailing view that a sounder junior high school program could be developed with fewer units, and it expressed the hope that the committee would engage in careful study and make its recommendations by the end of the 1962 school year.

While the Taylor Committee was functioning, the Board of Education considered specific action with respect to Glenfield, the junior high school with the smallest pupil population and the highest annual per capita cost of operation. Mrs. Halligan, president of the Montclair Board of Education, testified that it considered the Glenfield problem to be serious and one which could not properly be deferred until the Taylor report came in. In September 1961 the Board announced that, pending receipt of the Taylor report and subject to any action ultimately taken as a result of its recommendations, the Glenfield school would be closed as of the fall of 1962. It instructed Dr. Hinchey, the superintendent of schools, to submit a plan for the temporary relocation of the Glenfield pupils and he did so in November 1961. Under his plan, those pupils residing south of Bloomfield Avenue would be sent to Hillside and those residing north of it would be sent to George Inness; to relieve the crowded conditions which would result at Hillside, he proposed that some Hillside elementary pupils be sent to Southwest elementary school.

In February 1962 the Board announced that it intended to adopt Dr. Hinchey's plan. This was followed by objections which centered largely about the fact that it would intensify racial imbalance in the junior high schools. The approximate Negro population of Glenfield was then 90%, of Hillside 60% and of George Inness 18%. Mt. Hebron had no Negro pupils. Since most of the white pupils at Glenfield lived north and the Negro pupils south of Bloomfield Avenue, the superintendent's proposal would substantially increase the already very high percentage of Negroes at Hillside. While the objections to the plan were under consideration, the Taylor Committee submitted its report dated March 27, 1962. A majority of the committee recommended that all of the junior high schools be replaced by a single centrally located junior high school and that appropriate steps be taken to that end as soon as feasible. For the interim it recommended that all ninth grade pupils be sent to George Inness, that Montclair's new three-year high school be converted into a four-year high school in combination with George Inness, and that all seventh and eighth grade pupils throughout the town be sent in alternate years to Hillside and Mt. Hebron. The majority stressed the educational and financial soundness of its proposals and the fact that they would bring about total integration in the junior high schools.

Following its receipt of the Taylor report, the Board conducted a public hearing and reached the conclusion that a single junior high school was a goal which was educationally sound and economically feasible and that steps should be taken forthwith towards its ultimate attainment by 1966. In the light of this conclusion and the objections voiced to the superintendent's proposal, the Board reconsidered the matter and on April 30, 1962 announced a new plan of relocation of the Glenfield pupils. Under it the parents of the pupils being relocated stated their first, second and third choices and a lottery then assigned them to their first choice as long as space remained avail-

able, then to their second choice, and finally to their third choice. In this manner the 183 Glenfield pupils were divided evenly among the other three junior high schools, insofar as possible on the basis of the stated preferences. Mrs. Halligan testified that such dispersal of the Glenfield pupils among the other schools was educationally desirable since "it is a distinct advantage to students to be exposed to children of all kinds of backgrounds." Dr. Hinchey testified to the same effect, noting that one of our great democratic strengths is the intermingling in our public schools of students from varying economic and social surroundings.

In July 1962 the petitioners, consisting of four junior high school pupils and one elementary pupil, filed their petition for relief with the State Commissioner of Education, alleging that the Montclair Board had adopted "a double standard of school assignment" by applying the neighborhood school policy throughout Montclair but not as to residents of the Glenfield junior high school zone and had thereby deprived them "of the equal protection of the laws, guaranteed to them by the Fourteenth Amendment of the United States Constitution." Answer was filed by the Board, depositions were taken, a jurisdictional motion was determined adversely to the petitioners, and on July 3, 1963 the Commissioner rendered his decision. He determined that the Board's action was neither arbitrary nor unreasonable and that it had acted well within the discretionary authority granted to it by the school laws of our State, citing *R. S.* 18:6–19; *R. S.* 18:11–1; *Boult* v. *Board of Education of Passaic*, 135 *N. J. L.* 329 (*Sup. Ct.* 1947), *aff'd*, 136 *N. J. L.* 521 (*E. & A.* 1948). He noted that while the Board's plan for relocating the Glenfield pupils, pending the anticipated establishment of a single junior high school for the entire town, did take racial consideration into account, its effect was "to minimize rather than amplify any undesirable results that might accrue from increasing the racial imbalance in Hillside school." He rejected the petitioners' contention that the Board's adoption of a plan, "even temporarily," dealing with the Glenfield pupils differently from the other junior high school pupils was unconstitutionally discriminatory, citing *Guill* v. *Mayor and Council of Hoboken*, 21 *N. J.* 574, 582 (1956). See also *Williamson* v. *Lee Optical of Okla.*, 348 *U. S.* 483, 489, 99 *L. Ed.* 563, 573 (1955); *Hudson County News Co.* v. *Sills*, 41 *N. J.* 220, 234 (1963). He dismissed the petition and his action was affirmed by the State Board of Education. Thereafter the petitioners appealed to the Appellate Division and we certified before argument there.

Before us the petitioners do not attack the Commissioner's determination that the Board did not act arbitrarily or unreasonably or exceed the discretionary authority vested in it under our school laws. Indeed, they raise no questions of state law but confine themselves to the single contention that "the double standard of pupil assignment practiced by Montclair in its junior high schools was racially motivated, with the object of controlling the racial imbalance of pupils, and therefore violates the equal protection guaranty of the Fourteenth Amendment of the United States Constitution." They cite no holdings which furnish even remote support but rely on broad expressions which, in context, were designed to reinforce the recognized principle that State discriminations against Negroes deprive them of the equal protection of the laws. Thus Justice Harlan's famous remark in *Plessy* v. *Ferguson*, 163 *U. S.* 537, 559, 41 *L. Ed.* 256, 263 (1896), about the Constitution being color blind was made in the course of his attack on the then holding

that separation of the races in railroad transportation did not offend the Constitution. And Justice Clark's recent statement in *Goss* v. *Board of Education*, 373 *U. S.* 683, 10 *L. Ed.* 2*d* 632 (1963), that race classifications for purposes of transfers between public schools, as there, are unconstitutional was made in a case where a transfer plan was stricken as one which was intended to and would "inevitably lead toward segregation." Here, Montclair's plan was intended to and would inevitably lead toward integration rather than segregation; furthermore it was only an interim plan, pending the anticipated day when the existing junior high schools would be replaced by a single school designed to advance the educational interests of the town while achieving total integration at the junior high school level.

The Monclair Board's obligation was to maintain a sound educational system by the furnishment of suitable school facilities and equal educational opportunities. It could not, consistently with either sound legal principles or with sound educational practices, maintain an official policy of segregation with its inherent inequalities of educational opportunities and its withholding of the democratic and educational advantages of heterogeneous student populations. See *Brown* v. *Board of Education*, 349 *U. S.* 294, 99 *L. Ed.* 1083 (1955); *N. J. Const., Art. I, para.* 5; *R. S.* 18:14–2; *R. S.* 18:25–4; *R. S.* 18:25–5. Nor need it close its eyes to racial imbalance in its schools which, though fortuitous in origin, presents much the same disadvantages as are presented by segregated schools. See *Jackson* v. *Pasadena City School Dist.*, 59 *Cal.* 2*d* 876, 881, 382 *P.* 2*d* 878, 882 (1963); *Blocker* v. *Board of Education*, 226 *F. Supp.* 208, 223 (*E. D. N. Y.* 1964); *cf. Branche* v. *Board of Education*, 204 *F. Supp.* 150, 153 (*E. D. N. Y.* 1962); *Balaban* v. *Rubin*, 248 *N.Y.S.* 2*d* 574 (*App. Div.* 1964); but *cf. Bell* v. *School City of Gary Indiana*, 324 *F.* 2*d* 209, 213 (7 *Cir.* 1963); *Evans* v. *Buchanan*, 207 *F. Supp.* 820, 823 (*D. Del.* 1962).

When the Board made its decision to close Glenfield (a decision which is not under attack here), it was duty bound to relocate Glenfield's pupils in a manner consistent with sound educational and legal principles. Dividing them equally between George Inness and Hillside, as originally suggested, would have greatly aggravated the already existing racial imbalance in Hillside. In seeking to avoid this, the Board acted in proper discharge of its responsibilities. The plan of relocation which it ultimately chose, dealt equally with all of the Glenfield pupils without any reference to race and without any disruption of the pupils in the other junior high schools. It presented no troublesome educational or transportation problems and brought about an increased measure of integration pending the anticipated construction of a totally integrated junior high school for the entire town. The Board's action was reasonable and there is no substance to the petitioner's contention that since its plan of relocation had some racial motivation it was violative of the fourteenth amendment. The motivation was to avoid creating a situation at Hillside which would deprive the pupils there of equal educational opportunities and subject them to the harmful consequences of practical segregation. Constitutional color blindness may be wholly apt when the frame of reference is an attack on official efforts toward segregation; it is not generally apt when the attack is on official efforts toward the avoidance of segregation. The moving purpose of the Montclair Board and its fulfillment in the manner here may not sensibly be viewed as violative of the fourteenth amendment;

to us the Board's action appears clearly to have been in sympathetic furtherance of the letter and spirit of the amendment and in fair fulfillment of the high educational functions entrusted to it by law.

Affirmed. 42 *N. J.* 237.

RUTGERS, THE STATE UNIVERSITY, *et al.*,

Respondents,

v.

THE BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY,

Appellant.

Decided by the Commissioner of Education, July 31, 1963.

ORDER OF THE STATE BOARD OF EDUCATION

It appearing by letter dated November 17, 1964 from Frank J. Rubin, Esq., attorney for the Board of Education of Piscataway Township, that the Board of Education desires to withdraw its appeal in the above entitled matter without prejudice, and that the said Board has rescinded its resolution of the 18th day of June, 1962, likewise without prejudice to any rights which the Board may have,

NOW, THEREFORE, it is on this 2nd day of December, 1964,

ORDERED that the above entitled appeal is dismissed without prejudice.

SPRUILL, *et al.*,

v.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY

Decision of the Commissioner of Education, July 1, 1963.

Affirmed State Board of Education, September 25, 1963.

Appeal before Superior Court, Appellate Division, withdrawn.

(The following decision is an extension of the Spruill case in U. S. District Court.)

Decision of United States District Court, District of New Jersey, June 3, 1964.

GERTRUDE P. FULLER, *et al.*,

Plaintiffs,

v.

AUSTIN A. VOLK, *et al.*, constituting the BOARD OF SCHOOL ESTIMATE OF THE CITY OF ENGLEWOOD; the CITY OF ENGLEWOOD; and JOHN H. PERRY, *et al.*, constituting the BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD,

Defendants.

JERRY VOLPE, *et al.*,

Intervening Plaintiffs,

and

FREDERICK M. RAUBINGER, Commissioner of Education of the State of New Jersey,

and

KENNETH ANCRUM, *et al.*,

and

DEBORAH SPRUILL,

Intervening Defendants.

Appearances:

Vorsanger & Murphy, Esquires, Attorneys for plaintiffs Gertrude P. Fuller, et al.,
By: James T. Murphy, Esquire;

Breslin & Breslin, Esquires, Attorneys for defendants Austin A. Volk, et al., constituting the Board of School Estimate of the City of Englewood; and the City of Englewood,
By: John J. Breslin, Jr., Esquire;

Sidney Dincin, Esquire, Attorney for defendants John H. Perry, et al., constituting the Board of Education of the City of Englewood;

Major & Major, Esquires, Attorneys for intervening plaintiffs Jerry Volpe, et al.,
By: James A. Major, Esquire;

Arthur J. Sills, Esquire, Attorney General of New Jersey, Attorney for intervening defendant Frederick M. Raubinger,
By Joseph A. Hoffman, Esquire, Deputy Attorney General;

Herbert H. Tate and Barbara A. Morris, Esquires, Attorneys for intervening defendants Kenneth Ancrum, et al.;

Morton Stavis and William M. Kunstler, Esquires, Attorneys for intervening defendant Deborah Spruill.

Opinion

Augelli, District Judge:

The plaintiffs in this case challenge the validity of a plan (hereinafter called the "Plan") adopted by the Englewood Board of Education on July 29, 1963, entitled "Proposal of a Plan to Comply With the Decision of the State Commissioner of Education of New Jersey Directing the Englewood Board of Education to Reduce the Extreme Concentration of Negro Pupils in the Lincoln School."

The following facts are based on a stipulation made in open court on December 16, 1963, and on the several exhibits marked in evidence on that date, including a map showing the school attendance areas in Englewood prior and subsequent to the effective date of the Plan.

The School District of the City of Englewood is organized under the provisions of Chapter 6 of Title 18 of the Revised Statutes of New Jersey, N. J. S. A. 18:6–1 *et seq*. The Englewood Board of Education consists of five members appointed by the Mayor, and its funds for operation of the schools are subject to approval by the Board of School Estimate.

The City of Englewood is a community with a population of approximately 30,000 people, and has a geographical area which measures roughly 2.7 miles in length and 2.3 miles in width. The City has one junior high school, attended by children in grades 7, 8 and 9; and one senior high school, attended by children in grades 10, 11 and 12.

The controversy in this case centers around the elementary schools of Englewood, with its focus on the Lincoln School where the enrollment was composed almost exclusively of Negro children.

Prior to the adoption of the Plan, there were five elementary schools in Englewood, kindergarten through sixth grade, to which pupils were assigned generally on the basis of residence in certain designated attendance areas. As of September 19, 1962, these schools, their enrollment, and racial composition, were as follows:

School	*Enrollment*	*% White*	*% Negro*
Cleveland	477	99.6	.4
Liberty	418	38.0	62.0
Lincoln	505	2.0	98.0
Quarles	343	96.8	3.2
Roosevelt	345	85.5	14.5

Prior to the commencement of this litigation, the intervening defendants herein, Spruill and Ancrum et al., filed petitions with the Commissioner of Education of the State of New Jersey, in which they charged the Englewood Board of Education with the maintenance of racially segregated schools and with refusal to consider plans, including a proposal for a central intermediate school, to eliminate such racial segregation. The intervening plaintiffs herein, Volpe et al., were permitted to intervene in the proceedings before the Commissioner. They objected to the establishment of a central intermediate school, and sought to restrain the Board of Education from violating the neighbor-

hood school principle and from expending public funds in furtherance of the changes demanded by the Spruill and Ancrum petitioners.

The Englewood Board of Education denied that it was guilty of intentional segregation or discrimination. It asserted that educational opportunities afforded Englewood children were equal, regardless of the school attended. The Board also pointed out that the racial imbalance that existed at the Lincoln School resulted not from any action attributable to the Board, but from the fact that the neighborhood in which the school was located was inhabited by a predominantly Negro population.

In an opinion dated July 1, 1963, the Commissioner directed the Englewood Board of Education to formulate a plan to reduce the extreme concentration of Negro pupils in the Lincoln School; to submit such plan to the Commissioner for approval on or before August 1, 1963; and to put a plan, as approved, into effect at the beginning of the 1963-64 school year. This decision was based upon the Commissioner's determination that the pupil assignment policies then in force in the Englewood School District resulted in an extreme concentration of Negro children in the Lincoln School: that attendance at the almost exclusively Negro Lincoln School engendered feelings and attitudes in pupils which tended to interfere with learning; that such continued concentration of Negro pupils as existed at the Lincoln School constituted a deprivation of educational opportunity under New Jersey law for those pupils compelled to attend that school; and that reasonable and practicable means, consistent with accepted educational and administrative practice, could be devised to reduce the racial concentration in the Lincoln School. The Commissioner also found that there was no evidence in the case before him of any deliberate attempt by the Englewood Board of Education to segregate the pupils in its public schools by race.

Acting pursuant to this decision by the Commissioner, the Englewood Board of Education formulated the aforementioned Plan, and submitted it to the Commissioner for approval. The Commissioner approved the Plan on August 1, 1963. The Plan directed the Board to take the following action:

> "1. To establish at the former Junior High School building at 11 Engle Street, a city-wide sixth-grade school to which the Board assigns all sixth grade pupils of the Englewood Public schools,
>
> 2. To assign all pupils of grades one through five residing in the Lincoln School attendance district to the Cleveland, Quarles and Roosevelt Schools, such assignment to be determined by the Superintendent on the basis of the following criteria:
>
> (a) define attendance districts so that children of the Lincoln School district will be assigned as nearly as possible, to the school nearest their homes,
>
> (b) provide for an even distribution of class loads,
>
> (c) to permit the children whose parents wish them to remain at the Lincoln School to remain there provided that it is administratively and educationally practicable to do so.
>
> 3. As a prerequisite to the establishment of the city-wide sixth-grade school referred to in Paragraph (1), either of the following two conditions must occur:

(1) 125 or more present students of Lincoln School must NOT elect to remain for the 1963-64 term at Lincoln School

or

(2) The number of transfers from Lincoln School will result in class loads in Quarles, Cleveland, or Roosevelt Schools which, in the opinion of the Board of Education, are educationally undesirable.

4. To assign to Lincoln School all children of Kindergarten age residing in the present Lincoln School district.

5. To transfer the central administrative offices of the Board of Education to the Lincoln School.

6. To instruct the Superintendent to proceed immediately with all necessary arrangements, notices and procedures consistent with the laws of the State of New Jersey to execute these directives."

Meanwhile, on July 16, 1963, the Volpe group had filed an appeal from the Commissioner's decision of July 1 to the State Board of Education. The State Board affirmed the Commissioner's decision, and from that determination the Volpe group appealed to the Appellate Division of the Superior Court of New Jersey, which appeal has since been withdrawn. In addition, the Volpe group, as well as the Fuller plaintiffs in this action, filed complaints in the Chancery and Law Divisions of the Superior Court of New Jersey, in which they sought to enjoin the expenditure of funds to implement the Plan. Injunctive relief was denied to the Volpe and Fuller plaintiffs, and appeals taken from these decisions are presumably still pending.

Following the Commissioner's approval of the Plan, Dr. Mark R. Shedd, the Englewood Superintendent of Schools, sent to the parents of the 325 pupils in grades one through five of the Lincoln School a letter and questionnaire, in which the parents were asked to indicate whether they desired their children to remain at the Lincoln School or be assigned to the Cleveland, Quarles or Roosevelt Schools. The returns from these questionnaires, as of August 21, 1963, showed 242 acceptances of assignments out of the Lincoln School and 21 preferences to remain at Lincoln.

On August 19, 1963, the Board of School Estimate certified the sum of $53,000.00 to implement the Plan, which sum was transferred by the City of Englewood to the Board of Education on or about September 11, 1963. In addition, $50,000.00 of bond money was transferred by the Board of Education from the Improvement Authorization Account to the Capital Outlay Account. The total sum of $103,000 was allocated as follows:

Building renovation at 11 Engle Street	$50,600.00
Equipment for 11 Engle Street	10,000.00
Moving Board offices from 11 Engle Street to Lincoln School	700.00
Temporary classrooms at Cleveland School	5,200.00
Faculty preparation	3,500.00
Pre-kindergarten program	6,000.00
Higher Horizons	25,000.00
Adult education	2,000.00

When the 1963-64 school term opened on September 4, 1963, approximately 125 Lincoln School pupils, grades one through five, were assigned to the Cleveland, Roosevelt and Quarles Schools in accordance with the Plan. The full Plan did not go into effect at this time because the renovation of the building at 11 Engle Street had not yet been completed.

The Fuller plaintiffs filed their complaint in this Court on October 11, 1963. They named as defendants the City of Englewood, and the members constituting the Board of School Estimate and the Board of Education of that City. Plaintiffs sought to enjoin the appropriation and expenditure of public funds to implement the Plan, and to have such appropriation and expenditure, as well as the Plan itself, declared unconstitutional and unlawful. They predicated their right to relief on the Fourteenth Amendment and their status as taxpayers of the municipality.

The Fullers complained that, under the Plan, the neighborhood school policy, pursuant to which children beneath the junior high school grades had been assigned to attend schools on the basis of residence within a particular attendance area, regardless of race, was abandoned; and that children from the entire city were now required, because of racial considerations, to attend a sixth grade school in the industrial area of Englewood at 11 Engle Street. They also complained that they were unduly discriminated against on account of race, because the children in grades one through five in the elementary schools, other than Lincoln, were not given a right to vote on the effectiveness of the Plan. Another objectionable feature of the Plan, according to plaintiffs, was that the children residing in the attendance areas of the elementary schools, other than Lincoln, were not permitted to attend schools outside of their previously established attendance areas. These latter two provisions, it was alleged, denied equal protection of the laws to the pupils in four out of the five attendance school areas, and gave a preference to the Lincoln School pupils that was based solely on race and color.

On October 14, 1963, plaintiffs obtained from this Court an order directing defendants to show cause why they should not be enjoined from appropriating or expending public funds to implement the Plan. At the hearing on October 21, 1963, the order to show cause was discharged on the basis of an agreement among the parties that defendants spend no additional money, other than for normal operating expenses, in furtherance of the Plan, and that every effort would be made to fix an early date for final hearing. In addition, at this hearing, the Volpe group was permitted to intervene as plaintiffs in the action, and the Commissioner of Education was allowed to intervene as a defendant.

A motion by the Commissioner to dismiss the complaint for lack of jurisdiction was also heard on October 21, 1963, and denied. Subsequently, the Commissioner applied for leave to file an interlocutory appeal from this decision, which also was denied. Thereafter, the Commissioner, who had not joined in the above-mentioned October 21 agreement, made applications to the Court of Appeals for this Circuit and to the United States Supreme Court for leave to petition for a writ of prohibition on the jurisdictional issue. The Court of Appeals denied the Commissioner's application on December 3, 1963, and the Supreme Court took like action on April 20, 1964.

On October 28, 1963, the renovations at 11 Engle Street were completed, and the remainder of the Plan went into effect, as follows: all sixth grade

pupils in Englewood were assigned to the 11 Engle Street School; the remaining pupils at Lincoln School, grades one through five, were assigned to the Roosevelt, Quarles and Cleveland Schools; Lincoln was eliminated as an elementary school, except for the kindergarten grade and trainable classes; and finally, the offices of the Board of Education were established at Lincoln.

As of November 12, 1963, after the assignments contemplated by the Plan had been made, the composition of the student body, grades one through six, of the elementary schools in Englewood was as follows:

School and Grades	*Number of Pupils*	*% White*	*% Negro*
Engle Street (6)	290	58.3	41.7
Cleveland (1-5)	547	66.3	33.7
Liberty (1-5)	283	39.0	61.0
Roosevelt (1-5)	310	65.8	34.2
Quarles (1-5)	301	81.4	18.6

On November 15, 1963, the Volpe intervening plaintiffs, as parents of children attending the Englewood public schools and as taxpayers, filed their complaint, in which they joined in the prayers for relief in the Fuller complaint filed on October 11, 1963, and additionally sought to restrain the Englewood Board of Education and the Commissioner of Education from interfering with the attendance of their children at their neighborhood schools. These plaintiffs alleged that, under the Plan, their children, solely because of color, were no longer permitted to attend the school located in their neighborhood, and were required to attend a sixth grade school established for the sole purpose of forcibly intermixing white pupils with Negro pupils. They complained that the Plan became operative by vote of the Negro first through fifth graders of Lincoln School, and that no opportunity was given to students in the other elementary schools to vote on the effectiveness of the Plan. They claimed that the Plan, therefore, resulted in a violation of rights secured to them and to their children by the Fourteenth Amendment.

The Fuller plaintiffs have now moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The intervening Volpe plaintiffs joined in the motion. Affidavits for and against the motion have been filed. A hearing was held on January 23, 1964. The Englewood Board of Education took the position that the existence of disputed questions of fact would preclude the granting of the summary judgment motion, but suggested that if the Court concluded otherwise, the state of the record was such as to justify summary judgment in favor of the defendants. The other defendants also contended that there were disputed issues of fact, and that there should be a final hearing for the purpose of adducing additional proofs. In addition, at this hearing, a motion by the intervening defendant Spruill, joined in by the intervening Ancrum defendants, to dismiss the complaint or, in the alternative, to stay further proceedings in this Court, was denied. Leave to appeal from this determination was also denied.

A consideration of the affidavits filed on the summary judgment motion is now in order. The affidavit filed by the plaintiff Gertrude P. Fuller in support of the motion adds nothing to the stipulation of facts and the allegations of her complaint, which have been discussed earlier in this opinion. The

affidavits filed on behalf of the intervening defendants Ancrum and Spruill likewise make no factual contribution to the case. These affidavits merely seek to show that additional factual as well as expert testimony should be taken on the question of the reasonableness of the Plan before the Court undertakes to decide the case.

In an affidavit filed on behalf of the Englewood Board of Education, Dr. Shedd states that race, creed, and color are in no way considered in making assignments of children to the public schools of Englewood; that in connection with the Plan, all sixth grade children in Englewood were assigned to the Engle Street School, without regard to color or to the desires of their parents; and that the reasons only the parents of the Lincoln School children, grades one through five, were given the right to vote the Plan into effectiveness were that theirs were the children who, according to the Commissioner's decision of July 1, 1963, were being denied equal educational opportunity, and that theirs were the children who, if they so chose, would be moved out of Lincoln School to attend a different school. Dr. Shedd, who holds a degree of Doctor of Education from Harvard University and has had thirteen years of experience in teaching and in school administration, gives his expert opinion that the Plan is educationally sound. He also points out that, in any event, the continued use of Lincoln as an elementary school was limited, because of its age and physical condition. He further states that the educational opportunities for the children assigned to the city-wide, sixth grade school at Engle Street are superior to opportunities previously available at the individual elementary schools, because of the pooling and consolidation of resources. Finally, according to Dr. Shedd, the distances traveled to the Engle Street School and the conditions of travel do not constitute undue hardship or safety hazards for the children.

In the affidavit filed by the Commissioner, he recites that he appointed a committee of six expert educators to make a study of the situation existing in the Englewood public schools, and sets forth a brief biographical profile of the members of the committee. This committee submitted a report to the Commissioner on October 5, 1962. The report, which the Commissioner states he considered in preparing his decision of July 1, 1963, disclosed that, among the Negro pupils at the Lincoln School, achievement scores were lower, retentions in grade were higher, high school records of graduates were poorer, and drop-outs among graduates were higher, as compared with the Negro and white pupils in the other elementary schools. The Commissioner states that, in his opinion, "a stigma attaches to attendance at a school whose enrollment is completely or almost exclusively Negro and that this sense of stigma and resulting feelings of inferiority have an undesirable effect upon attitudes related to learning." The Commissioner found that these conditions existed at the Lincoln School, not due to any deliberate action by the Englewood Board of Education, but because of the segregated living pattern of the neighborhood. Notwithstanding the lack of intentional action by the Board, the Commissioner was of the opinion that since several reasonable solutions existed, the Board was under a legal obligation to take appropriate steps to mitigate or eliminate these conditions at the Lincoln School. Finally, the Commissioner states he believes that the Plan is an educationally sound method of carrying out its objective.

The Court is satisfied from an examination of the record made in this case that the material facts necessary to decide the constitutional issue raised by

the pleadings are not disputed, and that therefore there is no need to delay the matter further by the taking of additional proofs. The provisions of the Plan have already been recited in this opinion. The circumstances surrounding the adoption and operation of the Plan, its purpose to reduce the extreme concentration of Negro pupils in the Lincoln School, and its effect on the racial composition of the individual schools in Englewood have all been stipulated. Even the evidence that the Plan is educationally sound has not been challenged. The constitutional issue, put simply, is whether or not the Plan, in its operation, deprives plaintiffs of any of the rights secured to them by the Fourteenth Amendment to the United States Constitution.

The plaintiffs, who acknowledge that the material facts in this case are free from dispute, contend that these facts demonstrate that the Plan was adopted solely out of racial considerations, that it discriminates against the white pupils because of their color, and that it is, therefore, unconstitutional. Plaintiffs argue that since in this case the school attendance areas were honestly drawn without regard to race or color, and racial imbalance in the schools resulted because such attendance areas are populated almost entirely by Negroes, there is no affirmative duty on the part of the Englewood Board of Education to blend Negro and white pupils in any particular school to eliminate such racial imbalance. Since the Constitution is supposed to be "color-blind," plaintiffs argue, the state is constitutionally prohibited from requiring the Board to take racial factors into consideration in order to eliminate the extreme concentration of Negro pupils in a particular school.

It cannot be seriously disputed that racial considerations were a motivating factor in the formulation of the Plan. The school attendance lines in this case were redrawn to eliminate the condition that the Commissioner found to exist at the Lincoln School. This poses the question as to whether or not a local board of education may take race into consideration in redrawing school attendance lines in order to reduce the extreme concentration of Negro pupils in one of its public schools, where such concentration admittedly resulted, not from deliberate state action, but from de facto or adventitious segregation.

Plaintiffs place great reliance on the case of *Bell* v. *School City of Gary, Indiana*, 213 F. Supp. 819, aff'd. 324 F. 2d 209 (7 Cir. 1963), *cert. den.* 32 LW 3385 (1964). That action was brought on behalf of Negro children to enjoin the maintenance of racially segregated public schools in Gary, Indiana. The evidence satisfied the district court that there was no intent or purpose on the part of the defendant to segregate the races in certain schools. The plaintiffs in that case contended that, regardless of the motive or intent of the defendant, actual segregation of the races existed in the schools because a large percentage of the Negro children were required to attend schools that were totally or predominantly Negro in composition, whereas a large percentage of the white students attended schools that were totally or predominantly white. They took the position that there was an affirmative duty on the part of the defendant to integrate the races so as to bring about, as nearly as possible, a racial balance in each of the schools in the Gary school system. The district court, in rejecting these arguments and dismissing the complaint, held that the defendant did not have an affirmative constitutional duty to alter racially segregated attendance districts, resulting from the application of the neighborhood school policy in residentially segregated areas. On appeal, the Court of Appeals for the Seventh Circuit affirmed, and the Supreme Court denied certiorari on May 4, 1964.

Several other federal courts have taken the same view as the court in *Bell* on this question of the constitutionality of de facto segregation. *Briggs* v. *Elliott,* 132 F. Supp. 776 (E.D. S.C. 1955); *Henry* v. *Godsell,* 165 F. Supp. 87 (E.D. Mich. 1958); *Evans* v. *Buchanan,* 207 F. Supp. 820 (D. Del. 1962); *Webb* v. *Board of Education of City of Chicago,* 223 F. Supp. 466 (N.D. Ill. 1963). Some courts have disagreed. *Blocker* v. *Board of Education of Manhasset, New York,* 226 F. Supp. 208 (E.D. N.Y. 1964); *Branche* v. *Board of Education of Hempstead,* 204 F. Supp. 150 (E.D. N.Y. 1962); *Jackson* v. *Pasadena City School District,* 382 P. 2d 878 (Calif. Sup. Ct. 1963).

In each of the above cited cases involving this issue of the constitutionality of de facto segregation, Negro plaintiffs sought to compel local boards of education to take affirmative action to reduce or eliminate de facto segregation in the public schools. Here, the Englewood Board of Education has already acted, and white plaintiffs are now seeking to have that action set aside. Thus, under the particular facts of this case, the issue before this Court is not whether a local board of education must or is constitutionally required to act, but rather whether a board may or is not constitutionally prohibited from acting.

Since the summary judgment motion was argued, both the Supreme Court of New Jersey and the Court of Appeals of New York have handed down decisions in cases that have quite similar factual situations to the case at bar.

In *Morean* v. *Board of Education of Montclair,* decided on May 4, 1964, and not yet reported, the New Jersey Supreme Court held that, in formulating a plan which provided for closing down one school and transferring its students to other schools in the school district, a local board of education could take racial factors into consideration, where the board's moving purpose was in furtherance of the constitutional mandate against segregated schools and where all pupils were treated in an equal and reasonable manner. In that case, a number of white pupils attending the Montclair schools alleged that they had been discriminated against, since the pupils in the closed junior high school were given a choice as to which of the three other junior high schools they could attend. The white pupils claimed that the Board of Education was applying a double standard of pupil assignment, since they were required to attend their neighborhood schools while the pupils from the closed school, which had a Negro population of approximately 90%, were permitted to attend schools outside their neighborhood. The white students argued that this double standard of pupil assignment was racially motivated, with the object of bringing about racial balance in the junior high schools in Montclair, and therefore was discriminatory and in violation of the equal protection clause of the Fourteenth Amendment.

In *Balaban* v. *Rubin,* decided on May 7, 1964, and reported in 32 LW 2600, the Court of Appeals of New York held that a local board of education could take racial factors into consideration in establishing school attendance zones, where the plan adopted excluded no one from any school and had no tendency to foster or produce racial segregation. In that case, a number of white school children in Brooklyn claimed that they were being discriminated against, by reason of their inclusion within the school attendance area of a newly-established junior high school for the purpose of bringing about a racial balance in that school.

This Court is in agreement with the principle enunciated in the foregoing state court decisions that a local board of education is not constitutionally prohibited from taking race into account in drawing or redrawing school attendance lines for the purpose of reducing or eliminating de facto segregation in its public schools. In *Brown* v. *Board of Education*, 347 U. S. 483 (1954), the Supreme Court of the United States determined that racial segregation in the public schools violates the equal protection clause of the Fourteenth Amendment, in that such segregation discriminates against Negro pupils. In essence, a principal contention of plaintiffs in this case seems to be that racial integration violates the equal protection clause of the Fourteenth Amendment because such integration discriminates against white pupils. Plaintiffs have not shown, nor does this Court believe, that racial integration, per se, discriminates against white pupils. Only if specific provisions of the Plan do in fact discriminate against plaintiffs because of their race, could it be said to result in an infringement of their constitutional rights.

Plaintiffs allege that there are three specific forms of racial discrimination against white pupils in the Plan. First, all sixth grade pupils in Englewood are required to attend the Engle Street School, which is located outside the previous attendance areas of some of these pupils. Second, the pupils in the elementary schools, other than Lincoln, were not given the right to vote on whether or not the Plan would become effective. Third, these other pupils, unlike those attending grades one through five at the Lincoln School, were not given the privilege of attending a school outside their neighborhoods.

Viewing the Plan as a whole, and taking into consideration the factual background leading up to its adoption and the objectives sought to be achieved thereby, it is difficult to see wherein the Plan is unreasonable or discriminatory in its application. The city-wide, sixth grade school established at 11 Engle Street applies equally to all Englewood sixth graders, and no hardships are shown to have been suffered by plaintiffs or their children as a result of this provision. It is no different in principle from the single, city-wide junior and senior high schools which exist in Englewood. While the right to vote on the effectiveness of the Plan was limited to the parents of the children in grades one through five in the Lincoln School, these were the children whom the Board proposed to move out of their neighborhood school, and therefore were the most logical ones to be consulted. The assignment of these children to the other elementary schools in Englewood was determined under the Plan by the Superintendent of Schools on the basis of certain criteria, which took into consideration an even distribution of class loads and distances of the other elementary schools from the residences of the relocated Lincoln School students. Finally, it is unrealistic to argue that since the students at the Lincoln School, grades one through five, were given an opportunity to attend schools outside their neighborhood, similar opportunity must be given to the pupils in the same grades in the other elementary schools to attend schools outside their neighborhoods. In the opinion of this Court, any discrimination that may be said to exist in this case is not of constitutional dimensions.

Moreover, plaintiffs have made no showing that they have been harmed by the operation of the Plan. As taxpayers, plaintiffs must establish that their tax moneys are being spent for an invalid purpose. See *Doremus* v. *Board of Education of the Borough of Hawthorne*, 342 U. S. 429 (1952);

Massachusetts v. *Mellon*, 262 U. S. 447 (1923); *Crampton* v. *Zabriskie*, 101 U. S. 601 (1880). As parents, they must establish that their children are being discriminated against to their injury under the Plan. See *Blocker* v. *Board of Education of Manhasset, New York*, 226 F. Supp. 208, 227. Plaintiffs have failed in both these particulars. This Court finds no evidence that plaintiffs have been harmed in a constitutionally recognized way, either as taxpayers or as parents, by the action taken by the Englewood Board of Education in this case.

Under these circumstances, plaintiffs' motion for summary judgment must be denied. Although defendants have not formally moved for summary judgment, the Court believes, as the Englewood Board of Education suggests, that it may enter summary judgment for defendants. See 6 *Moore's Federal Practice*, ¶ 56.12 (2nd Ed. 1953). Since the Court has already determined that there exists no genuine issue of material fact to be tried and that defendants are entitled to a judgment as a matter of law, summary judgment will be entered in favor of defendants against plaintiffs. Counsel for defendant Englewood Board of Education will please submit an appropriate order on notice to all counsel.

230 Fed. Supp. 25.

GEORGE I. THOMAS,

Petitioner-Appellant,

v.

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

Respondent.

Decided by the Commissioner of Education, April 1, 1963.

DECISION OF THE STATE BOARD OF EDUCATION

On December 15, 1960, appellant, George I. Thomas, was employed at the Morris Township Board of Education as Superintendent of Schools. The agreement was for a 2-year period from March 1, 1961 to January 31, 1963. The contract also permitted either party to terminate the agreement upon 90 days' written notice.

On October 18, 1961, before the end of the first year of employment, the Board of Education adopted a resolution whereby the foregoing contract was voided and further resolving that a new contract be entered into for a period of 3 years from October 18, 1961 to October 18, 1964, and containing no provision for termination by either party. The resolution was adopted by a vote of 5-2 and a new contract pursuant to the latter resolution was signed the same day.

It was stipulated below that the appellant "* * * will be unable to disprove the contention of 3 members of the Board of Education that they had no prior knowledge of the resolution of October 18, 1961, or that it would be presented for consideration that evening."

At a school election held on February 13, 1962, 3 incumbent members were replaced by new Board members and at the subsequent organization meeting, 2 other incumbents resigned from the Board. On March 21, 1962 a

new Board of Education, by unanimous vote, adopted a resolution to the effect that:

(a) The resolution adopted by the previous Board on October 18, 1961 purporting to rescind the original contract dated December 15, 1960 and purporting to authorize the new 3-year contract, as well as the latter contract itself, was against public policy, invalid and of no force or effect;

(b) Resolving that only the original 2-year contract was valid. Thereafter, on June 21, 1962 the Board of Education adopted a resolution recognizing the original 2-year contract as the only valid agreement with appellant, invoking the 90-day termination clause and terminating (after due written notice) the services of appellant as of July 1, 1962.

Appellant thereafter appealed to the Commissioner of Education who dismissed the petition of appeal.

The Commissioner below found that:

> ". . . the majority acted upon a secretly conceived plan to decide a matter of major significance to the school district, without discussing it with the minority members, and executed this plan at the public meeting over the declared protests of minority members that the resolution, at the very least, was premature and deserved further consideration before being presented for final action. The abuse of discretion is so palpable as to require that the resolution of October 18, 1961, and the contract executed pursuant thereto, be declared a nullity."

Appellant having claimed below that the local Board was estopped from taking the action which it did by alleged failure to take prompt action, the Commissioner found otherwise, advertising to the fact that the respondent Board took office on February 10th and one month later notified petitioner that it recognized only the original contract. For the foregoing reasons the Commissioner held that (1) the agreement of October 18, 1961 was illegally entered into, (2) on June 21, 1962 appellant was serving his second year as Superintendent under the 2-year contract beginning February 1, 1961 and ending January 31, 1963, and (3) in giving petitioner 90 days' notice of termination of his employment pursuant to the terms of the contract, that the Board was within the proper exercise of its discretionary authority. He therefore dismissed the petition of appeal.

Before this Board appellant, by counsel who did not represent him before the Commissioner, argues in essence that the findings of the Commissioner, were not warranted by the evidence before him. Throughout appellant's brief there is the assertion that there was "no" evidence to support the Commissioner's finding that the action of the Board taken on October 18, 1961 was the result of a secretly conceived plan without sufficient discussion, resulting in an abuse of discretion so palpable as to warrant declaring the said contract a nullity. The complaint seems to be that there was no "oral" evidence presented and that "the entire matter seems to have been completely on stipulation." Appellant therefore argues that the stipulation, to the effect that 3 members of the Board did not know that the question of extending appellant's contract for 3 years was to be considered at the meeting, is to be ignored. However, before the Commissioner appellant was represented by counsel who entered the stipulation after adequate deliberation, as evidenced by the fact

that he expressly waived the right to present oral testimony before the Commissioner, and in lieu thereof made the pertinent stipulation.

Stipulations by counsel are proper and are conclusive against the parties involved. *State* v. *Atlantic City Electric Co.*, 23 N. J. 259, 264 (1957); *Motorless Corp*, v. *Mulroony*, 9 *N. J.* 82, 85 (1952); *Statford* v. *Barkalow*, 31 *N. J. Super.* 193, 195 (*App. Div.* 1954); *Dudley Co.* v. *Aron*, 106 *N. J. L.* 100, 193 (*E. & A.* 1929); *Decker* v. *Smith & Co.*, 88 *N. J. L.* 630, 635 (*E. & A.* 1916). As stated by the Supreme Court in *State* v. *Atlantic City Electric Co.*, *supra* (at page 264):

> "Since under the adversary system of litigation the responsibility for the course which the proceedings take lies upon the contesting parties, we concur in the State's argument that the defendant should be bound by its representations and stipulations made at the hearing below. The defendant should not be permitted upon appeal to alter its interpretation of the facts upon which the issue was framed and which has legitimately been relied upon by the State in its conduct of the case."

Thus we reject appellant's argument before this Board that the stipulation aforesaid is not evidence in support of the finding of fact below.

However, there remains the question, assuming that the 3 members of the Board had no prior knowledge of the resolution of October 18, 1961 or that it would be presented for consideration on that date, does such mere lack of knowledge of what will be presented at such a *regular* meeting of a board render invalid action taken at such meeting?

Under normal principles of corporate action the answer would be in the negative. But a local Board of Education is a public body whose members are fiduciaries and trustees of the public weal and who are to exercise their discretion not arbitrarily but reasonably. *Cullum* v. *North Bergen Board of Education* (*App. Div.* 27 *N. J. Super.* 243, 248, Aff. 15 *N. J.* 285). In acting concerning the Superintendent of Schools they were performing one of their ". . . most vital and responsible duties." *Cullum* v. *North Bergen Board of Education* (1954) 15 *N. J.* 285, 292. The action of cancelling an already existing contract 15 months before its normal termination was so extraordinary and of such a special nature that reasonable exercise of discretion in the public interest would require notice to all members of the Board that, at least, such question was to be considered at the meeting.

While we agree that the facts here are distinguishable from those in *Cullum* we nevertheless feel that the basic philosophy of that case well supports an invalidation of the action taken by the local Board on October 18, 1961. True it is that in *Cullum* the proof was clear that in fact the majority members of the Board there had agreed in caucus prior to the appointment of *Cullum*. Here the proof is not so clear in establishing prior agreement. However, there is sufficient evidence for the drawing of an inference that the majority members and Dr. Thomas had reached an agreement before the meeting that his original contract would be voided and a new contract extending his term for an additional 3 years would be made. The resolution of October 18, 1961, prepared before the meeting and presented in its final form at the meeting, contains the statement of fact:

"WHEREAS, it now appears desirable *by mutual consent* of the parties that the contract of December 15, 1960 be voided and that a new contract be entered into by the parties: . . ."
(Emphasis Added)

The conclusion is inescapable that such "mutual consent" had been reached before the meeting. The fact that Dr. Thomas was asked after the adoption of the resolution whether he consented to it does not overturn the foregoing inference. He could hardly be expected to object to a contract which (a) extended his term for 3 more years; (b) practically assured him of tenure because it extended his services beyond the statutory period necessary therefor (*R. S.* 18:13–16) (Dr. Thomas himself made a statement at the March 21st, 1962 meeting in which he spoke of the new contract in these terms: "It is a contract which gives me tenure."); and (c) eliminated the provision of the original contract which permitted termination by either party on 90 days' notice.

While there was here no express "moratorium" on action concerning the superintendency such was as present in *Cullum*, we consider that the minority members of the Board below could reasonably have assumed that no action would be taken to alter or modify an already existing contract which had 15 months to go before its normal expiration, subject only to the 90 days termination clause. In a sense, therefore, the original contract can be said to be a kind of moratorium on actions concerning the superintendency.

In any event, we hold that under the circumstances here, where the local Board undertook to invalidate the previous contract, in dealing with a position such as the superintendency wherein it performed one of its "most vital and reasonable duties," *Cullum supra*, the Board acted contrary to public policy in not informing all members of the Board that the matter would be considered at the meeting of October 18, 1961. In other words, there was such an abuse of discretion and arbitrary action as to invalidate the action taken.

It might have been argued, though it was not before us, that the action of the new Board of March 21st, 1962 in refusing to recognize the new contract may be subject to the same infirmity, for no notice was given before that meeting that the question of the superintendency was to be considered. However, the resolution adopted on that date was adopted by unanimous vote of the Board. Thus, there was no objection—nor could there be—by any members to the consideration of the resolution such as was voiced by the 2 minority members at the meeting of October 18, 1961. The decision of the Commissioner is affirmed.

August 12, 1964.

Pending before Superior Court, Appellate Division.

JOSEPH VICARI,

v.

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

Decision of the Commissioner of Education, December 18, 1961.

Affirmed State Board of Education, November 6, 1963.

Order of Dismissal for Failure to Prosecute Appeal, Superior Court, Appellate Division, August 7, 1964.